Circuit Court for Howard County
Case No. C-13-CR-20-000413

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1324

September Term 2021

TERRELL ROLOMD SINGLETON

v.

STATE OF MARYLAND

Berger,
Ripken,
Wright, Alexander, Jr.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Ripken, J.

Filed: August 4, 2022

On the night of September 17, 2019, Officer Eric Colson ("Officer Colson") stopped a vehicle that he observed to be speeding in Ellicott City. Officer Colson asked for the driver's license, but the driver ran from the scene. Upon investigation, Officer Colson determined that the driver was Terrell Singleton ("Singleton"). Singleton was subsequently charged with numerous counts related to the traffic stop. He was tried in the Circuit Court for Howard County, and a jury convicted Singleton of attempting to elude a uniformed police officer by fleeing on foot as well as driving without a license. Singleton filed this appeal contending that the circuit court abused its discretion by failing to propound a proposed *voir dire* question, permitting Officer Colson to testify about a voicemail purportedly left by Singleton, and permitting certain remarks in the State's closing argument. Because we conclude that the circuit court did not abuse its discretion in any of those challenged rulings, we shall affirm.

FACTUAL AND PROCEDURAL BACKGROUND

At approximately 11:00 p.m. on September 17, 2019, Officer Colson observed a red Honda Accord that appeared to be speeding. His radar unit indicated that the Accord was driving 63 miles per hour in a 45 mile-per-hour zone. Officer Colson turned on his emergency lights to alert the vehicle to stop. Instead, the Accord accelerated and made two quick right turns before stopping. Officer Colson parked his vehicle behind the Accord and approached the driver, Singleton. Lace Reed ("Reed") was seated in the front passenger seat. Officer Colson asked Singleton to exit the vehicle, and they walked together to the rear of the vehicle, leaving Reed in the passenger seat.

Officer Colson asked Singleton about his apparent effort to avoid the traffic stop. Singleton apologized and stated that he was not trying to run, he was just scared. Officer Colson asked Singleton for his driver's license, and Singleton replied that it was in the car. Singleton walked toward the open door to the driver's seat, as though to retrieve the license, but then slammed the car's door closed and ran away. Officer Colson did not pursue Singleton. Instead, Officer Colson spoke to Reed, the passenger in the Accord. Reed indicated she knew the driver only as "T," but she had his cell phone in her purse. Officer Colson seized the phone from Reed.

Officer Colson thereafter answered an incoming call on Singleton's cell phone. The caller, later identified as Britnee Talbert ("Talbert"), informed Officer Colson that the driver's name was Terrell Singleton. Officer Colson used this information to check Singleton's record with the Maryland Motor Vehicle Administration ("MVA"). Singleton's MVA records indicated that he was unlicensed. The MVA record contained a photograph of Singleton, who Officer Colson recognized as the same person who had fled from the traffic stop. Officer Colson later determined that the red Accord was registered to Talbert. Police officers searched for Singleton, but were unable to locate him.

The following day, Officer Colson received a voicemail message from a caller, identifying himself as Terrell Singleton. On that voicemail, the caller "apologized for fleeing the scene," stating that "he was scared, and he only [fled] because he was unlicensed." The caller also requested the return of his cell phone, which Officer Colson had seized at the traffic stop.

Singleton was charged, and the case was tried in the Circuit Court for Howard County before a jury on two counts: (1) attempt by the driver to elude a uniformed police officer by fleeing on foot and (2) driving without a required license. and (3) driving on a revoked license and privilege.

The parties each submitted proposed *voir dire*, and Singleton's included the following question:

> Has any member of the jury panel, or any relative or close friend, ever been:
> a. the victim of a crime;
> b. a witness in a criminal case;
> c. convicted of a crime; or
> d. a defendant in a criminal case?

The court declined Singleton's proposed question. Instead, the court included the following question:

> Other than a conviction for a minor motor vehicle violation, has any member of the panel or member of your immediate family ever been convicted of a crime or a defendant in a criminal case?

