Circuit Court for Wicomico County
Case No. 22-K-16-000004

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1973

September Term, 2016

JEFFREY JONES

v.

STATE OF MARYLAND

Berger,
Nazarian,
Arthur,

JJ.

Opinion by Arthur, J.

Filed: January 9, 2018

After a jury trial in the Circuit Court for Wicomico County, appellant Jeffrey Jones was convicted of attempted second-degree murder, first-degree assault, the use of a firearm in the commission of a crime of violence, possession with intent to distribute marijuana, possession with intent to distribute cocaine, possession of a firearm by a prohibited person, second-degree assault, reckless endangerment, possession of cocaine, and possession of methadone. He was sentenced to incarceration for 15 years for attempted second-degree murder, a consecutive term of 10 years for the use of a firearm in the commission of a crime of violence, and a consecutive term of 10 years for possession with intent to distribute cocaine. The court either merged the remaining convictions or declined to impose a sentence for them. This timely appeal followed.

QUESTIONS PRESENTED

Jones presents the following questions:

> I. Is the evidence insufficient to sustain the convictions for attempted second-degree murder, first-degree assault, second-degree assault, reckless endangerment, and use of a firearm in the commission of a crime of violence?
>
> II. Did the trial court err in refusing to instruct the jury on voluntary intoxication?
>
> III. Did the trial court err in denying the motion to suppress DNA evidence?
>
> IV. Did the trial court err in admitting evidence of jail calls purportedly made by Jones?
>
> V. Did the trial court err in admitting State's Exhibit 21, a petition for protective order containing a statement written by [Tyzanna] Cottman?

For the reasons set forth below, we shall affirm.

FACTUAL BACKGROUND

Shortly after midnight on Sunday, November 15, 2015, Salisbury Police Officer Donna Dubas was dispatched to a residence in response to a 911 call, in which the caller reported that Jeffrey Jones had shot her. When Officer Dubas arrived, Tyzanna Cottman opened the door. Officer Dubas saw blood coming from Ms. Cottman's right shoulder, smelled a "very strong odor of marijuana and gun smoke," and saw "lingering smoke inside the house." Ms. Cottman was "in a panic," "complaining of pain," and was very nervous and scared. When the officer asked Ms. Cottman who shot her, she responded, "Jeffrey Lamore Jones, Sr." Ms. Cottman did not know whether Jones was still in the house.

Three additional officers arrived at the residence and conducted a security sweep to make sure that no one else was in it. During the course of the sweep, the officers observed a black digital scale, a substance that they suspected to be marijuana, and two baggies containing numerous smaller clear plastic baggies in plain view on the kitchen table.

After completing the security sweep of the house, one officer searched the area behind the house and the neighboring properties. He found Jones in a backyard that adjoins the backyard of the house in which Ms. Cottman was shot. He was asleep or unconscious on the ground. An officer thought that he had passed out.

Ms. Cottman was taken in an ambulance to the place where Jones had been found. She identified him as "the guy that shot me." She was then transported to the emergency room.

Jones was arrested and searched. In a fanny pack that Jones was wearing, the police recovered $8,000, which was divided into eight bundles of approximately $1,000 each. Another bundle of cash, totaling $857, was found in the right, front pocket of Jones's pants. The police also found three pills of what they suspected to be methadone in a small baggie on Jones's person.

The officers variously described Jones as being "a little intoxicated," "extremely intoxicated," "incoherent," and appearing as if he was "under the influence of something." Jones smelled of alcohol and slurred his words, but was able to speak English. The officers had to help Jones up to his feet, because he was "lethargic" and it was a struggle for him to stand.

A police sergeant observed a .32 caliber revolver within arm's reach of Jones. Near Jones, the police found a baggie containing what they suspected to be marijuana and a baggie containing what they suspected to be cocaine.

While wearing gloves, an officer cleared the weapon, which had one, spent .32 caliber shell casing in one of the chambers and live .32 caliber rounds in the other four. Another officer returned to the scene of the shooting and secured the suspected contraband on the kitchen table. The same officer recovered a "projectile" (evidently, a bullet) from the bedroom.

The gun found near Jones was processed for latent fingerprints, but none were located. No fingerprints were found on the bullets either.

Pursuant to a search warrant, the authorities used a buccal swab to collect a DNA sample from Jones's mouth. DNA samples were also collected from the gun, and the live

rounds were tested for "touch DNA," which is "the skin cells that have been left behind on something" after a person has touched it.

Terry Zerbe, a forensic scientist for the Maryland State Police, who testified as an expert in the field of forensic DNA analysis, tested the swabs collected from the gun and the swabs taken from Jones. She concluded that Jones's DNA profile matched the DNA profile of the major contributor to the swabs that were taken from the grip, trigger, hammer, and front sight of the gun. She opined that because "the rarity of this profile exceeds 1 in 303 billion," it would be "unreasonable to conclude that the major contributor" was anyone other than Jones.

Jessica Taylor, a forensic scientist for the Maryland State Police, who testified as an expert in the field of chemistry and the identification and analysis of controlled dangerous substances, tested the suspected contraband that was seized from the kitchen table, from Jones's person, and from the area where he was detained. She concluded that those items consisted of a total of .83 grams of cocaine, 12.39 grams of marijuana, and three tablets of methadone.

