

Circuit Court for Washington County  
Case No. C-21-CR-17-000070

UNREPORTED  
IN THE COURT OF SPECIAL APPEALS  
OF MARYLAND

No. 3284

September Term, 2018

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JACK LEE PHILLIPS, JR.

v.

STATE OF MARYLAND

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Graeff,  
Friedman,  
Eyler, James R.  
(Senior Judge, Specially Assigned),

JJ.

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Opinion by Friedman, J.

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Filed: June 3, 2020

\*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.

A jury in the Circuit Court for Washington County convicted Jack Lee Phillips, Jr. of first-degree murder, armed robbery, and several lesser included offenses. The trial court sentenced Phillips to life in prison without the possibility of parole, after which he filed this timely appeal. Phillips asks us to consider the following:

1. Did the lower court err in admitting visual evidence at trial absent sufficient authentication of that evidence?
2. Did the lower court err in excluding evidence that police had received a report of a different suspect, and collected physical evidence associated with that report, which it associated with the investigation of the offenses alleged at trial?

For the reasons that follow, we affirm the judgments of the trial court.

### **FACTS AND LEGAL PROCEEDINGS**

On October 17, 2017, Phillips, Heather Schnebly, Michael Slick, and Suzanne Jones occupied two rooms at a Days Inn in Hagerstown. Throughout the late afternoon and early evening hours, the four engaged in drug and alcohol use. As captured on Days Inn's security video, around 6:45 p.m., Jones left the hotel on foot, followed by Phillips. Edmund Musser, an uninvolved witness, observed Jones pick up her pace as Phillips closed in on her. Musser then saw Phillips attacking Jones and honked his horn and flashed his headlights to scare Phillips away. This prompted Phillips to run into an alley. Musser approached Jones and found her bloody and moaning on the ground. Musser called 911

and stated that the attacker was wearing a yellow shirt and jeans. The entire incident was captured on the security video of a nearby building owned by Gideon Properties.<sup>1</sup>

Although medical personnel attempted resuscitation, Jones died from multiple sharp force injuries. The investigating officers identified Jones through her prior interaction with the police department and after learning that she was likely staying at the Days Inn, the police responded to the hotel. The police interviewed Slick and Schnebly, who acknowledged that Phillips and Jones left Slick's room after "partying." Then, 45 minutes later, Phillips returned bloody, with a cut on his finger, and wearing less clothing than when he left.<sup>2</sup> Phillips washed his hands in the room and stated that "he stabbed this girl, and killed her, she was gone." Later, when Phillips, Slick, and Schnebly went to purchase more drugs, Slick saw Phillips throw one or two shoes into the woods near the parking lot.

Based upon the information provided by Slick, Phillips was arrested and the police searched the woods behind the hotel and recovered a pair of black Nike sneakers. The sneakers were analyzed, and one contained DNA from Phillips and Jones. In nearby dumpsters, the police recovered a black purse with no wallet or identification inside and a yellow polo shirt like the one Phillips was wearing earlier that day. Both items had blood stains.

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<sup>1</sup> Several clips from the Days Inn and Gideon Properties security videos were played for the jury and admitted into evidence.

<sup>2</sup> Still photos taken from the Days Inn security video showed Phillips leaving the hotel wearing jeans and a yellow short-sleeved polo shirt over a long-sleeved shirt and returning wearing plaid shorts and a tee shirt.

## DISCUSSION

### I.

Phillips argues that the trial court erred in admitting into evidence the Days Inn and Gideon Properties security video recordings and still photos taken from those recordings. In his view, the visual evidence was improperly admitted in the absence of sufficient authentication showing that the video recordings were the product of a reliable recording system that produced reliable results. We disagree.

Raj Patel, the owner of the Days Inn, testified that the web-based video recording system at his hotel is “buried up in the ceiling” and physically inaccessible. Only he and authorized users can access the system, whose data is maintained on a hard drive in the digital video recorder. According to Patel, the system was working properly, the time maintained by the system was accurate, and the footage was not, and cannot be, altered.

