UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 163

September Term, 2015

ADAM KENTRELL RICHARDSON

v.

STATE OF MARYLAND

Eyler, Deborah S.,
Wright,
Moylan, Charles E., Jr.
(Retired, Specially Assigned),

JJ.

Opinion by Eyler, Deborah S., J.

Filed: June 22, 2016

A jury in the Circuit Court for Howard County convicted Adam Kentrell Richardson, the appellant, of two counts of armed robbery, one count of conspiracy to commit armed robbery, two counts of robbery, one count of conspiracy to commit robbery, two counts of kidnapping, two counts of false imprisonment, one count of conspiracy to commit false imprisonment, two counts of first-degree assault, two counts of second-degree assault, one count of first-degree burglary, one count of third-degree burglary, and two counts of theft under $1,000. The court sentenced the appellant to a total of 40 years' imprisonment.

The appellant presents five questions for review, which we have rephrased as follows:

I. Did the circuit court abuse its discretion by admitting maps showing the locations of cell phone towers, and expert opinion testimony related to the maps, when there was no evidence about the range of the cell phone towers?

II. Did the circuit court err by admitting hearsay evidence that a database showed that a person whose fingerprint was recovered at the crime scene was a white male?

III. Did the circuit court err by allowing a police officer to express an opinion about the meaning of a text message?

IV. Did the circuit court err in its answer to the jury's question about the elements of first-degree assault?

V. Must the record be corrected to reflect that the jury rendered not guilty verdicts on Counts 3, 7, 11, 12, 15, and 17, and not reflect that those counts were lesser included offenses?

For the following reasons, we answer Questions I through IV in the negative and Question V in the affirmative. Accordingly, we shall remand the case to the circuit court

with directions to amend the docket entries in accordance with this opinion. The judgments are otherwise affirmed.

FACTS AND PROCEEDINGS

The crucial events in this case took place beginning in the very early hours of May 21, 2014. Adrian Klein-Hebron ("Hebron") was visiting a friend, Michael Spitler, at Spitler's house on Durham Road East, in Columbia. Suddenly, there was a loud noise and two African-American males burst into the house, "shouting that they were the police." One of the men, later identified as the appellant, sprayed Spitler's dog with "some kind of chemical" and then jumped on Spitler. The other man ran up to Hebron, holding a firearm, and ordered him not to move. The appellant also pointed a gun at Hebron. The assailants directed both victims to sit on the couch and demanded that they "tell them where the—where everything was." The assailants "started trashing the room" and demanded "money and drugs[.]"

The assailants bound the victims' hands with zip ties. The appellant then grabbed Spitler from the couch and demanded that he open his safe. Spitler complied. Apparently, there was nothing of interest inside, because the assailants proceeded to look "all around the house for . . . money or drugs[.]" At one point, one of the assailants placed a phone call and said that what they had come for was not there. A third man, also African-American, entered the house and directed that the victims be blindfolded. The first two men complied by pulling the victims' shirts over their faces.

After the assailants once again ransacked the house, Hebron, who was still on the couch, felt a "gun on the back of [his] head[.]" One of the assailants said, "I know you

know where this stuff is . . . we are going to kill you if you don't tell us where it is." Hebron responded that he did not know what they were talking about. At that point, the assailants forced the victims to their feet, led them outside, and threw them into the back of Hebron's rental car. The appellant and one of the other assailants got in that car with the victims. The third assailant got into another car.[1]

The assailants drove from Spitler's house in Columbia to an abandoned row house on Baker Street in Baltimore City. They removed the victims from Hebron's car and escorted them inside. All three assailants began beating Spitler "for a number of minutes" until he lost consciousness. At some point, one of the assailants "heard something in the front of the abandoned house" and "went to go check[.]" He told the other assailants that a woman was looking in the front window of the house. The three men fled, leaving Spitler unconscious and Hebron bound in zip ties. Eventually, Hebron was able to escape and locate a Baltimore City Police officer, who rescued Spitler.

Spitler told the police that he thought a man named Jared Price ("Jared") may have had something to do with the crimes. Spitler, who had convictions for drug distribution, sold marijuana with Jared from time to time. Jared had been to Spitler's house two or three times in the past. Five days before the crimes, Jared had questioned Spitler about whether he was going to be home, which Spitler found odd.

Two days after the crimes, one Gregory Price ("Gregory"), Jared's brother, was found dead of an apparent homicide near the abandoned row house on Baker Street. His

[1] Although Hebron's shirt was still covering his face, he could see through it.

cell phone was recovered by the police. A search of the phone revealed several text messages between Gregory and Jared. These messages, which were sent around the time of the attack on Spitler and Hebron, included directions to Spitler's house.

The service provider's records for Gregory's phone were obtained and revealed a series of calls around the time of the attack between his phone and a phone number registered to the appellant.

