Circuit Court for Baltimore City
Case No. 117156022

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1769

September Term, 2019

BRANDON W. BURKS

v.

STATE OF MARYLAND

Graeff,
Nazarian,
Eyler, James R.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Graeff, J.

Filed: May 3, 2021

*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.

A jury in the Circuit Court for Baltimore City convicted Brandon Burks, appellant, of child sexual abuse and second-degree assault after S. accused appellant, her stepfather, of raping her on three occasions when she was 12 years old.[1] The court sentenced appellant to 25 years' imprisonment, all but 15 years suspended, on the conviction of child sexual abuse, and 10 years' imprisonment, all suspended, on the assault conviction.

On appeal, appellant presents the following questions for this Court's review:

1. Did the trial court err in admitting hearsay evidence in the absence of necessary findings establishing an excited utterance?
2. Did the trial court abuse its discretion in admitting evidence of text messages in the absence of proper authentication?
3. Did the trial court commit plain error in permitting the State to engage in improper questioning of defense witnesses and improper closing argument?

For the reasons set forth below, we shall affirm the judgments of the circuit court.

FACTUAL AND PROCEDURAL BACKGROUND

In 2014, when S. was 12 years old, she lived with her mother, Mindy Pascal, her three siblings, and appellant, who was 22 years old at the time, in appellant's three-story rowhouse in Baltimore City. Ms. Pascal, who was dating appellant at the time, worked nights, and appellant watched the children overnight.

[1] To preserve her privacy, we refer to the minor victim solely by her first initial.

S. testified that, during the time she lived with appellant, he raped her three times at the home while her mother was at work.[2] S. initially did not tell anyone about the rapes because appellant was "very controlling," and she was afraid that he might kick them out of the house and they would have "nowhere to go." She stated that, because of their unstable housing situation, she felt like she was "taking one for the team."

On March 24, 2015, Ms. Pascal was monitoring S.'s cell phone and discovered messages from appellant to S. via the "Kik" messenger app.[3] Ms. Pascal thought it was strange that appellant was texting his stepdaughter on Kik because the app typically was used by kids, and he could have texted S. using the default messaging application on the phone. Ms. Pascal was particularly startled when she saw the message, which she testified said that he "wanted her to come downstairs in the shorts that he liked."

When Ms. Pascal confronted appellant about the message, he began to cry and begged her not to call the police. Ms. Pascal admitted, with regret, that she also yelled at S. about the message, but S. told her mother that it was "nothing."

Following this incident, Ms. Pascal moved to her mother's house with the children. Approximately two months later, however, they moved back in with appellant because Ms. Pascal's mother was "getting put out of her house," and they had nowhere else to go.

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[2] Because appellant does not challenge the sufficiency of the evidence supporting his convictions, we will not recount the details of the abuse. *See Washington v. State*, 180 Md. App. 458, 461 n.2 (2008).

[3] "Kik" is a third-party smartphone messaging application. *See United States v. Hood*, 920 F.3d 87, 88 (1st Cir. 2019).

Appellant agreed that Ms. Pascal's mother could come live with them. Appellant's house was much larger than their grandmother's house, so the younger children were eager to move back. S. was supportive of the decision to return to appellant's house for these reasons.

Ms. Pascal, who did not want to believe what she had seen on the Kik message, did not ask S. about her relationship with appellant before returning to his house. She told S., however, that she did not intend to leave her alone with appellant. After they returned, Ms. Pascal's mother was always there at night while Ms. Pascal was working.[4]

S. first told someone about the rapes in 2016, approximately two years after the assaults happened. She was in ninth grade and it was near the beginning of the school year. While she was in class, appellant sent her a series of text messages. Over defense objection, discussed in Part II *infra*, the following text messages were admitted into evidence:

> [APPELLANT]: U in school
>
> [S.]: Yes
>
> [APPELLANT]: I just want to ask u one thing do u think I took advantage of u
>
> [S.]: I do
>
> [APPELLANT]: We will talk about it later u have to work today
>
> [S.]: I don't really want to talk about it but yes
>
> [APPELLANT]: Ok and if u think I did I apologize but its times where I didn't tell u do anything you just did it right

[4] Additionally, Ms. Pascal stopped working in late 2015 due to health issues, so she was present more in the household.

