

Circuit Court for Wicomico County
Case No.: C-22-CR-22-000262

UNREPORTED
IN THE APPELLATE COURT
OF MARYLAND*

No. 1791

September Term, 2022

DERRICK HARMON

v.

STATE OF MARYLAND

Friedman,
Tang,
Battaglia, Lynne A.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Tang, J.

Filed: May 2, 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 appeal stems from criminal charges related to the non-fatal stabbing of James Ivery. After a jury trial in the Circuit Court for Wicomico County, Derrick Harmon, the appellant, was convicted of first-degree assault, second-degree assault, and reckless endangerment. The court sentenced the appellant to 20 years' incarceration with all but ten years suspended. On appeal, the appellant presents the following questions, which we have rephrased:¹

- I. Did the circuit court abuse its discretion by admitting into evidence a still shot of a video posted on an unknown Facebook account?
- II. Was the evidence sufficient to sustain the appellant's convictions?

For the reasons that follow, we affirm the judgments of the circuit court.

BACKGROUND

Because this appeal includes a challenge to the sufficiency of evidence, we recount the facts established at trial in the light most favorable to the State. *See Davis v. State*, 207 Md. App. 298, 303 (2012).

¹ The questions presented in the appellant's brief are:

1. Did the trial court abuse its discretion when it admitted State's Exhibit 6 into evidence over an authentication objection, where State's Exhibit 6 was a still shot taken from an unidentified cell phone video that was filmed by an unknown person, was posted to an unknown user's Facebook page, and was deleted from Facebook almost immediately after the still shot was captured?

2. Was the evidence insufficient to prove that Mr. Harmon stabbed the victim, where Mr. Harmon and the victim were involved in a bar fight which involved an estimated forty to forty-five participants, where the victim admitted that he did not know who stabbed him or when he was stabbed, and where the surveillance video from the bar did not show the stabbing?

James Ivery, a college student, went to Brew River Bar (“Brew River”) in Salisbury on March 1, 2022, with friends from school. At some point, one of Mr. Ivery’s school acquaintances, Aaliyah Edwards, became upset because a man with dreadlocks, who was not the appellant, misbehaved toward her.

Mr. Ivery and other friends brought Ms. Edwards to a back room to calm her down. The man with dreadlocks entered that room, and “things escalated.” The altercation moved into the main bar area, where a fight broke out. Mr. Ivery saw the man with dreadlocks try to hit Ms. Edwards. Mr. Ivery attempted to intervene, and the men exchanged punches.

Mr. Ivery testified that another man, later identified as the appellant, threw Mr. Ivery to the ground. When the appellant threw Mr. Ivery down, they were in the restaurant’s foyer. From there, “it was just all[-]out chaos.” A “bunch of people” from Mr. Ivery’s school “jumped in,” and a “big commotion” ensued in the foyer. Mr. Ivery eventually made it outside, where he saw “a lot of blood” on himself. His friends took him to the hospital, where he discovered he had been stabbed twice, once in his lower back and once in his chest.

Brew River Surveillance Videos

The State admitted, without objection, surveillance videos from Brew River, marked as Exhibit 1. The footage captured the incident from various angles—the east and west sides of the bar, the foyer, the outside front door, and the parking lot. The State played portions of the videos for the jury. At the same time, Mr. Ivery recounted the details of the altercation and explained where individuals were located at the bar. The footage showed that as the appellant threw Mr. Ivery to the ground in the foyer, the appellant dropped an

item that the State claimed was a knife. The appellant then picked up the item and put it in his pocket. The appellant does not dispute that the foyer camera captured the appellant with a knife in his hand after throwing Mr. Ivery to the ground.

Detective David Underwood, who was the lead detective investigating the stabbing, testified that he reviewed the Brew River footage “multiple times[. He] watched every angle.” The State showed the detective three still shots from the Brew River videos, marked as Exhibits 7, 8, and 9, chronologically depicting different scenes of the altercation. Exhibit 7 showed the appellant by the bar, grabbing Mr. Ivery with his right hand while holding an object in his left hand; Exhibit 8 showed a knife on the ground in the foyer after the appellant threw Mr. Ivery to the ground; and Exhibit 9 showed the appellant picking up the knife.

