

Circuit Court for Baltimore County
Case No. 03-K-16-000108

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 1715

September Term, 2017

HAYES SAMPLE

v.

STATE OF MARYLAND

Wright,
Arthur,
Raker, Irma S.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Raker, J.

Filed: July 31, 2019

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

Appellant Hayes Sample was convicted by a jury in the Circuit Court for Baltimore County of attempted armed robbery, first degree assault, illegal possession of a regulated firearm, and two counts of use of a handgun in the commission of a crime of violence.

Appellant presents the following questions for our review:

1. Did the trial err in admitting into evidence information obtained from the Facebook pages connected to the names Claude Mayo 5 and Solo Haze?
2. Did the trial court err in not granting appellant's motion for mistrial based on the prosecution's failure to disclose the notes on appellant's interview taken by Detective Gary Childs?
3. Did the trial court err in denying the defense request for mistrial based on the prosecution's statement in closing argument that appellant had been "on parole and probation surveillance?"

We shall hold that the Facebook records were not properly authenticated and shall reverse.

I.

Appellant was convicted by a jury in the Circuit Court for Baltimore County of attempted armed robbery, first degree assault, illegal possession of a regulated firearm, and two counts of use of a handgun in the commission of a crime of violence. Appellant was sentenced to a term of incarceration of twenty years for attempted armed robbery, twenty-five years, consecutive, for first degree assault, five years, consecutive, for illegal possession of a firearm, and a term of five years, concurrent, for each use of a handgun conviction.

Before trial, the parties agreed not to mention that appellant was on probation for a

prior conviction at the time of the robbery. Appellant moved *in limine* to preclude the prosecution from introducing information found on two Facebook pages bearing the names Solo Haze and Claude Mayo 5, respectively. The State alleged that the two Facebook pages were owned by appellant and Claude Mayo (the other masked man at the attempted robbery, who was shot and killed).

To prove the pages' ownership, the State introduced records obtained from Facebook that detailed the actions taken on the Facebook pages. The person who controlled the Claude Mayo 5 page was Facebook "friends" with Shantell Richardson, Mayo's mother, and there was a posting on the Claude Mayo page after Mayo's death announcing a candlelight vigil for him. The Solo Haze Facebook page was associated with the email mrsample2015@gmail.com and listed the owner's current city as Baltimore City, Maryland. The page also listed Claude Mayo 5 and Skkyla Lynn as Facebook friends. Ms. Lynn is the mother of the child of appellant, and appellant claimed that he was in her home on the night of the robbery. The day after the attempted robbery, someone accessed the Solo Haze page and "defriended" the Claude Mayo page, severing the connection between the two pages. The motions court found that the pages were sufficiently authenticated and that there was sufficient proof "from which a reasonable juror could find that this evidence is what it purports to be."

We state the following facts as set forth at trial. On December 7, 2015, two armed men attempted to rob Towson Wine and Spirits in Towson, Maryland. The men wore masks, and the victims were unable to give a detailed description of their appearance. One of the robbers, later identified as Mayo, was shot and killed by the storeowner as he fled

the store. At the time of the robbery, Patricia Culotta was working near the store. She told police that she heard gunshots and saw an African American male wearing a light gray sweatshirt running through a nearby alley. The issue at trial was establishing that appellant was the second robber. The State offered and the court admitted the Facebook pages to show that appellant was the second robber.

On the fourth day of appellant’s trial, defense counsel became aware of the existence of notes taken by Detective Gary Childs detailing appellant’s interview with Detectives Robert Caskey and Christopher Smith. The detective had recorded the notes for his separate investigation into Mayo’s death. During his testimony, Det. Childs mentioned the notes when he asked to reference them to confirm the time of appellant’s interview. Defense counsel requested a mistrial, alleging that had the notes been disclosed in discovery, the defendant would have “prepared for trial differently” and may have filed “other pretrial motions.” The defense averred that the notes revealed appellant had trouble reading the word “explanation” in his Miranda waiver form. The defense also pointed out that the notes contained a different cell phone number for the defendant than the one investigated by Det. Caskey and made no mention of the defendant having access to a vehicle—police reports stated that he did. The prosecutor claimed that she did not know the notes existed and that “the substance of Childs’ notes had been disclosed to the defense through Caskey and other witnesses.” The court denied the motion for mistrial, finding that there was “really nothing new” in the notes and that there was no evidence the prosecutor knew of their existence prior to Det. Childs’s testimony.