[S.]: No you geeking

[APPELLANT]: Ok [S.]

[APPELLANT]: I'm not even mad I'm just going fall back so nothing else won't be said I did or started enjoy ur day

[S.]: Ok

[S.]: What are you talking about though? What are you saying I did ?

[APPELLANT]: Nothing I'm just going leave at I took advantage of u

[S.]: Because anything I did was only motivated by what you did [unclear emoji] you know I neverrr played a role

[APPELLANT]: [S.] u could have said no all those times its times when I wasn't even home and u did stuff but u right it was all my fault

[S.]: What did I do when you wasn't there? How could you even know what I was doing when you wasn't there ?

[APPELLANT]: U and zoe drunk that bottle I had on the table

[S.]: All yall was up stairs when we drunk that [unclear emoji] that was all out fun and you know that ! You don't have nothing to say because there is nothing

[APPELLANT]: [S.] I didn't even know y'all drunk it and that time when I had my first acura and we was riding threw dru hill park u took my hand and put it in your shirt and u put ur hand u know where I didn't tell u do that u

[S.]: You one fucking lying ass bitch [unclear emoji] how could you even say some shit like that ? You sick as shit ! So you telling me I put yha hand in my shirt ? Fuck no ! You did that shit to me

[APPELLANT]: But it no point of going back and fourth u said I took advantage of u so that's it I'm just going fall back so nothing can be said I did or started

[APPELLANT]: Ok w.e [S.] I'm done talking I took advantage of u and watch that bitch word

[APPELLANT]: I won't say nothing to u no more

[S.]: Don't

S. testified that she interpreted appellant's comments about "tak[ing] advantage" as referring to the prior sexual assaults. She felt "destroyed" and became extremely upset because she felt that he was trying to blame her for the assaults. S. tried to leave school, but a friend intervened to figure out what was wrong. A hall monitor brought S. back into the building, and the school contacted her mother. S. disclosed to her mother over the phone that appellant "had been raping her." She then was transported to the "child abuse center," where she gave a statement to police.

Appellant was arrested and charged in a two-count indictment with child sexual abuse pursuant to Md. Code Ann., Crim. Law ("CR") § 3-602 (2015 Repl. Vol.) and second-degree assault. A jury trial commenced on July 9, 2019.

S. testified to the details of the three rapes and her reaction to the text messages she received from appellant at school on December 13, 2016. On cross-examination, appellant's counsel highlighted that S. did not disclose the rapes to anyone until she was caught trying to leave school that day.

Her mother, Ms. Pascal, testified that she was in "disbelief" when she discovered the Kik message on S.'s phone from appellant about the shorts, and she admitted that she handled the situation poorly by confronting both S. and appellant. She expressed regret about not inquiring further into the nature of appellant's relationship with S., but she stated

that she had never seen appellant acting inappropriately with S., aside from the Kik message.[5]

As discussed in further detail *infra*, Ms. Pascal also testified to the phone call she received from S. at school following the text messages in December 2016. She described S. as "hysterical" and unable to speak. Ms. Pascal stated that S. told her over the phone that appellant "had been raping her." When Ms. Pascal arrived at the school, S. was still "hysterical," and she consoled S. before bringing her to a local child abuse center.

Testifying in his own defense, appellant denied raping S. He stated that the text messages referred to his leniency towards letting her use marijuana and alcohol. He explained that he allowed her access to both because he wanted to be a "cool father," but he then "tightened down" and became more strict. He also denied sending the Kik message about the shorts, stating that he used the app to communicate with the football players he coached, and they had access to his phone on that day.

On cross-examination, when the prosecutor asked appellant why S. would lie about the rapes, he answered: "The same thing I want to know." He agreed that she had no "motive to make this up against" him. He denied that he cried when confronted with the Kik message by Ms. Pascal. Appellant did not, however, deny that the confrontation occurred. The exchange was as follows:

[5] S. testified, however, that on one occasion, Ms. Pascal asked her if appellant had "ever touch[ed her]," but S. said no because her cousin was in the car and she was afraid to say anything. Ms. Pascal was not asked about this conversation.

