Circuit Court for Baltimore City
Case No. 115253014

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1400

September Term, 2016

ANDRE MIXON

v.

STATE OF MARYLAND

Eyler, Deborah S.,
Graeff,
Alpert, Paul E.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Alpert, J.

Filed: October 27, 2017

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

Andre Mixon, appellant, was convicted by a jury sitting in the Circuit Court for Baltimore City of first-degree premeditated murder and use of a firearm in the commission of a felony or a crime of violence. He was sentenced to a total of life imprisonment plus ten years. Appellant raises two questions on appeal, which we have slightly rephrased:

I. Did the trial court err when it admitted into evidence four telephone calls because they were allegedly not properly authenticated?

II. Did the trial court err in denying appellant's motion for judgment of acquittal?

For the reasons that follow, we shall affirm.

FACTS

Around 9:00 p.m. on July 15, 2013, Montae Higgins was shot multiple times and killed near 200 Diener Place in Baltimore City. Eyewitnesses to the shooting claimed they did not see the shooter. With no leads to the shooter, the case became cold until the police discovered several recorded telephone calls shortly after the murder between appellant and his cousin, Darrell Gwaltney. At trial, the State argued that appellant was the shooter, relying heavily on the telephone calls coupled with the testimony of several Baltimore City police officers; an expert in cellular analysis and recovery; two eyewitnesses as to how the shooting occurred; and Mecca Lee, appellant's girlfriend. The defense's theory was appellant did not shoot Higgins. The defense presented no testimonial evidence. Viewing the evidence in the light most favorable to the State, the following was elicited at appellant's trial.

At 8:59 p.m. on July 15, 2013, the police received a call for shots fired near 200 Diener Place, a residential area where the community was described as "tight-knit." The police arrived a minute later and found a crowd of 50 or so people milling about and a man lying unresponsive on the ground with bullet wounds. The police recovered three 380-caliber cartridge casings. The man, later identified as Montae Higgins, died on the scene. A subsequent autopsy showed that Higgins suffered five gunshot wounds: one to his chest, three to his back, and one to his wrist. The toxicology report tested negative for both alcohol and drugs.

Jasmine Hussy and her cousin, Diamond Thomas, witnessed the shooting. Both had known Higgins only for a few days -- he had apparently slept at Hussy's home the night before the shooting. The cousins testified that they, Higgins, and two other female friends were hanging out at a playground near where Hussy lived when Higgins was shot. According to Hussy, she was standing next to Higgins when "somebody just came up on us and I just blanked out." She claimed not to have seen the shooter. Thomas likewise testified that her cousin and Higgins were standing next to each other when she turned and saw Higgins "getting shot up in his back[.]" She also did not know who shot Higgins but described the shooter as tall, thin, and wearing all black. When she spoke to the police after the shooting, she told them that she did not want to make an identification.

Mecca Lee, appellant's live-in girlfriend of eight years, described appellant and Higgins as "[r]eal close." Higgins lived with her and appellant for about a year and a half before the shooting, but in May of 2013, about two months before the shooting, Higgins was incarcerated, and she and appellant moved to a place closer to downtown. When

Higgins was released from jail three days before the shooting, he did not move back in with them. When she was interviewed by the police, she gave appellant's cell phone number as 410-402-0724, the targeted phone number. She told the police that she "got [] Andre a phone in [her] name[,]" adding that they both paid the bill.

Ashley Davis, Higgins' younger sister, likewise testified that her brother and appellant were very close friends – her brother referred to appellant as his brother. She testified that her brother always kept his hair short, that he was always getting his hair cut. She testified, and phone records for the targeted phone were admitted into evidence showing, that she called appellant's cell phone the day after the murder. A few days later, she texted several of his friends, including appellant, asking them to be pallbearers. Appellant never responded, although the other friends responded back. Two vigils were held for her brother – one in the neighborhood where he was killed and another in the neighborhood where they grew up. Davis attended the former; she did not see appellant there.