In her closing argument, the prosecutor mentioned that appellant was “on the Parole

and Probation surveillance” and that appellant was “meeting in the City with Mr. Wilkins” (his parole officer) hours before the attempted robbery. Appellant objected, arguing that the prosecutor’s statement violated the pre-trial agreement of the parties to make no reference to appellant’s probation for a prior conviction. Appellant requested a mistrial based on the prosecutor’s comment. The trial court denied the motion for mistrial, finding that the statement was “an inadvertent [blurt-out]” and that “[w]e are in a situation whether they already know that your client has been convicted of a crime. He has been convicted of a crime that prohibits him from having a regulated firearm.”

As indicated, the jury convicted appellant, the court imposed sentence, and this timely appeal followed.

II.

Before this Court, appellant argues that the circuit court erred in admitting evidence that was not sufficiently authenticated and that the court abused its discretion in declining to grant a mistrial for the prosecutor’s discovery violation and allegedly improper statement during closing argument.

Appellant argues first that the circuit court erred in admitting the Facebook records for “Solo Haze” and “Claude Mayo 5” because they were not sufficiently authenticated. He argues that we should apply “greater scrutiny” in authenticating social network evidence because of the “heightened possibility for manipulation” of these sites by someone other than the true owner. Appellant argues that the prosecutor’s proffered evidence did not satisfy that standard. He asserts that the error is not harmless because the

State referred repeatedly to the Facebook evidence in its closing argument.

Appellant's second argument is that the circuit court erred in not granting a mistrial for the prosecutor's failure to disclose the notes of appellant's interview taken by Det. Childs. He contends that failure to deliver the notes was a discovery violation. He argues that the notes covered material not included in the other materials given to the defense and that the court abused its discretion by failing to consider why the disclosure was not made, the prejudice to the defense, or ways to cure the prejudice created by the violation before the court denied the motion for mistrial.

Third, appellant argues that the circuit court erred in denying appellant's request for a mistrial based on the prosecutor's statement in closing argument that appellant was meeting his probation officer on the day of the robbery. Appellant contends that the reference to appellant's probation was evidence of a prior bad act that prejudiced the jury. He argues that even though the jury knew that he was convicted previously of a crime (because he was charged in this case with possessing a firearm after a criminal conviction) the statement prejudiced the jury against him. Appellant notes that the jury was not told which conviction he was on probation for and could have surmised that he was on probation for a crime other than the one that precluded him from owning a firearm. He argues further that the statement was a violation of the pre-trial agreement between him and the State to avoid mentioning of his probation. Appellant concludes that the mention of his probation warranted a mistrial and that the error could not be harmless because the prosecution's case rested only on circumstantial evidence.

The State argues that the circuit court concluded correctly that the evidence was

sufficiently authenticated and did not abuse its discretion in denying a mistrial for the discovery violation or the prosecutor's statements at closing argument. The State argues that for the court to admit the Facebook pages, the prosecutor needed only to offer "proof from which a reasonable juror could find that the evidence is what the proponent claims it to be." As proof of authentication, the State points out that the "Haze" title of the Facebook page sounded similar to appellant's first name and that the email address for the page included appellant's last name. The State argues that information on the page (the profile owner's education history and current city, connection with appellant's child's mother, and termination of a connection with the Claude Mayo 5 page the day after the attempted robbery) supports the State's claim that the page belonged to appellant.

