UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

ERNEST FLOWERS

v.

STATE OF MARYLAND

No. 2869, September Term, 2015

LARRY GILMORE

v.

STATE OF MARYLAND

No. 2514, September Term, 2015

Berger,
Beachley,
Moylan, Charles E., Jr.,
(Senior Judge, Specially Assigned),

JJ.

Opinion by Moylan, J.

Filed: May 9, 2017

The appellants, Ernest Flowers and Larry Gilmore, were both convicted in the Circuit Court for Baltimore City by a jury, presided over by Judge Paul E. Alpert, of first-degree murder and of conspiracy to commit first-degree murder. Each appellant has filed a separate appeal, but the appeals have been consolidated for purposes of appellate argument. We shall resolve the appeals with a consolidated opinion.

The Joint Contention

Both appellants have raised, as a joint contention, the claim that Judge Alpert erroneously permitted the State to introduce a surveillance video and pictures made from that video when the video had not been properly authenticated.

Contentions By Flowers Alone

The appellant Flowers alone has raised two additional contentions. He claims:

1. that Judge Alpert abused his discretion when he denied Flowers's motion for a mistrial; and

2. that Judge Alpert abused his discretion when he permitted the State to make improper and prejudicial remarks in closing argument.

Factual Background Without Video Surveillance

The murder victim was De'Juan Willis. The State's theory of the case is that on the early morning of January 10, 2014, Willis stole a black two-door Toyota Solara from the appellant Flowers and that, several hours later, both appellants caught up with Willis and killed him.

Willis's mother, Shawnette Graham, testified that on January 10, 2014, Willis, her 17-year-old son, left their home to go to school at 7:30 a.m. Their home was approximately five blocks from the 1100 block of Calhoun Street. On that morning, Officer Joel Jiminez,

of the Baltimore City Police Department, responded to a call in the 1100 block of Calhoun Street. He there took a report of a stolen automobile. The appellant Flowers, who made the complaint, was the registered owner of the Toyota Solara, with a Maryland tag number of 2BF5479. It was Officer Jiminez's subsequent recollection that the theft had occurred between 7:10 and 7:20 a.m.

The scene then shifted to the Westside Shopping Center on Frederick Road approximately two hours later. An Enterprise Car Rental company is located in that shopping center. At approximately 9:54 a.m., Desmond Stewart, an employee of Enterprise, walked outside to retrieve something from his car. He observed a teenager, who turned out to be De'Juan Willis, walking around the building in no apparent hurry. Stewart then saw two men running around the corner, each with "a knife or metal object tucked up under their hoodies and their jacket." At that point, Stewart himself backed up toward the door of Enterprise. He observed Willis trying to climb a hill toward a surrounding sidewalk. He saw the two men, in turn, run toward the hill. One of the men yelled "Somebody stop him," and Stewart saw him point to the hill. The man who yelled out was wearing a navy blue sweatshirt with "Fila" written across the front. The two men climbed the hill, as Stewart retreated to the door of his building.

He continued to watch, however, and observed the two men and the teenager "pretty much having a confrontation." He stated that the teenager "put his arms up" and that "they were kind of talking." He then saw the man in the Fila sweatshirt "swing" at the teenager, making a "stabbing motion." Stewart also testified that the second man, who was wearing

a "bubble vest" and a knit hat, also made "stabbing motions." After the teenager was stabbed several times, he fell to his knees and then fell face-first to the ground. One of the men then "stomped" the teenager. Stewart saw the man wearing the Fila sweatshirt get into a van and saw the van head east on Frederick Road. It then drove through the shopping center and drove south toward Wilkins Avenue. Stewart immediately called 911, at what he estimated was some time between 9:45 a.m. and 10:00 a.m.

On February 28, 2014, Stewart viewed a photographic array and selected a photo of the appellant Flowers. He identified Flowers as the man in the bubble vest. Although admitting that his "fifty percent" estimate of his certainty meant that he "wasn't sure," he nevertheless explained that he "had a good feeling" and that he "just wasn't 100% sure." On June 3, 2014, Stewart viewed another photographic array that included a picture of the appellant Gilmore. Stewart picked Gilmore's photograph and identified him as the man wearing the Fila sweatshirt. At trial, Stewart identified both appellants as the men who chased and attacked Willis.