An expert in cellular analysis and recovery testified as to the location of appellant's cell phone between 7:09 p.m. and 10:08 p.m. on the night of the murder based on the 53 calls made to or from appellant' cell phone during that time and the cellular sites to which the phone connected. From 7:09 p.m. to 8:59 p.m., appellant's cell phone connected 35 times to a cellular site at 200 Diener Place, where the murder occurred. From 8:59 p.m. to 9:01 p.m., appellant's cell phone connected once to a cellular site a few blocks north of Diener Place. From 9:01 p.m. to 9:14 p.m., appellant's cell phone connected five times to three different cellular sites over several miles, moving south and then north. From 9:14

p.m. to 9:39 p.m., appellant's cell phone connected five times to three different cellular sites over several miles, moving north. From 9:39 p.m. to 10:08 p.m., appellant's cell phone connected twelve times to five different cellular sites clustered around the area where appellant lived with Lee. The expert opined that the phone was most likely in a car between 9:01 p.m. and 9:39 p.m. because of the large distance between the different cellular sites to which the phone connected. He further opined that appellant's cell phone was most likely stationary between 9:39 p.m. and 10:08 p.m. because the cellular sites to which it connected were clustered around a small area.

Pursuant to a subpoena, the police obtained recordings of jail calls made between July 1, and July 31, 2013, from the SID account of Darrell Gwaltney, appellant's cousin, to appellant's cell phone. During this time period, there were 36 calls between them. Four of the calls were recorded and played for the jury. We shall relate parts of the calls, along with the State's closing argument regarding the relevance of their content.

The first recording was roughly 13 minutes long and occurred at 9:01 p.m. on July 15, only a few minutes after the murder. Gwaltney called appellant and the following was recorded:

> Recording: This call will be recorded and monitored. Please enter – inmate at a Maryland correctional facility. This call will be recorded and monitored. To hear the cost of this call, press nine now. To accept this call, press zero now. For customer assistance – thank you for using Global Tel Link.
>
> [APPELLANT]: (Indiscernible)
>
> [GWALTNEY]: Yeah.

> [APPELLANT]: Yep, I hollered at his bitch ass straight like that. You heard me?
>
> [GWALTNEY]: Yeah, yo.
>
> [APPELLANT]: Yeah, I hollered at him.
>
> [GWALTNEY]: Oh, aight. Like what, what, was he cool or, you know what I mean, was it – is it over with?
>
> [APPELLANT]: I think it was over with.
>
> [GWALTNEY]: Oh, aight.
>
> [APPELLANT]: He's gone, so he's gone (indiscernible)[.]

The State argued that there were no introductory pleasantries between the two men because they both knew who they were talking about, and when the call connected appellant immediately told Gwaltney in slang that he had murdered Higgins because it had just occurred and he needed to "get it off his chest." The State argued that when Gwaltney asked if it is over, appellant responded, "I think" it is, because, although he shot Higgins multiple times, he fled the scene and did not know if Higgins was dead. The recording continued:

> [APPELLANT]: I'm right – I'm about to pull up to my shit in one second.
>
> [APPELLANT]: My fuckin' window man, keep trying to fix my window, right?
>
> [GWALTNEY]: Oh, it's fixed?
>
> [APPELLANT]: Bitch keep – man, bitch keep coming down though, man. He ain't even fix it all the way, man. Bitch keep coming down.
>
> [GWALTNEY]: It might be off track. It might be off track.

The State argued that this portion of the call showed that appellant was in his car driving, which was corroborated by the testimony of the cellular site expert that the phone was in a car during this time. The recording continued:

> [GWALTNEY]: Hey, he ain't see you, did he?
>
> [APPELLANT]: Huh?
>
> [GWALTNEY]: He ain't even see you?
>
> [APPELLANT]: Fuck no, bitch ass nigga, hell no. Until I – until I – what's his name, seen him up close and personal, I was like, what's up yo? (Indiscernible) what's up? I'm like –

The State argued that appellant was talking about the shooting and that he had surprised Higgins. The recording continued:

> [GWALTNEY]: Where you at now, in the house?
>
> [APPELLANT]: Yeah.

The State explained that appellant's statement that he had arrived home was corroborated by the cellular site data showing that appellant's phone was connecting to cellular sites clustered around the home where he lived with his girlfriend. The recording continued:

> [GWALTNEY]: You gotta be careful, man.
>
> [APPELLANT]: I'm minding' my Ps and Qs, buddy, straight up. Bitch ass (indiscernible).

The State argued that Gwaltney was warning appellant to "be cool" and to not "make any moves." The recording continued:

> [GWALTNEY]: Yo, man. That was – that's – that was his dumbness.
>
> [APPELLANT]: Decision.