Second, the State argues that the circuit court did not err when it declined to grant a mistrial for the failure to give Det. Childs' notes to appellant. The State contends that there was no bad faith by the prosecutor in the non-disclosure. The State argues that no prejudice arose from the failure to deliver the notes, as the trial court provided the defense with copies of the notes upon learning of their existence and asked the detective to read the notes into the record outside the presence of the jury. The State argues further that the notes contained no new substantive information, as the information was available to the defense through the testimony of Det. Caskey and appellant's completed waiver form. The State argues that the notes were informal and created for a different investigation and, therefore, had little value for appellant's case.

Third, the State argues the circuit court did not err in declining to grant a mistrial for the prosecutor's reference to appellant's probation during closing argument. The State

argues that “mistrial is not a sanction designed to punish an attorney for impropriety.” The State contends further that even if the prosecutor’s statement was improper, appellant has not established that the error prejudiced him in any way or deprived him of a fair trial.

III.

We hold that the circuit court erred in admitting the records of the “Solo Haze” Facebook page into evidence because there was not sufficient evidence to link appellant to the Facebook activity in question. Evidence must be authenticated to be admitted. Md. Rule 5-901(a). Evidence is authenticated by “evidence sufficient to support a finding that the matter in question is what its proponent claims.” *Id.* “[T]o authenticate evidence derived from a social networking website, 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). When an appellant claims that evidence admitted by a trial court was not properly authenticated, we review the admission for abuse of discretion. *Wheeler v. State*, 459 Md. 555, 560–61 (2018). A court abuses its discretion when its decision is “well removed from any center mark imagined by the reviewing court and beyond the fringe of what that court deems minimally acceptable.” *Id.* at 561.

In authenticating evidence from a social networking website, a court must find that a reasonable juror could conclude that the alleged author accessed the account to take the action in question. *Sublet*, 442 Md. at 638; *Griffin v. State*, 419 Md. 343, 357–58 (2011). In *Griffin*, the State offered into evidence a printout of a MySpace page that included evidence that the defendant’s girlfriend threatened a witness. *Id.* at 348. The State

attempted to authenticate the page, pointing to a photograph of the defendant and his girlfriend that was posted on the page and the fact that the page included the girlfriend's date of birth and referred to her children. *Id.* at 349. The Court of Appeals held that the trial court abused its discretion in admitting the copy of the page, finding that “[t]he potential for abuse and manipulation of a social networking site by someone other than its purported creator and/or user” warranted “a greater degree of authentication” than the evidence presented. *Id.* at 357–58. The court gave a non-exhaustive list of ways to authenticate social network evidence, including: “search the computer of the person who allegedly created the profile and posting . . . to determine whether that computer was used to originate the social networking profile and posting in question” or “obtain information directly from the social networking website that links the establishment of the profile to the person who allegedly created it and also links the posting sought to be introduced to the person who initiated it.” *Id.* at 363–64.

In *Sublet*, a Court of Appeals case on the issue of social media authentication, the Court adopted the “reasonable juror” standard for authentication. *Sublet*, 442 Md. at 671. Citing federal jurisprudence, the Court held that because the court is merely the “gatekeeper” in questions of authentication, the court must find *only* that there is “evidence from which a reasonable juror could conclude” that the social media evidence in question was authentic. *Id.* It is then the jury’s decision whether to believe the evidence and how much weight to accord it. *Id.* at 668.

Applying that standard to three different appeals consolidated in one opinion, the Court questioned not only whether the pages at issue belonged to certain individuals but

whether those individuals wrote the “posts” and messages at issue. *Id.* at 671–76. In the first case, the Court held that a page was not authenticated sufficiently where there was testimony and evidence that the individual allowed others to create posts on her profile. *Id.* at 672–73. In the second, the Court held that because a witness testified that only seven people heard the conversation that was repeated in a social media message a few hours later, there was sufficient evidence to show that the defendant wrote the social media message at issue (which he sent from an account associated with him). *Id.* at 675. In the third, the Court held that social media messages were authenticated by witness testimony that the defendant wrote the messages, which were written in the defendant’s native language and referenced an incident of which few people were aware. *Id.* at 676–77.