Corporal Lee Stevens of the Wicomico County Sheriff's Office gave expert testimony that the evidence was consistent with the possession of cocaine and marijuana with an intent to distribute them. In reaching that conclusion, Corporal Stevens noted the finding of empty plastic baggies that were the same as the ones containing the controlled substances, the packaging of drugs for street-level sale, the presence of a scale, and the storage of money in $1,000 increments.

Melissa Bowden, an emergency room nurse, treated the shooting victim, Ms. Cottman, in the early morning hours of November 15, 2015. According to Nurse Bowden, when Ms. Cottman arrived at the emergency room, she was sitting up on a stretcher, was "awake, alert, oriented, speaking, [and] answering questions," and was "highly upset." She was treated for both entrance and exit gunshot wounds in the area of her right shoulder. According to Nurse Bowden, a gunshot wound to that part of Ms. Cottman's body could have been life-threatening.

To determine the proper course of treatment, Nurse Bowden asked Ms. Cottman how she had sustained her injury. Ms. Cottman told the nurse that her boyfriend had shot her at close range, that she was afraid of him, and that she was afraid to go home. Nurse Bowden testified that Ms. Cottman was under the influence of alcohol, but did not slur her words or fall asleep.

Ms. Cottman was called by the State, but claimed that she could not recall everything that happened on the night of the shooting, because, she said, she had been drinking vodka and had an undiagnosed memory problem. She acknowledged that she had known Jones for 20 years, that they were living together at the time of the shooting, that they had had a romantic relationship, and that they had a child together. She identified her handwriting on a petition for a protective order, which asserted that Jones had shot her. Although she claimed at trial that nothing happened on November 15, 2015, she also acknowledged that she had sustained a gunshot wound that evening. She testified that she had accused Jones of shooting her because she thought they were the only people in the house, and that she filled out the petition for a protective order on the

advice of the Life Crisis Center. Ms. Cottman had told the State's Attorney that she did not want to proceed with the charges and at one point had said that the shooting might have been an accident.

The State played recordings of telephone calls made by Jones from the Wicomico County Detention Center. In the calls, Jones said that he wanted Ms. Cottman to know that the shooting was an accident.

The parties stipulated that, on November 15, 2015, Jones was a person prohibited from possessing a regulated firearm under § 5-133(c)(1)(ii) of the Public Safety Article of the Maryland Code.

We shall include additional facts as necessary in our discussion of the issues presented.

DISCUSSION

I.

Jones contends that the evidence is insufficient to sustain his convictions for attempted second-degree murder, first-degree assault, second-degree assault, reckless endangerment, and the use of a firearm in the commission of a crime of violence. In particular, he contends that that there was insufficient evidence to establish that he was the person who shot Ms. Cottman. In addition, he contends that there was insufficient evidence to establish that he intended to shoot her, because, he says, he was so intoxicated that he was unable to form the necessary intent. We reject his contentions.

In considering a challenge to the sufficiency of the evidence, we consider "'whether after reviewing 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.'" *Neal v. State*, 191 Md. App. 297, 314 (2010) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)); *accord Benton v. State*, 224 Md. App. 612, 629 (2015). "The test is 'not whether the evidence should have or probably would have persuaded the majority of the factfinders, but whether it could have persuaded a rational factfinder." *See*, *e.g.*, *Benton v. State*, 224 Md. App. at 629 (citing quoting *Painter v. State*, 157 Md. App. 1, 11 (2004)). "The appellate court thus must defer to the factfinder's 'opportunity to assess the credibility of witnesses, weigh the evidence, and resolve conflicts in the evidence[.]'" *Id.* (quoting *Pinkney v. State*, 151 Md. App. 311, 329 (2003)).

A. Evidence that Jones Shot Ms. Cottman

Jones argues that, even when viewed in the light most favorable to the State, the evidence cannot support a finding, beyond a reasonable doubt, that he shot Ms. Cottman. He points out that she had been drinking on the night of the shooting; she was highly intoxicated (her blood-alcohol concentration was about .25, or more than three times the legal limit, when she got to the hospital); she testified that she did not want to go forward with the prosecution; and she indicated, at one point, that she thought the shooting was some sort of accident. Jones also argues that the State failed to link the gun that was found beside him to the shooting of Ms. Cottman – i.e., the State had no ballistics or forensic evidence that the gun was the source of the bullet that was found on the bedroom floor in the house that Jones and Ms. Cottman shared; the police officers did not attempt to swab Jones's hands or arms for gunshot residue and, hence, had no forensic evidence

that Jones had shot the gun; and the State had no expert testimony that Cottman's wound had probably been caused by a gunshot from Jones's .32. We disagree that the evidence was insufficient.

Notwithstanding Ms. Cottman's intoxication, the jury was free to credit her several out-of-court statements that Jones was the person who shot her. The emergency room nurse who treated Ms. Cottman testified that she was "awake, alert, oriented, speaking, [and] answering questions." Ms. Cottman told the nurse that her boyfriend, whom she had known for 20 years, was living with, and had a child with, had shot her at close range. Ms. Cottman identified Jones as the shooter both in the 911 call[1] and to Officer Dubas, the officer who responded first to the 911 call. Finally, Ms. Cottman positively identified Jones as the shooter when she was in the ambulance on her way to the hospital.