> [GWALTNEY]: Yeah.
>
> [APPELLANT]: That was his decision. (Indiscernible) thinkin' yo slick as shit, yo. You shoulda seen him, yo, thinking he all was slick. Had a fresh lil haircut and all that sitting out talking to a little bitty.
>
> [GWALTNEY]: Huh?
>
> [APPELLANT]: Sittin' around talking to the broads.

Although there was no evidence of a motive, the State argued that this part of the conversation suggested that Higgins had done something appellant had not liked. The State argued that the conversation about the haircut corroborated Higgins's sister's testimony that Higgins always kept his hair short. Additionally, the State argued that the conversation corroborated Hussy's and Thomas's testimony that Higgins was standing outside with four women and talking to Hussy when he was shot. The recording continued:

> [APPELLANT]: Yeah, it's stuck, stuck, it's stuck back, know what I'm talking about?
>
> [GWALTNEY]: Stuck?
>
> [APPELLANT]: Yeah, it's stuck back.
>
> [GWALTNEY]: You gotta take the thing out, the – gotta take the what's a name out.
>
> [APPELLANT]: I did it. I just did it.
>
> [GWALTNEY]: What I'm talking about when I say what's a name?
>
> [APPELLANT]: It came out from the bottom.
>
> [GWALTNEY]: Huh?
>
> [APPELLANT]: Come out from the bottom.
>
> [GWALTNEY]: Yeah.
>
> [APPELLANT]: Yeah.

> [GWALTNEY]: Now –
>
> [APPELLANT]: There it go, there it go, there it go, you heard me?
>
> [APPELLANT]: You heard me?
>
> [GWALTNEY]: Yeah.
>
> [APPELLANT]: Yo, it's like 380, it's like 380. You heard me? You know where I can get some of them? You don't know nobody?
>
> [GWALTNEY]: Tryin' to think, Man.

The State argued that appellant was talking about the fact that the magazine on his gun was stuck and he was asking Gwaltney what to do. Appellant then asked Gwaltney where he could obtain .380 ammunition, which was the caliber of casings found at the crime scene. The recording continued:

> [GWALTNEY]: Man –
>
> [APPELLANT]: Huh?
>
> [GWALTNEY]: Did you up close and personal?
>
> [APPELLANT]: Up close, man. Yo, when I told you I seen his face and I said what's up.
>
> [GWALTNEY]: Like really.
>
> [APPELLANT]: That's why I told you I think it was a done dotta, 'cause the one, the one that was front to front (indiscernible).
>
> [GWALTNEY]: Who is that?
>
> [APPELLANT]: Mecca.
>
> [GWALTNEY]: Oh.
>
> [APPELLANT]: Little Mecca.
>
> [GWALTNEY]: The one was front to front what?

[APPELLANT]: The one up front was right there, right there, to the – what you got tatted on your front (indiscernible)?

[GWALTNEY]: Where? On my arm?

[APPELLANT]: No, like your chest.

[GWALTNEY]: Oh yeah.

[APPELLANT]: You heard me?

[GWALTNEY]: Yeah.

[APPELLANT]: (Indiscernible).

[GWALTNEY]: Aight.

[APPELLANT]: Then it was really uh, back motion after that.

The State argues that this corroborated the autopsy report that appellant was shot once in the chest and three times in the back. Additionally, because appellant does not know if Higgins is dead, he again says he "think[s]" it was a done deal. Appellant then stated that the background noise on the phone is from "Mecca", his girlfriend.

[GWALTNEY]: Like, you going back outside?

[APPELLANT]: Nah, I'm chillin'.

The State argued that this exchange again corroborated the cellular activity showing that appellant's cell phone was in a car shortly after the murder but was now stationary because he was at the home he shared with Mecca.

The second call lasted about six minutes and occurred the next day around 11:20 a.m.:

[GWALTNEY]: Yo.

[APPELLANT]: What's up?

[GWALTNEY]: Yeah.

[APPELLANT]: Sup, brotha?

[GWALTNEY]: What's up? What happened?

[APPELLANT]: What you mean?

[GWALTNEY]: Ain't hear nothing?

[APPELLANT]: I don't remember. I'm hot as shit, yo. I'm ready to go to Aunt Tina house.

[GWALTNEY]: Who?

[APPELLANT]: Aunt Tina house.

[APPELLANT]: (Indiscernible) you feel me?

[GWALTNEY]: What?

