UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 152

September Term, 2016

TROY MCNEIL

v.

STATE OF MARYLAND

Eyler, Deborah S.,
Nazarian,
Harrell, Glenn T., Jr.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Harrell, J.

Filed: January 20, 2017

Troy McNeil, Appellant, was convicted, following a jury trial in the Circuit Court for Baltimore City, of individual counts of first-degree assault,[1] use of a firearm during the commission of a crime of violence,[2] and wearing, carrying, or transporting a handgun.[3] After merger for sentencing purposes of the latter conviction, the trial judge sentenced McNeil to incarceration for a period of twenty years (fifteen suspended) on the assault conviction and a concurrent twenty years (fifteen suspended) on the use of a firearm conviction. McNeil's appeal to this Court was timely.

He poses two questions in his brief:

I. Was the evidence sufficient to sustain the conviction for use of a firearm during the commission of a crime of violence?[4]

II. Did the trial court err in allowing the State to introduce into evidence a jail call recording that was not authenticated properly?[5]

[1] Md. Code, Crim. Law Art. (Crim. Law), § 3-202 (2012 Repl. Vol., 2016 Supp.).

[2] Md. Code, Pub. Safety Art. (Pub. Safety), § 5-101 (2011 Repl. Vol., 2016 Supp.); Crim. Law § 4-204.

[3] Crim. Law § 4-203.

[4] The State, in its brief, concedes that McNeil's challenge in this regard was preserved for appellate review.

[5] Although Md. Rule 8-411(a)(3) obliges an appellant to transcribe recordings of audio evidence for purposes of appellate review, no transcript appears to have been requested of the relevant jail call played for the jury. McNeil supplemented the record on appeal with the CD that contained the recording of the relevant jail call, but no transcription of its contents. The State has not objected. Under the circumstances of this case, we are able to consider and decide this question, based on the record "as is."

We answer respectively these questions "Yes" and "No," and accordingly affirm the judgments of the circuit court.

FACTS[6]

On 1 February 2015, Deonte Carter worked as a cook at a Ruby Tuesday restaurant on East Northern Parkway in Baltimore City. After finishing his shift at 2:00 a.m., Carter and a female coworker were accosted on the street by a masked assailant. Carter was alerted to the approach of the assailant from behind the pair when he heard the click of what he believed was a gun, a gun seen later in the malefactor's hand. He begged the masked man to allow the coworker to depart the scene. Thereafter, instead of lying on the ground as ordered, Carter charged the person, snatched off the mask, and commenced to wrestle with him for control of the gun. For exercising this initiative, Carter was rewarded with two thumps on the top of his head with the gun. Although fearing he was about to be shot also, Carter was spared further injury when a passing motorist stopped and exited his vehicle, scaring off the attacker.

Carter lost consciousness and awoke in the Emergency Room of The Johns Hopkins Hospital. He was treated for a broken nose and two gashes in his scalp. He went from the Hospital to the Northeast District precinct station of the Baltimore City Police Department. Carter described his attacker to police as McNeil. He recognized him, after defrocking the mask, because the two knew each other since 2002. Until

[6] This recitation was taken from testimony and other evidence admitted at trial, viewed in a light most favorable to the State for the most part.

shortly before the incident of 1 February 2015, Carter deemed the relationship with McNeil as a "close" one, during which they would see each other frequently and hang-out at the mall talking to girls. The closeness dissipated somewhat approximately a month before February 1 when a former girlfriend of Carter's, by whom he fathered a child, began a relationship with McNeil. According to Carter, his former girlfriend tried to foment bad relations between the two men (provoked possibly by Carter's intent to take a DNA test on February 21 to resolve doubt whether he was the child's father, a test which the ex-girlfriend opposed), which efforts Carter thought had been frustrated because the two men resolved matters between them. But that wishful thinking dissipated completely when, about mid-shift of his job on February 1, Carter received harassing calls at work from McNeil and the ex-girlfriend.