"[A] court may admit, as substantive proof, evidence of a third party testifying as to an extrajudicial identification by an eyewitness when made under circumstances precluding the suspicion of unfairness or unreliability, where the out-of-court declarant is present at trial and subject to cross-examination." *Nance v. State*, 331 Md. 549, 560 (1993); *see also* Md. Rule 5-802.1(c) (the general prohibition against hearsay does not exclude "statements previously made by a witness who testifies at the trial or hearing and who is subject to cross-examination concerning the statement" if the statement is "one of

[1] The record does not contain a transcript of the 911 call. Nor does it contain the recordings themselves. To ascertain what occurred in the calls, we must rely on the State's descriptions of them in its closing argument.

identification of a person made after perceiving the person"). "An extrajudicial identification is sufficient evidence of criminal agency to sustain a conviction, even though the declarant is unable to identify the accused at trial." *Nance v. State*, 331 Md. at 561 (citing *Bedford v. State*, 293 Md. 172, 185 (1982)). In view of the several instances in which Ms. Cottman identified Jones as her assailant, the evidence was sufficient for a jury to conclude that he was the person who shot her.[2]

Furthermore, there was ample other evidence from which the jury could infer that Jones shot Ms. Cottman. Shortly after the incident, the police found him lying on the ground in a nearby yard within arm's reach of a gun bearing his DNA and containing one spent, .32 caliber shell. In addition, Jones placed telephone calls from jail, in which he conveyed his desire that Ms. Cottman be informed that he shot her, albeit accidentally. Thus, viewed in the light most favorable to the State, the evidence was sufficient to support the jury's conclusion that Jones shot Ms. Cottman.

[2] In addition to the several instances of extra-judicial identifications of Jones as the assailant, the court allowed the State to introduce an application for a protective order, in which she wrote:

> [E]arly Sunday morning, I was shot by Jeffrey in the back. We didn't agrue [sic] anything. I was sitting on the bed, and he stated, bitch, I should shoot you. I stated if that's what you want to do, then do it. And before I knew it, I felt a burning sensation.

In Part V of this opinion, we hold that the court could properly have admitted this statement under Md. Rule 5-802.1(a)(2), the exception to the general prohibition against hearsay for "[a] statement that is inconsistent with the declarant's testimony, if the statement was . . . reduced to writing and was signed by the declarant." The application for a protective order afforded additional, substantive evidence on which the jury could have based its verdict.

B. Voluntary Intoxication and Evidence of Intent

Jones contends that evidence of his voluntary intoxication negated the element of specific intent such that no reasonable jury could find that he intended to kill Ms. Cottman. This issue of voluntary intoxication is not properly before us.

Maryland Rule 4-324(a) provides, in pertinent part:

> A defendant may move for judgment of acquittal on one or more counts, or on one or more degrees of an offense which by law is divided into degrees, 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.

"The language of the rule is mandatory." *State v. Lyles*, 308 Md. 129, 135 (1986); *Whiting v. State*, 160 Md. App. 285, 308 (2004). Appellate review of the sufficiency of the evidence "is available only when the defendant moves for judgment of acquittal at the close of all the evidence and argues precisely the ways in which the evidence is lacking." *Anthony v. State*, 117 Md. App. 119, 126 (1997). The issue of the sufficiency of the evidence is not preserved when the motion for judgment is on a different ground from the one set forth on appeal. *Id.*

In his motion for judgment of acquittal, Jones's defense counsel argued, in relevant part:

> With respect to the charge of attempted second degree murder, as I said, there is a lack of evidence of any sort of intent. There is ample information that's been introduced by the State that this was or very well could have been either an accident, an accidental discharge, or some other cause could have led to Ms. Cottman suffering the injuries that she suffered.

While defense counsel argued *Ms. Cottman's* intoxication made her testimony unreliable, at no time did counsel argue that *Jones's* intoxication negated the element of specific intent. Consequently, that argument was waived. We cannot fault the circuit court for failing to credit an argument that wasn't made.

II.

Jones contends that the trial court abused its discretion in refusing to give the pattern jury instruction that pertains to voluntary intoxication and specific intent: Maryland Criminal Pattern Jury Instruction (MPJI-Cr) 5:08 (2d ed. 2012, 2017 Supp.).[3] We disagree.

[3] MPJI-Cr 5:08 provided then, as it does now:

> You have heard evidence that the defendant acted while intoxicated by [drugs] [alcohol]. Generally, voluntary intoxication is not a defense and does not excuse or justify criminal conduct. However, when charged with an offense requiring a specific intent, the defendant cannot be guilty if [he] [she] was so intoxicated, at the time of the act, that [he] [she] was unable to form the necessary intent.
>
> A specific intent is a state of mind in which the defendant intends that [his] [her] act will cause a specific result. In this case, the defendant is charged with the offense of (offense requiring a specific intent), which requires the State to prove that the defendant acted with the specific intent to (specific intent). [Voluntary intoxication is not a defense to (offense not requiring a specific intent), (offense not requiring a specific intent), and (offense not requiring a specific intent).]
>
> In order to convict the defendant, the State must prove, beyond a reasonable doubt, that the degree of the intoxication did not prevent the defendant from acting with that specific intent. A person can be [drinking] [taking drugs] and can even be intoxicated, but still have the necessary mental faculties to act with a specific intent.