Detective Kevin Brashears testified that when he learned that Jones may have been staying at the Days Inn, he received authority from Patel to obtain video from the hotel’s security system. With the password, Detective Brashears selected the hotel’s entrance cameras and pertinent time frames and downloaded the video to a USB drive without altering the footage in any way.<sup>3</sup> He was certain that the footage obtained was for the proper location because he was able to see himself on the video in real time as he accessed the system. Detective Brashears then uploaded the file from the USB drive to a folder on his computer at the police station.

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<sup>3</sup> He later downloaded the entire previous 24 hours of video from all 16 cameras at the hotel. Detective Brashears burned all of those recordings to a Blue-ray disc.

The lead investigator, Detective Charles Coy, watched the hotel video and created a written chronology, short clips, and still photos of the pertinent time frames for the jury. Detective Coy produced the Blue-ray disc of all 24 hours of surveillance footage, which the State sought to admit into evidence. After defense counsel objected on the ground that Detective Coy had not personally created the Blue-ray disc, the State offered to withdraw the exhibit in favor of the video clips which Detective Coy could verify through his personal knowledge, based on his (and other first responders’) appearance in them. Defense counsel acknowledged that any witness who appeared in the video clips (including Slick and Schnebly) could properly testify about their validity but argued that any other clips (i.e., clips that a witness was not in) would only be admissible if authenticated under the “silent witness” theory.

The trial court overruled the defense objection, finding that the continuous 24 hours set of recordings from Patel’s secure and reliable system, created a sufficient foundation. The court also overruled defense objections to still photos taken from the videos. The court granted Phillips a continuing objection to the admission of the Blue-ray disc and to the clips from the video that the officers deemed helpful to their investigation.

Daniel Fitzgerald, an employee of Gideon Properties, which owned the building housing the video cameras that captured the attack upon Jones, testified that the building’s several exterior cameras were part of the “Empress Link DR security system,” which was maintained on a computer located in a locked server room at the office. Fitzgerald pulled up the video from the time frame requested by the police and viewed it with Detective Jesse Duffey to locate the part of the video in which the victim and suspect appeared. He then

copied the recording to a USB drive for Detective Duffey. Detective Duffey denied altering the footage in any way but noted that the time stamp on the video was off by an hour.

Phillips challenges the admission of the Days Inn and Gideon Properties videotapes (and the still photos taken therefrom) into evidence by questioning the foundation for their authentication.

Because videos and photographs can be “easily manipulated,” trial courts require authentication “as a preliminary fact determination, requiring the presentation of evidence sufficient to show that the evidence sought to be admitted is genuine.” *Washington v. State*, 406 Md. 642, 651-52 (2008). Maryland Rule 5-901(a) requires that evidence be properly authenticated as a “condition precedent to admissibility” and is “satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.” MD. RULE 5-901(a).

When making an authenticity determination, the trial 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.”” *Jackson v. State*, 460 Md. 107, 116 (2018) (quoting *U.S. v. Safavian*, 435 F.Supp.2d 36, 38 (D.D.C.2006) (examining the identical federal counterpart to Maryland Rule 5-901(a))). We review a trial court’s ruling on the admissibility of video or photographic evidence for abuse of discretion. *State v. Simms*, 420 Md. 705, 724-25 (2011).

Videos and photographs are subject to the same authentication requirements for the purposes of admissibility. *Washington*, 406 Md. at 651. One method of authenticating a video is through the “[t]estimony of a witness with knowledge that the operative evidence

is what it is claimed to be.” MD. RULE 5-901(b)(1); *see also Washington*, 406 Md. at 652 (“[T]he pictorial testimony theory of authentication allows photographic evidence to be authenticated through the testimony of a witness with personal knowledge.”).