Singleton objected, arguing that the court's asking prospective jurors if they or an immediate family member had ever been convicted of a crime other than a minor motor vehicle violation or been a criminal defendant ("the criminal history question") without also asking if any member of the panel, a relative, or a close friend had ever been the victim of a crime ("the victim question") or a witness to a crime ("the witness question") was "lopsided." According to Singleton, the criminal history question gave the State the opportunity to identify panel members that were potentially biased against the State, without affording the defense the same opportunity to identify panel members that were

potentially biased against the defense. The court overruled that objection and gave the criminal history question to the jury, and a jury was empaneled.

At trial, the State called Officer Colson as its sole witness. He testified as to the events leading up to and following the traffic stop. Officer Colson also testified about the voicemail that was left on his phone. Singleton objected to this testimony, arguing that the State did not properly authenticate the voicemail as having been left by Singleton. Singleton further argued that because the voicemail was not authenticated, the contents of the voicemail were inadmissible hearsay. Finally, he argued that Maryland Rule 5-1002, known as the "best evidence rule," required admission of the original recording. The court overruled his objection. The court found that the voicemail was deleted at no fault of the officer, and the credibility and weight of the testimony surrounding the voicemail were "for the jury to decide," and therefore Officer Colson could testify about the message.

At the end of trial, during the State's closing argument, the prosecutor stated in part "you [the jury] must decide this case based only on the evidence that was before you, you may not speculate, you may not conjecture, you may not think of – you may not think of evidence you would have liked to have heard or may have asked of a witness yourself." Singleton objected to this statement contending that it constituted a misstatement of law. The circuit court overruled the objection.

The jury found Singleton guilty on all counts, and the court sentenced him to one year of incarceration, suspended, for attempting to elude a uniformed police officer by fleeing on foot and to sixty days' incarceration, suspended and to run concurrently, for

driving without a license. The sentence also included one year of unsupervised probation. Singleton noted this timely appeal.

ISSUES PRESENTED FOR REVIEW

Singleton presents three questions for our review:

I. Did the circuit court abuse its discretion in asking prospective jurors if they had ever been convicted of a crime or a criminal defendant without also asking if they had ever been victims of or witnesses to a crime?[1]

II. Did the circuit court abuse its discretion in admitting Officer Colson's testimony regarding the content of a voicemail message purportedly left for him by appellant?

III. Did the circuit court abuse its discretion in overruling defense counsel's objection to a portion of the State's closing argument?

For the reasons to follow, we affirm the convictions.

DISCUSSION

"We review the trial judge's rulings on the record of the *voir dire* process as a whole for an abuse of discretion, that is, questioning that is not reasonably sufficient to test the jury for bias, partiality, or prejudice." *Washington v. State*, 425 Md. 306, 314 (2012). In doing so, we examine whether the questions and procedure of the *voir dire* "have created a reasonable assurance that prejudice would be discovered if present." *Id.* at 313. If the trial court did not allow a question that is directed to a specific cause for disqualification, the refusal is "an abuse of discretion constituting reversible error." *Casey v. Roman Catholic Archbishop*, 217 Md. 595, 605 (1958). Therefore, "absent a clear abuse of discretion, an

[1] Rephrased from:

I. Did the circuit court abuse its discretion in declining to ask appellant's proposed voir dire question Number 26?

appellate court will not disturb a trial judge's decision to ask or not to ask a specific voir dire question." *Thomas v. State*, 139 Md. App. 188, 197 (2001).

"Determinations regarding the admissibility of evidence are generally left to the sound discretion of the trial court." *Donati v. State*, 215 Md. App. 686, 708 (2014). Claims regarding authentication of evidence are reviewed for an abuse of discretion. *Darling v. State*, 232 Md. App. 430, 456 (2017). Similarly, this Court reviews whether a trial court properly admitted hearsay under an exception for abuse of discretion. *Colkley v. State*, 251 Md. App. 243, 290 (2021).

Finally, regulation of closing arguments "rests largely within the trial judge's discretion because he or she is in the best position to determine the propriety of the argument in relation to the evidence adduced in the case." *Ingram v. State*, 427 Md. 717, 728 (2012). We will not reverse unless the remarks, standing alone, are improper, and such improper remarks may have influenced the verdict. *Sivells v. State*, 196 Md. App. 254, 271 (2010).

