UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2569

September Term, 2014

AREDELLE JONES

v.

STATE OF MARYLAND

Graeff,
Kehoe,
Salmon, James P.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Salmon, J.

Filed: September 16, 2016

After a jury trial held in October 2014 in the Circuit Court for Kent County, Aredelle Jones ("Jones") was convicted of robbery, second-degree assault, theft, first-degree burglary, and nine counts of reckless endangerment. In addition, he was convicted of third-degree burglary and two counts of fourth-degree burglary, but those convictions were merged by the court, for purposes of sentencing, into Jones's conviction for first-degree burglary. Prior to sentencing, the court dismissed six of the nine reckless endangerment convictions because, in the judge's view, they were inconsistent with other verdicts. The court imposed a sentence of 15 years imprisonment for robbery, but suspended all but ten years; a consecutive 20 year sentence for first-degree burglary, all but 10 years suspended; a consecutive 5 year sentence for reckless endangerment of Brittany Meekins and a consecutive 5 year sentence for the reckless endangerment of Amanda Friedel.[1] The court ordered that Jones be placed on 5 years supervised probation once the executed portions of his sentences were served. This timely appeal followed in which Jones raises three questions, phrased as follows:

> 1. Did the trial court err by admitting text messages that were not properly authenticated?
>
> 2. Did the trial court err by permitting Officer Simms to testify about the meaning of slang and street terminology within various text messages when he was not properly qualified as an expert at trial?

[1] The court imposed no sentence for appellant's conviction of reckless endangerment of Elon Black.

3. Did the trial court err in vacating some, but not all, of Mr. Jones' convictions for reckless endangerment because these convictions were impermissibly inconsistent?

I.
EVIDENCE PRODUCED AT TRIAL

On the evening of February 1 and morning of February 2, 2014, Elon Black was at the Kent Island home of his sister, Lacira Wilson. With Mr. Black were Amanda Friedel and Brittany Meekins. Also in the home that evening were Lacira Wilson, her boyfriend, Trequan Blake, and four of Ms. Wilson's children.

Between 10:00 and 11:00 p.m. on February 1, 2014, everyone except for Mr. Black, Amanda Friedel and Brittany Meekins went upstairs to sleep. Sometime after 2:00 a.m. on February 2, 2014, two armed men entered Ms. Wilson's home. Mr. Black first became aware of the intruders when he saw two men standing in the doorway wearing bandanas over their faces and holding guns. The gunmen told Mr. Black to "get on the floor and kick out the money." Initially, Black thought the gunmen were joking, but one of them stated "we're not playing."

Although both men had their faces almost entirely covered, Mr. Black testified that one of the intruders was Donta Montgomery, an individual he had known for a few years and a person who had a "distinctive voice." Black also immediately recognized the second man as appellant, Aredelle Jones, because he had "unique eyebrows."

Black told the gunmen that he was "broke" and added "you know me." Appellant replied, "I don't know you, dogs. I'm from Easton." When he said this, Black also recognized appellant's voice. Next, Black removed $100 from his pocket, threw it, and said "[t]hat's all I have." The man identified by Black as appellant said to Amanda Friedel, "Hey, Mandy, bring me the money." Ms. Friedel complied. The gunmen then asked for more money but Black pulled out his pockets, and even pulled his shorts down, to show them that he had nothing else to give. One of the gunmen then announced that he would find more money, but at about the same time as this announcement was made, the roar of a police car engine could be heard. The two gunmen ran out of the home.

At trial, Black testified that he was sure that the man with "the skull bandana" was Donta Montgomery and the gunman with "the red scorpion" bandana was appellant. Black further testified that appellant was his "fourth [or] fifth cousin[ ]" and that he had known appellant since middle school. In Black's words, he knew appellant "really well" having seen appellant "a lot over the years." Later in his testimony, Black said that he was "100% certain" that appellant was one of the armed robbers.

During the robbery, Lacira Wilson was upstairs. She heard voices coming from below of persons who had not previously been in her house. Ms. Wilson recognized one of the voices as that of Donta Montgomery. When she heard someone below telling her brother

to "kick the money out," she called the police on her cell phone. According to Ms. Wilson's testimony, the police arrived about three minutes after she called them.

