Circuit Court for Anne Arundel County
Case No. C-02-CR-17-000387

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1356

September Term, 2019

GIBRAN DOMINIQUE ANDERSON

v.

STATE OF MARYLAND

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

JJ.

Opinion by Raker, J.

Filed: December 8, 2020

Appellant Gibran Dominique Anderson was convicted by a jury in the Circuit Court for Anne Arundel County of conspiracy to commit murder. Appellant presents the following questions for our review:

> "1. Should the trial court have granted private counsel's pretrial motion to strike her appearance?
> 2. Was there a violation of the sequestration rule [Maryland Rule 5-615] involving the way in which the State used Detective Carbonaro as a witness?
> 3. Should the trial court have granted the pretrial motions to exclude evidence taken from social media accounts?"

Finding no error, we shall affirm.

I.

The Grand Jury for Anne Arundel County indicted appellant for first-degree murder, use of a firearm in a crime of violence, and conspiracy to commit murder. Following a trial by jury, he was convicted of conspiracy to commit murder. The court imposed a term of incarceration of life imprisonment.

The State accused appellant of conspiring with Brian Brunson to murder Tylique Proctor. The State presented the case that appellant and Brunson arranged to meet Mr. Proctor to purchase an assault rifle, that Brunson and appellant drove a black SUV rental car to Glen Burnie to meet Mr. Proctor, and that when Mr. Proctor approached the SUV, appellant shot him multiple times and killed him.

In this appeal, appellant complains that the circuit court erred in declining his private counsel's request to withdraw her representation of appellant at the trial below. Appellant was represented first by two attorneys from the Office of the Public Defender. On July 28,

2017, private counsel entered her appearance and both public defenders moved to strike their appearances. The court permitted one public defender to withdraw but kept one public defender in the case as counsel for appellant along with his private counsel.

Private counsel entered her appearance upon receipt of a small retainer from appellant's family, but received no further payments. She filed a motion in the circuit court asking the court to strike her appearance, arguing that she could not afford to represent appellant for his trial. She advised the court that she had received no payments since she had entered her appearance in the case, there were many videos she needed to yet review, the trial was going to cause a great financial strain on her solo practice and it would "create a massive post-conviction issue." She offered to turn her files over to the public defender. The State represented that the public defender attorneys "don't think they would be ready or even have the ability in January." The State wanted the trial to proceed on the scheduled trial date and took no position on the motion to withdraw.

The court denied private counsel's motion to strike her appearance but granted the remaining public defender's motion to withdraw. The court explained as follows:

> "I'm not crazy about defense counsel entering their appearance and then withdrawing in a criminal case, especially one of this magnitude, especially one that's—and I feel bad for you—that's close to a trial date or close to a motions date and a trial date.… The motions are next month, in December, and then early January for a trial date.… The preparation and the amount of business days between now and then, it's not a lot of time.… It's rare that criminal defense attorneys move to withdraw under these circumstances.… The rule of thumb has always been in criminal work you get paid and then you enter your appearance, not you enter into some type of written retainer agreement.… [T]hat's not written anywhere. That's just sort of the way things have been for years and years and years.… That's the risk you took.… I'm not inclined to strike your appearance.… You've got time to prepare.…

> If you have a written contract, you could always pursue the money in—or attempt to pursue it.… I don't know the likelihood of collecting it."

At the conclusion of the trial, the court permitted private counsel to withdraw and the Office of the Public Defender assigned two attorneys to handle post-trial motions and disposition.

Before trial, appellant moved *in limine* to exclude from evidence tweets that the State alleged had come from appellant's Twitter account and were directed towards Mr. Proctor, the murder victim. Appellant argued that the State could not authenticate the tweets as having come from appellant's account. The trial court denied the motion.

At the beginning of trial, the court imposed the rule on exclusion of witnesses pursuant to Maryland Rule 5-615. The State wanted Detective Vincent Carbonaro of the Anne Arundel Police Department to remain in the courtroom, and defense counsel stated "[t]he State may have the detective representative present, notwithstanding the sequestration order" and that "Detective Carbonaro can assist the State in the presentation of its case."

During trial, defense counsel advised the court that she objected to the way the State was "using" Detective Carbonaro. Detective Carbonaro testified on six separate occasions for the State, over four different days of the trial. The defense noted that after each witness's testimony or during a break, the prosecutors were having lengthy discussions with Detective Carbonaro about what the witness said, and then when Detective Carbonaro would be called by the State piecemeal in the trial, "he's really cleaning up or potentially cleaning up the prior testimony of witnesses." Counsel characterized the State's conduct as impugning access to a fair trial, violating procedural requirements, and violating the

sequestration rule. He concluded by telling the court: "If [Detective Carbonaro] is being prompted to clean up other witnesses' testimony…that goes beyond the bounds of assisting the State in the presentation of its case." Defense counsel asked that the sequestration order be enforced and that any testimony be stricken, and requested that at minimum the court prohibit the State and Detective Carbonaro from piecemealing his testimony. The trial judge denied all relief, stating three reasons:

> "One…I don't have any evidence that there's been a violation of the sequestration order…two, I'm going to allow the State to call their witnesses as they see fit, even if it's piecemeal, because sometimes that just makes a clearer presentation to the jury…third…you conceded there was no argument as to whether Detective Carbonaro could remain in the courtroom as the State's representative."