The autopsy that was performed on Willis revealed that he had suffered 14 stab wounds, sustaining injuries to his lung, kidney, liver, diaphragm, and a major vein. The wounds were typical of those inflicted by a knife. The autopsy also revealed a blunt force injury to Willis's head, seven extensive abrasions to the side of his head, and contusions on the right side of his head.

Sherry Stein, who lived at 2611 Wilkins Avenue, witnessed what was apparently the last episode of the automobile theft that preceded the murder. While watching television

at approximately 10 a.m., she heard a crash. Looking out the window, she saw a black Toyota Solara on the sidewalk. Its tag number was 2BF5479. She saw a young man get out of the car and run up Millington Avenue toward Christian Street. He was wearing a black cap, a black "vesty-looking thing," and was carrying a backpack. Sherry Stein called 911.

As she stood observing the scene, a man came up to the car. He sat briefly in the driver's seat. Blood was dripping from his hand. He wrapped his hand in a white cloth and he removed something from the glove compartment. When asked "Is that your car?" the man responded "Yes, it is." He said that someone had stolen his car and that he had chased the "guy" who had stolen it. The man then walked up Millington Avenue toward Christian Street. At trial, Sherry Stein identified the appellant Gilmore as the young man who had run up Millington Avenue, and ultimately identified the appellant Flowers as the man to whom she spoke about the stolen car.

Two Video Surveillances

There is no appellate contest with respect to what has thus far been described. The challenge is with respect to the fact that the fatal confrontation between the two appellants and De'Juan Willis was captured by not one, but two, video surveillance cameras. One of the surveillance cameras pointed out from the front of Enterprise Car Rentals. It captured images of the victim Willis and of both appellants. A second surveillance camera was mounted on the side of Enterprise Car Rentals. It recorded the essential actus reus of the crime, as it captured the two appellants chasing the victim up the hill, the appellants confronting the victim and delivering stabbing-like motions to his body, and the victim

falling prostrate at their feet. The appellants challenge the introduction of those videotapes into evidence by questioning their authentication. The authentication procedure is controlled by Maryland Rule 5-901, which provides in pertinent part:

> **Md. Rule 5-901. Requirement of Authentication or Identification.**
>
> (a) General Provision. The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.
>
> (b) Illustrations. By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this Rule:
>
> (1) Testimony of Witness With Knowledge. Testimony of a witness with knowledge that the offered evidence is what it is claimed to be.
>
> . . .
>
> (3) Comparison With Authenticated Specimens. Comparison by the court or an expert witness with specimens that have been authenticated.
>
> (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.

(Emphasis supplied).

As we apply Rule 5-901, we are guided by Dickens v. State, 175 Md. App. 231, 239, 927 A.2d 32 (2007):

> [U]nder Federal Rule 901, from which Maryland Rule 5–901 is derived, the 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."

(Emphasis supplied).

This is not one of those rules that exists for the sake of the rule, with strict compliance as the order of the day. What a factfinder needs is some rough assurance that a picture or videotape actually depicts what it is purported to depict. A technical lecture on the operation of the camera is seldom necessary. In some investigations, a surveillance camera may capture an image of a suspect, frequently as no more than a casual passerby, in a suspicious place at a suspicious time. It may be critical, in such a case, to pinpoint precisely when the picture, as a piece of circumstantial evidence, was taken. When, on the other hand, the camera captures the entire unfolding of the actus reus itself, the film is essentially self-authenticating. In this case, for instance, would it make any difference that the filming of the murderous attack took place at 10:15 a.m. instead of at 10:45 a.m.? Of course not! Would it make any difference that the depiction of the delivery of the fatal wounds was in slow motion or in real time or in fast action? It would not. The appellants do not tell us what they would have wished by way of authentication. What they wished, of course, was that the videotapes would never be received in evidence.

On the issue of authentication, there is an interesting divergence of trial tactics between the two appellants. Whereas Gilmore challenges the authentication of the footage from both the front camera and the side camera, Flowers challenges only the footage from the front camera. He concedes that the testimony of Desmond Stewart was adequate to authenticate the footage from the side camera but insists that the State failed to go through the necessary drill with respect to the footage from the front camera.