Maryland Rule 4-325(c) provides that a "court may, and at the request of any party shall, instruct the jury as to the applicable law[.]" Under this rule, trial courts are required to give jury instructions requested by a party when all of the conditions of a three-part test are met: the instruction must correctly state the law, the instruction must apply to the facts of the case (in that it must have been generated by some evidence), and the content of the instruction must not have been fairly covered by another instruction. *Preston v. State*, 444 Md. 67, 81-82 (2015)

In evaluating whether the evidence is sufficient to generate a requested instruction, "we view the evidence in the light most favorable to the accused." *General v. State*, 367 Md. 475, 487 (2002). "[T]he threshold is low, as a defendant needs only to produce 'some evidence' that supports the requested instruction[.]" *Bazzle v. State*, 426 Md. 541, 551 (2012). "Some evidence" simply means any evidence, regardless of source, that, if believed, would support the defendant's claim. *Id.* "'The threshold determination of whether the evidence is sufficient to generate the desired instruction is a question of law for the judge.'" *Id.* at 550 (quoting *Dishman v. State*, 352 Md. 279, 292 (1998)).

Voluntary intoxication may be a defense "when a defendant, charged with a crime requiring a specific intent, is so [intoxicated] that he is unable to formulate that [specific intent]." *State v. Gover*, 267 Md. 602, 606 (1973). Jones argued that evidence of his conduct on the night of the shooting constituted "some evidence" that he was incapable of forming the requisite intent for the charges against him that required proof of specific intent. The trial judge disagreed. Our task is to determine whether Jones produced the

minimum threshold of evidence necessary to generate the instruction regarding voluntary intoxication.

In *Bazzle v. State*, 426 Md. at 548, the defendant was convicted of attempted second-degree murder, attempted armed carjacking, and first-degree assault, all of which required a specific intent. He requested a jury instruction on voluntary intoxication but the court declined to give it. *Id.* at 547. On appeal, he challenged the trial court's denial of his request for the instruction, arguing that he had generated "some evidence" of voluntary intoxication with evidence that his blood-alcohol content was nearly twice the legal limit, that he was (or claimed to be) unable to remember some of the events on the night of the crime, that a witness testified he was "almost about to pass out" at one point, and that his alleged behavior during the assault was odd. *Id.* at 552, 555.

In a 4-3 opinion, a majority of the Court of Appeals rejected the defendant's arguments on the ground that the evidence of his drunkenness was insufficient to generate the instruction on voluntary intoxication. *Id.* at 555. "[M]ere intoxication," the majority said, "is insufficient to negate a specific intent[.]" *Id.* at 553. Absent "'a **proven incapacity in the accused to form the intent necessary to constitute the crime**,'" the evidence "'merely establishes that the mind was affected by drink so that he more readily gave way to some violent passion[.]'" *Id.* (quoting *Hook v. State*, 315 Md. 25, 31 n.9 (1989)) (emphasis added in *Bazzle*). "In light of the high degree of intoxication required to negate a specific intent," "the mere consumption of alcohol, 'with no evidence as to the [effect] of that alcohol on the defendant, would not permit a jury reasonably to conclude that he had lost control of his mental faculties to such an extent as

to render him unable to form the intent[.]'" *Id.* at 555 (quoting *Lewis v. State*, 79 Md. App. 1, 13 n.4 (1989)) (alterations in *Bazzle*). "Mere drunkenness does not equate to the level of intoxication necessary to generate a jury instruction on intoxication as a defense to a crime." *Id.*

In *Bazzle* the defendant had shown only "that he was drunk and exhibited the typical characteristics of being drunk." *Id.* at 556. "This," the majority concluded, "is not evidence that he was unable to form a specific intent, and is therefore insufficient to raise a jury issue on voluntary intoxication as a defense to a specific intent crime." *Id.* In the majority's assessment, the defendant had not shown that he "was so severely impaired that he could not form the intent necessary to constitute his crime." *Id.* at 555.

In addition to concluding that the defendant failed to generate "some evidence" that he "was so severely impaired" as to be incapable of forming a specific intent to commit an attempted murder, an attempted carjacking, and an assault, the *Bazzle* majority went on to cite other evidence that was inconsistent with the defense of voluntary intoxication: the defendant "demonstrate[d] a significant amount of design in planning the crime" by wearing a bandana to conceal his face and wrapping a shirt around his weapon to avoid leaving fingerprints; he claimed to have been attacked and to be able to identify the gender of his alleged attackers; he was able to escape from the scene by running away and was able to find his way to a friend's house; and he could speak intelligibly. *Id.* at 557-58. On these facts, a majority of the Court concluded that "not only is there insufficient evidence, standing alone, to support his intoxication theory, but

there is also ample evidence, uncontradicted at trial, that is inconsistent with the intoxication defense." *Id.* at 558.