The appellant was arrested on June 20, 2014, and was interrogated. He admitted that he, Gregory, and a man named Aaron went to Spitler's house in Howard County on the night in question. He claimed that he did not enter the house, did not ride in the car with the victims, and did not go to the Baltimore City house on Baker Street. He stated that he went to Spitler's house at Gregory's request and understood they were going there to steal marijuana. At trial, however, Richardson testified that he had never been to Howard County and only told the police he had gone there with Gregory and Aaron because that is what the police wanted to hear.[2]

A DNA sample obtained from the appellant was tested and found to match DNA recovered from a can of dog-repellant spray at Spitler's house.

DISCUSSION

I.

At trial, Detective Daniel Branigan of the Howard County Police Department ("HCPD"), was designated as an expert in "cellular phone technology historical analysis

[2] Aaron has never been found.

retrieval." He testified about an analysis he performed of the cell phone carriers' records for the appellant's and Gregory's cell phones. Using several maps of the area, Detective Branigan testified that certain calls made between Gregory's phone and the appellant's phone around the time of the attacks were linked to cell phone towers located near Spitler's house, to other cell phone towers located between Spitler's house and the abandoned row house on Baker Street, and near that abandoned row house. Detective Branigan used this information to opine about the locations of both phones when the calls were made. He prepared maps showing the locations of the phones and attached the relevant cell phone records that he used in his analysis.

On appeal, the appellant contends the trial court erred by admitting the maps prepared by Detective Branigan and his opinion testimony. Specifically, he complains that this evidence should not have been admitted without foundational evidence of the range of the cell phone towers. According to the appellant, "[w]ithout any evidence regarding the range of the towers, *i.e.*, how far away a phone could be from a particular tower and still communicate with that tower, the evidence that phones communicated with a particular tower was not relevant." (Footnote omitted.) He argues further that even if this evidence was relevant, its probative value was outweighed by its likelihood to cause unfair prejudice, and therefore the court abused its discretion by admitting it.

Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Md. Rule 5-401. Whether evidence is relevant is a legal question. *State v. Simms*, 420 Md. 705, 725 (2011). Relevant evidence may still be

excluded "if the probative value of such evidence is determined to be substantially outweighed by the danger of unfair prejudice." *Andrews v. State*, 372 Md. 1, 19 (2002); Md. Rule 5-403. Whether evidence is unfairly prejudicial depends upon whether its inflammatory character outweighs its utility. *Smith v. State*, 218 Md. App., 689, 705 (2014). This balancing "is left to the sound discretion of the trial judge and will be reversed only upon a clear showing of abuse of discretion." *Malik v. State*, 152 Md. App. 305, 324 (2003) (citing *Martin v. State*, 364 Md. 692, 705 (2001)).

There is no merit in the appellant's arguments about the cell phone records, in particular, Detective Branigan's maps and opinions. Before the detective used his maps and expressed his opinions, defense counsel objected, saying that the evidence depended upon foundational evidence about the range of the cell phone towers depicted on the maps. Those cell towers had been marked on the maps (created with Microsoft Streets and Trips software, 2013 version) by Detective Branigan using GPS coordinates (longitude and latitude). During the bench conference, at which Detective Branigan was present, the judge asked, "What is the range of one of these towers?" The answer in the transcript is, "(Indiscernible for approximately six words)." In the next four lines of the transcript, nearly everything spoken is reported as "Indiscernible." It seems obvious that an answer was given to the judge's question but was *not* picked up by the court reporter's machine.

The subject was not broached again. We will not consider that the range information was not given when it seems highly likely that it was.[3]

And, even if it was not given, the information on Detective Branigan's maps and his opinion testimony were supported by an adequate foundation. The records furnished to Detective Branigan by the cell phone carriers for Gregory and the appellant detail the exact date and time for each call between them and the codes that reflect the precise cell phone tower location and the side of the cell phone tower through which each call was routed. (Indeed, those records were attached to the maps.) The locations of those towers plotted on the maps with the times of the calls show Gregory and the appellant traveling from an area near Spitler's house (north of Columbia and west of Route 29) to areas near Route 29, Interstate 70, moving east on I-70, and moving into Baltimore City in the immediate area of North Avenue, near the abandoned row house on Baker Street. The precise range of operation of each cell tower is not critical to the significance of this evidence, which is the trend of movement of Gregory and the appellant from the area of Spitler's house in Columbia (the first crime scene) to the area of the abandoned Baker Street row house (the second crime scene) within a span of two to three hours in the very early morning of May 21, 2014. This evidence was relevant, as it tended to show that the appellant was associated with Gregory, one of the assailants, and was in the vicinity of both crime scenes when the crimes were committed. Its probative value was significant, in that the appellant was

[3] Counsel for the appellant attempted to obtain, through the Supervisory Court Reporter for Howard County, a review of the court reporter's notes. The court reporter had since left, and it was not possible to review her notes. The transcript was certified as being as complete and accurate as possible.

denying being around any of those locations at the relevant times, and was not unduly prejudicial. The court did not err or abuse its discretion in admitting Detective Branigan's cell phone evidence and the opinions he based on it.

