

Circuit Court for Baltimore City
Case No. 121166008

UNREPORTED*
IN THE APPELLATE COURT
OF MARYLAND

No. 1445

September Term, 2022

ANDRE PRESTON

v.

STATE OF MARYLAND

Beachley,
Zic,
Getty, Joseph M.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Getty, J.

Filed: May 16, 2024

*This is an unreported opinion. This opinion may not be cited as precedent within the rule of stare decisis. It may be cited for its persuasive value only if the citation conforms to Rule 1-104(a)(2)(B).

This case concerns the admission of surveillance video evidence during a jury trial in the Circuit Court for Baltimore City. Andre Preston, Appellant, was charged with: (1) first-degree murder; (2) use of a handgun in the commission of a crime of violence; (3) possession of a regulated firearm with a disqualifying conviction; and (4) second-degree murder. At trial, the State introduced two video clips from a pole camera installed by the Federal Bureau of Investigation (“FBI”) in Baltimore City.

On appeal, Preston contends that the two clips from the surveillance video were not properly authenticated and therefore should not have been admitted during his jury trial. Preston focuses on confusion by the State’s witnesses about the continuous video from the pole camera and the process by which it was reduced to the video clips offered into evidence.

A jury convicted Preston of second-degree murder, use of a handgun in the commission of a crime of violence, and possession of a regulated firearm with a disqualifying conviction. The court sentenced Preston to 40 years for second-degree murder; a consecutive term of 20 years for the use of a handgun; and a consecutive term of 15 years for possession of a regulated firearm. Preston raises a single question on appeal which we have rephrased:¹

Was the video from the surveillance system properly authenticated?

¹ The Appellant states his question presented as:

Did the trial court err in allowing the admission of surveillance camera video footage that was not properly authenticated?

BACKGROUND

A shooting occurred on the 3000 block of Normount Court in Baltimore City during the afternoon of May 13, 2021. Officer Tyrik Thompson was on patrol and received a call for service for a shooting on Normount Court. He found a body, later identified as Gary Wilson, with multiple gunshot wounds. Later that day, Detective David Moynahan responded to the scene as the lead homicide detective assigned to the case. Detective Moynahan knew from a separate investigation a few days earlier that the FBI had installed pole cameras in this area of Normount Court. Detective Moynahan obtained from the FBI the pole camera video from the time of the murder and subsequently developed Andre Preston as a suspect.

Preston was arrested and brought to Baltimore City Police Headquarters for questioning on May 24, 2021. During the interview, Preston was shown photographs derived from the pole camera video on various dates. He identified himself in the photographs.

A four-day jury trial was held in the Circuit Court for Baltimore City. At trial, the State called Jeffrey Kelly, a Special Agent with the FBI Baltimore Division, as a witness. Agent Kelly testified that he was assigned to the City Streets Task Force and was familiar with pole cameras. He described a pole camera as a “device, usually attached to a pole, a telephone pole or a light pole, and it records whatever is in front of it.”

The State then questioned Agent Kelly about how pole cameras operate.

[The State]: And is there a way to obtain the video that’s been recorded by [the pole camera]?

* * *

[Agent Kelly]: So, the device records whatever is in front of it. It wirelessly sends what is recording to our server, which is at our office in Woodlawn. And then it records to a hard drive for that specific camera in a server at our office.

Agent Kelly continued to testify that he was familiar with the pole camera on the 3000 block of Normount Court, that it was reliable, and that it was no longer active but was active at the time of the shooting on May 13, 2021.

After Agent Kelly’s testimony, the State offered “the two files that are on State’s Exhibit No. 8” into evidence. Defense counsel objected, arguing the State had not laid the proper foundation. The judge allowed defense counsel to voir dire Agent Kelly further about authentication of the video evidence.

[Defense Counsel]: Okay. So, if we’re talking about the one clip starts at 1:27 and 54 seconds to be precise on May 13, 2021, you believe that those two clips encompassed a straight 15^[2] minute period?

[Agent Kelly]: I know that there is the full 15 minutes, yes. I created it myself.

[Defense Counsel]: Okay. And, so, then who was the one that duplicated it for the State?

[Agent Kelly]: I gave the hard drive to the State.

* * *

² It is unclear from the record whether the entire video is a total of 15 minutes or 19 minutes in length.

[Defense Counsel]: Okay. So, let me ask you. So you said it's 15 minutes continuous time on this video. Correct?

[Agent Kelly]: There is 15 minutes, yes.

Defense counsel proceeded to show Agent Kelly the two video clips the State was trying to admit into evidence. Defense counsel noted that the first clip starts at "1:27:55 and there's a minute and 40 seconds."