> During Desmond Stewart's testimony, the prosecutor showed him a number of photographs that were taken from the enhanced video that Mr. Imel

> created. Specifically, Mr. Stewart was shown State's Exhibits 14 a, b, c, e, f, g, h, i, j, k, m, and n, all of which came from the side camera. Mr. Stewart testified that he appeared in some of the photographs, and he testified that the photographs depicted what he saw happen on January 10. That testimony, therefore, authenticated the video, enhanced video and pictures from the side camera. It did not, however, authenticate the video, enhanced video and pictures from the front camera.

(Emphasis supplied).

Flowers is exalting form over substance. Stewart's testimony was that when he stepped out of the front door of Enterprise Car Rentals on the morning of January 10, 2014, he first saw Willis walking around to the front of the building and then saw the two appellants, each with "a knife or metal object tucked up under their hoodies and their jacket," running around the same corner of the building in pursuit of Willis. Stewart was able, moreover, to identify both appellants at the trial. Stewart's testimony authenticated that the footage from the front tape depicted precisely what it was purported to depict, to wit, the dramatis personae of the murderous drama that would immediately follow. To claim that the State did not march through the drill of showing a bit of the front footage to Stewart and then asking him the magic words as to whether that picture accurately reflected what he saw on January 10, 2014 and that that failure thereby invalidated the evidence is sheer trivialization. The testimony of Desmond Stewart adequately authenticated the footage from both surveillance cameras. The testimony of Desmond Stewart quintessentially satisfied the authentication requirement of Rule 5-901(b)(1), which gives as an illustration of such satisfaction:

> (1) Testimony of Witness With Knowledge. Testimony of a witness with knowledge that the offered evidence is what it is claimed to be.

With respect, moreover, to Flowers's challenge to the authentication of the footage from the front camera alone, he ignores the fact that the unchallenged (by him) footage from the side camera provides, in and of itself, significant authentication of the footage from the front camera. The combined footage from the two cameras depicted precisely what it was purported to depict, the murder of De'Juan Willis. We cannot imagine what more the appellants might have wished.

Authentication Procedures Were Impeccable

When the police arrived at the crime scene on the morning of January 10, 2014, they noticed that there were closed circuit cameras mounted outside the Enterprise Car Rental store. They contacted Andrew Wendler, the regional risk manager for Enterprise, and summoned him to the store to unlock the room containing the closed circuit TV camera footage. Mr. Wendler located the footage that recorded the victim and the two perpetrators and showed it to the police. Significantly, both Mr. Wendler and Detective Dean D'Alesandro of the Baltimore City Police Department's Homicide Division reviewed the footage there at Enterprise on January 10, 2014.

Mr. Wendler then ran into a technical problem, but one that did not constitute a legal problem. He was unable to download the footage. He promptly telephoned Protection One, a company retained by Enterprise to install, maintain, and monitor the cameras, and requested that Protection One personnel come and download the critical footage. They did so. Three days later, Mr. Wendler received a downloaded copy of two CD recordings in the mail. To the chagrin of the appellants, who see their deliverance in a challenge to the

chain of custody, both Mr. Wendler and Detective D'Alesandro viewed the video footage after the copy came back from Protection One and both testified that the footage was precisely the same as had been the footage they had earlier viewed on January 10, 2014. So much for a chain of custody problem.

At the trial, moreover, Mr. Wendler provided the technical jargon that the appellants seem eager to demand, although it strikes us as essentially surplusage. He explained that the front camera and the side camera were too "separate cameras" with distinct footage of different views. He explained that the data from the two cameras is separately stored and that the footage is retained for a limited period of time. The surveillance equipment is kept in a locked closet in the office area of Enterprise. The conclusion that the cameras were in proper working order was supported by the fact that when Mr. Wendler and Detective D'Alesandro entered the relevant date and time "into the system," they immediately accessed the relevant footage from both cameras. The detective used the clock on his cellphone and observed that the video footage was one minute faster than real time. In similar fashion, Mr. Wendler noted that the time on the footage was "close to the time, the proper time."

The State also presented the testimony of Anthony Imel, a forensic examiner for video enhancement for the Federal Bureau of Investigation ("FBI"). He was accepted as an expert witness without objection. In his expert opinion, the video footage in that case had never been tampered with. He gave the basis for his conclusion.

> [IMEL]: So a video that has been tampered with, and I did one not too long ago, the very first thing that you would look at is the overall video itself,

is it an open format; is it in a proprietary format. That would indicate to me that it came directly from the digital video recorder.