II.

On cross-examination, defense counsel questioned Detective Daniel Lenick about an HCPD forensic report showing that fingerprints were recovered from Spitler's house and that they belonged to Spitler, Hebron, and a man named Joel Vernon Young. The report was moved into evidence. The next day, the prosecutor informed the court that the State intended to call Allen Hafner, of the HCPD forensics division, to testify that Young is a white male.[4] The court permitted the testimony, and Hafner testified that he had "accessed a database" and that Young was "listed in the database as a white male."

The appellant contends the trial court erred by allowing Hafner to so testify. He argues that this was inadmissible hearsay because Hafner relied on a "computer database" to obtain the information and did not have "personal knowledge that Mr. Young was a white male."

This issue is not preserved for review. When the State informed the court that it intended to call Hafner as a witness, defense counsel objected on the ground that Hafner had not been disclosed as a witness prior to trial. Defense counsel maintained this position

[4] As noted in our factual recitation, the three assailants were all identified as African-American.

throughout, never once objecting to the testimony based on hearsay.[5] Consequently, the issue before this Court was not raised or decided below and we shall not address it. *See State v. Jones*, 138 Md. App. 178, 218 (2001) ("[W]hen particular grounds for an objection are volunteered or requested by the court, that party will be limited on appeal to a review of those grounds and will be deemed to have waived any ground not stated.") (internal quotation marks and citations omitted).

III.

Detective Lenick testified about some of the text messages between Gregory's cell phone and Jared's cell phone. Specifically, he explained that one text message, which was sent around the time of the attack, read "9-1-1-1," which the police took to mean that "there's an emergency that just happened . . . or is happening."[6]

The appellant contends the trial court erred by allowing this testimony. Specifically, he argues that the court should not have allowed Detective Lenick to give this testimony "without first making a preliminary legal determination that Detective Lenick was qualified to testify as an expert witness and that defense counsel had been provided proper notice that he would render this expert opinion."

[5] The appellant asserts that because defense counsel stated, as part of his discovery argument, that "there was no way to check the reliability of the information the witness would present to the jury," the hearsay issue was raised. That statement did not mention or even allude to hearsay.

[6] Although the text reads "9-1-1-1," when the prosecutor questioned Detective Lenick about its meaning, the State referred to the text as "Nine One One." The parties operated under the assumption that the extra "1" was a typo.

This argument has no merit. First, the court *did* make a determination that Detective Lenick was qualified to testify as an expert. When the question was first posed by the prosecutor, defense counsel objected on the grounds that Detective Lenick's response "call[ed] for speculation" and that he had "non-expertise in decoding test messages." At that point, the following colloquy transpired:

> THE COURT: If you can establish his ability to do so . . .
>
> [STATE]: Detective Lenick, how long have you been a law enforcement officer?
>
> [DET. LENICK]: I've been a law enforcement officer for twenty-one and a half years.
>
> [STATE]: How many homicides have you investigated?
>
> [DET. LENICK]: Uh . . . Either as the primary or as a secondary, I would say in the forty-plus range.
>
> [STATE]: And can you tell the ladies and gentlemen of the jury approximately how many arrests you've been involved in and were made?
>
> [DET. LENICK]: I can't even begin to guess how many arrests.
>
> [STATE]: How many radio calls have you responded to?
>
> [DET. LENICK]: At least thousands.
>
> [STATE]: What's Nine One One mean to police officers?
>
> [DET. LENICK]: To me, it means that there's an emergency that just happened . . . or is happening.
>
> THE COURT: And I'll overrule the objection.

Based on the above exchange, it is clear that the trial court responded to defense counsel's objection by having the State first establish Detective Lenick's expertise in law

enforcement before allowing him to answer and overruling the objection. *See* Md. Rule 5-702. In fact, the appellant acknowledges as much in his brief when he states that "[t]his questioning of the detective constituted qualifying him as an expert witness." That the court did not make an on-the-record finding regarding Detective Lenick's expertise is of little consequence. *See Brown v. State*, 171 Md. App. 489, 509 (2006) ("It is a rule of appellate review that a trial judge is presumed to know the law and apply it properly." (citing *State v. Chaney*, 375 Md. 168, 180 (2003))).