[Defense Counsel]: Okay. So we should be looking at 1:29 [for the start of the next clip]. What time does that say?

[Agent Kelly]: 1:42:57.

[Defense Counsel]: And this clip is how long?

[Agent Kelly]: Three minutes.

[Defense Counsel]: So, we do agree that the two clips the State gave you are not encompassing the entire 15 minute period that you were talking about?

[Agent Kelly]: That's correct.

[Defense Counsel]: Well, you indicated that what you recorded would have had the whole 15 minutes?

[Agent Kelly]: The hard drive has the whole 15 minutes.

After this line of questioning, the parties approached the bench and defense counsel renewed his objection to admitting the videos into evidence. Defense counsel stated that he was not given the whole 15-minute video and argued that Agent Kelly "cannot say how that video was copied. He cannot establish what type of system it is, the camera or anything else." He continued that Agent Kelly had not testified "if he checked to make sure the time

stamp or anything else was accurate. He did nothing [*Washington v. State*] requires that was sufficient to show the admissibility of this video.”

The trial judge disagreed, and ultimately found that the “foundation authentication is met” and admitted the two video clips into evidence. Defense counsel noted a continuing objection.

During defense counsel’s cross-examination of Agent Kelly, counsel attempted to elicit more information about what happened to the rest of the video. The State objected to each question, stating it had been “asked and answered.” The court sustained these objections.

The State later called Baltimore City Homicide Detective David Moynahan to testify. Detective Moynahan was assigned to investigate Gary Wilson’s murder on Normount Court. During cross-examination, Detective Moynahan was questioned about the video footage the police obtained from the FBI and defense counsel showed him both video clips the State had introduced into evidence.

[Defense Counsel]: Detective, let’s talk about that video. What was played, is that what was given you at [the FBI Baltimore Office]?

[Detective Moynahan]: Yes.

[Defense Counsel]: Have you edited what was given to you by the FBI?

[Detective Moynahan]: Have I edited it?

[Defense Counsel]: Have you, or anyone with the Baltimore City Police Department, edited what was given to you from the FBI?

[Detective Moynahan]: No.

[Defense Counsel]: So if the Agent from the FBI said he gave you a 19 minute continuous clip, that would be mistaken?

[Detective Moynahan]: Oh, no, there was more video.

* * *

[Defense Counsel]: Were you given portions [of the video], or were you given a 19 minute period [from the FBI]?

[Detective Moynahan]: I was given a 19 minute video.

[Defense Counsel]: So where is that [video]?

[Detective Moynahan]: Your question, did the Baltimore City Police Department edit that video I watched here today, the answer is no.

[Defense Counsel]: Where is the 19 minutes? Do you know?

[Detective Moynahan]: I don't have that answer.

[Defense Counsel]: Did you have [the full 19 minutes]?

[Detective Moynahan]: Yes.

After a brief bench conference, defense counsel again questioned Detective Moynahan about what happened to the entire pole camera video.

[Defense Counsel]: Detective, where is the 19 minute video?

[Detective Moynahan]: The video I had was turned over to the State.

[Defense Counsel]: So, the State doesn't have a 19 minute video and I don't have a 19 minute video, and you don't have a 19 minute video, then would it be safe to

say you have no idea where the 19 minute video is?

[Detective Moynahan]: The video the FBI handed to me was turned over to the State.

[Defense Counsel]: I'm going to ask you again. Do you know where the 19 minute video is?

[Detective Moynahan]: No.

Defense counsel then renewed his motion to preclude the video evidence. He argued,

You have an Agent who testified that he gave [the full video], it was a continuous stream of video. Now it is not. No one will tell me what happened to it, where it is I have three and a half minutes, and those 15 minutes that are missing are incredibly important because it's everything that happens up to the murder. And I don't know how the [FBI Agent] can authenticate the video when he said it was 19 minutes in length.

The trial judge stated she would not reconsider her previous ruling on admissibility but would consider defense counsel's argument regarding the rule of completeness. She made the following inquiry:

[The Court]: [State's Attorney] do you have the 19 minutes?

[State]: No, Your Honor. I don't. I have clips, the same ones I turned over. That's what I have

[The Court]: . . . I just wanted to find out, do you have it. And even if you don't have it, how come your homicide detective doesn't have this? I mean, usually, they keep a copy of all the evidence, forward you a copy because you have to prepare your case. But the original is usually either in [evidence] or somewhere.

The judge then allowed each side to put their arguments regarding the video evidence on the record. At this time, the State clarified that there was a hard drive that was provided by the FBI with a year's worth of video footage, including the entire video of the shooting that is the subject of this case. After hearing from both sides, the judge found a discovery violation, and told the parties to review the video footage on the hard drive before the trial resumed in two days. The judge said she would then hear their arguments about whether the full video should be admitted when the trial resumed.