I. THE CIRCUIT COURT DID NOT ABUSE ITS DISCRETION IN DENYING SINGLETON'S PROPOSED *VOIR DIRE* QUESTION.

Singleton first contends that the trial court abused its discretion in declining to propound his victim question and witness question to the prospective jurors. He argues that this decision was unfairly one-sided in favor of the State in that "it was likely to identify jurors who had a bias toward one of the parties, the State, but not the other party, the

defense."[2] Therefore, according to Singleton, he was deprived of an opportunity to identify potential biases. The State responds that the Court of Appeals' opinion in *Pearson v. State*, 437 Md. 350 (2014) dictates that a trial court is not required to ask if prospective jurors have been victims of a crime. The State further argues that the same reasoning applies to the witness question. We agree.

"In Maryland, the sole purpose of voir dire is to ensure a fair and impartial jury by determining the existence of cause for disqualification[.]" *Washington*, 425 Md. at 312. "It is the responsibility of the trial judge to conduct an adequate voir dire to eliminate from the venire panel prospective jurors who will be unable to perform their duty fairly and impartially and to uncover bias and prejudice." *Id.* at 313. "On request, a trial court must ask a *voir dire* question if and only if the *voir dire* question is 'reasonably likely to reveal [specific] cause for disqualification.'" *Pearson*, 437 Md. at 357 (alteration in original) (quoting *Moore v. State*, 412 Md. 635, 663 (2010)).

The Court of Appeals has identified two main areas of inquiry for disqualification: "(1) examination to determine whether the prospective juror meets the minimum statutory qualifications for jury service, and (2) examination to discover the juror's state of mind as to the matter in hand or any collateral matter reasonably liable to have undue influence over him." *Washington*, 425 Md. at 313. "The latter category is comprised of 'biases

[2] We note that, according to the trial transcript, Singleton's trial counsel stated that the victim or witness question would permit Singleton "to see whether anyone was biased against the State." Singleton contends on appeal that "it is apparent defense counsel misspoke and meant to say 'biased against the defense.'" For purposes of our analysis, we accept this contention.

directly related to the crime, the witnesses, or the defendant.'" *Pearson*, 437 Md. at 357 (quoting *id*.). In determining whether a prospective juror has an underlying bias, prejudice, or preconception, the inquiry "must [] focus on the venire person's ability to render an impartial verdict based solely on the evidence presented." *Davis v. State*, 333 Md. 27, 37 (1993), *overruled on other grounds by Pearson*, 437 Md. 350.

Pursuant to Section 8-103(b) of the Courts and Judicial Proceedings Article ("CJP") (2020 Repl. Vol.) of the Maryland Code, a juror is disqualified from jury service if he or she: "has been convicted, in a federal or State court of record, of a crime punishable by imprisonment exceeding 1 year and received a sentence of imprisonment for more than 1 year," or "has a charge pending, in a federal or State court of record, for a crime punishable by imprisonment exceeding 1 year." While prospective jurors are required to provide information regarding their criminal histories or pending criminal charges on jury questionnaires, such disclosure does not excuse the trial court from its obligation to ensure that prospective jurors meet the minimum statutory qualifications for jury service. *Benton v. State*, 224 Md. App. 612, 625 (2015). Indeed, we have held that a trial court committed reversible error by "refus[ing] to ask the potential jurors whether any of them were currently charged with or had previously been convicted of a serious offense[.]" *Id.* at 626.

In contrast, the Court of Appeals has explicitly indicated that trial court is not required to ask whether a prospective juror has ever been a victim of a crime. *Pearson*, 437 Md. at 359. In *Pearson*, the Court of Appeals identified three reasons why that question is discretionary. 437 Md. at 359–60. "First, a prospective juror's experience as the victim of a crime lacks a '*demonstrably strong correlation* [with] a mental state that gives rise to

[specific] cause for disqualification.'" *Id.* at 359 (alterations in original) (quoting *Curtin v. State*, 393 Md. 593, 607 (2006)). Second, asking prospective jurors whether they have ever been a victim of a crime will likely result in follow-up questions that consume a disproportionately large amount of time and resources as compared to the chance of any bias being revealed, as "[m]any (if not most) prospective jurors have been the victims of some kind of crime." *Id.* at 359–60. Third, upon request by the defense, the trial court is already required to ask whether a prospective juror has "strong feelings about" the crime with which the defendant has been charged. *Id.* at 360 (quoting *State v. Shim*, 418 Md. 37, 54 (2011)). The "strong feelings" question will likely reveal the specific cause for disqualification that the "victim" question is intended to discover. *Id.*