The second method is known as the “silent witness method of authentication,” which “allows for authentication by the presentation of evidence describing a process or system that produces an accurate result.” MD. RULE 5-901(b)(9); *Washington*, 406 Md. at 652. There are no “rigid, fixed foundational requirements” for admitting evidence under the “silent witness” theory. *Jackson*, 460 Md. at 117. The authenticating witness may establish the foundational basis through testimony relative to the “type of equipment or camera used, its general reliability, the quality of the recorded product, the process by which it was focused, or the general reliability of the entire system.” *Washington*, 406 Md. at 653. The trial court’s authentication finding does not require exhaustive testimony bearing on technical matters if the moving party presents other foundational proof sufficient to enable the court to find that the video is what it purports to be. *See id.* at 654-55 (“Any concerns that the defendant had regarding the surveillance procedures, and the method of storing and reproducing the video material, ‘were properly the subject of cross-examination and affected the weight, not the admissibility, of the’ [evidence].” (quoting *Commonwealth v. Leneki*, 846 N.E.2d 1195, 1199 (Mass. App. Ct. 2006))).

Here, Phillips does not contest the admissibility of any video clips in which a witness was able to identify themselves. Rather, Phillips claims error only in the admission of the video clips authenticated by the “silent witness” method. In our view, however, there was a sufficient foundation laid to permit authentication under the “silent witness” method.

Patel testified that his hotel's security system was safely housed in the ceiling of the building, that it was functioning properly on the day Jones was killed, and that the date and time stamps were accurate. He also identified still images taken from cameras on the hotel property. Patel granted authority to his staff to give Detective Brashears the password to the system, and Detective Brashears downloaded the previous 24 hours' recording, without alteration, onto a USB drive through an internet portal. Detective Brashears also verified the authenticity of the system and the integrity of the recording by observing himself on the video as he arrived at the hotel and accessed the system. The video from Gideon Properties is admissible for similar reasons. Fitzgerald described the Gideon Properties security system as secure because it was housed on a dedicated server in a locked room. He copied the video himself onto a USB drive and stated that it had not been altered. Despite the discrepancy in the time stamp, both Fitzgerald and Detective Duffey testified that they verified that the system was off by one hour by noting their own arrival at the building on the recording. The Gideon Properties video, which recorded the entire attack upon Jones, was also essentially self-authenticating, as it depicted precisely what it purported to depict: Phillips attacking Jones.

We conclude that the witnesses' testimony established sufficient foundational proof for authentication of the videos and the still photos taken therefrom. The trial court, therefore, did not abuse its discretion in admitting the videos and photos.<sup>4</sup>

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<sup>4</sup> As to the Gideon Properties video, we also reject Phillips's appellate argument for a second, wholly-independent ground. Defense counsel made two objections regarding the admissibility of the Gideon Properties video. First, defense counsel objected on the ground



## II.

Phillips also argues that the trial court erred in declining to permit him to introduce evidence that the police, through an agent unrelated to the investigation, received a tip and physical evidence that another suspect may have committed the crimes against Jones. Because, Phillips continues, that his “primary defense was to call into question the inappropriately myopic nature of the police investigation,” the agent’s testimony, which was probative and “relevant to the efficacy of the police investigation and, in turn, relevant to the defense challenge to the proof of criminal agency,” was improperly restricted. We hold that because the defense counsel decided not to call Agent Hook to testify, this issue was not preserved for our review.

After resting its case, the State moved *in limine* to restrict the testimony of Agent Hook, an expected witness, who was likely to testify that he received information from a source that a man named Gordon Conte committed Jones’s murder, along with physical evidence of a bloody shirt and razorblades—which Agent Hook submitted to the crime lab under the case number of the Jones investigation. The State argued that Agent Hook’s

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that Detective Duffey was not a proper witness to testify to the inaccuracy of the time stamp on the video because he did not have personal knowledge about why the time stamp was incorrect. The trial court overruled that objection and admitted the video into evidence. Later on, defense counsel added that he also objected to the lack of an adequate foundation being laid for the video. Maryland Rule 4-323(a) requires that an “objection to the admission of evidence shall be made at the time the evidence is offered or as soon thereafter as the grounds for objection become apparent,” otherwise, the objection is waived. The first objection was timely, but because there was a specific ground for the objection, any other ground was waived. *See Klauenberg v. State*, 355 Md. 528, 541 (1999). As such, defense counsel’s objection on the ground of authentication—which was made after the video was offered *and* admitted into evidence—was untimely and not preserved for this Court’s review.

expected testimony would be irrelevant and comprise of inadmissible hearsay. Defense counsel, acknowledging that “there would be hearsay,” assured the trial court he would tailor his questions so as not to elicit hearsay. Defense counsel also added that the relevance of Agent Hook’s testimony was clear because Agent Hook received the information about Conte the day after Jones’s murder and logged the physical evidence into the crime lab.