The jury convicted appellant of conspiracy to commit first-degree murder. About one year later, on September 18, 2019, the court imposed a sentence of life imprisonment. This timely appeal followed.

II.

Before this Court, appellant argues that the trial court should have granted private counsel's pre-trial motion to strike her appearance, because this case "proved to be too overwhelming for counsel in a 'solo practice' who also had an unexpected and unreasonable financial burden, and that combination created the unacceptable risk of ineffective assistance of trial counsel for appellant." He contends also that the trial judge erred by finding that Maryland case law allows for striking the appearance of private

counsel for unreasonable financial burden in a civil case but not in a criminal case.[1] Appellant concludes his arguments on the motion to strike the appearance by apparently acknowledging that he may have no remedy available at this stage in criminal appellate procedure other than asking this Court to consider an ineffective counsel claim in this direct appeal. *See* Appellant Br. at 13–14. He acknowledges that the only remedy for denial of a motion to strike appearance of counsel in a civil case is by filing an interlocutory appeal, which private counsel below did not do. Appellant argues that if denial of a motion to strike appearance of counsel in a criminal case is not remediable except by way of interlocutory appeal, then the failure of private counsel to pursue an interlocutory appeal would amount to ineffective assistance of counsel. Appellant argues that this Court should

[1] Appellant argues that at least ten extenuating circumstances should have led the court to grant the motion to strike the appearance of private counsel: (1) the private attorney was in solo practice; (2) the trial judge asserted that Maryland criminal defense attorneys are supposed to be fully paid in advance when the law has no such requirement; (3) private counsel was not reckless in taking on the case in the first place, having known appellant's family and received payment by them previously; (4) private counsel did not know before taking on the instant case that it would be so vast; (5) appellant previously waived his *Hicks* right to prompt trial, and so the impending trial date at the time of the motion to strike should not properly have been an obstacle to postponement; (6) prior to denial of her motion to strike appearance, private counsel did not file a single request for postponement of trial; (7) private counsel's appearance was entered for only three months before she sought to withdraw, whereas the State previously had sought and received postponement for a longer duration; (8) where the unreasonable financial burden falls on a single attorney, the effects are more pronounced, both on that attorney and on all of that attorney's other clients; (9) the trial court knew or should have known that private counsel's unresolved financial predicament was likely to prejudice appellant's defense in ways that appellant might not know and might not be able to understand; (10) the trial court created a conflict of interest for private counsel by forcing her to stay in the case, because applying any additional effort to the case, beyond the bare minimum, would cause her greater financial harm and prospectively harm her other clients.

now review, in this direct appeal, the denial of the motion to strike the appearance of counsel.

On the second question presented, appellant argues that the State violated the sequestration rule based upon the way the State used Detective Carbonaro as a witness, *i.e.*, by seating Detective Carbonaro at the counsel table during the trial, allowing him to listen to the testimony of other witnesses, and then calling Detective Carbonaro repeatedly to resolve gaps in the testimony of the other witnesses. Related to this argument, albeit alternatively, appellant argues that even if the sequestration rule was not violated, the State nevertheless was undermining a fair trial by calling the same witness repeatedly. Appellant argues that this piecemeal testimony violated Rule 5-611, which leaves to the trial court the responsibility to exercise "reasonable control" over the mode and order of interrogating witnesses and presenting evidence for the ascertainment of truth. Appellant also points to Rule 5-615, which requires the trial court, upon request before testimony begins, to order witnesses excluded so that they cannot hear the testimony of other witnesses.

Finally, as to the evidentiary question, appellant argues that the circuit court denied the motion *in limine* improperly and erred in accepting the social-media evidence. Specifically, appellant argues that the State failed to establish sufficiently that the Twitter account belonged to appellant, that appellant actually sent the tweets in question, and that the tweets were directed towards luring the victim to his death. Appellant points to the standard of social-media evidentiary authentication set out by the Court of Appeals in *Sublet v. State*, 442 Md. 632 (2015), and *Griffin v. State*, 419 Md. 343 (2011), arguing that

the State's evidentiary authentication for the social media evidence introduced at trial did not meet this standard.