Singleton concedes that the ruling in *Pearson* commits the victim question to the trial court's discretion.[3] Nonetheless, Singleton argues that the circuit court provided the State an unfair advantage by declining to include the victim and witness questions while including the criminal history question. He contends that *Charles v. State*, 414 Md. 726, 737 (2010), and *Stringfellow v. State*, 199 Md. App. 141 (2011), *rev'd*, 425 Md. 461 (2012), mandate that *voir dire* questions be fair and not "one-sided," and that asking the State's

[3] Singleton seems also to agree that the witness question is committed to the court's discretion. We conclude that it is and that the logic of *Pearson* applies equally to the witness question. Like the victim question, the witness question bears no strong correlation to a ground for disqualification and risks a disproportionate expense of time and resources. *See Perry v. State*, 344 Md. 204, 218 (1996) (noting that a prospective juror's experience as a witness in a criminal proceeding "is not *per se* disqualifying.").

question gave the State an unfair advantage. We, however, find *Charles* and *Stringfellow* to be inapposite to Singleton's position.

In *Charles*, the Court of Appeals examined whether the trial court abused its discretion by asking a venire panel the following question:

> [I]f you are currently of the opinion or belief that you cannot **convict** a defendant without "scientific evidence," regardless of the other evidence in the case and regardless of the instructions that I will give you as to the law, please rise. . . .

414 Md. at 736 (emphasis added). The Court held that the trial court abused its discretion, finding that the use of the word "convict" was not neutral and "suggested that the jury's only option was to convict." *Charles*, 414 Md. at 737.

Similarly, in *Stringfellow*, this Court found that the trial court abused its discretion in including the following question in the *voir dire*:

> Does any member of the panel believe that the State is required to utilize specific investigative or scientific techniques such as fingerprint examination in order for the defendant to be **found guilty beyond a reasonable doubt**?

199 Md. App. at 146 (emphasis added). This Court determined that the phrase "found guilty beyond a reasonable doubt" expressed a "similar foregone conclusion as to the expected outcome of the trial" as was expressed by the word "convict" in *Charles*. *Id.* at 153. Though this Court's holding in *Stringfellow* was later reversed by the Court of Appeals, 425 Md. 461, 465 (2012),[4] Singleton maintains that our earlier reasoning remains valid and persuasive.

[4] In *State v. Stringfellow*, the Court of Appeals reversed this Court's holding on the grounds that the defendant had not preserved the issue for appellate review because he accepted the empaneled jury without qualification, and therefore waived his earlier objection. 425 Md.

In sum, *Charles* and *Stringfellow* dealt with questions propounded with wording that implied the defendant was guilty. The holdings conclude that trial courts must use "neutral language," 199 Md. App. at 153, and caution against phrasing that may "poison[] the venire," 414 Md. at 739. Singleton does not take issue with the phrasing or particular content of any question. Instead, he argues that the circuit court permitted the State a greater opportunity than the defense to root out unfavorable biases.

Based on our review of the process "as a whole," we conclude that the *voir dire* created a reasonable assurance that prejudice would have been discovered if present. The circuit court's questions adequately covered potential bias against Singleton or, more generally "the defense." By asking whether any prospective juror had "strong feelings" about the crimes with which Singleton was charged, the trial court fulfilled its duty to help the defense determine "the specific cause for disqualification" that Singleton wished to expose through his victim and witness questions. Aside from the strong feelings question, the circuit court also asked the members of the panel whether they believe that being charged with a crime raises a presumption of guilt; whether they believe the testimony of police officers is more or less credible than that of civilian witnesses; whether they or their family have ever been employed by any police force, law enforcement agency, or law office; and whether they would be more likely to believe a prosecution witness. Singleton has not offered any explanation as to why these questions were inadequate to cover the

at 469. It further held that even if he had not waived his objection, the asking of the *voir dire* question was harmless because the judge permitted the defense to argue at length in closing that the State did not put forth any fingerprint evidence which gives rise to reasonable doubt. *Id.* at 474–75.

potential bias that he suggests would have been revealed by the victim and witness questions.