Still Shot from Video Posted on Facebook

The day after the stabbing, Detective Underwood found a video posted on Facebook that was captured with a cell phone (“Facebook video”). The detective testified, without objection, that the Facebook video depicted the same incident captured in the Brew River footage that had already been admitted as Exhibit 1. He could “[a]bsolutely” tell that the Facebook video depicted the same incident based on the “same people in the bar that night, same clothing, there were several shots of faces, it was the same exact people.” Detective Underwood could not download the video because it “was taken down before [authorities] could even preserve it.” He explained that the video “was only up for minutes” but that he could view it and take a still shot from it. The State marked this still shot as Exhibit 6, which the detective testified was a fair depiction of an excerpt from the Facebook video.

Exhibit 6 depicted the back of a man standing by the bar, dressed in light gray or white clothing. His pants had two large back pockets, and a small, dark tag or label was visible at the center of his pants' back. The still shot also depicted the man holding what the State claimed to be a knife in his left hand. The State proffered that the still shot showed the appellant in the bar area before he had thrown Mr. Ivery to the ground in the foyer.

As detailed later, defense counsel objected to the admission of Exhibit 6 on authentication grounds, arguing that it was a photograph taken from a since-deleted Facebook post from an unknown account. After the State was prepared to rest its case, the parties resumed their arguments on the admissibility of Exhibit 6. The court reviewed the admitted Brew River footage and still shots excerpted from it to determine whether Exhibit 6 could be authenticated. Ultimately, the court concluded that Exhibit 6 had been sufficiently authenticated under Maryland Rule 5-901.

The court stated that the Rule governing authentication “is satisfied by evidence sufficient to support a finding that the matter in question is what the proponent claims[.]” and “[t]here are numerous ways to authenticate a photograph or document or a piece of evidence.” The court explained how Exhibit 6 had been authenticated in two ways under the Rule:

Circumstantially, one can show such as by appearance, contents, substance, internal patterns, location, or other distinctive characteristics that the offered evidence is what it claims to be. This is very complex, but I think that the State has met their threshold burden for authentication.

And the way they've done that is through, one, the testimony of Detective Underwood who says, close in temporal proximity to the occurrence I was reviewing Facebook and I saw a video. In the video I saw

the same place, some of the same people, it appeared to be taken—it appeared to be a video that was basically a video of the same event that was occurring.

Additionally, I’ve looked at the picture and the individual in the picture appears to be wearing the same, at least the same pants with the same tag and the same location, that’s what I was looking at, it appears to be the same type of lighting, the same type of furnishings, the same type of decor, the same type of floor color. There appears to be a bar. So, I think that the totality of everything I’ve received, I believe the State has made a threshold showing that a reasonable juror could find the picture to be what it purports to be.

The court added that the appellant’s argument about “Facebook and the potential manipulation . . . is for the fact finder to decide[.]” “[I]n terms of the weight that the fact finder should give [Exhibit 6], that is for you both to argue.” After balancing the probative value of the still shot against the risk of unfair prejudice, the court admitted Exhibit 6 into evidence.

Appellant’s Statements

Detective James Hicks interviewed the appellant on March 24, 2022. During the interview, the appellant admitted that he was at Brew River on March 1. The appellant stated that there were “minors at the business” that “shouldn’t have been there[.]” and “they were fighting his people[.]” Detective Hicks showed the appellant the still shot from the Brew River footage that was admitted into evidence as State’s Exhibit 8. The appellant identified himself in the exhibit as the man wearing “the gray shirt, the white pants, with the gray shoes with the white laces.” The appellant did not admit to stabbing anyone, but he conceded that he was there with a knife. Detective Hicks recounted from the interview: “So, I showed [the appellant] still photographs of a subject that he had already identified

himself as in a picture, and wearing the same clothing, same everything, and he said you see me with the knife.”

We shall include additional facts as relevant to our discussion.

DISCUSSION

I.

Still Shot from the Facebook Video

The appellant contends that the circuit court erred in admitting the still shot marked as Exhibit 6, showing him with a knife in his hand. First, he asserts that the State was required to authenticate the underlying Facebook video from which the still shot was captured. Second, even if the State was not required to authenticate the underlying video, the still shot itself was not properly authenticated.

The State contends that the appellant’s first argument was not preserved for appellate review. As to the second argument, it responds that the still shot was sufficiently authenticated. We agree with the State on both issues.