Second, although Rule 4-263(d)(8) requires the State to disclose the nature and substance of an expert opinion, and section (h)(1) of that rule requires disclosure "within 30 days after the earlier of the appearance of counsel or the first appearance of the defense before the court," the State's failure to do so is not an automatic bar to admission of the opinion testimony. *See id.* at § (n) ("The failure of a party to comply with a discovery obligation in this Rule does not automatically disqualify a witness from testifying."). Instead, "disqualification is within the discretion of the court." *Id.*

The appellant did not raise the issue of disqualification at trial. Consequently, the issue is not preserved for our review. *See* Md. Rule 8-131(a). Even so, the trial court did not abuse its discretion by allowing Detective Lenick to render an expert opinion about what "9-1-1" means to a police officer. *See Paige v. State*, 226 Md. App. 93, 124 (2015) (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." (citations omitted)). The phrase "9-1-1" is common parlance known to mean

an emergency call for help. Detective Lenick did not testify that "9-1-1" means something other than that to a police officer.

IV.

At the close of all the evidence, the trial court instructed the jury as follows regarding second-degree assault and first-degree assault:

> [The appellant] is also charged with first degree assault and second degree assault of Mr. Spitler and Mr. Klein-Hebron. Let me first define second degree assault and then you'll have an idea. It will be easier for me to describe first degree assault.
>
> So second degree assault under the theory of battery. In order to convict [the appellant] of that offense the State must prove that [the appellant] caused offensive physical contact or physical harm to the victim in that case. Secondly, that the contact was [the] result of an intentional or reckless act of [the appellant] and was not accidental. And third, that the contact was not consented to by the victim.
>
> In order to convict [the appellant] of first degree assault the State must prove all of the elements of second degree assault as I've just defined them, but the State must also prove that [the appellant] used a firearm to commit the assault or that [the appellant] intended to cause serious physical injury in the commission of the assault.

During deliberations, the jury sent the following note: "Does either suspect have to physically touch the victims with the gun to be considered Assault 1?" After discussing the matter at length with the prosecutor and defense counsel, the court answered, "No," and sent the note back to the jury.

The appellant contends the trial court's answer to the jury's question was incorrect. He argues that because the jury was instructed only on assault of the battery variety, he only could be found guilty of first-degree assault of a victim upon proof that he physically touched the victim with a gun.

The appellant is incorrect. Although the trial court instructed the jury on assault of the battery variety, it also instructed the jury that the State had to prove that the appellant "used a firearm to commit the assault ***or that [the appellant] intended to cause serious physical injury in the commission of the assault***." (Emphasis added.) Accordingly, the appellant could be found guilty of first-degree assault upon proof that he intended to cause serious physical injury to a victim, without a finding that he physically touched that victim.[7] The trial court's response to the jury's question was a correct statement of the law. *See* Md. Code (2002, 2012 Repl. Vol.) § 3-202 of the Criminal Law Article ("CL") (stating "assault in the first degree" includes either an assault with a firearm or an assault with the intention of causing serious physical injury).

V.

Finally, the appellant contends the record must be corrected to accurately reflect the jury's verdicts. The verdict sheet and the trial transcript "both reflect that the jury returned not guilty verdicts on Counts 3, 7, 11, 12, 15 and 17." The docket entries list the dispositions on these counts as "LO," which, according to the appellant, means these charges were treated as "lesser offenses" rather than acquittals. The State agrees that the docket entries should be corrected.

"When there is a conflict between the docket entries and the transcript, the transcript, 'unless shown to be in error, takes precedence[.]'" *Caldwell v. State*, 164 Md.

[7] The indictment charged the appellant with first-degree assault of Hebron (Count 18) and first-degree assault of Spitler (Count 19), generally. Second-degree assault was an uncharged lesser included offense.

App. 612, 649 (2005) (citations omitted). According to the trial transcript, the appellant was found not guilty of conspiracy to commit armed robbery of Hebron (Count 3), conspiracy to commit robbery of Hebron (Count 7), conspiracy to commit kidnapping of Hebron (Count 11), conspiracy to commit kidnapping of Spitler (Count 12), conspiracy to commit false imprisonment of Hebron (Count 15), and use of a handgun in the commission of a felony or crime of violence (Count 17). The docket entries list the disposition on these counts as "LO" and are silent as to the jury's verdict.[8] Therefore, the docket entries must be amended to reflect that the appellant was found not guilty on these counts.

CASE REMANDED TO THE CIRCUIT COURT FOR HOWARD COUNTY WITH DIRECTIONS TO AMEND THE DOCKET ENTRIES IN ACCORDANCE WITH THIS OPINION. JUDGMENTS OTHERWISE AFFIRMED. COSTS TO BE PAID 80% BY THE APPELLANT AND 20% BY HOWARD COUNTY.

[8] In contrast, the counts for which the appellant was found guilty are entered in the docket with a disposition of "G" and a verdict of "G." Although no legend is provided, we assume that "G" stands for "guilty."