Following *Bazzle*, we conclude that the evidence in this case us was insufficient to allow a jury to rationally conclude that Jones was so severely intoxicated that he could not form the intent necessary to constitute his crimes. *Id.* at 555. The record contains no specific evidence about which drug or drugs led to Jones's intoxication (the parties seem to assume that it was alcohol), and no evidence of how much he consumed. *Cf. id.* at 546, 555-56 (finding the evidence insufficient to generate an instruction about voluntary intoxication even though Bazzle had "consumed at least three 40-ounce containers of beer in an apartment," "drank more alcohol" at a mall, and had a blood-alcohol concentration of .157, which is almost twice the legal limit). Nor does the record contain any evidence about the likely effect on Jones's mental faculties of ingesting whatever quantity of whatever drug or drugs it was that he ingested. *See id.* at 553. The record reflects only that when he was apprehended Jones was unconscious and unable to stand without assistance; was variously described as "a little intoxicated," "extremely intoxicated," "incoherent," and appearing as if he was "under the influence of something"; smelled of alcohol; was lethargic; and was "slurring his words." The record, however, also reflects that Jones could understand and follow the officers' commands. In addition, the record reflects that Jones evidently had enough presence of mind to flee from the scene of the crime and to take the gun that he had apparently used in the shooting, as well as almost $9,000 in currency.

As in *Bazzle*, Jones has shown only that he was intoxicated and that he manifested the physical characteristics of a person who is intoxicated, such as an impairment of his motor skills. *Id.* at 556. But "[t]his is not evidence that he was unable to form a specific intent[.]" *Id.* The evidence was, therefore, "insufficient to raise a jury issue on voluntary intoxication as a defense to a specific intent crime." *Id.*

III.

Jones argues that the trial court erred in denying his motion to suppress DNA evidence because the judge who signed the warrant authorizing the collection of the buccal swab was not neutral and detached. We disagree.

Our review of a ruling on a motion to suppress evidence is limited to the record developed at the suppression hearing. *Raynor v. State*, 440 Md. 71, 81 (2014). "We view the evidence and inferences that may be drawn therefrom in the light most favorable to the party who prevails on the motion," in this case, the State. *Briscoe v. State*, 422 Md. 384, 396 (2011) (citations omitted). We review legal questions on a de novo basis, without deference to the lower court. *Grant v. State*, 449 Md. 1, 14-15 (2016).

At a pretrial hearing, the defense presented evidence that a district court judge had recused himself from Jones's bail review hearing because he had represented Jones and members of Jones's family before he became a judge. Later, however, the same judge signed a search warrant authorizing the seizure and analysis of DNA or biological evidence including a buccal swab to collect a DNA sample from Jones. Defense counsel argued that Jones was entitled to have a neutral and detached magistrate review and issue the search warrant. Because the district court judge had found it necessary to recuse

himself at the bail review hearing, counsel argued that the judge could not have been neutral and detached in determining whether there was probable cause to issue a warrant.

The motions judge rejected that argument. She reasoned that "the recusal from the bail review hearing by itself had no bearing on [the district court judge's] neutrality to issue a warrant because [he] was merely confined to the four corners of the warrant application." The motions judge also reasoned that, "[e]ven assuming [that the district court judge] was unable to be fair and impartial, there is no evidence that the police did not act objectively, and in good faith in obtaining and relying upon the warrant for [Jones's] DNA." Jones challenges both aspects of the motions judge's ruling.

In Maryland, judges must recuse themselves whenever their impartiality could reasonably be questioned. Md. Rule 18-102.11(a). In view of this standard, it is completely understandable why the district court judge might recuse himself from the bail review hearing, but not from the decision about whether to issue the warrant.

In deciding whether Jones should be released on bail (and if so, under what conditions), the district judge was required to consider and evaluate a number of personal factors pertaining to Jones himself. *See* Md. Rule 4-216(e)-(f) (2015).[4] The judge could have concluded that because of his prior representation of Jones and Jones's family members, a member of the public could reasonably question whether he could be

[4] The current version of Rule 4-216 is considerably different from the version that was in effect at the time of the pretrial proceedings in Jones's case. We cite the version that was in effect at that time.

wholly impartial in evaluating those personal factors and making a discretionary decision about the conditions, if any, on which Jones should be released on bail.

By contrast, in assessing whether there was probable cause to justify a warrant to obtain a DNA sample by means of a buccal swab from the inside of Jones's cheek, the district court judge's role was far more circumscribed. In those circumstances, the judge's task was "to reach a practical and common-sense decision, given all of the circumstances set forth in the [supporting] affidavit, as to whether there exists a fair probability that contraband or evidence of a crime will be found in a particular search." *Greenstreet v. State*, 392 Md. 652, 667-68 (2006). Ordinarily, a judge cannot consider "evidence that seeks to supplement or controvert the truth of the grounds stated in the affidavit." *Valdez v. State*, 300 Md. 160, 168 (1984). Instead, the judge is ordinarily confined to the four corners of the affidavit in support of the warrant. *Greenstreet v. State*, 392 Md. at 669. Jones agrees that in this case the district court judge was confined to the four corners of the affidavit.