During the next day of trial, both sides discussed the entire video and made their arguments about whether or not the entire video from the FBI pole camera should be admitted.

[Defense Counsel]: It is also my understanding . . . there never was a continuous—so, Agent Kelly testified that he gave a continuous [video] on a thumb drive that day. And that is what Detective Moynahan said he received it on that day, was that continuous time frame and that he gave that to the State.

I believe that a thumb drive was given to Detective Moynahan on that day. Detective Moynahan did give it to the State. But Agent Kelly and Detective Moynahan both were mistaken that it is not a 15 minute continuous [video], it's the two clips that we have, that are in evidence.

* * *

[State]: [Defense counsel] has had an opportunity to view the 13 minutes . . . that was not in the two clips that were presented in court. And the State had no intention of using that video during its

case. And, so, it's not evidence that the State would have used.

There is—[Defense counsel] has had an opportunity to review [the footage] and so have I. There is nothing inculpatory or exculpatory about the video, the 13 minutes.

Defense counsel disagreed with the State's assessment of the full video and argued the full video was inculpatory. The judge ultimately ruled the State could not introduce the entire 13-minute video into evidence because “[i]t's much more inculpatory and it should have been viewed before [trial] and it should have been provided [to defense counsel].”

The trial then continued with the cross-examination and redirect examination of Detective Moynahan. During the State's redirect examination, the State questioned Detective Moynahan about the two video clips that had been admitted into evidence. Detective Moynahan stated he went to view the pole camera footage at the FBI Baltimore Office and was given a flash drive with two clips from the video, as extracting the entire video would have taken a long time.

On recross examination, defense counsel questioned Detective Moynahan further about the video given to him by the FBI.

[Defense Counsel]: So, Detective, if Agent Kelly testified that he gave you, you know, a continuous video containing at least 15 minutes, then that would be a mistake. He did not do that on [the day you went to the FBI Baltimore Office]. Correct?

[Detective Moynahan]: That is correct. He made a mistake, yes.

At the end of the recross examination of Detective Moynahan, the State rested. Defense counsel made a motion for Judgment of Acquittal, which the trial judge denied. Ultimately, the jury found Preston guilty of second-degree murder, use of a handgun in the commission of a felony or crime of violence, and possession of a regulated firearm with a disqualifying conviction. This appeal followed.

STANDARD OF REVIEW

“When an appellant claims evidence was erroneously admitted based on lack of authenticity, we review the trial court’s decision for an abuse of discretion.” *Sykes v. State*, 253 Md. App. 78, 90 (2021) (citing *Darling v. State*, 232 Md. App. 430, 456 (2017)). An abuse of discretion occurs when the trial court “acts without reference to any guiding principles, and the ruling under consideration is clearly against the logic and effect of facts and inferences before the court.” *Reyes v. State*, 257 Md. App. 596, 615 (2023) (quoting *Sibley v. Doe*, 227 Md. App. 645, 658 (2016)). This Court will only reverse for an abuse of discretion if “the trial judge’s determination was both manifestly wrong and substantially injurious.” *Id.* (quoting *Angelakis v. Teimourian*, 150 Md. App. 507, 525 (2003)).

DISCUSSION

A threshold requirement for admissibility of nontestimonial evidence is authentication of the evidence. Maryland Rule 5-901(a) states, “[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.” The standard for admissibility under Rule 5-901 is low: “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.’” *Reyes*, 257 Md. App. at 630 (emphasis omitted) (quoting *Jackson v. State*, 460 Md. 107, 116 (2018)).

Videos and photographs are treated the same for admissibility purposes and are subject to the same rules of admissibility. *Id.* (citing *Washington v. State*, 406 Md. 642, 651 (2008)). One of the ways video and photographic evidence may be admissible is through the “silent witness” theory of authentication. *Washington v. State*, 406 Md. 642, 652 (2008). *See also* Md. Rule 5-901(b) (providing a non-exhaustive list of methods to authenticate evidence, including, “[e]vidence describing a process or system used to produce the proffered exhibit or testimony and showing that the process or system produces an accurate result.”).

Under the “silent witness” theory, “photographic evidence operates ‘as a mute or silent independent photographic witness’ that speaks with its own probative effect.” *Reyes*, 257 Md. App. at 630 (quoting *Washington*, 406 Md. at 652–53). Authenticating a video under this theory “focuses more on ‘assuring the accuracy of the process producing it.’” *Id.* (quoting *Washington*, 406 Md. at 653). “Testimony under this theory may include the ‘type of equipment or camera used, its general reliability, the quality of the recorded product, the process by which it was focused, or the general reliability of the entire system.’” *Id.* at 630–31 (quoting *Jackson*, 460 Md. at 117).