The State, appellee, maintains that the circuit court's refusal to grant the motion to strike appearance of private counsel is not cognizable in this appeal from his conviction. Alternatively, on the merits, the State argues that the trial court exercised its discretion properly in denying private counsel's motion to withdraw from representing appellant. Moreover, as to ineffective assistance of counsel because she did not note an interlocutory appeal from the denial of the motion, the State says the claim is baseless and that counsel was an effective advocate for appellant. In fact, the State notes, counsel won acquittals on all but one of the charges before the jury. The State argues that appellant was not harmed by the court's ruling and that there is no record support for appellant's claim of ineffective assistance of counsel.

As to the sequestration issue, appellee argues that the trial court exercised its discretion properly in finding no sequestration violation and in permitting Detective Carbonaro to be called repeatedly as a witness. In support, appellee's argument has three facets. First, the claim below was waived because of counsel's acknowledgment that Detective Carbonaro's presence might not be a sequestration problem. Second, the trial court did not abuse its discretion in finding that the conversations between the prosecutors and the detective did not violate the sequestration order. Third, according to appellee, the trial court exercised its discretion properly in permitting the State to call Detective

Carbonaro multiple times for the purpose of making a complicated case more intelligible to the jury.

As to the last question presented, appellee argues that, to the extent appellant's arguments were preserved and not waived, appellant's Twitter account was authenticated properly and the evidence was relevant.

III.

A. *Motion to Strike Counsel's Appearance*

We address first appellant's argument related to private counsel's motion to strike her appearance. We agree with the State that the issue is not reviewable in this direct appeal of appellant's conviction, neither as error nor abuse of discretion. Furthermore, we decline to consider this issue on direct appeal as ineffective assistance of counsel. Appellant has cited no authority to support the proposition that this claim is cognizable on direct appeal from a criminal conviction, nor has he cited any prejudice to appellant. He has shown no harm to him based upon the trial court's ruling, and appears to be arguing merely private counsel's issues.[2] We leave for another day any argument, if any exists, to support a claim for deficient performance or prejudice therefrom.

[2] Even if we were to consider whether the court exercised its discretion properly, we would find no abuse of that discretion. The trial court held a hearing on the motion and made a reasoned decision based on weighing the various alternatives. The court considered the financial burden argument, and weighed withdrawal of counsel against the impact on the impending trial.

B. *The Sequestration Rule and Detective Carbonaro's Testimony*

Rule 5-615 addresses the exclusion of witnesses during proceedings, including trial. The Rule provides, in pertinent part, as follows:

> **EXCLUSION OF WITNESSES**
> (a) **In General.** Expect as provided in sections (b) and (c) of this Rule, upon the request of a party made before testimony begins, the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses.… The court may order the exclusion of a witness on its own initiative or upon the request of a party at any time. The court may continue the exclusion of a witness following the testimony of that witness if a party represents that the witness is likely to be recalled to give further testimony.
> (b) **Witnesses Not to Be Excluded.** A court shall not exclude pursuant to this Rule. . .
> (2) an officer or employee of a party that is not a natural person designated as its representative by its attorney…
> (4) a person whose presence is shown by a party to be essential to the presentation of the party's cause, such as an expert necessary to advise and assist counsel. . .

As an initial matter, the State argues that any violation of a sequestration order was waived by defense counsel. Defense counsel stated on the record that Detective Carbonaro was excluded from the application of the sequestration rule because he was designated as a representative of the State, and he was entitled to remain in the courtroom to assist the prosecution. Later, when counsel complained to the court that the detective was testifying on multiple occasions, counsel told the court the following:

> "I'm aware of course that the State may have the detective representative present, notwithstanding the sequestration order. My concern is that—and while I understand that Detective Carbonaro can assist the State in the presentation of its case—my concern is that the manner in which Detective Carbonaro is being used in this case is vis-à-vis his testimony…. So what I have observed throughout the course of the trial, is that after each of the witnesses or during a break there is lengthy discussions with Detective Carbonaro about what the witness has said and my concern is then, when

> Detective Carbonaro is called piecemeal in this trial, he's really cleaning up or potentially cleaning up the prior testimony of prior witnesses."

Assuming, without deciding, that counsel is correct that the State may permit a police officer to remain in the courtroom notwithstanding the application of the sequestration rule, appellant waived any argument that the detective's presence violated the Rule. Appellant conceded that the detective could remain in the courtroom, and that the Rule did not apply to him. Because of appellant's concession, the detective's presence did not cognizably violate the Rule.[3]

Appellant's argument does not end with any alleged Rule violation. He argues as well that the State's use of the detective to "clean up other witnesses' testimony. . . goes beyond the bounds of assisting the State in the presentation of its case." He asked the trial court to preclude the State from "piecemeal[ing] his testimony."