Because the judge was confined to the four corners of the affidavit, the only question before him was whether the assertions in the affidavit, which he was required to assume to be true, were, in themselves, sufficient to establish probable cause to order a search. In view of the narrowness of that largely legal determination, it is difficult to envision how the judge's past representation of Jones and his family could lead one to *reasonably* question his ability to make an impartial decision. For that reason, we see no reason why the district court judge was required to recuse himself from the decision about whether to issue a warrant. We certainly see no reason why the judge was required

to recuse himself from that decision merely because he recused himself from the quite different decision about whether Jones should be released on bail.

But even if the district court judge were required to recuse himself from the decision to approve the warrant, we would find no error in the decision not to exclude the DNA evidence, because the officers who executed the warrant could reasonably rely in good faith on its validity. *United States v. Leon*, 468 U.S. 897, 913 (1984); *Massachusetts v. Sheppard*, 468 U.S. 981, 988 (1984); *Connelly v. State*, 322 Md. 719, 727-30 (1991). Under the so-called good faith exception to the exclusionary rule, an officer is not required to "disbelieve a magistrate who has just advised him, 'by word and by action, that the warrant he possesses authorizes him to conduct the search he had requested.'" *Connelly v. State*, 322 Md. at 729-30 (quoting *Massachusetts v. Sheppard*, 468 U.S. at 989-90).

In *Leon* the Supreme Court identified four situations in which an officer's reliance on a search warrant would not be reasonable:

> (1) the magistrate was misl[ed] by information in an affidavit that the officer knew was false or would have known was false except for the officer's reckless regard for the truth;
>
> (2) the magistrate wholly abandoned his detached and neutral judicial role;
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> (3) the warrant was based on an affidavit that was so lacking in probable cause as to render official belief in its existence entirely unreasonable; and
>
> (4) the warrant was so facially deficient, by failing to particularize the place to be searched or the things to be seized, that the executing officers cannot reasonabl[y] presume it to be valid.

Patterson v. State, 401 Md. 76, 104 (2007) (quoting *Leon*, 468 U.S. at 923).

Relying on *Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319 (1979), Jones argues that in the instant case the "magistrate" (i.e., the district court judge) wholly abandoned his detached and neutral judicial role. His reliance on that case is misplaced.

In *Lo-Ji Sales*, 442 U.S. at 321-26, a town justice participated in the execution of a defective warrant that he had issued, assisting and even directing the law enforcement officers in the performance of their duties. In this case, by contrast, the district court judge did not abandon his judicial role. Assuming for the sake of argument that the judge's prior representation of Jones meant that he ought not to have decided the adequacy of the basis for a warrant to take a DNA sample from the inside of Jones's cheek, the officers who executed the warrant would still have had no reason to suspect that it was anything other than a facially-valid order. Accordingly, the circuit court did not err in declining to suppress the DNA evidence that was obtained from Jones's buccal swab.

IV.

Jones argues that the trial court abused its discretion in admitting and playing recordings of telephone calls purportedly made by him from the Wicomico County Detention Center. He maintains that the calls were not admissible as business records

under Md. Rule 5-803(b)(6)[5] and were never properly authenticated as required by Md. Rule 5-901.[6] We disagree.

[5] Maryland Rule 5-803(b)(6) provides that the following evidence is not excluded by the hearsay rule, even though the declarant is available to testify:

> (6) Records of regularly conducted business activity. A memorandum, report, record, or data compilation of acts, events, conditions, opinions, or diagnoses if (A) it was made at or near the time of the act, event, or condition, or the rendition of the diagnosis, (B) it was made by a person with knowledge or from information transmitted by a person with knowledge, (C) it was made and kept in the course of a regularly conducted business activity, and (D) the regular practice of the business was to make and keep the memorandum, report, record, or data compilation. A record of this kind may be excluded if the source of information or the method or circumstances of the preparation of the record indicate that the information in the record lacks trustworthiness. In this paragraph, "business" includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

[6] 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:
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> (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.

Maryland Rule 5-902(b)(1) concerns the authentication of records of a regularly conducted business activity:

> (1) Procedure. Testimony of authenticity as a condition precedent to admissibility is not required as to the original or a duplicate of a record of regularly conducted business activity, within the scope of Rule 5-803(b)(6) that has been certified pursuant to subsection(b)(2) of this Rule, provided that at least ten days prior to the commencement of the proceeding in which the record will be offered into evidence, (A) the proponent (i) notifies the adverse party of the proponent's intention to authenticate the record under this subsection and (ii) makes a copy of the certificate and record available to the adverse party and (B) the adverse party has not filed within five days after service of the proponent's notice written objection on the ground that the sources of information or the method or circumstances of preparation indicate lack of trustworthiness.