Carter identified McNeil also from a photo array shown to him by the police. He described to police (and testified consistently so at trial) the gun held by McNeil as "long," silver in color, and having a "spin barrel."[7]

Detective Anthony Forbes of the City-Wide Shootings Unit of the Baltimore City Police Department testified also at trial as a State's witness. He was the primary detective assigned to investigate Carter's mugging. He confirmed that Carter named McNeil as his assailant before the photo array was composed and shown to him. Of additional material significance was Det. Forbes' testimony about a specific telephone

[7] No gun was recovered by police from the crime scene or a later search of a dwelling associated with McNeil.

call made from jail on February 28, after McNeil was arrested and being held pending trial, by someone using the SID number assigned to McNeil. The person calling from jail inquired of the recipient of the call whether the police, who McNeil knew had executed a search warrant for premises associated with him, found "the" or "a" "bang bang." Police played pre-trial the recording of the jail call for Carter, who recognized the male voice of the person initiating the call and posing the question about a "bang bang" as McNeil's voice. Carter testified to that effect during an in limine proceeding on the second day of trial. Despite McNeil's objection to the admissibility of the CD and playing the recording for the jury, the trial judge found the recording to be admissible hearsay by a party opponent.

I.

Because disposition of McNeil's contention regarding the alleged improper authentication of the State's demonstrative evidence of the CD (State's Exhibit 4A) containing a recording of the 28 February 2015 jail telephone call may have some impact on the analysis of McNeil's sufficiency of the evidence question, we shall consider first the authentication question. McNeil maintains that the State's Exhibit 4A was not authenticated properly under Md. Rule 5-901. The State responds that the "low bar" for authentication established by the Rule (as interpreted by appellate cases) was met on this record.

Appellate review of a challenge to an authentication of evidence calls upon us to determine whether an abuse of discretion occurred in the trial court's acceptance of the

evidence. *See Dep't of Pub. Safety & Corr. Servs. v. Cole*, 342 Md. 12, 672 A.2d 1115 (1996). The exercise of discretion has been described as "a reasoned decision based on the weighing of various alternatives," which discretion is abused "where no reasonable person would take the view adopted by the trial court." *Metheny v. State*, 359 Md. 576, 604, 755 A.2d 1088, 1104 (2000) (quoting *In re Adoption/Guardianship No. 3598*, 347 Md. 295, 312, 701 A.2d 110, 118 (1997)) (emphasis removed).

At trial, defense counsel argued that a proper foundation had not been laid that the voice on the call was that of McNeil. Counsel continued that, because the State had failed to establish that it was McNeil's voice on the call, the call would not be admissible as a statement by a party opponent. Defense counsel maintained further that the State failed to authenticate the call itself, because the database containing the recorded call was owned and maintained by a third-party vendor of the State's, an entity that was not present in the person of a representative to authenticate the recording. Counsel argued finally that the State had to lay a foundation as to how the recording had been transferred "from where it is housed or stored onto" the CD.

The trial court overruled defense counsel's objections. The court found that the call constituted hearsay, but was admissible as a statement by a party opponent.

> He [Carter] testified he had heard the recording prior to taking the stand this morning and that he had heard it last week. He testified that he recognized the voice on the tape based on all of his encounters with Mr. McNeil as the voice of Mr. McNeil. The Court found his testimony to be credible and I find that the evidence is trustworthy and reliable.
>
> The final issue that the Court has to determine is whether this evidence is more probative or prejudicial to the defendant. Because the defendant was aware that whatever he said on the phone was being

> recorded the Court finds that he had – he had knowledge of the fact and he, therefore, is aware of that fact. That's why they put the sign up there. I find that the evidence is more probative than prejudicial. Therefore, I will allow the admission of the jail house call.[8]

Rule 5-901 governs the authentication of various types of evidence, including audio recordings. The possibly relevant portions of the Rule, for present purposes, are:

> (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.
> (5) *Voice Identification.* Identification of a voice, whether heard firsthand or through mechanical or electronic transmission or recording, based upon the witness having heard the voice at any time under circumstances connecting it with the alleged speaker.
> (6) *Telephone Conversation.* A telephone conversation, by evidence that a telephone call was made to the number assigned at the time to a particular person or business, if
> (A) in the case of a person, circumstances, including self-identification, show the person answering to be the one called, or
> (B) in the case of a business, the call was made to a place of business and the conversation related to business reasonably transacted over the telephone.
> * * *

[8] The trial judge ruled during a motions hearing earlier on the second day of trial that State's Exh. 4A (referring to its contents) would not be admitted as a business record (under Rule 5-902(b)) because there was no attestation or certification by a witness that it was something kept in the ordinary course.

> (9) *Process or System.* Evidence describing a process or system used to produce the proffered exhibit or testimony and showing that the process or system produces an accurate result.

The evidence, viewed in a light most favorable to the State, justified the trial judge's admission and playing for the jury of the jail call recorded on State's Exh. 4A. Although not polished testimony in a technological sense, Det. Forbes stated that he had password-protected remote access to the online electronic recordings of the State's vendor, which recorded all calls made from the jail. Granted that access and armed with the SID number assigned to McNeil, Forbes checked the online log of calls made under McNeil's SID number and listened to the content of those calls. He listened to, among other calls made under McNeil's SID number, the so-called "bang bang" call on February 28. The CD, State's Exh. 4A (a redaction made from State's Exhibit 4, which was not admitted in evidence because it contained other calls that the trial judge ruled were not admissible) is patently a recording (State's Exh. 4A) of a recording (part of State's Exh. 4) of a recording (the vendor's recording). There was no evidence or even a whiff or hint that the trail of recordings were manipulated, altered, or tampered with in such a way as to present other than the true and accurate content of the vendor's recording of the February 28 call made under McNeil's SID number. Satisfying the trial judge's earlier trepidation about a foundation linking the spoken words on State's Exh. 4A to McNeil, beyond the fact that the call was made under his SID number, Carter's testimony about his basis to recognize McNeil's voice when the recording of the February 28 call was played for him tipped the judge's determination in favor of admitting State's Exh. 4A and

allowing it to be played before the jury. This ruling strikes us as quintessentially a reasoned exercise of discretion.

As the result of evolving sophistication in electronic media, the Maryland courts' modern view of the standard by which such proffered evidence may be authenticated and received have adopted the relatively lenient standard attached to Federal Rule 901, from which Md. Rule 5-901 is derived. This is illustrated by the Court of Appeals's opinions in *Sublet v. State*, 442 Md. 632, 113 A.3d 695 (2015).

In *Sublet*, the Court of Appeals had occasion to revisit the authentication requirements for the admission of social electronic media messages sent allegedly via direct messages and public tweets on Twitter and Facebook messages. *Sublet*, 442 Md. at 637–38, 113 at 697–98. *Sublet* decided three cases in a single opinion. In Sublet's case, the creator of a Facebook page disputed that certain postings on her page (for which the State sought, during cross-examination of the creator of the Facebook page, to admit into evidence copies of certain of the postings) were authorized by her. Moreover, she stated that she gave relatively freely her password to others and had had her page "hacked" previously. The State did not produce evidence contradicting the creator's testimony in those regards.

In the second case decided in *Sublet*, *Harris v. State*, a police detective (received for testimonial purposes as an expert in analysis and interpretation of digital evidence) linked certain inculpatory Twitter messages and tweets to Harris. *Sublet*, 442 at 645–50, 113 A.3d at 702–05. In *Monge-Martinez v. State*, the State sought to introduce, through

the defendant's former girlfriend (also the victim in the case), the content of certain inculpatory Facebook messages sent to her allegedly by the defendant.