> [PROSECUTOR]: And when confronted about [the Kik message], you started crying and asking Ms. Pascal not to call the police; right?
>
> [APPELLANT]: That wasn't the same day.
>
> [PROSECUTOR]: Okay. That wasn't my question.
>
> [APPELLANT]: And I was not on the steps crying when all that came out about the Kik message.
>
> [PROSECUTOR]: Okay. So you're denying that what Ms. Pascal said is true?
>
> [APPELLANT]: Correct.

As indicated, the jury convicted appellant of child sexual abuse and second-degree assault. This appeal followed.

DISCUSSION

I.

Appellant's first contention is that the circuit court abused its discretion in admitting Ms. Pascal's testimony regarding S.'s "hysterical" report that appellant raped her. He contends that this was hearsay, that the "only plausible theory for admissibility was the excited utterance hearsay exception," and the court erred in admitting the testimony without making the necessary factual findings.

The State argues that the court properly admitted this testimony. It argues that the testimony was admissible pursuant to either the excited utterance exception or the prompt complaint of sexual assault exception.

The testimony at issue occurred after S. testified about her distress upon receiving the text messages from appellant in December 2016. Ms. Pascal testified that the following exchange occurred after the school called for her to talk to S.:

[PROSECUTOR]: Okay. Now, when you spoke to [S.] on the phone, how was she acting?

[MS. PASCAL]: She was hysterical. She couldn't really talk. I could hear people in the background trying to console her. And she like – she couldn't – you could like she was snotty. [Sic] She – her voice was like crackling. She couldn't really talk to me.

[PROSECUTOR]: On a scale of one to ten, one being perfectly calm, ten being absolutely hysterical, where would you put her?

[MS. PASCAL]: She was a ten.

[PROSECUTOR]: So she was crying and hysterical on the phone with you?

[MS. PASCAL]: Yes.

[PROSECUTOR]: Did she say anything to you?

[MS. PASCAL]: Yes.

[PROSECUTOR]: What did she say to you?

[DEFENSE COUNSEL]: Objection.

THE COURT: Come forward.

(Counsel and the defendant approached the bench, and the following ensued:)

THE COURT: Yes?

[DEFENSE COUNSEL]: Hearsay, Your Honor.

[PROSECUTOR]: It's excited utterance. She's on the phone. She's hysterical. She's crying. She had just gotten text messages from the [appellant] blaming her for the sexual assault of her, which is clearly an exciting circumstance. It's an excited utterance.

THE COURT: It's admissible. Thank you. Overruled. . . .

[PROSECUTOR]: What did she say to you over the phone?

[MS. PASCAL]: She said that [appellant] was raping her – had been raping her.

There is no question that the testimony regarding what S. told her mother on the phone was hearsay. "'Hearsay' is a statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Md. Rule 5-801(c). "[H]earsay is not admissible" unless an enumerated exception applies. Md. Rule 5-802.

As indicated, the State contends that the statement was admissible as an excited utterance. Pursuant to Md. Rule 5-803(b)(2), "[a] statement relating to a startling event or made while the declarant was under the stress of excitement caused by the event or condition" is an exception to the general rule that hearsay is inadmissible. Md. Rule 5-803(b)(2). "[T]he rationale behind the 'excited utterance' exception is that the inherent untrustworthiness of hearsay is overcome when the circumstances are such that they render the declarant's reflective capabilities inoperative." *Cooper v. State*, 163 Md. App. 70, 97 (2005).

The factual predicate for admission under this exception is a showing that "the declaration was made at such a time and under such circumstances that the exciting influence of the occurrence clearly produced a spontaneous and instinctive reaction on the part of the declarant . . . [who is] still emotionally engulfed by the situation[.]" *Cooper v. State*, 434 Md. 209, 243 (2013) (quoting *State v. Harrell*, 348 Md. 69, 77 (1997)), *cert. denied*, 573 U.S. 903 (2014). The proponent must present evidence that there was "a startling event and a spontaneous statement which is the result of the declarant's reaction to the occurrence." *Parker v. State*, 365 Md. 299, 313 (2001) (quoting *Mouzone v. State*, 294 Md. 692, 697 (1982)).