A lengthy discussion ensued regarding Agent Hook’s expected testimony. The trial court commented that the problem with the testimony is that to “link this in any way to the crime requires hearsay.” The trial court further stated that defense counsel was prohibited from identifying Conte or linking him to the crime, thereby limiting Agent Hook from testifying that he collected the evidence because it was alleged that another individual committed the crime. Moreover, the trial court provided examples of the narrowly tailored questions defense counsel could ask— “Did you receive a phone call the day after?”, to which Agent Hook could answer “Yes, I did.” and “What action did you take on that?”, to which Agent Hook could answer “We collected items.”

Defense counsel proffered that he then would ask Agent Hook, “And then based upon that information that you received, what did you do with that property in relation to this case?” to which he predicted that Agent Hook would respond that he gave it to the crime lab “to log into evidence and into property in relation to this case.” The trial court again questioned the relevance of the expected testimony because, in the absence of the source of information in court to testify as to why he made the statement about Conte, the defense would be unable to link the physical evidence recovered to this matter. The trial court expressed its concern that the jury might be confused by the limited testimony and

that the defense might “open the door” to the State asking if it had made any effort to identify and contact the source of information or test the physical evidence, which could in turn lead to a defense claim of burden shifting. In response, defense counsel stated that if “we’re going to be so limited that it would be ... too confusing for the jury then certainly we just won’t call ... Agent Hook. However, [the] Defense does believe that it wouldn’t, the hearsay being offered wouldn’t be offered for the truth of the matter asserted and it would be relevant to the case.”

The trial court determined it would permit defense counsel to call Agent Hook, “but it’s going to be a very, very basically tightly monitored examination,” and that it would be stopped if it veered too close to “saying what the source of information stated.” Agent Hook would only be allowed to state what he did after receiving the information from the source. The trial court said: “All right well let’s ... let’s go ahead. You can call [Agent Hook] and we’ll see where it goes from there.” The State then requested that the physical evidence collected not be described—because the “best evidence is the evidence itself,” which the defense failed to bring. The trial court repeated, “Let’s just proceed an[d] we’ll see how it goes.” After a moment’s consideration, defense counsel stated:

At this point, I do believe that while the Defense believes that the limitation ... that would be put on or is being indicated will be put on would hamper ... [the] Defense in putting on their case, we’re going to elect not to ... call ... Agent Hook at this time in light of the Court’s ruling.

The trial court, therefore, did not prevent Phillips from calling Agent Hook as a defense witness. Rather, the trial court properly cautioned that Agent Hook would be prohibited from providing any impermissible hearsay testimony, but left the door open for

the additional testimony sought by defense counsel by stating: “[W]e’ll see how it goes.” Nonetheless, perceiving limitations the court had not yet imposed, Phillips elected not to call Agent Hook.

Phillips’s decision not to call Agent Hook is fatal to his appellate claim. Defense counsel waived the objection by declining to call Agent Hook and the issue is, therefore, not preserved for our review. *See Diggs & Allen v. State*, 213 Md. App. 28, 73 (2013) (“That appellant[] subsequently [chose] not to introduce this evidence does not, and cannot, constitute reversible error.”); *see also Apenyo v. Apenyo*, 202 Md. App. 401, 424-25 (2011) (“The trial judge played no part in this, and it is, of course, only the trial judge who can commit reversible error.”). We, therefore, affirm.

**JUDGMENTS OF THE CIRCUIT COURT  
FOR WASHINGTON COUNTY  
AFFIRMED. COSTS ASSESSED TO  
APPELLANT.**