We similarly reject Singleton's contention that the question given by the circuit court was unfairly "lopsided." Because a juror is disqualified from jury service if he or she has been convicted of or charged with certain crimes, the part of the criminal history question directed to the prospective jurors served to determine the existence of a possible statutory cause for disqualification. It was the circuit court's duty to determine whether the prospective jurors were statutorily eligible to serve as jurors. This line of inquiry was mandated by *Benton v. State*. 224 Md. App. at 625. Singleton's argument suggests the automatic pairing of the victim and witness questions with the criminal history question, regardless of the facts and circumstances of the individual case. Such a rule would be contrary to the well-established law governing *voir dire* and the discretion vested in trial courts to balance expenditure of time with likelihood of revealing bias in the *voir dire* process. *See Perry v. State*, 344 Md. 204, 218 (1996); *Pearson*, 437 Md. at 358–59. Finally, we note that the criminal history question (and follow up from the parties) was not exclusively aimed—as Singleton seems to contend—towards uncovering bias against the State. Rather, panel member's experiences with criminal justice may lead to a multitude of attitudes or preconceptions, some of which may well be of concern to the defendant.[5] The

[5] For example, in this case, the circuit court received only one response to the criminal history question. A panel member indicated that her daughter had been charged with but not convicted of assault. The panel member believed her daughter had been treated fairly by the trial court and prosecution in that case but believed her daughter's defense attorney had been incompetent. The court asked whether the panel member "would have a problem with defense attorneys in general." The panel member stated she would not and that she

record shows no indication that the circuit court unduly limited the *voir dire* process, and we find no abuse of discretion in its decision to omit the victim and witness questions.

II. THE CIRCUIT COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING OFFICER COLSON'S TESTIMONY REGARDING THE CONTENTS OF A VOICEMAIL MESSAGE APPARENTLY LEFT BY SINGLETON.

Singleton next argues that the circuit court abused its discretion in admitting Officer Colson's testimony regarding the contents of the voicemail—where the caller identifies himself as Singleton and inculpates himself as to both counts—in three respects. First, Singleton claims that the testimony is inadmissible because the State did not authenticate the message as having been left by Singleton. Second, Singleton argues that the testimony constitutes inadmissible hearsay and, because the message is not authenticated, it does not qualify for any hearsay exception. Third, Singleton contends that the State's failure to present the original voicemail recording renders Officer Colson's testimony inadmissible under the "best evidence rule," Maryland Rule 5-1002.

As to his authentication argument, the State responds that the voicemail was sufficiently authenticated because the contents of the voicemail contained information that only Singleton would know. The State also argues that, because the voice message was properly authenticated, the testimony is admissible under the Maryland Rule 5-803(a)(1) hearsay exception for statements of a party opponent. Finally, the State contends that under Maryland Rule 5-1004(a), testimony regarding the contents of the original can suffice

could be fair and impartial. Defense counsel asked a follow up question of the panel member, who was ultimately seated as a juror.

because the original was not lost or destroyed in bad faith. We agree with the State on each point.

A. The Voicemail Was Sufficiently Authenticated as Having Been Left by Singleton.

Pursuant to Maryland Rule 5-901(a), "[t]he 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." Evidence can be authenticated in several ways, including through circumstantial evidence as defined in Maryland Rule 5-901(b)(4).[6]

Authentication must be shown by a preponderance of the evidence, meaning "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." *Darling*, 232 Md. App. at 455 (quoting *Johnson v. State*, 228 Md. App. 27, 59 (2016)). This "reasonable juror test" applies for authentication of both physical and electronically stored evidence. *Sublet v. State*, 442 Md. 632, 671 (2015). Once a court has found the evidence to be authentic by a preponderance of the evidence, the jury is then left to weigh that evidence. *Id.* at 668–69.