A. Preservation

The appellant’s first argument was not preserved. At trial, the appellant did not object to the detective’s testimony that the Facebook video depicted the same incident as the one captured in the Brew River footage. When the State sought to admit the still shot from the Facebook video, the defense objected because nothing was known about the Facebook account. The defense argued that “the user hasn’t been authenticated. Facebook, as we all know, has some information on it, and it has some misinformation. . . . [I]t’s loaded with evidentiary problems, to just have a mysterious photograph that was taken off

a since[-]deleted Facebook post from an *unknown account* comes into evidence.”
(Emphasis added).

Later, the court evaluated the admissibility of Exhibit 6 by reviewing the Brew River footage and the still shots taken from it. Defense counsel’s arguments focused on the authenticity of the “unknown Facebook account” and the possibility that the “image” in Exhibit 6 may have been manipulated:

The idea that you can take an *unknown Facebook account*, we have no idea even whose account this was. If [the d]efense wanted to inquire into the veracity or the *authenticity of the account*, we wouldn’t even know how to do so. Because we don’t know. It’s vanished. It’s gone.

It could be a real account. It could be virtual reality, for all we know. *It could be a tampered with account*. It could be someone – and it’s so easy to do, you know. You can go with filters and alter any *image* now and post it, I mean, the misinformation that’s out there, to say that I saw something on Facebook and, therefore, it’s admissible and it’s authentic and it is what it purports to be, is like such a, such a leap of faith from an evidentiary standpoint. You know, I couldn’t begin to do the proper investigation to determine whether or not it’s real, because we just don’t know anything about it. You can bring in any image from any source.

I would argue, respectfully, that it does not meet the required, I guess, components of reliability.

(Emphasis added).

Defense counsel continued to argue that the Facebook account from which Exhibit 6 was derived had to be authenticated, and the image could have been manipulated:

Right, so it’s, you can’t simply say that because we have still frames taken from the Brew River video, that we can have another still frame from an independent source that, that isn’t duplicitous, it’s not like it’s the same thing as adding something of evidentiary value so, from a foreign source, and we don’t know whether it’s reality or virtual reality. Because with any filter, every social media app right now has filters where you can, they can be easily distorted. Therefore, the conventional way to do it would be, for Facebook

vouching for its authenticity, you know, to say that, you know, that hasn't been done, or for someone from Snapchat or Instagram to say, you know, this is what a filter is, this is what reality is.

But to say I have a video that shows one thing, I have something I saw on an *unknown Facebook account* that adds something to that, *would require at minimum authentication of the Facebook account.*

(Emphasis added).

The claim that the Facebook video had to be authenticated as a predicate for admitting a still shot derived from it is not preserved. *See* Md. Rule 8-131(a); *Brecker v. State*, 304 Md. 36, 39–40 (1985) (“[O]ur cases have consistently stated that when an objector sets forth the specific grounds for his objection . . . the objector will be bound by those grounds and will ordinarily be deemed to have waived other grounds not specified.”).

The appellant argues that the prosecutor’s and the court’s responses to his arguments conveyed their understanding that he was challenging the authenticity of the Facebook video. We disagree. Contrary to the appellant’s assertion, the court did not rule on the authenticity of the Facebook video; the defense did not raise the specific issue at trial. Rather, the prosecutor’s and the court’s comments about the Facebook video related to the circumstantial evidence of the detective’s testimony that Exhibit 6 depicted a scene from the incident.

The appellant also argues the thrust of his argument at trial was that the admissibility of Exhibit 6 depended on whether the State could prove that the Facebook video had not been manipulated. He suggests that the argument made on appeal is a more detailed version of the one advanced at trial. But to accept this argument would require trial courts to “imagine all reasonable offshoots of the argument actually presented to them before

making a ruling on admissibility.” *Sifrit v. State*, 383 Md. 116, 136 (2004). We have declined to place such a substantial burden on the trial court. *Id.*

B. Analysis

The appellant argues that even if Exhibit 6 could be authenticated without the Facebook video first being authenticated, the circuit court’s findings were inadequate to authenticate the still shot.