Amanda Friedel testified at trial, but she was a classic "turncoat" witness in that her trial testimony differed markedly from a recorded statement she gave to the police on the date of the robbery. She testified that she was present when people entered Ms. Wilson's home but her glasses were broken so that she could not really see anything. Also, according to Ms. Friedel's testimony, she was "strongly under the influence" so that it made it "kinda like a blur type year." She said that what she told the police was essentially what everyone else had told her about the crimes. Also, according to Ms. Friedel's testimony, "pretty much everything" that she told the police on the date of the robbery was a lie.

The State played for the jury the recorded statement that Ms. Friedel gave to the police on February 2, 2014. In that recorded statement, she identified appellant as one of the perpetrators of the robbery. The recorded statement was later introduced as substantive evidence.

Corporal Calvin Shelton of the Kent County Sheriff's Department arrived at Ms. Wilson's home at 2:52 a.m. on February 2, 2014. While at the house he spoke to the individuals inside. Also responding to Ms. Wilson's 911 call was Officer James Walker, of the Chestertown Police Department, K-9 Patrol Division. Officer Walker testified that immediately upon arrival he and his dog began searching the area for suspects. During this

search, Donta Montgomery was found by Officer Walker's dog in the woods, a short distance from Ms. Wilson's house. The dog bit Montgomery who was taken to a local hospital where he was treated for his wounds. At the hospital, Montgomery was searched and a cell phone was recovered from his pocket.

Trooper Kyle Simms, a Maryland State Police Officer, obtained a search and seizure warrant that allowed him to photograph 27 text messages that were on Montgomery's cell phone. The messages were from Montgomery to "Ardale."[2]

Photographs of numerous text messages that were on Montgomery's phone were introduced into evidence. Discussed below are some of the more important ones. The interpretation as to what the texts meant, which are in parenthesis, is based on Trooper Simms's trial testimony.

One text message was sent at approximately 7:13 p.m. on February 1, 2014.[3] The text was between Montgomery and a person named "Ardale" and read: "W Y A," ("where you at"). Ardale responded, "On my way back from Elkton. W Y A." A subsequent text from

[2] The name in the text messages is "Ardale"; the trial transcript, however, refers to this person as "Aredelle."

[3] The phone had what Trooper Simms characterized as "some sort of daylight savings (time) issue on the cell phone itself." That meant, apparently, that although the phone showed that the text was sent at 8:13 p.m. on February 1, 2014, it was actually sent one-hour earlier because Maryland was not on Eastern Daylight Savings Time in February, 2014.

Ardale to Montgomery asked: "what's the plan for tonight?" Montgomery replied: "I D K ('I don't know') man. Tryna get sum hole" ("trying to get some sex").

At approximately 1:37 a.m. on February 2, 2014 Montgomery sent Ardale a text message, which read: "I N D you gt out hood ASAP G," ("I need you to get out of the hood ASAP"). Ardale asked "why" to which Montgomery replied, "Lick man," ("Lick" means a robbery or easy money). Montgomery then texted: "You wit it? If not, it don't matter. It's gonna get done." Ardale responded: "Yea. I'm on my way!" Montgomery texted "Bet," (an exclamation signifying agreement). Montgomery next texted Ardale: "Down Y G side," to which Ardale responded "I'm rey pull up." Montgomery texted: "I T E U C me," ("alright. Do you see me?") to which Ardale replied, "W Y A."

Trooper Simms further testified that on Montgomery's phone there was a person listed as "YG." A text message to YG, sent shortly before the robbery, told YG "to cut your backdoor light off." A subsequent police investigation revealed that a person with the initials "Y.G," lived in the area where the subject robbery occurred.

Trooper Simms conceded that he tried to obtain information about the number attributed to "Ardale," but the phone was not registered to anyone. He also conceded that he did not know whether "Ardale" was appellant nor did he know whether appellant used the phone number attributed to "Ardale." When appellant was arrested, no phone was found that linked him to the phone number used by "Ardale."