If above and beyond that there are some computer engineers that are involved in this programming, I would next do – next go to just the visual inspection of the video, what we call the uncanny valley inspection. We all know what a human being looks like, how a person walks, talks, moves, how in this case whether when – integrate shadows how that would operate in a video recording.

If everything looks normal and nothing is out of sorts, then I would go into an electronic review of it. I would look in the metadata. I would ensure it's – make sure there's no non-linear editing metadata tags in that video, and then make sure that everything within the video or within the metadata is normal for its type of video stream.

[THE STATE]: And was that the case with regard to this disc?

[IMEL]: It was. Again, I didn't see any indications of any manipulation in this video.

Mr. Imel then concluded:

[THE STATE]: Yes. And do you also have expertise – your training, does it give you the expertise to determine whether or not a video such as the one in question was tampered with or not?

[IMEL]: It is. That is one of my job titles is authentication of video.

[THE STATE]: And so to a reasonable degree of scientific certainty can you testify as to whether or not the video that you reviewed that is identical to State's Exhibit 18 is authentic and un-tampered with?

[IMEL]: I do not see any signs, outward signs or interior signs, or any manipulation with this video.

[THE STATE]: And would that be to a reasonable degree of scientific certainty –

[IMEL]: It is.

[THE STATE]: – based on your training in this field?

[IMEL]: It is.

Mr. Imel testified that from the original video footage, he was able to produce an enhanced video for purposes of clearer viewing. He was also able to produce some still photographs. Although the appellants, in their appellate briefs, lump everything together as part of their authentication argument, the production of an enhanced videotape and of still photographs are separate and distinct issues. At trial, the appellants did not object to the use of the enhanced video or to the still photographs. Any objection to them has not been preserved for appellate review.

Ironically, the unchallenged enhanced video and the unchallenged still photographs serve as yet further authentication of the video footage that was challenged. The State repeatedly referred to the still photographs during the testimony of Desmond Stewart without objection. The unchallenged still photographs show both appellants attacking Willis. In addition to showing that the appellants murdered Willis, they also coincidentally show that the challenged video footage shows precisely what it is purported to show. That, of course, is the core aim and purpose of authentication. Judge Alpert ruled that the State had made the required prima facie showing to authenticate the contents of the video. We fully affirm that ruling.

Motion For Mistrial/Trial Severance

On the fifth day of trial, a minor incident occurred that caused a momentary flap in the courtroom. The State called the appellant Gilmore's mother, Kyra Uzzell, as a witness. Attempting to prove that the two appellants knew each other, the State asked if she knew

anyone in the courtroom. Ms. Uzzell responded, "Yes, my son." The prosecutor followed up, "Is there anyone else?" Ms. Uzzell responded, "Yes." After the prosecutor then asked "Who else?" Ms. Uzzell answered "Ernest," referring to the co-defendant, Ernest Flowers. When the State then asked how well Ms. Uzzell knew Ernest Flowers, counsel for Flowers objected. The lawyers approached the bench, but the defendants remained at the trial table and Ms. Uzzell remained "on the stand" in the witness chair.

As the bench conference concluded, the sheriff informed Judge Alpert and the lawyers that during the bench conference, the appellant Gilmore had "mouthed" two or three questions to his mother. The courtroom clerk indicated that she also had seen the communication and that, in response to her son, Ms. Uzzell had nodded and made "eye gestures." The clerk was of the opinion that the jurors could have seen the interaction. All parties agreed that Judge Alpert should voir dire the jurors. He did so.

A number of the jurors informed the court that they had not seen or heard anything. Some jurors, on the other hand, had seen Gilmore "mouth" words, but they had no idea what he was "mouthing." One juror saw Gilmore say "Mom." One juror saw Gilmore ask his mother if she was "all right" and another juror saw him ask her if she was "okay." Every one of the jurors assured the court that they remained "fair and impartial."

One alternate juror observed that Gilmore was "making reference to her not to acknowledge that he knows Flowers or that she knows Flowers." Judge Alpert offered to dismiss the alternate, but counsel for Flowers expressly declined the offer. That alternate juror was dismissed the next day and did not deliberate.