When "determining whether a declarant was under the stress of a startling event while making a statement, one primary consideration is the time between the startling event and the declarant's statement." *Harrell*, 348 Md. at 77. "[W]here the time interval between the event and the statement is long enough to permit reflective thought, the statement will be excluded in the absence of some proof that the declarant did not in fact engage in a reflective thought process." *Cooper*, 434 Md. at 244 (citations omitted). In particular, "[t]estimony that the declarant still appeared 'nervous' or 'distraught' and that there was a reasonable basis for continuing emotional upset will often suffice." *Id*. (citation omitted) (emphasis omitted).

Moreover, this Court has held

> that an otherwise qualified excited utterance that includes comments about a prior happening may be admissible under the excited utterance/spontaneous declaration exception to the hearsay evidence rule if the subsequent startling event that generates the utterance relates directly or indirectly to that prior event, *i.e.*, is likely to produce an exclamation about the prior event. . . . The time between the prior event, the subsequent event, and the utterance are all factors that may be considered by the trial court in determining whether the utterance is indeed a spontaneous declaration or exclamation. We note that the trial court judge is uniquely situated to make that determination.

Bayne v. State, 98 Md. App. 149, 177 (1993) (Grandmother's testimony was admissible under excited utterance exception where the out-of-court statement by the child victim disclosing the sexual abuse was made after the child's uncle asked the child whether she had been exposed to sexual activity and she became distraught.). *Accord Harrell*, 348 Md. at 79–82 (When a declaration pertains to, is associated with, or concerns the startling event that prompted it, and both the declaration and the startling event concern a prior event, the

declaration is sufficiently related to the prior event to have the "inherent trustworthiness" that underlies this hearsay exception.).

"Because a circuit court has no discretion to admit hearsay in the absence of an exception to Rule 5-802," appellate courts review *de novo* a decision that a hearsay statement is admissible. *Hallowell v. State*, 235 Md. App. 484, 522 (2018). When evaluating whether a statement qualifies as an excited utterance,

> we look at the totality of the circumstances to determine whether the foundation for its admissibility has been established. The adequacy of the foundation is judged "by the spontaneity of the declarant's statement and an analysis of whether it was the result of thoughtful consideration [or] . . . the product of the exciting event."

Cooper, 163 Md. App. at 97 (quoting *Parker*, 365 Md. at 313).

Here, given the circumstances of S.'s declaration, it is evident that S. was "still emotionally engulfed" in the "the exciting influence of the occurrence" at the time of conversation with her mother. *Cooper*, 163 Md. App. at 97. S. testified to her extreme emotional reaction to the text messages sent by appellant, stating that they "destroyed" her. S.'s distress was evidenced by her hysteria, which continued during the phone call with her mother when she told her that appellant had raped her. Ms. Pascal described S. as being a "ten" on a scale of one to ten for hysteria, adding that even as others were trying to "console" S., she was still crying so hard that "she really couldn't talk[.]"

This evidence gave the court an adequate factual foundation to admit Ms. Pascal's testimony as an excited utterance. That the court did not set forth a detailed explanation of its findings in support of its conclusion that it was an excited utterance does not, contrary to appellant's contention, constitute cause for reversal. The trial court was "not required

'to spell out in words every thought and step of logic' taken to reach [its] conclusion." *Dickens v. State*, 175 Md. App. 231, 241 (2007) (quoting *Beales v. State*, 329 Md. 263, 273 (1993)). A trial court is presumed to know the law and apply it properly. *Id.*

The disclosure of the prior sexual abuse occurred right after the startling texts that caused S. to become hysterical. There was a sufficiently strong relationship linking S.'s declaration to both the startling event (i.e., appellant's text messages that S. understood to reference his sexual assaults) and the prior events (i.e., the rapes) to qualify her statement under the excited utterance exception to the hearsay rule. The circuit court did not err in admitting S.'s statement as an excited utterance.[6]

II.

Appellant next contends that the trial court abused its discretion in admitting evidence of text messages between he and S., including: (1) the December 2016 text message exchange where he asked whether S. thought that he had taken advantage of her; and (2) the Kik app message in which he asked her to "come downstairs" in a particular pair of shorts. Appellant argues that "the State failed to properly authenticate" both sets of messages because "[t]here was simply no showing that [he] was the person who sent the text[s]."

[6] Given our decision that the trial court properly admitted the declaration as an excited utterance, we need not address the State's alternative argument regarding the prompt complaint of sexual assault exception to the hearsay rule.