The defense called Kimberly Wilson, appellant's mother, who testified that appellant was living with her at the time of the robbery. She also testified that appellant had two telephone numbers, neither of which was the number attributable to "Ardale" as listed on Montgomery's phone.

Additional facts will be added in order to answer the questions presented.

II.
ANALYSIS

A. Authentication of the Text Messages

Appellant contends that the text messages from Montgomery to "Ardale" were erroneously admitted into evidence by the trial judge. According to appellant, neither direct nor circumstantial evidence linked the messages to him. We disagree.

Maryland Rule 5-901 provides, in relevant part:

> (a) **General provision**. 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.
>
> (b) **Illustrations**. By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this Rule:
>
> (1) Testimony of witness with knowledge. Testimony of a witness with knowledge that the offered evidence is what it is claimed to be.
>
> * * * *

> (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.

The burden of proof for authenticating evidence under Maryland Rule 5-901 is slight. *Dickens v. State*, 175 Md. App 231, 239 (2007). In fact, the trial judge "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." *Id.* (citations and internal quotation marks omitted). *See also Griffin v. State*, 419 Md. 343, 367 (2011).

There was circumstantial evidence sufficient to authenticate the text messages as being between appellant and Montgomery. First, the text messages were to and from "Ardale." That name is very similar to the actual spelling and phonetic pronunciation of appellant's rather uncommon first name - Aredelle. Moreover, the text messages indicated that Montgomery and "Ardale" were planning to meet and commit a crime, only about one-hour before the subject robbery. Importantly, appellant was identified by Black as one of the persons who participated in the robbery along with Montgomery, and Black's identification of appellant was corroborated by the recorded statement that Amanda Friedel gave to the police within hours of the robbery.

From the evidence set forth in the preceding paragraph, a rational jury could infer that the text messages in question were between appellant and Montgomery. That circumstantial evidence was sufficient to authenticate the text messages pursuant to Md. Rule 5-901(b).

B. Trooper Simms's Interpretation of Slang Words and Street Terms Used in Various Text Messages

Appellant contends that the trial judge erred by permitting Trooper Simms to testify about the meaning of slang and street terminology as used in the text messages "without having been identified or accepted as an expert at trial." The State contends that this issue was not preserved for appellate review. For the reasons that follow, we agree with the State.

This issue is controlled by Md. Rule 4-323(b), which reads:

> (b) **Continuing objections to evidence.** At the request of a party or on its own initiative, the court may grant a continuing objection to a line of questions by an opposing party. For purposes of review by the trial court or on appeal, the continuing objection is effective only as to questions clearly within its scope.

As will be shown, although the trial judge did grant defense counsel a continuing objection, it was not clear that the continuing objection was as to questions to Trooper Simms that involved his expertise in interpreting slang and "street expressions."

When the prosecutor began to question Trooper Simms about the text messages the following colloquy occurred:

> [DEFENSE COUNSEL]: - the arguments regarding the cell phone messages. To the extent Your Honor is gonna grant the . . . State's request to put those in . . . or, you know, overrule my objection to those coming in, I have no objection . . . I have my continuing objection, but, - -
>
> THE COURT: Right.

[DEFENSE COUNSEL]: - other than that, I'm gonna object more so toTrooper Simms giving them context. I think the best evidence rule says that they speak for themselves, they are what they are, and I'm going to object to any further context. This goes to that secondary issue.

THE COURT: Well, let's take it as he . . . as he states whatever it is you're objecting to -

[DEFENSE COUNSEL]: Okay.

THE COURT: - rather than a blanket. I understand you have a continuing objection to the issue of the . . . the . . . the texts coming in, which I overruled.

* * * *

If you have additional objections for other reasons . . . just state them for the record as we come. If you want to, of course, approach the bench. But, right now, you're not . . . don't have anything to object to.

[DEFENSE COUNSEL]: Well, the reason I brought it up now is because [the prosecutor] said he was going to be asking questions about those messages. So I thought this . . . .