The Court, in *Sublet*, purporting to elucidate and implement *Griffin v. State*, 419 Md. 343, 19 A.3d 415 (2011) (*Sublet*, 442 Md. at 637–38, 113 A.3d at 697–98), adopted the analysis of the proper authentication standard articulated by the Federal Second Circuit in *U.S. v. Vayner*, 769 F.3d 125 (2d Cir. 2014), where Fed. Rule of Evidence 901 was interpreted and applied. *Sublet*, 442 Md. at 664, 671, 113 A.3d at 718. Our Court of Appeals stated,

> [u]nder the standard articulated in *Vayner,* the 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 or identification[.]

Sublet, 442 Md. at 666, 113 A.3d at 715 (citations and quotation marks omitted).

The *Sublet* Court continued, in pertinent part:

> Illustration of authentication techniques, according to the Second Circuit, could be derived from documents:
>
> > Some examples illustrate the point. For instance . . . where the evidence in question is a recorded call, we have said that [w]hile a mere assertion of identity by a person talking on the telephone is not in itself sufficient to authenticate that person's identity, some additional evidence, which need not fall into any set pattern, may provide the necessary foundation. . . .
>
> The Second Circuit, finally, iterated that even after evidence is authenticated, the issue of [its] ultimate reliability [is left] to the jury.

Sublet, 442 Md. at 667–68, 113 A.3d at 716 (quoting *Vayner*, 769 F.3d at 130–31) (citations, quotation marks, and footnotes omitted).

The *Vayner* Court observed that "[e]vidence may be authenticated in many ways, and as with any piece of evidence whose authenticity is in question, the 'type and quantum' of evidence necessary to authenticate a web page will always depend on context." *Sublet*, 442 Md. at 670, 113 A.3d at 718 (quoting *Vayner*, 769 F.3d at 133) (citations omitted).[9]

In sum, Maryland's modern interpretation of Rule 5-901 (derived from Federal Rule 901) gives broad gatekeeper discretion to trial judges to consider authentication of evidence in the context of the offer. The trial judge must answer the question whether the proof that the item is what the proponent claims it is sufficient to permit a reasonable juror to find in favor of authenticity or identification. It remains for the jury to decide the reliability of the admitted item.

[9] The Court majority in Sublet's case affirmed the trial court's exclusion of the proffered four pages of the asserted Facebook "conversation" between the victim and six other individuals because the victim, through whom the pages were sought to be introduced during Sublet's cross-examination of her, testified (without contradiction) that she freely gave her password to others and specifically disclaimed the accuracy of parts of the "conversation." *Sublet*, 442 Md. at 671-73, 113 A.3d at 718–19. Three members of the Court dissented in Sublet's case because they viewed the victim's overall testimony as authenticating the "conversation" as an accurate representation of what occurred, leaving for the jury to resolve reliability and conflicts. *Sublet*, 442 Md. at 678–83, 113 A.3d at 722–25. In Harris's case, a unanimous Court affirmed the trial court's decision to admit the Twitter tweets and direct messages as authenticated by the distinctive inherent and comparative characteristics of their content. *Sublet*, 442 Md. at 674–76, 113 A.3d at 719-21. Finally, in Monge-Martinez's case, a unanimous Court affirmed the admission of Monge-Martinez's remorseful Facebook messages to the victim, whom he had battered, because there was circumstantial evidence provided by the victim, as the recipient of the messages, implicating Monge-Martinez as the originator. *Sublet*, 442 Md. at 676–78, 113 A.3d at 721–22.