“A trial judge’s decision to admit or exclude evidence will not be set aside absent an abuse of discretion.” *Gerald v. State*, 137 Md. App. 295, 304 (2001). An abuse of discretion occurs “where no reasonable person would take the view adopted by the [trial] court.” *Fontaine v. State*, 134 Md. App. 275, 288 (2000) (cleaned up). “Thus, where a trial court’s ruling is reasonable, even if we believe it might have gone the other way, we will not disturb it on appeal.” *Id.*

The process of authentication refers to “laying a foundation” to admit “nontestimonial evidence [such] as documents and objects” sufficient to establish “a connection between the evidence offered and the relevant facts of the case.” *Reyes v. State*, 257 Md. App. 596, 629 (2023) (citation omitted); Md. Rule 5-901(a) (“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.”).

The authentication threshold is “slight,” meaning that a 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.” *Jackson v. State*, 460 Md. 107, 116 (2018).

Photographic evidence may be authenticated through first-hand knowledge or under the “silent witness” theory. *Id.* at 117. “[T]he pictorial testimony theory of authentication allows photographic evidence to be authenticated through the testimony of a witness with personal knowledge, and the silent witness method of authentication allows for authentication by the presentation of evidence describing a process or system that produces an accurate result.” *Washington v. State*, 406 Md. 642, 652 (2008). But, as the appellant acknowledges, these are not exclusive ways to authenticate photographic evidence. *See Reyes*, 257 Md. App. at 630. Maryland Rule 5-901(b) offers non-exclusive examples of how such evidence may be sufficiently authenticated. Here, two examples of authentication are relevant:

(3) *Comparison With Authenticated Specimens*. Comparison by *the court* or an expert witness with specimens that have been authenticated.

(4) *Circumstantial Evidence*. Circumstantial evidence, such as appearance, contents, substance, internal patterns, location, or other distinctive characteristics, that the offered evidence is what it is claimed to be.

Md. Rule 5-901(b)(3) (emphasis added), (4).

We conclude that the circuit court did not abuse its discretion in admitting Exhibit 6. Under Rule 5-901(b)(3), the court compared Exhibit 6 with the Brew River footage and related still shots that had already been admitted into evidence. It determined that the person in Exhibit 6 appeared to be wearing “the same pants with the same tag[.]” The court also observed that Exhibit 6 depicted “the same location” based on the “same type of lighting, the same type of furnishings, the same type of decor, the same type of floor color[, and t]here appears to be a bar.” *See, e.g., Sublet v. State*, 442 Md. 632, 675–76 (2015)

(court did not abuse discretion by receiving “tweet” in evidence where under Rule 5-901(b)(3), the court looked at the temporal proximity of the “tweets” to direct messages that had already been authenticated).

The court also considered the circumstantial evidence under Rule 5-901(b)(4). The court recounted Detective Underwood’s testimony that he reviewed the Facebook video the day after the stabbing. He testified that he had reviewed the Brew River videos many times. The Facebook video depicted “the same place, some of the same people,” and it depicted the “same event” as the one in the Brew River footage. In addition, the appellant admitted he was present at the restaurant at the time of the incident and identified himself in Exhibit 8 as wearing a gray shirt, white pants, and gray sneakers. As the court noted, the person in Exhibit 6 appeared to be wearing clothing consistent with what the appellant wore in Exhibit 8. Thus, the circumstantial evidence was sufficient for a reasonable juror to find that Exhibit 6 was what the State claimed it to be—that the still shot taken from the Facebook video depicted a scene from the incident. *See, e.g., Gerald*, 137 Md. App. at 305 (affirming admission of letters where trial court found sufficient evidence to attribute authorship to defendant based on totality of circumstantial evidence).

The appellant argues that the quality, tone, and details of Exhibit 6 made it impossible for the court to compare it with the Brew River footage and the still shots taken from it. He contends that the image’s background in Exhibit 6 is blurry, making it difficult to discern the furnishings, decor, and lighting. The color of the floor in Exhibit 6 was also different from that depicted in Exhibits 7, 8, and 9. And the details relied upon by the court did not demonstrate that Exhibit 6 showed Brew River at the time of the fight.

In addition, the appellant claims that in Exhibit 6, the man had his back toward the camera, which made it impossible to identify him as the appellant. He also claims that the man in Exhibit 6 appeared to be white, while the man identified as the appellant in the Brew River footage and still shots appeared to be Black. Although the appellant concedes to wearing white pants with a small black mark on the back, like the man in Exhibit 6, he argues that white pants are not unusual attire in the summer months.