In the instant case, the State argues that the “Solo Haze” Facebook page was authenticated properly. The State points to identifying factors on the page through which it claims “a reasonable juror could find that the evidence is what the proponent claims it to be.” The page uses a name that sounds like appellant’s first name, was associated with an email address that included appellant’s last name, listed its user’s location as Baltimore City, Maryland, and was Facebook “friends” with a profile with the name “Mayo” and a profile linked to appellant’s child’s mother.

But there are effectively two parts to the authentication at issue. The State needed to show not only that the Facebook page was associated with appellant but also that he took the action at issue (“defriending” Mayo after the robbery). *See id.* at 672–73. Although there may have been enough evidence for a juror to conclude that the account was created by appellant, the State failed to proffer any evidence to show that *appellant* severed the

connection with the page associated with Mayo. Unlike the consolidated cases in *Sublet*, there was effectively no evidence that appellant took the action at issue.

The State stresses that relatively few people would have known of the shooting at the time Solo Haze “defriended” Claude Mayo 5. There is, however, insufficient evidence for a reasonable juror to conclude that appellant was the person who took that action. Another person within the same social circle could have heard of the shooting in the more than twenty-four hours after the shooting, accessed the Solo Haze page, and removed Mayo as a “friend” of the profile. That possibility is demonstrated by the fact that someone logged into the Claude Mayo 5 profile after Mayo’s death and posted a flier for Mayo’s memorial. Without evidence of appellant controlling the profile (such as evidence linking the profile to appellant’s phone or computer), a reasonable juror could only speculate that appellant took the action at issue. By admitting the action taken on the “Solo Haze” Facebook page without a showing that appellant took that action, the circuit court abused its discretion.

The admission of the Facebook activity was not harmless error. An error cannot be deemed harmless “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.” *Washington v. State*, 406 Md. 642, 656 (2008) (citing *Dorsey v. State*, 276 Md. 638, 659 (1976)).

The State’s case against appellant was based on circumstantial evidence connecting appellant to the vicinity of the robbery and to Mayo. The State offered no forensic evidence which tied appellant to the exact location of the attempted robbery. The evidence presented

included cell phone records which indicated that appellant and Mayo spoke over the phone an hour before the attempted robbery and placed appellant's phone in Towson at the time of the robbery. The State also presented the information relayed to the police by Mr. Wilkins (appellant's probation officer). Mr. Wilkins met appellant a few hours before the robbery and testified that appellant "was wearing a grey sweat suit and white tennis shoes." This description was consistent with the outfit worn by a person walking with Mayo in Towson, captured on surveillance footage later that day. It also matched the description of the individual that Patricia Culotta observed running through an alley behind her building immediately after she heard the shooting. The State asserts that Wilkins' description is consistent with the description of the robber given by Samantha Twist, a store employee who was present at the time of the attempted robbery. But the description of the second robber remains unclear, as Douglas Marcus (the store owner present at the time of the robbery) testified that the robbers were "wearing all black from head to toe."

The Solo Haze Facebook page served two roles in the State's case. First, it purported to provide a link between appellant and Mayo. Second, and more importantly, it showed consciousness of guilt from the fact that the owner of the Solo Haze page removed his digital connection to "Claude Mayo 5" a day after Mayo was killed in the attempted robbery. The State believed that the evidence of consciousness of guilt was important for its case, as is evident from its reference to the Facebook activity on two occasions in closing argument. In closing argument, the prosecutor asked, "[w]hy would you delete a deceased person unless you were afraid that it would help to get back to you?" and further asserted that appellant "deleted Claude Mayo a day after he died, because he

doesn't want to get caught." Considering the lack of direct evidence linking appellant to the crime and the evidentiary value of the Facebook activity to the State's case, we cannot say that the admitted Facebook page did not influence the verdict.¹

**JUDGMENT OF THE CIRCUIT COURT
FOR BALTIMORE COUNTY REVERSED.
CASE REMANDED TO THAT COURT
FOR A NEW TRIAL. COSTS TO BE PAID
BY BALTIMORE COUNTY.**

¹ Because we reverse appellant's convictions based on his first question presented, we need not address his other questions presented.