Rule 5-611 addresses the mode and order of interrogation of witnesses and control by the court. The Rule provides, in pertinent part, as follows:

> "(a) **Control by the Court.** The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment."

Maryland Rule 5-611 is the Maryland analogue to Federal Rule 611. Most of our sister states have a similar rule, and all recognize the broad discretion resting within the trial

[3] It is certainly possible that the law nevertheless would have permitted the detective to remain in the courtroom over a proper objection, under the exception for a party representative. *See* Md. Rule 5-615(b)(2). That exception can include a law enforcement officer involved in a criminal prosecution. *Poole v. State*, 207 Md. App. 614, 629 (2012).

court to manage and control the trial and the mode and order of interrogation of witnesses. *Myer v. State*, 403 Md. 463, 476 (2008); *see also* Jack B. Weinstein & Margaret A. Berger, Weinstein's Federal Evidence § 611.02[2] ("Control Over Examining Witnesses"); *id.* § 611.02[3][f] ("Recalling Witnesses"). That control includes the decision whether to allow a witness to be recalled, as well as the order of the recalling of witnesses.

Apparently, what occurred here is that on the third day of trial, Detective Carbonaro testified about the actions he took in the beginning of the investigation. After the State called five other witnesses, who testified in part about locating the SUV involved in the shooting, the State recalled Detective Carbonaro to testify about his actions based on the evidence collected about the SUV, phone records, and video surveillance. After the general manager of the hotel and the detective who arrested the person who rented the SUV testified, the State recalled the detective, who testified about the rental receipt, rental records, and calls and texts on the victim's cellphone.

To be sure, the procedure elected by the State and permitted by the trial court is not the usual and ordinary method of presenting a case. The typical method is that the witness testifies on direct examination to all that he or she knows (or that counsel intends to introduce), followed by cross-examination, and then redirect examination. As noted, recall of the witness is subject to the discretion of the trial court.

We have found several cases similar to the case at bar, where, in purportedly complicated trials, the State or government elected to call police officer witnesses several times during the trial. In *State v. Hatfield*, 426 P.3d 569 (Mont. 2018), the Supreme Court

of Montana considered the claim that the trial court abused its discretion in permitting two law enforcement officers to testify multiple times on direct examination, over objection. The court held that "[w]hile we agree it is preferable to have witnesses testify in a less interrupted manner," the court did not abuse its discretion. *Id*. at 524. The Montana court relied on cases in the United States Court of Appeals for the Eighth Circuit. *See U.S. v. Puckett,* 147 F.3d 765 (8th Cir. 1998) (holding "while it may be preferable to have witnesses testify in a less interrupted manner, we cannot say the district court abused its discretion"); *United States v. DeLuna*, 763 F.2d 897, 911–12 (8th Cir. 1985) (same). Appellant has pointed to no prejudice ensuing from the procedure permitted by the trial court. He points to no limitation on cross-examination or unfairness. We agree with the federal courts and the Montana Supreme Court that while it would be the better practice to have witnesses testify in a less interrupted manner, we hold that the trial court did not abuse its discretion in permitting the State to call the witness several times. We note, however, that this is not a procedure that we endorse or encourage.

C. Social Media

This Court reviews for abuse of discretion a trial court's ruling admitting social-media evidence. *See State v. Sample*, 468 Md. 560, 596–97 (2020). 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. Md. Rule 5-901(a). For a trial court to admit social-media evidence, "there must

be sufficient evidence for a reasonable juror to find that the social media is authentic by a preponderance of the evidence." *Sample*, 468 Md. at 598.

In the instant case, appellant's claim that the Twitter account was not authenticated properly was waived by defense counsel during trial. Appellant's counsel stated that "what the State has gone through now in its proffer is precisely what's required for the admissibility of the evidence." Defense counsel said additionally that she was "not going to sit and argue against if someone's calling him Gibran and he's responding." Appellant cannot now on appeal raise a claim that he or his counsel deliberately waived at trial. *See* Md. Rule 8-131.

Assuming *arguendo* that the issue was preserved for our review, we would find that the trial judge exercised his discretion properly to admit the Twitter evidence. There was sufficient evidence for a reasonable juror to find by a preponderance of the evidence that the social-media evidence was authentic. The Twitter account was connected to appellant by witness testimony that it was his; by photographs of appellant on the account; by direct messages in which interlocutors address "Gibran" and the account holder responds to that name; and by direct messages in which the accountholder states that he has two phone numbers which are otherwise circumstantially connected to appellant. Furthermore, the Twitter evidence included a death threat directed at the murder victim. The tweets were relevant, and the trial judge exercised his discretion properly to admit them.

JUDGMENTS OF THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY AFFIRMED; COSTS TO BE PAID BY APPELLANT.