Preston argues that the surveillance video from the pole camera was not properly authenticated and therefore the trial court abused its discretion by admitting the two video clips into evidence. In support of his argument, Preston relies on the Supreme Court of Maryland’s decision in *Washington v. State*, 406 Md. 642 (2008), to argue that Agent Kelly’s testimony did not properly authenticate the surveillance video clips.

In *Washington*, the State introduced video and photographs from surveillance cameras, which depicted a shooting that occurred outside of a bar. 406 Md. at 646. The evidence was introduced during the direct examination of the bar owner. *Id.* He testified that there was an eight-camera security system that recorded 24 hours a day. *Id.* The evidence introduced at trial was made using footage from the various cameras. *Id.* at 655. However, the owner testified “that he did not know how to transfer the data from the surveillance system to portable discs,” and that he hired “a technician to transfer the footage from the eight cameras onto one disc in a single viewable format.” *Id.* The owner could not testify to the editing process and the detective only watched the footage after it had been edited by the technician. *Id.*

At trial, the court admitted the video evidence under the “silent witness” theory of authentication over defense counsel’s objection. *Id.* at 646–47. Ultimately, the Supreme Court held the State failed to properly authenticate the video. *Id.* at 655–56. The Court determined that the foundational requirement was “more than that required for a simple videotape” since it was “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.” *Id.* at 655.

While Preston argues his case is similar to *Washington*, the facts are quite distinguishable. In this case, footage from multiple cameras was not spliced together by an unknown person but instead video excerpts from a single camera were clipped by the FBI agent. Furthermore, there was testimony about the process used to retrieve the video from the pole cameras.

Agent Kelly testified about pole cameras generally and then stated he was familiar with the pole camera on the 3000 block of Normount Court. He testified it was active at the time of the shooting and was reliable. Agent Kelly then testified about the process for obtaining footage from the pole camera and how the footage is saved and stored. He further testified that he created the video himself and gave it to the police.

As the Supreme Court said in *Washington*, “to satisfy the evidentiary requirement for authentication, the proponent of the evidence must show that the evidence is ‘sufficient to support a finding that the matter in question is what its proponent claims.’” *Washington*, 406 Md. at 651 (quoting Md. Rule 5-901(a)). Typically, surveillance tapes are authenticated under the “silent witness” theory and without “an attesting witness” who has first-hand knowledge of the incident. *Id.* at 653. This theory of admissibility authenticates a photograph or video as an independent witness of events because the photograph or video speaks with its own probative effect. *Id.* at 652–53

“Courts have admitted surveillance tapes and photographs made by surveillance equipment that operates automatically when ‘a witness testifies to the type of equipment or camera used, its general reliability, the quality of the recorded product, the process by which it was focused, or the general reliability of the entire system.’” *Id.* at 653 (quoting *United States v. Stephens*, 202 F. Supp. 2d 1361, 1368 (N.D. Ga 2002)).

In this case, Agent Kelly met the benchmarks set out in *Washington* to properly authenticate the surveillance video. He testified that the system used to record the surveillance video was a pole camera that “records whatever is in front of it.” He understood how pole cameras work generally and described the process by which the pole camera video is saved and stored. He testified that “[the camera] wirelessly sends what is recording to [the FBI’s] server, which is at our office in Woodlawn. And then it records to a hard drive for that specific camera in a server at [the FBI’s] office.” He testified that the camera was working at the time of the shooting and was generally reliable. Finally, he testified that he was the one who created the video and gave a copy of the video to police.

Agent Kelly’s testimony was sufficient to authenticate the video clips introduced at trial under the “silent witness” theory. When defense counsel questioned Agent Kelly, there seemed to be some confusion about what happened to the remaining portion of the video.³ However, the standard for admissibility under Maryland Rule 5-901 is low, and the trial judge only needs to find that there is sufficient evidence that the jury might

³ It was later adduced that Agent Kelly was mistaken when he said he gave the entire video to police. He in fact only gave the two clips that were admitted into evidence.

find that the evidence is what the proponent claims. *Reyes*, 257 Md. App. at 630. Therefore, the court did not abuse its discretion by admitting the footage.

CONCLUSION

We affirm the judgment of the Circuit Court for Baltimore City. The trial court did not err when it admitted the surveillance video into evidence, as Agent Kelly's testimony properly authenticated the video under Maryland Rule 5-901.

**JUDGMENT OF THE CIRCUIT
COURT FOR BALTIMORE CITY
AFFIRMED. COSTS TO BE PAID
BY APPELLANT.**