The State contends, initially, that the authentication claim is not preserved with respect to the Kik message about S.'s shorts. In any event, it contends that the text messages were sufficiently authenticated, and the court properly admitted them.

We will address each set of messages in turn, but we begin with the applicable legal standards regarding authenticity of cell phone communications. "Maryland Rule 5-901 addresses the requirements to authenticate evidence, including electronically stored evidence." *Donati v. State*, 215 Md. App. 686, 709, *cert. denied*, 438 Md. 143 (2014). Under this rule, a message alleged to have been digitally sent or received, whether as a text on a cell phone or as a "direct message" through a social media platform, may be authenticated by "evidence sufficient to support a finding that the matter in question is what its proponent claims." Md. Rule 5-901(a). *Accord Sublet v. State*, 442 Md. 632, 666 (2015).

Md. Rule 5-901(b)(1)&(4) provide that such evidence may be authenticated by the "[t]estimony of a witness with knowledge that the offered evidence is what it is claimed to be" and by "[c]ircumstantial evidence, such as appearance, contents, substance, internal patterns, location, or other distinctive characteristics, that the offered evidence is what it is claimed to be." For example, a cell telephone conversation may be "authenticated by evidence that a telephone call was made to the number assigned at the time to a particular person . . . if . . . circumstances, including self-identification, show the person answering to be the one called[.]" Md. Rule 5-901(b)(6)(A).

As the Court of Appeals has explained:

> [T]he preliminary determination of authentication must be made by the trial judge and "depends upon a context-specific determination whether the proof advanced is sufficient to support a finding that the item in question is what its proponent claims it to be," . . . based upon "sufficient proof . . . so that a reasonable juror could find in favor of authenticity[.]"

Sublet, 442 Md. at 666 (quoting *United States v. Vayner*, 769 F.3d 125, 130 (2d Cir. 2014)). "The 'proof of authentication may be direct or circumstantial.'" *Id.* at 667 (quoting *Vayner*, 769 F.3d at 130).

"The State [is] not required to eliminate all possibilities that [are] inconsistent with authenticity[.]" *State v. Sample*, 468 Md. 560, 605 (2020). Instead, the requisite burden of proof is a preponderance of the evidence, i.e., in the case of a particular text message, it was more likely than not that the message in question was sent by the person alleged to have sent it. *See id.* This Court reviews a decision to admit evidence over an authentication objection for abuse of discretion. *See id.* at 588.

A.

When the State attempted to admit a printout of text messages that appellant sent to S. on her cell phone on December 13, 2016, defense counsel objected, asserting that there was no foundation for admitting these texts. The prosecutor then had S. look at State's Exhibit 1, and the following occurred:

> [PROSECUTOR]: Let me start by asking a couple of questions before we talk about what's up there.
>
> You said that he was texting you while you were at school that day; right?
>
> [S.]: Yes.
>
> [PROSECUTOR]: How do you know it was him who was texting you?

[S.]: That's his phone, his number. That's –

[PROSECUTOR]: Okay.

[S.]: – who else would be texting me, "Do you feel like I took advantage of you?"

[DEFENSE COUNSEL]: Objection.

THE COURT: Sustained.

* * *

THE COURT: The jury is to disregard, "Who else do you think would be texting me – do you think I would be taking advantage of you?" The same is stricken from the record.

* * *

[PROSECUTOR]: So you recognize the number the text was – texts were coming from?

[S.]: Uh-huh.

[PROSECUTOR]: Did you recognize the number to be [appellant's] number?

[S.]: Yes.

[PROSECUTOR]: And you have received text messages from this number before?

[S.]: Uh-huh.

[PROSECUTOR]: From him?

[S.]: Yes.

[PROSECUTOR]: Okay. So the document that I just handed you, what is that? What is State's 1?

[S.]: It's text messages between me and [appellant].

[PROSECUTOR]: Okay. Let's talk about the top page first. Do you recognize the top page?

[S.]: Yes.

[PROSECUTOR]: What is that?

[S.]: It's the contact, like the number, the picture and the name.

[PROSECUTOR]: Okay. Is this from your phone?

[S.]: Yes.

[PROSECUTOR]: Okay. And whose contact information is it?

[S.]: It's [appellant's].