Having reviewed the exhibits, the image in Exhibit 6 is not of such poor quality that one could not discern the features of the man’s clothing or his surroundings. This depiction has characteristics consistent with Exhibit 7, in which the appellant is shown grabbing Mr. Ivery with his right hand while holding an object in his left hand near the bar before both moved into the foyer. And the clothing worn by the man in Exhibit 6 is consistent with the clothing worn by the appellant in Exhibit 8. *See Sublet*, 442 Md. at 666 (the proponent of the evidence “need not rule out all possibilities inconsistent with authenticity, or . . . prove beyond any doubt that the evidence is what it purports to be” (citation omitted)). We are satisfied that the circuit court followed Rule 5-901 by admitting Exhibit 6 and then allowing the jury to weigh that evidence to determine the ultimate question of authenticity. For the reasons stated, the circuit court did not err in admitting the still shot from the Facebook video.

II.

Sufficiency of the Evidence

The appellant argues that his convictions for first-degree assault and reckless endangerment must be reversed because the finding that the appellant was the one who

stabbed Mr. Ivery was based on speculation and conjecture. This is because Mr. Ivery did not know who stabbed him, and no evidence depicted the stabbing itself. At most, the evidence proved that the appellant was at Brew River at the time of the fight, the appellant and Mr. Ivery fought, and the appellant had a knife. He contends that no evidence permitted an inference beyond a reasonable doubt that the appellant was the one who stabbed Mr. Ivery. We disagree.

The test for considering the sufficiency of the evidence on appeal is well-established. To determine if the State has provided sufficient evidence to sustain a conviction, we ask “whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *Smith v. State*, 415 Md. 174, 184 (2010) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). An appellate court views “not only the evidence in a light most favorable to the State, but also all reasonable inferences deducible from the evidence in a light most favorable to the State.” *Id.* at 185–86. “Because the fact-finder possesses the unique opportunity to view the evidence and to observe first-hand the demeanor and to assess the credibility of witnesses during their live testimony, we do not re-weigh the credibility of witnesses or attempt to resolve any conflicts in the evidence.” *Tracy v. State*, 423 Md. 1, 12 (2011).

This standard applies to all criminal cases, including those resting on circumstantial evidence. *Neal v. State*, 191 Md. App. 297, 314 (2010). “[C]ircumstantial evidence alone is sufficient to support a conviction, provided the circumstances support rational inferences

from which the trier of fact could be convinced beyond a reasonable doubt of the guilt of the accused.” *Painter v. State*, 157 Md. App. 1, 11 (2004) (cleaned up).

The evidence presented at trial was sufficient to persuade a rational fact-finder that the appellant was the one who stabbed Mr. Ivery. Although the appellant denied that he stabbed anyone, he admitted to Detective Hicks that he was at Brew River that night when the fight broke out and had a knife on him. He also admitted to Detective Hicks when viewing the still shots of the Brew River footage, “[Y]ou see me with the knife.”

The Brew River camera on the west side of the bar captured the appellant pushing Mr. Ivery at various times before they moved into the foyer. The appellant appeared to be holding an item in his left hand while using his right hand to push and pull Mr. Ivery out of view and into the foyer. The appellant was captured on the foyer camera grabbing the hood of Mr. Ivery’s sweatshirt from behind with his right hand while his left arm was around Mr. Ivery’s chest. The appellant then threw Mr. Ivery to the left and into the ground as a knife fell from the front of Mr. Ivery’s body. As Mr. Ivery stood up, the appellant pushed Mr. Ivery away and picked up the knife from the ground. A group of people then gathered around them, and a brawl ensued. Moments later, blood was seen on the front of Mr. Ivery’s sweatshirt. From the evidence, the jury could have inferred that the appellant was the one who stabbed Mr. Ivery during their physical altercation. Viewing the evidence and all reasonable inferences from it in the light most favorable to the State, the evidence was sufficient to sustain the convictions.

**JUDGMENTS OF THE CIRCUIT COURT
FOR WICOMICO COUNTY AFFIRMED.
COSTS TO BE PAID BY THE
APPELLANT.**