Circuit Court for Baltimore City
Case No.: 119086005

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1490

September Term, 2019

DAMON SHIELDS

v.

STATE OF MARYLAND

Graeff,
Berger,
Moylan, Charles E., Jr.
(Senior Judge, Specially Assigned),

JJ.

PER CURIAM

Filed: October 8, 2020

Following a not guilty plea upon an agreed statement of facts entered in the Circuit Court for Baltimore City, the court found Damon Shields, appellant, guilty of possession of a regulated firearm after being disqualified by a criminal conviction (count 1), and transporting a handgun in a vehicle (count 4). The court sentenced appellant to a term of five years' imprisonment, without the possibility of parole for count 1, and to a concurrent term of three years' imprisonment for count 4. Prior to entering his plea, the State moved, *in limine*, seeking to exclude from evidence certain text messages and/or social media posts, which the court granted. In this appeal, appellant claims the circuit court erred in granting the State's motion in limine. We disagree and shall affirm.

BACKGROUND

On February 26, 2019, the police became interested in the van appellant was driving because it did not appear to have a rear license plate. Upon closer inspection, they saw a temporary license plate from Virginia in the rear window, which the police determined was not registered to appellant's van. The police then initiated a traffic stop.

Appellant produced various papers including a driver's license belonging to another person. Then, while one officer returned to the patrol vehicle to check appellant's papers, another officer stayed with appellant. The officer who stayed with appellant said that appellant appeared to be nervous. According to the statement of facts read during trial, the following then occurred:

> Multiple times [Mr. Shields began] shouting out obscenities and then began to say to the woman in the front seat, "baby I'm done, I'm done." Multiple times, he also reached around in the vehicle, despite the officer telling him to please not reach while the officer was standing by the car. At that time the officer told him you're making me nervous and made him step out of the

> vehicle and detained him while they continued in their investigation because he kept reaching in the car.
>
> …The Defendant at that point said, take me. She has nothing to do with this. The officer then asked him if there was anything in the vehicle that they need to know about and the Defendant responded, yes, there's a gun in there. Officer Van Helton then searched the vehicle and located in the backseat of the vehicle a black bag containing a Kimber Elite Carry 45-caliber handgun, serial number KEC0545. The firearm was loaded with eight live rounds.

The entire episode was captured on video by the body-worn camera of the police officer who interreacted with appellant, searched the van, and recovered the firearm.

Prior to trial, appellant shared with the State in discovery paper print-outs of various text messages and/or social media posts (hereinafter "the messages"). As noted earlier, the State moved *in limine* to exclude them from evidence at trial. During the hearing on the State's motion, appellant contended that someone had planted the gun in appellant's van, and that the messages were proof of that. The messages were, according to appellant, sent by appellant's then girlfriend's ex-boyfriend in an effort to get appellant "out of the picture."

Appellant's then girlfriend (Makiah Parker) had been in a relationship with Michael Lee Jones. One of the messages that was allegedly sent to Parker, which came from an author named "mjoneslee," stated, in pertinent part, "I knew yall went to the auction on mondays wensdays [sic] and satardays [sic] i been watching yall" . . . "I just want u back," and "now i finally got him out the picture so [w]e can be together[.]"[1]

[1] None of the messages were entered into evidence during the hearing. The pertinent portions of them were referenced by counsel during the hearing. Two pages of messages attributed to "mjonslee" are in the record as attachments to an application for a bail review.

The State also referenced messages from other authors, including a message from "Troy" from about a month before appellant's arrest. A message from "OTF_MikeB" apparently stated, "that's why I put the gun in the car."

The State sought to exclude the messages from evidence because they were sent by unknown persons, from unknown social media accounts, and they were hearsay not meeting any of the recognized exceptions to the ban on the use of hearsay. The defense claimed that the messages were admissible under the statement against interest hearsay exception found in Maryland Rule 5-804(b)(3). The court granted the State's motion *in limine*, stating:

> First of all, . . . it is hearsay and . . . I find no exception to the hearsay rule that would effectually allow the statement to come in. There has been no testimony that there was a declaration against a party or an individual. The social media statements are, aren't reliable because they come from numerous different accounts. They can't be authenticated at all. So if the first ones, to me aren't important because they happened in January, before this incident. So I'm going to find that they are [ir]relevant.[2] There are numerous accounts with different names. There's no dates on the accounts as well. For all those reasons, … I'm going to grant the State's request that it be inadmissible.

DISCUSSION

On appeal, appellant claims solely that the circuit court erred, and/or abused its discretion, when it determined that the statement against interest hearsay exception was not applicable. Appellant makes no mention of the circuit court's alternative rationale for granting the State's motion, *i.e.* that the messages "can't be authenticated at all."

[2] It is clear from the context that the court found that these earlier text messages were irrelevant.