[APPELLANT]: (Indiscernible).

[GWALTNEY]: Dog, your dog?

[APPELLANT]: Hell yeah, yo. They say yo, they say that was a done dotta, yo.

[GWALTNEY]: I just asked you.

[APPELLANT]: I know. I didn't wanna talk in front of Mecca. She too nosy, yo.

[GWALTNEY]: Aight.

[APPELLANT]: She nosy, brotha. (Indiscernible) that was a done dotta. Yo's peoples called my phone.

* * *

[GWALTNEY]: Hey yo, who called you?

[APPELLANT]: What, and told me?

[GWALTNEY]: Yeah.

[APPELLANT]: I mean, the sister called and told me.

[GWALTNEY]: Oh, aight.

[APPELLANT]: She callin' me 'cause I thought you was his closest friend. I'm like – I'm like, yeah, that's crazy man.

[GWALTNEY]: You must be doing crazy shit, man.

[APPELLANT]: (Indiscernible) Instagram, a couple people, a couple people like man, rest in peace, Tae.

The State argued that appellant ignored Gwaltney's initial question because Mecca, his girlfriend, was present, and once she was no longer present he spoke more openly, saying that Higgins' sister called him and told him about the murder, which again was corroborated by the phone records to appellant's cell phone. The State argued that the call confirmed that appellant had been talking about the murder of Montae Higgins, whom he referred to as "Tae."

The third call lasted about two minutes and was recorded two days after the murder, on September 17 around 1:30 p.m.:

[GWALTNEY}: (Indiscernible) situation.

[APPELLANT]: Yeah, hell, yeah.

[GWALTNEY]: What?

[APPELLANT]: Hell, yeah, done dotta.

[GWALTNEY]: Oh, aight.

[APPELLANT]: Mothafuckin' – listen, his sister text – sent a text message to my phone. Huh? Hell no. Where at? Hey, yo.

[GWALTNEY]: Yeah.

> [APPELLANT]: Yeah. His sister sent a text message on my phone talking about a candlelight, candlelight vigil.
>
> [GWALTNEY]: Ahh.
>
> [APPELLANT]: Askin' me talking about – then she hit me with the I want you to be his pall burier (phonetic), you know what I'm talking about?
>
> [GWALTNEY]: Yeah.
>
> [APPELLANT]: She like I want you to be his pall burier (phonetic), you know what I'm saying? I'm like damn. I probably don't even go.

The State argued that appellant now knows that Higgins is dead and the call confirmed Higgins sister's testimony that she texted appellant and asked him to be a pall bearer.

The fourth and final recorded call played for the jury was about three minutes long and occurred about fifteen minutes later:

> [GWALTNEY]: I ain't gonna say nothin'.
>
> [UNKNOWN FEMALE]: Yeah, they said there's a candlelight vigil tonight.
>
> [GWALTNEY]: You going?
>
> [APPELLANT]: Hell no. (Indiscernible).
>
> [GWALTNEY]: Yeah.
>
> [APPELLANT]: (Indiscernible).
>
> [GWALTNEY]: Hell, yeah, this is – yeah. Yeah, man, go ahead and – yeah. Hey, you heard me?
>
> [APELLANT]: Yeah.
>
> [GWALTNEY]: Yo, go ahead and – know what I mean, put that situation off.
>
> [APPELLANT]: Nah, man.
>
> [GWALTNEY]: All the way through, you heard me.

> [APPELLANT]: Nah.
>
> [GWALTNEY]: All the way through, go ahead, know what I mean, yeah, go ahead all the way through, go ahead and, yeah.
>
> * * *
>
> [APPELLANT]: (Indiscernible) the one you talking about?
>
> [GWALTNEY]: All the way through, go ahead and pull that off all the way through.
>
> [APPELLANT]: Oh, all right, all right.
>
> [GWALTNEY]: What she said, what she asked you to do?
>
> [APPELLANT]: Yeah.
>
> [GWALTNEY]: Yeah, go ahead, yeah, go ahead.

The State argued that Gwaltney was giving appellant advice to attend Higgins' candlelight vigil so as not to raise suspicion. The call continued:

> [GWALTNEY]: Where it gonna be at?
>
> [APPELLANT]: What the funeral?
>
> [GWALTNEY]: Nah.
>
> [APPELLANT]: The candlelight?
>
> [GWALTNEY]: Yeah.
>
> [APPELLANT]: They said it's up on (indiscernible) right there where (indiscernible) at, where he used to live at, remember?