In a bench conference, the prosecutor proffered that the State had sent a business records certification to defense counsel with regard to the recordings and that the defense had filed no objection. Defense counsel did not dispute that assertion. As a consequence,

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> (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.
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> * * *
>
> (7) Public record. Evidence that a writing authorized by law to be recorded or filed and in fact recorded or filed in a public office, or a purported public record, report, statement, or data compilation, is from the public office where items of this nature are kept.

the circuit court had no reason to require testimony as a condition precedent to the admissibility of the calls.[7]

Even if the State had not certified the records pursuant to Md. Rule 5-902(b)(1), Jones's contentions would lack merit. Under Rule 5-901(b)(4), evidence may be authenticated by "[c]ircumstantial 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 identity of a telephone caller may be established by self-identification of the caller coupled with additional evidence such as the context and timing of the telephone call, the contents of the statement challenged, internal patterns and other distinctive characteristics, and disclosure of knowledge of facts known peculiarly to the caller.'" *Clark v. State*, 188 Md. App. 110, 119 (2009) (quoting *United States v. Orozco-Santillan*, 903 F.2d 1262, 1266 (9th Cir. 1990)); *see also Knoedler v. State*, 69 Md. App. 764, 773-74 (1987) (quoting 7 *Wigmore on Evidence*, § 2155(1)

[7] Jones argues that the recordings are not records of a regularly conducted activity, because telephone calls placed by inmates "are clearly not 'made' by detention center officials or anyone else working . . . in the detention center." For our purposes, however, it is sufficient that the recordings of the calls, if not the calls themselves, were made and kept in the course of a regularly conducted activity. In this regard, we note that the State may have invoked the business records exception to the hearsay rule only to take advantage of the authentication procedure in Rule 5-902(b)(1). To the extent that the State introduced the calls to prove the truth of the statements that Jones made, it would not need to rely on the business records exception, because Jones's statements were admissible under Rule 5-803(a) as the admissions of a party opponent. To the extent that the State intended to introduce the calls to prove that Jones gave certain orders or commands to the other persons on the line, it would not need to rely on any exception to the hearsay rule at all, because orders and commands typically are not factual assertions, are incapable of being true or false, and therefore cannot be hearsay. *See Wallace-Bey v. State*, 234 Md. App. 501, ___ (2017).

(1978)) (stating that "'sundry circumstances,'" such as a conversation that reveals "that the caller had knowledge of facts that only he would be likely to know," "'may suffice'" to authenticate a telephone call).

In the first recorded call, which was made at 9:11 a.m. on November 18, 2015, the caller, who was identified as an inmate at the Wicomico County Detention Center, referred to himself as "Jeff," which is Jones's first name, and began the conversation by saying, "Hey, Jamel," which is the name of Jones's son. The caller told Jamel that he needed someone to "talk to Ty," which is the victim's first name, "and let her know it was an accident." He added: "I didn't try to shoot her and kill her," and "[w]e were just playing and the gun went off."

In other calls, the caller was also identified as an inmate at the Wicomico County Detention Center, referred to himself as Jeff, and mentioned "Ty." The caller said, "I'm trying to get everybody to talk to Ty and let Ty know . . . that that was a [sic] accident. I didn't mean that." He also said that "You all got to get together and talk to Ty (phonetic) and get her to . . . to come around," and that "[t]he gun just went off." (State's Ex. 27 at 6-7, 10, 43).

The content and context of the calls provided sufficient circumstantial evidence that Jones was the caller. *See Walls v. State*, 228 Md. App. 646, 689 (2016). In fact, Jones allows that "sufficient 'sundry circumstances' may exist to authenticate the first call," but he argues that the record does not contain sufficient circumstantial evidence to authenticate the remaining calls. We are unpersuaded.

Accepting that there was a sufficient amount of circumstantial evidence to authenticate the first call, the court could have admitted the subsequent calls simply by comparing the voice on those calls to the voice on the first call. At the bench, the prosecutor asserted that the caller's voice appeared to be the same in each call, and defense counsel did not disagree. Similarly, the court stated, in what it called an "editorial comment," that the voice on the recordings "sounded like" that of Jones. Finally, setting aside the identity of the caller's voice in each of the calls, the caller consistently identified himself as "Jeff" in each call, and he consistently addressed the same issue – the need to convince Ms. Cottman that the shooting was an accident. On this record, there were sufficient "sundry circumstances" to authenticate the calls.

In any event, any error in admitting the subsequent calls would have been harmless beyond a reasonable doubt, because they contained only versions of the same information that was included in the first call, which Jones agrees was adequately authenticated. *Dorsey v. State*, 276 Md. 638, 659 (1976); *Potts v. State*, 231 Md. App. 398, 408-09 (2016). For all of these reasons, we conclude that the trial court did not abuse its discretion in admitting any of the recordings of the jail calls.

V.

Jones's final contention is that the trial court erred in admitting an application for a protective order that contained a statement, written by Ms. Cottman, identifying him as the person who shot her.