THE COURT: You're anticipating - -

[DEFENSE COUNSEL]: Yes.

THE COURT: - - that he's going to put context on these?

[DEFENSE COUNSEL]: Absolutely.

THE COURT: Okay.

[DEFENSE COUNSEL]: And I would . . . and I think that's inappropriate. They speak for themselves.

THE COURT: But it's - -

> [DEFENSE COUNSEL]: And if they're gonna be published to the jury - -
>
> [PROSECUTOR]: They speak for themselves once they're entered into evidence.
>
> THE COURT: But it's an anticipatory objection. Is that right?
>
> [DEFENSE COUNSEL]: Right. I wanted to make sure nothing came out first before I objected.
>
> THE COURT: No, that's alright. That's alright. You're doing the right thing. I . . . I just want to make sure we're clear what we're objecting to - -
>
> [DEFENSE COUNSEL]: Sure.
>
> THE COURT: - - and what I'm ruling on. So, at that point, let's wait and see what he says.

(Emphasis added.)

The State next had the clerk mark for identification as State's Exhibits 1-27 photographs of text messages between Montgomery and "Ardale." Trooper Simms was asked to look at Exhibit 1 and "detail that to the [c]ourt and the jury." Simms answered "The first one, it's sent from the owner of the phone, Donta Montgomery[,] to someone named [Ardale]." Defense counsel objected and approached the bench, whereupon the following exchange occurred:

> [DEFENSE COUNSEL]: Now, he's gonna start reading it. If he's going to enter it into . . . evidence, I think it's appropriate to do it at this . . . time. He can't just read it into evidence. It's either gonna go in or it's not.

> And, at that point, then he can ask him questions about it. But it speaks for itself is my objection.
>
> [PROSECUTOR]: Once it's in evidence, it speaks for itself, Your Honor. He's ID'd it.
>
> [DEFENSE COUNSEL]: Right.
>
> [PROSECUTOR]: And I'm going to ask him about each one. And he can read it. I've got some questions for him. Then, when I enter it into evidence - -
>
> THE COURT: Before . . . before you enter it into evidence?
>
> [PROSECUTOR]: Exactly, Yeah.

Immediately after the bench conference, Trooper Simms was asked to "describe what . . . [Exhibit 1] portrays." He answered "[I]t's a photograph of the screen of a cell phone from the owner of the cell phone to someone named [Ardale] with a text message content of "W Y A." Defense counsel objected saying "same objection to reading it into evidence." The objection was overruled.

Next, when State's Exhibit No. 2 was shown to Trooper Simms, the prosecutor asked the Trooper to describe what the text message "portrays." Trooper Simms answered that it was a text from Ardale to Montgomery and that the text said: "on my way back from Elkton . . . W Y A." He then reiterated that "W Y A" means "where you at." The following exchange then occurred:

> [DEFENSE COUNSEL]: Your Honor, I'm going to object again and please note my continuing objection. He's not been named as an expert. He's

reading it into evidence. And I'd ask at this point for Your Honor to make a ruling on that.

THE COURT: I'm going to overrule at this point.

[DEFENSE COUNSEL]: Thank you. Please note my continuing objection.

THE COURT: And you do have a continuing objection to that issue.

The above exchange makes it ambiguous what the judge meant when he used the phrase "that issue." It is unclear whether the trial judge gave defense counsel a continuing objection to Trooper Simms interpreting the slang words or whether the continuing objection concerned defense counsel's frequently made earlier complaint that Trooper Simms should not be able to read the text messages aloud, because those messages, at that point, were not in evidence and/or that the text messages speak for themself. The ambiguity was cleared up shortly after the continuing objection was granted, when Trooper Simms read into evidence Exhibit 5, which was the text message in which Montgomery responded to the "Ardale" inquiry of "[w]hat's the plan for tonight?" Montgomery replied: "I D K man. Tryna get sum hole." When Trooper Simms was asked whether he knew what that meant, defense counsel stated: "Objection to the context being given without there being some foundation laid for his knowledge." The trial judge sustained that objection, saying: "We need a foundation of some sort." Trooper Simms was then asked a series of questions about his training, knowledge and experience concerning slang and street terms that he had gained

while a member of the State Police. He then related his experience in interpreting common expressions used by social media users and in wiretaps. After he gave that background, Trooper Simms, without objection, proceeded to answer a series of questions by explaining the meaning of numerous slang words and street expressions found in the text messages between "Ardale" and Montgomery.