"[T]o render testimony of a telephone conversation admissible, some preliminary testimony, either direct or circumstantial, must be presented to establish the identity of the [caller]." *Mutyambizi v. State*, 33 Md. App. 55, 61–62 (1976) "The mere fact that the caller purported to be the appellant is not sufficient to make the telephone conversation

[6] Md. Rule 5-901(b)(4) states that examples of circumstantial evidence include "appearance, contents, substance, internal patterns, location, or other distinctive characteristics[.]"

admissible." *Id.* However, such authentication is not achievable only by voice recognition, rather, a call can also be authenticated through circumstantial evidence, including where "the conversation revealed that the caller had knowledge of facts that only he would be likely to know." *Knoedler v. State*, 69 Md. App. 764, 773–74 (1987); *see, e.g.*, *Ford v. State*, 11 Md. App. 654, 657 (1971) (finding a call to be authentic where the caller discussed mutual acquaintances and details of an agreement to engage in drug transaction); *Mutyambizi*, 33 Md. App. at 62 (finding a call to be authentic where the caller provided the case number of a pending divorce matter and discussed intimate details of divorce proceedings).

Here, the caller who left the voicemail message identified himself as Singleton and provided detailed information pertaining to the traffic stop that occurred at approximately 11 p.m. the previous night. This information included knowledge of Officer Colson's seizure of Singleton's cell phone, that Singleton was unlicensed, and that Singleton fled the scene. Additionally, the voicemail message had explained that he fled the traffic stop because he was "scared," which mirrored Singleton's explanation to Officer Colson at the traffic stop as to why he failed to immediately pull over. The details mentioned in the voicemail, left on Officer Colson's machine only one day after the traffic stop, indicate that the caller had knowledge of facts that only Singleton would be likely to know. Thus, the circumstantial evidence surrounding the call is sufficient to support a jury finding that Singleton left the voicemail.

Singleton argues that the holding from *Griffin v. State* is instructive and indicates that the circuit court failed to account for the possibility that the voicemail was left by a

person falsely using Singleton's name. 419 Md. 343, 347–48 (2011). In *Griffin*, the Court of Appeals held that social media posts purportedly written by Jessica Barber, the defendant's girlfriend, were not properly authenticated. *Id.* at 347–48. The posts were attributed to a MySpace profile that included a photo of Barber, her date of birth, and her location. *Id.* at 357. The post in question referenced the defendant's nickname. *Id.* The Court held that this information was not distinctive or personal enough to authenticate Barber's authorship, particularly in light of the ability of social media users to post under false identities. *Id.* at 357–60.

We find *Griffin* to be distinguishable. There, the Court of Appeals stated that "authentication concerns attendant to e-mails, instant messaging correspondence, and text messages differ significantly from those involving a MySpace profile and posting printout, because such correspondence[] is sent directly from one party to an intended recipient or recipients, rather than published for all to see." *Id.* at 361 n.13. Because voicemail messages, as is the case here, are sent directly from one party to another, they "differ significantly" from the social media posts analyzed in *Griffin*.

Moreover, the Court of Appeals reasoned that the social media posts in *Griffin* could not be authenticated because they did not include information that only Barber would know. *Id.* at 357–60. As we have explained, the voicemail message included information that only Singleton was likely to know. A reasonable juror could find that it is more likely than not that the voicemail Colson described was authentic. Thus, the circuit court did not abuse its discretion in finding that Officer Colson's testimony regarding the voicemail message was properly authenticated by circumstantial evidence.

B. The Voicemail is Admissible Hearsay Under Maryland Rule 5-803(a)(1).

Maryland Rule 5-801(c) defines hearsay as "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." Hearsay is generally inadmissible, except as otherwise provided by rule or statute. Md. Rule 5-802. Relevant here, one exception to the rule permits the admission of hearsay statements where a statement is "offered against a party and is the party's own statement, in either an individual or representative capacity." Md. Rule 5-803(a)(1).

The voicemail message falls under the Maryland Rule 5-803(a)(1) hearsay exception. Having been authenticated as being made by Singleton, the contents of the voicemail message were offered by the State against Singleton and were Singleton's own statements. Singleton concedes that his hearsay claim is "inextricably linked" to the court's finding of authenticity of the voicemail, and seems to agree that if the message were to be authenticated then it would be admissible pursuant to this exception. Because the circuit court found the voicemail to be authenticated, the circuit court correctly found that the statements in the voicemail fall under a hearsay exception and are therefore admissible.[7]

[7] Both parties state that the hearsay exception described in Maryland Rule 5-804(b)(3), which applies to statements against the penal interest where the declarant is unavailable as a witness, may also apply here. Because we conclude the contents of the voicemail were admissible pursuant to Maryland Rule 5-803(a)(1), we do not address additional exceptions.