[PROSECUTOR]: And you said these are the messages that you received the day that you reported the incident?

[S.]: Yes.

[PROSECUTOR]: Are they in the same or substantially the same condition, like these are the messages, they haven't been changed at all?

[S.]: No.

S. further testified that appellant previously had called her from that same phone number. State's Exhibit 1, a print-out of the text messages, contained a header showing a saved contact on S.'s phone labeled with appellant's name and photo.

After this foundation was laid, the trial court overruled the defense objection, stating that "the witness has testified that she recognizes these as the messages that she received from the defendant while she was at school, that she recognizes the defendant's phone number as being the sending phone number." The court also pointed out that S. previously had received messages from appellant coming from that number.

The trial court did not abuse its discretion in admitting these text messages. As the court recognized, there was sufficient circumstantial evidence for the jury to find that

appellant sent those messages. S. testified that she received the message from the phone number associated with appellant, the same number from which she had received previous texts and phone calls from appellant. *See* Md. Rule 5-901(b)(6)(A) (authentication by evidence of phone contact); *Dickens*, 175 Md. App. at 238 (Text messages were properly admitted based on authenticating evidence that they were sent from a number assigned to a cell phone that victim gave to defendant, which was recovered near defendant's home the day after her murder.). Moreover, the text messages referenced matters that only S. and appellant would know about, including when appellant put his hand in S.'s shirt. The court did not abuse its discretion in admitting these text messages.

B.

Appellant next challenges the admission of Ms. Pascal's testimony regarding her discovery of the Kik message asking S. "to come downstairs in the shorts that [appellant] liked." He asserts that there was no showing that he sent the text, and he notes that he "testified without contradiction that the 'Kik' app existed to provide communication between himself and the football players whom he coached, and that the players had access to his phone."

The State contends that appellant's challenge is not preserved for appellate review. In any event, it asserts that the message was authenticated.

The text message came up after defense counsel cross-examined S. regarding the decision to move out of appellant's home and return months later. The court overruled the State's objection, but it warned that Ms. Pascal had yet to testify and the defense was potentially opening the door to questions about her reasons for moving.

Ms. Pascal subsequently testified that she saw the message. Defense counsel objected, and the following exchange occurred:

> THE COURT: I know what the objection is. Yes?
>
> [PROSECUTOR]: Well, Judge, I haven't been able to lay any foundation as to who it's from, or how she knows it was from the defendant, but this is again what -- since the defense is bringing up what happened after the rap[e]s, this is relevant to -- this is the message that he sent talking about he wanted this little girl to wear -- come downstairs and wear the shorts that he wanted her to wear.
>
> THE COURT: All right.
>
> [PROSECUTOR]: It gave concern to the mother, and then she didn't --
>
> THE COURT: All right. But you got to get into all that foundation.
>
> [PROSECUTOR]: I will.
>
> THE COURT: Okay.
>
> [DEFENSE]: I'm still going to object to it, Your Honor. I think the -- that even with Your Honor's warning previously, I still don't think the door's been opened enough for the prejudicial nature of the -- these messages that we don't have copies of, don't know anything about, don't have --
>
> [PROSECUTOR]: If I can make -- I'll just make a record, Judge.
>
> THE COURT: Yes.
>
> [PROSECUTOR]: Is [sic] the defense has insinuated that nothing must have happened because the girl agreed just to move in the house and was encouraging them to move back to the house.
>
> The fact of the matter is that once the mother saw this -- I'm sorry. Once the mother saw this message, she didn't leave the child alone with the defendant anymore.
>
> THE COURT: Objection is noted. Same is overruled.

The State then asked Ms. Pascal: "[W]ho was the message from?" Defense counsel again objected, but the court immediately overruled it without discussion. Ms. Pascal

responded that the message was from appellant, noting that his name and photo were on the message. Ms. Pascal then proceeded to describe the contents of the message without further comment from the defense.

We begin with the State's preservation argument. To be sure, an appellate court ordinarily will not decide an issue "unless it plainly appears by the record to have been raised in or decided by the trial court." Md. Rule 8-131(a). Here, however, the colloquy indicated that the court clearly understood defense counsel's objection to encompass authenticity/lack of foundation, having just addressed that objection with respect to the other text messages. Moreover, when the prosecutor proceeded to ask Ms. Pascal who the message was from, defense counsel made a general objection, which was summarily overruled. Accordingly, the issue is preserved for review. *See Johnson v. State*, 408 Md. 204, 223 (2009) ("[A] party basing an appeal on a 'general' objection to admission of certain evidence, may argue *any* ground against its inadmissibility.") (quoting *DeLeon v. State*, 407 Md. 16, 24–25 (2008)).