It is true, that at one point during the direct examination of Trooper Simms, defense counsel did complain that the witness was never "named as an expert." But appellant's trial counsel was never clearly given, as Rule 4-323(b) requires, a continuing objection to "a line of questioning" concerning Trooper Simms's opinion as to the meaning of slang or street terms. In other words, the continuing objection granted was not effective for preservation purposes because the offending questions here at issue were not clearly within the scope of the continuing objection that was granted.

Md. Rule 4-323(a) reads, in relevant part:

> An objection to the admission of evidence shall be made at the time the evidence is offered or as soon thereafter as the grounds for objection become apparent. Otherwise, the objection is waived. The grounds for the objection need not be stated unless the court, at the request of a party or on its own initiative so directs. . . .

When a party volunteers the ground for his or her objection, that party, on appeal, will be limited to a review of those grounds and will be deemed to have waived any ground not stated. *Leuschner v. State*, 41 Md. App. 423, 436 (1979). *See also*, *State v. Rich*, 415 Md

567, 574 (2010) (the "rules for preservation of issues have a salutary purpose of preventing unfairness and requiring that all issues be raised in and decided by the trial court . . . .") (*quoting Conyers v. State*, 354 Md. 132, 150 (1999)). Because appellant's trial counsel failed to object when Trooper Simms, on numerous occasions, explained to the jury what slang or "street" terms meant, the issue of whether the Trooper should have been allowed to give those explanations was waived.

C. The Reckless Endangerment Convictions

Appellant's final contention is that the trial judge erred by vacating some, but not all, of his convictions for reckless endangerment. According to appellant, these convictions were impermissibly inconsistent. The State, adopting the reasoning of Judge Harrell's concurring opinion in *Price v. State*, 405 Md. 10, 34-44 (2008), which we adopted in *Travis v. State*, 218 Md. App. 410, 450 (2014), contends that this issue is not preserved for appellate review.

As mentioned earlier, the jury acquitted appellant of two handgun related counts (i.e., wearing, carrying or transporting a handgun and use of a firearm in the commission of a crime of violence). Appellant was also acquitted of second and third-degree assault against Ms. Meekins and Ms. Friedel, but convicted of reckless endangerment against both those victims. Additionally, as already stated, the jury convicted appellant on seven other counts of reckless endangerment, i.e., one count for reckless endangerment against Black and six

additional convictions relating to the other occupants of Ms. Wilson's house who were upstairs when the robbery occurred.

When the jury announced its verdict, appellant never complained that any of the verdicts were inconsistent. But at sentencing, which occurred more than eight weeks after appellant's convictions, appellant's counsel argued that her client's acquittals on charges associated with possession and/or use of firearms were inconsistent with his convictions for reckless endangerment. Defense counsel also argued for the first time that because the jury acquitted appellant of both second-degree assaults of Ms. Meekins and Ms. Friedel, it would be inconsistent to convict him of any of the reckless endangerment counts.

The judge agreed with defense counsel that the jury's verdict implied that the jury did not believe that appellant or Mr. Montgomery possessed a gun. The trial judge dismissed the six counts that involved persons who were upstairs in Ms. Wilson's house at the time of the robbery. As to those convictions, the judge said: "I don't see how . . . [those convictions are] a possibility as far as a logical verdict is concerned." The court did not, however, dismiss the reckless endangerment counts involving Mr. Black, Ms. Meekins or Ms. Friedel.