Authentication

After the circuit court granted the State's motion, appellant's counsel proffered to the court that, "had the court allowed Parker to testify, she would have been able to authenticate the author of those text messages and the differences in the names." The State claims that the circuit court did not abuse its discretion in finding that the messages could not be authenticated.

In order for evidence to be properly authenticated, "the trial judge must determine that there is proof from which a reasonable juror could find that the evidence is what the proponent claims it to be." *Sublet v. State*, 442 Md. 632, 638 (2015). The admissibility of evidence is "generally left to the sound discretion of the trial court." *Donati v. State*, 215 Md. App. 686, 708 (2014). Under that standard, "a trial court abuses its discretion only when no reasonable person would take the view adopted by the [trial] court, or when the court acts without reference to any guiding rules or principles." *King v. State*, 407 Md. 682, 697 (2009) (internal citations and quotations omitted).

During the hearing on the State's motion, the State pointed out that there was no name, birth date, or other information associated with the messages. Moreover, according to the State, they were undated, and they were not in fact text messages from a phone, but came from some unknown social media account. Appellant does not refute any of that. On this record, we discern no abuse of discretion when the circuit court found that the messages had not been sufficiently authenticated for them to be admissible in evidence.

Hearsay

As noted earlier, appellant claims that messages were admissible under the statement against interest hearsay exception found in Maryland Rule 5-804(b)(3).[3] The first requirement of that hearsay exception is that the declarant must be unavailable as a witness within the contemplation of Rule 5-804(a), which provides as follows:

> (a) Definition of Unavailability. "Unavailability as a witness" includes situations in which the declarant:
>
> > (1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant's statement;
> >
> > (2) refuses to testify concerning the subject matter of the declarant's statement despite an order of the court to do so;
> >
> > (3) testifies to a lack of memory of the subject matter of the declarant's statement;
> >
> > (4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or
> >
> > (5) is absent from the hearing and the proponent of the statement has

[3] Rule 5-403(b)(3) provides:

> (b) *Hearsay Exceptions*. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
>
> ****
>
> (3) *Statement Against Interest*. A statement which was at the time of its making so contrary to the declarant's pecuniary or proprietary interest, so tended to subject the declarant to civil or criminal liability, or so tended to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless the person believed it to be true. A statement tending to expose the declarant to criminal liability and offered in a criminal case is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

> been unable to procure the declarant's attendance (or in the case of a hearsay exception under subsection (b)(2), (3), or (4) of this Rule, the declarant's attendance or testimony) by process or other reasonable means.
>
> A statement will not qualify under section (b) of this Rule if the unavailability is due to the procurement or wrongdoing of the proponent of the statement for the purpose of preventing the witness from attending or testifying.

An unavailable witness "includes one who is absent from a trial and the proponent of the [witness's] statement . . . has been unable to procure the witness's attendance by process or other reasonable means, which requires proof of efforts in good faith and due diligence to procure attendance." *Bell v. State*, 114 Md. App. 480, 491 (1997) (quotation omitted). "[T]he trial judge's ultimate determination that the witness is, indeed, unavailable and that the rule has therefore been satisfied is subject to review by the abuse of discretion standard." *Muhammad v. State*, 177 Md. App. 188, 298 (2007).

During the hearing on the State's motion in limine, appellant offered no proof that Jones was unavailable. Appellant told the court that Jones had failed to appear in another case, and that, although he had subpoenaed Jones for this case, he did not appear. Appellant, however, did not produce the subpoena[4] for the court, and did not explain anything else about his efforts to ensure Jones' presence. On appeal, appellant contends that we should presume that, had the author(s) of the messages appeared in court to testify, that they would have invoked their Fifth Amendment right to be free from self-incrimination, and would, therefore, had been unavailable within the meaning of the rule.

[4] There is a subpoena in the record for Jones in this case. It is for Jones to appear on July 24, 2019. The trial occurred on September 19, 2019 as the result of a defense request for a postponement.

Appellant cites to no authority for this proposition, and we are aware of none that would support it.

It is well settled "that an appellate court will ordinarily affirm a trial court's judgment on any ground adequately shown by the record, even though the ground was not relied on by the trial court." *Temoney v. State*, 290 Md. 251, 261 (1981) (citations omitted). Although the trial court did not grant the State's motion on the basis that appellant had not demonstrated that the witness was not available, we believe it is adequately shown in the record that appellant did not prove the unavailability of the witness or witnesses. As a result, we affirm the trial court's ruling on this alternative ground. We need not reach the question of whether the statement in the messages, which could be interpreted to mean that "mjoneslee" placed a firearm in someone else's vehicle to "get them out of the picture," otherwise satisfied the requirements of Md. Rule 5-804(b)(3).

Consequently, we shall affirm the judgment of the circuit court.

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