At trial, Ms. Cottman testified that she had been drinking on the day of the shooting and did not know what occurred, because she had a memory problem and drank

copious amounts of alcohol on a regular basis. Thereafter, the following exchange occurred:

> [PROSECUTOR]: Miss [Cottman], if I showed you a Protective Order that you filled out on November the 24th of 2016, would that help refresh your recollection on what happened on November 15, 2015?
>
> [COTTMAN]: It's a possibility.
>
> Q. Okay. You can read that to yourself, please, ma'am. Just quietly to yourself. Is that your handwriting?
>
> A. Uh-huh.
>
> Q. And that's your signature; correct? Excuse me. That's your signature?
>
> A. Correct.
>
> Q. Okay. So did you go to the District Court and fill out this Protective Order on November 24, 2015?
>
> A. Yes.
>
> Q. Okay. Having read what you wrote, does that help you refresh your recollection of what happened on November 15, 2015?
>
> A. Nothing happened.
>
> Q. Nothing happened?
>
> A. I mean, nothing happened. I mean, I don't know what you're asking, like what happened? Nothing.
>
> * * *
>
> Q. Did you write in your Protective Order on the 24th that early Sunday morning, I was shot by Jeffrey in the back[?] We didn't argue anything. I was sitting on the bed, and he stated, bitch, I should shoot you. I stated if that's what you want to do, then do it. And before I knew it, I felt a burning sensation. Did you write that?

> A. It's my handwriting, but like I said, you know, I [had] been drinking and so . . . things went a little foggy and . . .

The State sought to admit the application for a protective order. Defense counsel objected stating, "after [Ms. Cottman] has acknowledged having written it, it's not admissible for any further purpose, the actual written document." The trial court overruled that objection, stating:

> There may be a certain redundancy to it, but I don't see any undue prejudice to the defendant. She has orally testified to it. She has confirmed it's her handwriting. It may actually lend credibility. The jury may not find credibility. They may find less. They may find more, but I think it's relevant and probative. I will allow it.

Jones argues that the trial court erred in admitting the document. He relies on Md. Rule 5-613(b), which concerns the use of prior inconsistent statements for the purpose of impeachment.

In full, Rule 5-613 provides:

> (a) **Examining witness concerning prior statement**. A party examining a witness about a prior written or oral statement made by the witness need not show it to the witness or disclose its contents at that time, provided that before the end of the examination (1) the statement, if written, is disclosed to the witness and the parties, or if the statement is oral, the contents of the statement and the circumstances under which it was made, including the persons to whom it was made, are disclosed to the witness and (2) the witness is given an opportunity to explain or deny it.
>
> (b) **Extrinsic evidence of prior inconsistent statement of witness.** Unless the interests of justice otherwise require, extrinsic evidence of a prior inconsistent statement by a witness is not admissible under this Rule (1) until the requirements of section (a) have been met and the witness has failed to admit having made the statement and (2) unless the statement concerns a non-collateral matter.

Jones argues that the court erred in admitting the application for a protective order as extrinsic evidence of Ms. Cottman's prior statement, because she did not "fail[] to admit having made the statement." Md. Rule 5-613(b). To the contrary, she acknowledged her signature on the document, admitted that she went to the district court to fill it out, and said that she wrote out the allegations that Jones threatened and shot her.

The State does not argue that the court properly admitted the application as extrinsic evidence of a prior inconsistent statement under Rule 5-613(b). Instead, it argues that the court could have admitted the application for a protective order under Md. Rule 5-802.1(a), which establishes an exception to the hearsay rule for "[a] statement that is inconsistent with the declarant's testimony, if the statement was . . . (2) reduced to writing and was signed by the declarant[.]" Although the parties and the trial court appear not to have expressly considered the applicability of Rule 5-802.1(a)(2), there is no question that the rule would have authorized the admission of the application: it was obviously inconsistent with Ms. Cottman's testimony (that "nothing happened" in the early morning of November 15, 2015); it was reduced to writing; and Ms. Cottman signed it. Hence, even though the application would not have been admissible as extrinsic evidence of a prior inconsistent statement under Rule 5-613(b), it was still admissible as substantive evidence under Rule 5-802.1(a)(2). The court was right for the wrong reason.[8]

[8] Jones argues that the court could not have admitted the petition for a protective order as a prior inconsistent statement under Rule 5-802.1(a)(2), because it did not find that Cottman's memory loss was feigned. Jones is correct that if a witness claims not to

In any event, any error in admitting Ms. Cottman's written statement would have been harmless beyond a reasonable doubt, because the jury had already heard the substance of the statement, and because she made a number of other out-of-court statements identifying Jones as the shooter. Those statements include her 911 call, her statement to Officer Dubas, her identification of Jones at the location where he was first detained, and her statement to the nurse who treated her in the hospital emergency room. *Dorsey v. State*, 276 Md. at 659; *Potts v. State*, 231 Md. App. at 408-09.

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remember making a prior statement, her testimony is "inconsistent" with the statement only if the court finds that she is feigning memory loss in order to avoid testifying at trial. *See, e.g.*, *Corbett v. State*, 130 Md. App. 408, 425 (2000); *accord Nance v. State*, 331 Md. 549, 564 n.5 (1993) ("[w]hen a witness's claim of lack of memory amounts to deliberate evasion, inconsistency is implied"). But while Cottman sometimes claimed that her memory had failed her, at other times she affirmatively testified that "nothing happened." Because her testimony that "nothing happened" was squarely inconsistent with the prior statements in the petition for a protective order (that Jones shot her), the court was not required to make any finding as to whether she was feigning a lack of memory.