The State argued that the conversation corroborated what Higgins' sister testified to – that Higgins' friends held a candlelight vigil in the neighborhood where they were raised.

We will provide additional facts where necessary in our discussion below.

DISCUSSION

I.

Appellant argues that the trial court abused its discretion when it admitted into evidence the four recorded jails calls because the calls were not authenticated. The State responds that the trial court did not err based on the substantial corroborating circumstantial evidence surrounding the calls establishing appellant as one of the voices on the call.

Md. Rule 5-901(a), governing the authentication of evidence, provides that authentication, 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 Rule sets forth a non-exhaustive list of ways evidence may be authenticated, including:

> (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.
>
> * * *
>
> (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.

Md. Rule 5-901(b).

In *Knoedler v. State*, 69 Md. App. 764, 773 (1987), we held that telephone conversations are admissible if direct or circumstantial evidence is presented "to establish the identity of the other person to the conversation." (quotation marks and citations omitted). We stated that "[s]uch authentication can be found either from evidence that the witness was familiar with and recognized the voice of the alleged caller, or, in the absence of such recognition, 'sundry circumstances (including other admissions and the like) may suffice.'" *Id*. (quoting 7 *Wigmore on Evidence*, § 2155(1) (1978)). "[S]undry circumstances" can include a broad array of situations. In Maryland, the appellate courts have held that when the identity of a speaker in a telephone call is in question, authentication may be established by, among other things: testimony of a witness who recognizes the voice on the recording, *Donati v. State*, 215 Md. App. 686, 740-41 (defendant's telephone call properly authenticated by, among others, a police officer who had spoken with the defendant twice for a total of about 20 minutes), *cert. denied*, 438 Md. 143 (2014); the content of the recording itself may corroborate the identity of the speaker, *Basoff v. State*, 208 Md. 643, 649 (1956)(telephone conversation corroborated other facts

elicited at trial to show identity); or the calls may be authenticated by the circumstances of the call or subsequent behavior of the participants reflecting awareness of the call, *Ford v. State*, 11 Md. App. 654, 657 (1971)(a telephone conversation was properly authenticated and admitted into evidence where in the call the parties discussed mutual acquaintances in an area where they had once met briefly, and the purchase and quality of illicit drugs, which was the subject of the prosecution).

"[T]he burden of proof for authentication is slight, and the court need not find that the evidence is necessarily what the proponent claims, but only that there is sufficient evidence that the *jury* ultimately might do so." *Johnson v. State*, 228 Md. App. 27, 59 (quotation marks and citation omitted)(emphasis in original), *cert. denied*, 450 Md. 120 (2016). As explained in 2 McCormick on Evidence § 227 (John W. Strong ed.1999):

> [T]he authenticity of a writing or statement is not a question of the application of a technical rule of evidence. It goes to genuineness and conditional relevance, as the jury can readily understand. Thus, if a prima facie showing is made, the writing or statement comes in, and the ultimate question of authenticity is left to the jury.

See Darling v. State, 232 Md. App. 430, 455, *cert. denied*, 454 Md. 655 (2017). "Thus, once a *prima facie* showing of authenticity is made, the ultimate question of authenticity is left to the jury." *Id*. at 456. Professor Lynn McLain has written:

> The item will be properly authenticated if its proponent has offered foundation evidence that the judge finds would be sufficient to support a finding by a reasonable trier of fact that the item is what it is purported to be. . . . In a jury trial, the judge need not be personally satisfied, by even a preponderance of the evidence, that the proffered item is authentic; the judge must find the authentication requirement met, if a reasonable jury could find the evidence to be what its proponent claims it to be.

Maryland Evidence § 901:1, at 476-77 (2001) (footnotes omitted).

We are mindful that we review a trial court's decision regarding authenticity for an abuse of discretion. *Miller v. State*, 421 Md. 609, 622 (2011). *See also Gerald v. State*, 137 Md. App. 295, 304–05("A trial judge's decision to admit or exclude evidence [based on authenticity] will not be set aside absent an abuse of discretion.")(citations omitted), *cert. denied*, 364 Md. 462 (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 (quotation marks and citations omitted), *cert. denied*, 362 Md. 188 (2000). "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*.