The trial judge here explained, in pertinent part, her ruling to admit the CD of the February 28 jail call made under McNeil's SID number:

> THE COURT: Thank you. All right, the first thing the Court needs to determine is whether these jail calls are hearsay. The Court does find that they are hearsay. The lead case on jail house telephone calls is *McClurkin v. State*, 222 Md. App. 461. In *McClurkin* this jail call is concerning co-defendants however, but nonetheless the Court – the calls were admissible against McClurkin and not Jackson and the Court ruled that the calls although they are hearsay come into the – are admissible under the hearsay exception of a statement against a party opponent and this is the statement being proffered by the State against the defendant which is his own statement[.] [T]he Court also noticed that these calls are recorded by the jail and prior to the inmates using the phones there is a sign above the phones, a very large sign that says – informs them that the phone calls may be recorded. So Mr. McNeil knew when he got on the phone that his phone call may have been recorded.
>
> The second issue the Court has to decide in admissibility of whether the call which the Court heard this morning is relevant to the charges charged against Mr. McNeil, the Court finds that it is relevant in that although he says the bang bang – or a bang bang I find that a jury could infer from the evidence that he is speaking about a weapon that may have been in his possession. So I find that the call is relevant.
>
> * * *
>
> The Court did note yesterday I'm not persuaded just because someone is saying it's the SID number and the name. However, we had a witness this morning come in to lay the foundation for the authenticity of the call and identifying the voice on the tape to be that of Mr. McNeil.
>
> As to Mr. Carter testified that he is – he's had the opportunity in the past to hear Mr. McNeil's voice. He's testified that he had heard the voice a lot. He testified that he was familiar with the voice because they had hung out as friends between 2003 and 2015 right up until this incident is what his testimony was.
>
> He testified he had heard the recording prior to taking the stand this morning and that he had heard it last week. He testified that he recognized the voice on the tape based on all of his encounters with Mr. McNeil as the voice of Mr. McNeil. The Court found his testimony to be credible and I find that the evidence is trustworthy and reliable.

Considering Carter's and Detective Forbes's testimonies, we conclude that the trial judge had a reasoned basis to admit State's Exh. 4A and allow it to be played before the jury. She did not abuse her discretion.

II.

McNeil's remaining contention is that the evidence was insufficient to support his conviction for the use of a firearm in the commission of a crime of violence. The trial judge denied McNeil's motions for judgment of acquittal as to this count of the indictment, explaining:

> [a]s to count[] . . . three . . . the Court finds after reviewing the evidence in a light most favorable to the State that a rational trier of fact . . . could find the essential elements of the crimes charged beyond a reasonable doubt. The Court also finds that a rational trier of fact could draw various inferences from the evidence and find Mr. McNeil guilty of all charges beyond a reasonable doubt.

On appeal, McNeil argues that, in the face of Carter's testimony that McNeil possessed a handgun (silver in color, long, and with a spin barrel) in the commission of the crime and bludgeoned him with it,[10]

> [t]here was absolutely no testimony that Carter had any knowledge of guns. Thus, there was no evidence offered by the State to prove that the object Carter referred to as "a gun" was, in fact, a firearm as the term is statutorily defined. No evidence was offered to prove that the object expelled, was designed to expel, or could be readily converted to expel a projectile by the

[10] In addition, Carter testified that he heard the click of a gun when McNeil accosted initially him and his co-worker. The jail call made by McNeil on February 28 permitted an inference, based on his description of a "bang bang," that he possessed a handgun.

> action of an explosive or was a frame or receiver of such weapon. No weapon was ever recovered.

Given these deficiencies, McNeil continues, the State failed to prove that the object met the statutory definition of a firearm in Crim. Law § 4-204(a).

Section 4-204(a) of the Crim. Law Article defines "firearm" as:

> (a)(1) In this section, "firearm" means:
> (i) a weapon that expels, is designed to expel, or may readily be converted to expel a projectile by the action of an explosive; or
> (ii) the frame or receiver of such a weapon.
> (2) "Firearm" includes an antique firearm, handgun, rifle, shotgun, short-barreled rifle, short-barreled shotgun, starter gun, or any other firearm, whether loaded or unloaded.
> (b) A person may not use a firearm in the commission of a crime of violence, as defined in § 5-101 of the Public Safety Article, or any felony, whether the firearm is operable or inoperable at the time of the crime.