C. The Testimony About the Voicemail Was Not in Violation of the Best Evidence Rule.

Maryland's "best evidence rule," dictates that in order "[t]o prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by statute." Md. Rule 5-1002. Pursuant to Maryland Rule 5-1004, where "[a]ll originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith," or where "[n]o original can be obtained by any reasonably practicable, available judicial process or procedure[,]" secondary evidence may be permissible. Md. Rule 5-1004(a)–(b).

Secondary evidence is admissible under Rule 5-1004 only where the proponent has presented "good and sufficient reasons for the failure to produce the primary evidence." *Forrester v. State*, 224 Md. 337, 349 (1961). Even reasons that are based in "[c]arelessness, recklessness, ordinary negligence, [or] even gross negligence" can serve as sufficient explanation of the failure to produce the primary evidence, so long as the proponent did not act in bad faith. *State v. Cabral*, 159 Md. App. 354, 385 (2004) (quoting Joseph F. Murphy, Jr., *Maryland Evidence Handbook* § 1104(B)(3), at 461 (3d ed. 1999)).

Officer Colson testified that he saved the voicemail message to his voice mailbox archives under the assumption that it would remain accessible. When he attempted to play the message one year later, he discovered that the voicemail system could not play or recover the message because it had "expired." Officer Colson's failure to preserve the voicemail message for trial is not indicative of bad faith. Rather, he relied on an incorrect assumption that the voicemail would in fact be saved in his mailbox so as to preserve it for

trial. Such an explanation suffices to allow secondary evidence as to the contents of the message. He was not required, as Singleton implies to continuously check the voicemail to ensure that he had access to it in the time leading up to trial, nor was the fact that he "did not do enough to preserve the evidence" prevent the admissibility of his testimony thereto. As the circuit court found, the accuracy of Officer Colson's testimony regarding the contents of the message goes to the weight, not the admissibility of the evidence. Thus, the circuit court did not err by permitting Officer Colson's testimony regarding the voicemail message.

III. THE CIRCUIT COURT DID NOT ABUSE ITS DISCRETION IN OVERRULING SINGLETON'S OBJECTION TO A PORTION OF THE STATE'S CLOSING ARGUMENT.

Last, Singleton argues that the circuit court abused its discretion by permitting certain statements by the State in closing argument. He contends that, because a defendant is permitted to comment on the lack of evidence in a case, the prosecutor misstated the law by telling the jury that it "may not think of evidence [it] would have liked to have heard or may have asked of a witness." The State agrees with the proposition that "the defense is entitled to argue that there are gaps in the State's evidence and, in that sense, to ask the jurors to consider what evidence could have been, but was not, presented." Nonetheless, the State argues that the remarks were not improper and, even if they were, they did not influence the verdict.

In reviewing a circuit court's denial of an objection to remarks made in a closing argument, reversal is appropriate only where: (1) the remarks, standing alone, were improper, and (2) the improper remarks may have influenced the verdict. *Sivells*, 196 Md.

App. at 277, 288; *see Lee v. State*, 405 Md. 148, 164 (2008) ("[W]hen an appellant . . . establishes error, unless a reviewing court, upon its own independent review of the record, is able to declare a belief, beyond a reasonable doubt that the error in no way influenced the verdict, such error cannot be deemed 'harmless' and a reversal is mandated." (quoting *Dorsey v. State*, 276 Md. 638, 659 (1976))).

The determination of whether a closing argument is improper is highly fact-dependent and must be made "contextually, on a case-by-case basis." *Mitchell v. State*, 408 Md. 368, 381 (2009); *see Smith v. State*, 388 Md. 468, 488 (2005) ("What exceeds the limits of permissible comment or argument by counsel depends on the facts of each case."). Attorneys are generally afforded a high degree of latitude in making their closing arguments. *See Wilhelm v. State*, 272 Md. 404, 412–13 (1974). However, attorneys do not have latitude to misstate the law. *Carrero-Vasquez v. State*, 210 Md. App. 504, 511 (2013); *see Hunt v. State*, 321 Md. 387, 436 (1990) ("[T]he prosecutor is free to tell the jury that they *should not* consider the defendant's allocution [in a death penalty sentencing proceeding]; however, the prosecutor is not free to tell the jury that they *could not* consider the allocution.").