We are persuaded that appellant's voice in the telephone calls was properly authenticated. Mecca Lee, appellant's live-in girlfriend of eight years, testified that she bought the targeted cell phone for appellant and gave the police the targeted phone number as appellant's phone number. Even though she explained that she placed the targeted phone number in her name and they both paid for the phone, under the slight burden of proof required for authentication, we are persuaded that the trial court could find that the cell phone belonged to appellant, and therefore, it was his voice on the calls. Even if we viewed Lee's testimony under the strictest of lenses and concluded that she and appellant shared the phone, there was no suggestion that a woman was either the caller or receiver of the four recorded conversations played for the jury.[1]

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[1] Although it was not necessary to authenticate the other voice on the line, a corporal with the Department of Public Safety and Correctional Services in the Intelligence Division (continued)

Even if the above facts alone did not meet the "slight" burden of proof necessary to authenticate appellant's voice on the call, there was sufficient circumstantial evidence corroborating the external and internal details of the calls to authenticate his voice, including details about: how close and how many times appellant shot Higgin; a discussion about ammunition for a .380, which was the same sized gun used to kill Higgins; who was with Higgins and what he was doing immediately before he was killed; details about appellant's telephone conversations with Higgins' sister regarding Higgins' murder, the candlelight vigils, and her asking him to be a pall bearer; referring twice in the calls to his girlfriend Mecca; evidence that appellant's cousin initiated the calls; and cellular site data breaking down where appellant's cell phone was located around the time of the murder, which was consistent with appellant's reference to his location. We are also aware that in listening to the calls, one can pick up volume, tone, and nuance in voice, as well as pauses and other nonverbal evidence that weigh in the decision of authentication for the trial court. Certainly the authentication evidence could have been stronger had the State called a

(continued)
testified about the phone system in prison, how inmates make telephone calls, and how he complied with the subpoena in this case to download the four prison calls to a CD. He explained that to place a call an inmate must say his first and last name and enter his personal four-digit SID number. He testified that the downloaded calls were made from Gwaltney's SID account to the targeted phone number. Although on cross-examination he acknowledged that inmates sometimes use other inmate's SID number to make telephone calls, the facts presented were sufficient to authenticate the other voice on the jail calls belonged to Gwaltney. *See Gerald v. State*, 137 Md. App. at 303-05 (even though a letter could have been authored by someone other than appellant, this was not grounds to bar its admission where the trial court found sufficient circumstantial evidence that appellant was the author).

witness to identify appellant's voice on the calls, however, as related above, having a person identify a voice is not the only way to authenticate a call. Under the circumstances presented, we are persuaded that the calls were sufficiently authenticated, and we find no error in the trial court's decision to overrule the defense's objections to the admissibility of the telephone conversations.

II.

Appellant argues that the evidence was insufficient to sustain his convictions. Specifically, he argues that his first-degree murder conviction must be reversed because there was insufficient evidence to prove that the killing was "willful, deliberate, and premeditated." He then argues that we must reverse his handgun conviction because without the murder conviction there was insufficient evidence that he committed a felony or crime of violence while using a handgun. We agree with the State that appellant's arguments are not preserved and are, in any event, meritless.

Sufficiency of the evidence

Md. Rule 4-324(a) provides, in pertinent part: "A defendant may move for judgment of acquittal . . . at the close of the evidence offered by the State and, in a jury trial, at the close of all the evidence. *The defendant shall state with particularity all reasons why the motion should be granted*." (emphasis added). The rule is mandatory. *Bates v. State*, 127 Md. App. 678, 691 (citing *State v. Lyles*, 308 Md. 129, 135 (1986)), *cert. denied*, 356 Md. 635 (1999). Md. Rule 8-131(a) states: "Ordinarily, the appellate court will not decide any [] issue unless it plainly appears by the record to have been raised in or decided by the trial

court[.]" Rule 8-131(a) requires a timely objection at trial or the issue will be considered waived and cannot be raised on appeal. *Brice v. State*, 225 Md. App. 666, 678 (2015) (citations omitted), *cert. denied*, 447 Md. 298 (2016).