On the merits, however, we agree with the State that the circuit court did not abuse its discretion in admitting evidence of the Kik message. Ms. Pascal testified that she knew the message was from appellant because it had appellant's name and photo on it. Moreover, the contents of the message itself, a request to "come downstairs" wearing a certain article of clothing, was consistent with the text coming from appellant, whose room was in the basement, to S., whose room was on the top floor of the same house. *See Sublet*, 442 Md. at 676–78 (Admission of Facebook message expressing remorse, written in Spanish, and sent minutes after the stabbing was proper based on the "distinct

characteristics" of the message.). This evidence was sufficient for a jury to find by a preponderance of the evidence that the Kik message was sent by appellant. *See id.*; *Dickens*, 175 Md. App. at 239 ("[T]he burden of proof for authentication is slight, and 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.'") (quoting *United States v. Safavian*, 435 F.Supp.2d 36, 38 (D.C. 2006)).[7] Accordingly, the trial court did not abuse its discretion in admitting the challenged evidence.

III.

Appellant's final contention is that "the trial court committed plain error in permitting the State to engage in improper questioning of defense witnesses and improper closing argument." He makes several arguments in this regard. Initially, he argues that the prosecutor improperly attempted to shift the burden of proof on cross-examination by: (1) asking appellant whether S. had "any motive to make this up against" him; and (2) asking if he was "denying that what [Ms. Pascal] said is true" with respect to him crying and asking her not to call police when she confronted him about the Kik app message. Additionally, appellant contends that the prosecutor improperly argued during rebuttal

[7] Ms. Pascal provided additional authentication evidence later in her testimony when she stated that, after she confronted appellant about the message, he started "crying" and "begging [her] not to call the police[.]" *See Sublet v. State*, 442 Md. 632, 676–77 (2015). Appellant subsequently testified that the Kik message was sent from his phone, but he denied that he sent it.

closing that appellant could have produced evidence if he thought there was another context to the text messages.[8]

Appellant acknowledges that defense counsel made no objection below to the questioning and argument, but he asks this Court to engage in plain error review. We decline to do so.

As indicated, this Court ordinarily will not review an issue unless it has been raised or decided by the trial court. Md. Rule 8-131(a). Although we have discretion to review unpreserved issues, "appellate courts should rarely exercise" this discretion. *Chaney v. State*, 397 Md. 460, 468 (2007). This is because considerations of

> fairness and judicial efficiency ordinarily require that all challenges that a party desires to make to a trial court's ruling, action, or conduct be presented in the first instance to the trial court so that (1) a proper record can be made with respect to the challenge, and (2) the other parties and the trial judge are given an opportunity to consider and respond to the challenge.

Id. *Accord Ray v. State*, 435 Md. 1, 23 (2013).

Appellate review based on plain error is "a rare, rare, phenomenon." *Morris v. State*, 153 Md. App. 480, 507 (2003), *cert. denied*, 380 Md. 618 (2004). "Plain error

[8] During the defense closing argument, counsel stated that the State only produced "a little snippet of what [S.] wants you to see, what the State wants you to so see," and the messages were "all taken out of context." In response to the argument that something was missing in the text messages, the prosecutor stated, without objection:

> [S.] was not the only one in on that conversation. If the defendant had something he thought he should have added, he could have given it to you. He didn't, which suggests that perhaps there isn't anything that needed to be added, that what you're going to get is what's the relevant part for this particular case.

review is ‘reserved for those errors that are compelling, extraordinary, exceptional or fundamental to assure the defendant of a fair trial.’” *Newton v. State*, 455 Md. 341, 364 (2017) (quoting *Robinson v. State*, 410 Md. 91, 111 (2009)), *cert. denied*, 138 S. Ct. 665 (2018). We are not persuaded that this is one of those situations. Accordingly, we will not exercise our discretion to review appellant’s unpreserved claims.

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