Section 5-101(h) of the Public Safety Article of the Md. Code is to like effect as Crim. Law § 4-204(a)(1).

An appellate court, reviewing for evidentiary sufficiency, must determine "whether 'any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt' when the evidence is presented in the light most favorable to the State." *Bible v. State*, 411 Md. 138, 156, 982 A.2d 348, 358 (2009) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). It is required to "'give deference to all reasonable inferences [that] the fact-finder draws, regardless of whether [the appellate court] would have chosen a different reasonable inference.'" *Bible*, 411 Md. at 156, 982 A.2d at 358 (quoting *State v. Suddith*, 379 Md. 425, 430, 842 A.2d 716, 719 (2004)).

"A conviction can rest on circumstantial evidence alone." *Taylor v. State*, 346 Md. 452, 458, 697 A.2d 462, 465 (1997). "By definition, circumstantial evidence requires the trier of fact to make inferences, but those inferences must have a sounder basis than 'speculation or conjecture.'" *Bible*, 411 Md. at 157, 982 A.2d at 359 (quoting *Taylor*, 346 Md. at 458, 697 A.2d at 465). "'[C]ircumstantial evidence which merely arouses suspicion or leaves room for conjecture is obviously insufficient.'" *Taylor*, 346 Md. at 458, 697 A.2d at 465 (quoting 1 UNDERHILL, CRIMINAL EVIDENCE § 17, at 29 (6th ed. 1973)).

In *Brown v. State*, 182 Md. App. 138, 957 A.2d 654 (2008), the Court of Special Appeals stated, in its analysis of a sufficiency argument regarding a charge of use of a firearm in a crime of violence, that

> [a] challenge to whether a weapon meets the statutory definition of a handgun most frequently arises in cases in which the weapon in question is not recovered and thus not produced at trial. Nevertheless, tangible evidence in the form of the weapon is not necessary to sustain a conviction; the weapon's identity as a handgun can be established by testimony or by inference.
>
> * * *
>
> The cases also indicate that, in the absence of contradictory evidence, the prosecution is not required to introduce specific evidence that the weapon was a firearm; was operable; or was not a toy.

Brown, 182 Md. App. at 166–67, 957 A.2d at 670–71 (citations and footnotes omitted).

Thus, proof of operability of the firearm is not an element for obtaining a conviction under § 4-204. *See* subsection (b) ("A person may not use a firearm . . . whether the firearm is operable or inoperable at the time of the crime."); *see also York v. State*, 56 Md. App. 222, 467 A.2d 552 (1983). The failure to recover and produce at trial

the object described as a gun used during the crime is not an impediment necessarily to a conviction, provided the circumstantial evidence adduced would enable a fact-finder to infer reasonably the elements of § 4-204. *Couplin v. State*, 37 Md. App. 567, 378 A.2d 197 (1977), *cert denied,* 281 Md. 735 (1978), *overruled in part on other grounds by State v. Ferrell*, 313 Md. 291, 545 A.2d 653 (1988).

The relevant evidence in the present case, although somewhat thin gruel, is nourishing enough to feed a reasonable jury to draw an inference that a firearm was used in the commission of McNeil's assault on Carter on 1 February 2015. Although not indicative directly that McNeil possessed a firearm on February 1, his jail call made on February 28 permitted a reasonable inference that he possessed a firearm (a "bang bang," if you will) at that time and at some point earlier. Carter's description of the handgun wielded by McNeil during the assault permitted the inference that, on 1 February 2015, the gun used was a revolver (had a spin barrel and made a clicking noise that indicated cocking the weapon). Embellishing these descriptions was that the handgun was also silver in color and was long, characteristics consistent with a handgun firearm (as opposed to a shovel, baseball bat, or other, more traditional bludgeoning object). We conclude that McNeil's conviction under § 4-204 was supported by sufficient circumstantial evidence.

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