After the State rested, appellant moved for judgment of acquittal focusing exclusively on the jail calls and the State's purported failure to identify and establish appellant's voice on the calls. The trial court denied the motion. After the defense rested, appellant renewed his motion by stating that he was incorporating the same arguments that were made earlier. The trial court again denied the motion. Because the arguments appellant raised below, *i.e.*, authentication and identity, are different than the arguments he raises on appeal, *i.e.*, whether the murder was willful, deliberate and premeditated, he has not preserved his appellate arguments for our review. *See Berry v. State*, 155 Md. App. 144, 180(because appellant raised different issues in his motion for judgment of acquittal before the trial court than he raised on appeal, he has failed to preserve the issue he raised on appeal), *cert. denied*, 381 Md. 674 (2004). Nonetheless, even if appellant had preserved his arguments for our review, we would have found them without merit.

Standard of review

The standard for appellate review of evidentiary sufficiency is "'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.'" *Taylor v. State*, 346 Md. 452, 457 (1997) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). "That standard applies to all criminal cases, regardless of whether the conviction

rests upon direct evidence, a mixture of direct and circumstantial, or circumstantial evidence alone." *Smith v. State*, 415 Md. 174, 185 (2010) (citation omitted). "Where it is reasonable for a trier of fact to make an inference, we must let them do so, as the question is not whether the [trier of fact] could have made other inferences from the evidence or even refused to draw any inference, but whether the inference [it] did make was supported by the evidence." *State v. Suddith*, 379 Md. 425, 447 (2004) (quotation marks and citation omitted)(brackets in *Suddith*). This is because weighing "the credibility of witnesses and resolving conflicts in the evidence are matters entrusted to the sound discretion of the trier of fact." *In re Heather B.*, 369 Md. 257, 270 (2002) (quotation marks and citations omitted). Thus, "the limited question before an appellate court is not whether the evidence *should have or probably would have* persuaded the majority of fact finders but only whether it *possibly could have* persuaded *any* rational fact finder." *Allen v. State*, 158 Md. App. 194, 249 (2004) (quotation marks and citation omitted).

First-degree murder conviction

> "For a killing to be 'wilful' there must be a specific purpose and intent to kill; to be 'deliberate' there must be a full and conscious knowledge of the purpose to kill; and to be 'premeditated' the design to kill must have preceded the killing by an appreciable length of time, that is, time enough to be deliberate. It is unnecessary that the deliberation or premeditation shall have existed for any particular length of time."

Wagner v. State, 160 Md. App. 531, 564-65 (2005) (quoting *State v. Raines*, 326 Md. 582, 589, *cert. denied*, 506 U.S. 1029 (1992) (quoting *Tichnell v. State*, 287 Md. 695, 717-18 (1980))). Because intent is "'subjective and, without the cooperation of the accused, cannot be directly and objectively proven, its presence must be shown by'" facts and inferences

from those facts. *Buck v. State*, 181 Md. App. 585, 641 (2008) (quoting *Raines*, 326 Md. at 591 (quoting *State v. Earp*, 319 Md. 156, 167 (1990))). It is well–established that "'an intent to kill may be inferred from the use of a deadly weapon directed at a vital part of the human body.'" *Id*. at 642 (quoting *Smallwood v. State*, 343 Md. 97, 104 (quoting *Raines*, 326 Md. at 591)). This is because "[i]t is permissible to infer that one intends the natural and probable consequences of his act[ions]." *Id.* (quotation marks and citations omitted)(some brackets found in *Smallwood*). Moreover, a jury may find sufficient evidence of premeditation based on the time it took the shooter to draw, aim, and fire his firearm. *Ferrell v. State*, 304 Md. 679, 683–84 (1985) (citations omitted).

We can quickly dispose of appellant's argument. Although appellant denied making the calls, whether it was his voice on the calls was ultimately a matter for the jury to decide. A rational juror could infer from the jail calls, the autopsy report, and other circumstantial evidence that appellant walked up to Higgins and killed him by shooting him once in the chest and three times in the back. Accordingly, viewing the evidence presented at trial in the light most favorable to the prevailing party, the State, a rational juror could find that appellant had acted willfully, deliberately, and with premeditation.

Use of a handgun conviction

Appellant argues that there was insufficient evidence to sustain his conviction for use of a handgun during the commission of a felony or a crime of violence because the State failed to prove that he murdered Higgins – that he had committed a felony or crime of violence while using a handgun. This argument is meritless for the reasons we stated

above that, under the facts presented, a rational juror could conclude that appellant committed first-degree murder when he shot Higgins.

JUDGMENTS AFFIRMED.

COSTS TO BE PAID BY APPELLANT.