If the closing argument is found to be improper, the reviewing court must then determine whether inclusion of the statement in the proceedings was prejudicial or harmless error. *Sivells*, 196 Md. App. at 288. In assessing the prejudicial effect of improper statements, courts look to factors including "the severity of the remarks, the measures taken to cure any potential prejudice, and the weight of the evidence against the accused." *Lee*, 405 Md. at 165 (quoting *Lawson v. State*, 389 Md. 570, 592 (2005)).

The closing argument remarks made by the State and objected to by Singleton were made as the State was discussing the jury instructions. The prosecutor stated as follows:

> Next, I – State wants to emphasize your duty to deliberate. . . . His Honor read to you that [im]partial is without bias or prejudice, not swayed by public opinion, it's literally the facts of this case, looking at what was presented to you.
>
> [D]uring your deliberations, you must decide this case based only on the evidence that was before you, you may not speculate, you may not conjecture, **you may not think of—you may not think of evidence you would have liked to have heard or may have asked of a witness yourself.** You must think of the evidence that is before you.
>
> ***
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> The – instruction goes on to tell you things that are not to be considered as evidence. And the State would point out the important line that when [the circuit court] did not permit a witness to answer the question, you must not speculate as to the possible answer.

(Emphasis added). Defense counsel objected:

> Your Honor, I am going to object to part of the State's closing argument. The State indicated to the jury that they should decide the case only based on the evidence here that they heard, but not on the evidence that they would have liked to have heard. And I don't think that's an accurate statement of the law, And I think that when Your Honor gave them instructions about speculation, that was when you told a witness that they couldn't answer. But I do think the jury has a right to consider evidence that they would have liked to have heard in order to make their determination, I think that's a misstatement of the law.

The court overruled the objection. The court explained that the State's comment was presumably referencing a jury note, received while Officer Colson was on the witness stand, which had asked "who provided the driver's name and date of birth to the police officer?" The circuit court responded, with the parties' assent, "In this case, I'm going to tell you in response to this question that the Court has received, you will be presented with the relevant evidence in this case, and you will have to make your decision based on the

evidence that's been presented to you." In fact, the answer to that question was the subject of a stipulation reached before trial. The parties resolved a motion *in limine* relating to Officer Colson's identification of Singleton by agreeing that the State would not call Talbert or Reed as witnesses nor question Officer Colson about his conversations with Talbert or Reed.

Initially, we note that as a general principal, a defendant may challenge the State's case by commenting on the lack of evidence presented or contrasting the evidence presented with other forms of potentially relevant evidence the State failed to present. *Sample v. State*, 314 Md. 202, 208–09 (1988). "[L]ack of evidence is a common defense in a criminal case to generate reasonable doubt." *Robinson v. State*, 436 Md. 560, 580 (2014).

Turning to the challenged comments here, we conclude that they did not misstate the law. We examine the comments in context. The main emphasis of the relevant portion of the State's closing argument was the familiar rule that the jury must rely solely on the evidence presented. The prosecutor repeatedly told that the jury not to resort to speculation or conjecture. In our reading, the remarks are illustrative examples of deciding a case through speculation. To decide a case on "evidence [a juror] would have liked to have heard" or on what a juror "may have asked of a witness," *i.e*. based on assumptions about what a witness might have said in a different scenario, would constitute conjecture. The circuit court's instructions to the jury throughout the trial, including in response to the jury note during Officer Colson's testimony, repeated the precept that the jury must decide the case only on the trial evidence. In context, the comments did not clearly contradict the trial

court's instructions or the general principle stated above that the jury may consider a lack of evidence or the quality of the evidence in deliberation.

Even if we were to find that the remarks were improper, we would conclude that the resulting error was harmless beyond a reasonable doubt based on the weight of the evidence and Singleton's own closing argument, which invited the jury to consider his theory of a lack of evidence. *See Dorsey*, 276 Md. at 659.

JUDGMENTS OF THE CIRCUIT COURT FOR HOWARD COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.