Appellant does not contend in this appeal that the inconsistencies in the verdicts constituted legal inconsistencies. Instead, he admits that the inconsistencies were factual. This is important because in jury trials, factually inconsistent verdicts are tolerated while legally inconsistent verdicts are not. *See McNeil v. State,* 426 Md. 455, 462 (2012) and

Travis, *supra*, 218 Md. App. at 451-52. In *Travis*, we adopted the views expressed by Judge Harrell's concurring opinion in *Price*:

> Mere logical inconsistency is only factual inconsistency and will not condemn a jury's verdicts as fatally inconsistent.
>
> > The verdicts in the present case also contain a factual inconsistency. Price was acquitted of being a felon in possession of a handgun, but convicted of possessing a handgun in the course of drug trafficking. There was no dispute at trial as to Price's prior felony convictions. Therefore, *it is illogical for the jury to find that Price is guilty of possessing a firearm in the course of drug trafficking without possessing a firearm as a convicted felon. Despite the illogical verdict, this does not rise to the level of a legally inconsistent verdict.*
>
> 405 Md. at 37, 949 A.2d 619 (emphasis supplied).
>
> A legal inconsistency, by contrast, must announce squarely contrary decisions with respect to actual elements of the two offenses. This does not mean contrary findings of fact which have logical implications with respect to elements. Every factual inconsistency necessarily has implications with respect to elements. If that were not so, the factual inconsistency would be immaterial. Legal inconsistency, by contrast, requires direct contrariety with respect to elements themselves.
>
> > *A legal inconsistency*, by contrast, *occurs when "an acquittal on one charge is conclusive as to an element which is necessary to and inherent in a charge on which a conviction has occurred . . . .*" [T]he Supreme Court of Rhode Island stated that "if the essential elements of the count[s] of which the defendant is acquitted are identical and necessary to prove the count of which the defendant is convicted, then the verdicts are inconsistent." *Verdicts of guilty of crime A but not guilty of crime B*, where both crimes arise out of the same set of facts, *are legally inconsistent when they necessarily involve the*

> *conclusion that the same essential element or elements of each crime were found both to exist and not to exist*."

405 Md. at 37-38, 949 A.2d 619 (emphasis supplied).

Travis, 218 Md. App. at 450-51 (footnotes omitted). *See also Givens v. State,* ____ Md. ____ (No. 85, Sept. Term 2015,filed August 22, 2016) in which a majority of the Court of Appeals adopted the logic and reasoning of Judge Harrell's concurring opinion in *Price.* Maj., *slip op*. 2, 55.

When a party contends that <u>any</u> inconsistency exists in a jury verdict, there is an "iron-clad" preservation requirement which states that the party that contends that a verdict is inconsistent, must object <u>before</u> the jury is discharged. *Travis*, 218 Md. App. at 451-53. If no objection is made prior to the discharge of the jury, the objection is waived for purposes of appeal.

The preservation requirement just discussed is recognized by appellant. He nevertheless argues:

> The record is clear that no one, State, defense or trial judge, mentioned inconsistent verdicts prior to the verdict becoming final and the jury being discharged. *See Travis v. State*, 218 Md. App. 410, 451-452, 98 A.3d 281 (2014) (holding that issue of inconsistent verdicts not properly preserved if not raised at proper time) (*citing* concurring opinion in *Price v. State*, 405 Md. 10, 40 (2008)). At the sentencing phase, the trial court was not obligated to remedy the inconsistency since it was not raised in the proper manner at trial. <u>However, once the trial court exercised its discretion and decided that some of the reckless endangerment counts were inconsistent, it was obligated to</u>

> decide whether the other reckless endangerment counts were inconsistent, too. The failure to do so constituted an abuse of discretion.

(Emphasis added.)

While everything not emphasized in the paragraph just quoted is true, the heart of appellant's argument (the part that we have emphasized) has no merit. As has been shown, at sentencing appellant did not have the right to have any of the allegedly inconsistent verdicts set aside because no objection was made prior to the discharge of the jury. Nevertheless, as to six of the reckless endangerment convictions, the trial court set the verdicts aside. That was a mistake. But the fact that a mistake was made as to six counts does not support the argument that the trial judge abused his discretion in not making the same mistake as to the three remaining reckless endangerment counts.

JUDGMENT AFFIRMED; COSTS TO BE PAID BY APPELLANT.