After the jurors had been voir-dired, counsel for Flowers, who had earlier moved for a trial severance or for a mistrial, renewed both motions.

> My client had absolutely nothing to do with that aspect of the case. I mean, obviously there's some communication between a witness and the co-defendant, and I think it inures poorly to my client. I think that it's just, you know – so I would ask for a severance at this point. I know the Court is allowed to do that at any point, we argued it at the beginning. I just think it's improper that what took place while we were up here, even though I didn't think we should have been up here --
>
> . . .
>
> And Mr. Gilmore now is seen as trying to influence the witness[.]

The two motions were, in effect, one motion. A trial severance would have been, ipso facto, a mistrial for at least one of the defendants. A mistrial for Flowers would have been, ipso facto, a trial severance.

Judge Alpert gave the matter short shrift, as do we.

> [DEFENSE COUNSEL FOR FLOWERS]: Your Honor, if that happened, I'm going to ask for a mistrial. That's just –
>
> THE COURT: Fine, ask for it.
>
> [DEFENSE COUNSEL FOR FLOWERS]: I am asking, Your Honor.
>
> THE COURT: Denied.
>
> [DEFENSE COUNSEL FOR FLOWERS]: I mean the Co-Defendant –
>
> THE COURT: I'll make – okay.
>
> [DEFENSE COUNSEL FOR FLOWERS]: – I'm going to ask for a severance actually.
>
> THE COURT: Denied. Let's move on.

Had Judge Alpert observed Gilmore attempting to communicate with his mother, Gilmore would assuredly have suffered a stern verbal admonishment not to do that again. That is about what this procedural glitch would have been worth. A mistrial, on the other hand, is an extraordinary remedy. We see no extraordinary trial disruption calling for an extraordinary remedy. To begin with, we see no prejudice to the appellant Flowers who made the motion. More significantly, if five days of a multi-defendant murder trial before a jury plus alternates could be wiped out by a procedural glitch so relatively inconsequential, the institution of trial by jury could not long survive. Judge Alpert did not remotely abuse his discretion.

A Tempest In A Teapot

The third and final contention, raised only by the appellant Flowers, is that Judge Alpert erroneously permitted the State to make an improper remark in rebuttal argument. The focus is on the following segment of the State's rebuttal argument. The State was responding to Flowers's argument that Desmond Stewart could not have known that a stabbing took place because Stewart could not have seen it.

> [THE STATE]: [Stewart] was doing his duty as a good citizen of Baltimore City calling 9-1-1 saying, "I just saw two men with knives stab somebody." Before police got there, he knew it was a stabbing.
>
> How did he know it was a stabbing if he didn't see a stabbing? Mr. Needleman's argument makes absolutely no sense that his client did not stab someone because Desmond Stewart couldn't have seen it.
>
> Except he did see it because he called 9-1-1 moments after it happened, perhaps while it was still happening, and said, "I see two guys doing a stabbing; one had a black puffy coat, one in a blue Fila sweatsuit." Fila, Fila, however you pronounce it doesn't matter. He saw what he saw.

> He told the police what he saw. He watched them chase the victim, as did you. He watched his client [SIC] catch up to the victim. He watched them stand together. He watched the conversation. He watched the stabbing. He called the police horrified at what he'd seen.
>
> Today, we live in a stop snitching culture but somebody had the courage –
>
> [DEFENSE COUNSEL FOR FLOWERS]: Objection.
>
> [THE STATE]: – to come forward and say –
>
> THE COURT: All right. Let's just stick to this case, not about some other cultures.
>
> [THE STATE]: – say this is wrong stabbing a young man, a high school student with a backpack on him in broad daylight in front of me, in front of a camera, in front of the neighborhood, in front of Lori Anderson.

(Emphasis supplied).

Flowers's contention is that Judge Alpert erroneously "permitted the prosecutor to make improper and prejudicial remarks." Judge Alpert did no such thing. The objection presumably was to the mention of "a stop snitching culture." Judge Alpert did everything that Flowers asked to be done. He immediately directed the State to "stick to this case, not about some other cultures." The State did precisely what Judge Alpert ordered it to do. It never mentioned the "stop snitching culture" again and went on to confine itself to the present case.

Flowers never requested the declaration of a mistrial. For the trial judge to have declared one sua sponte here would have been outrageous. It would also have been a declaration of a mistrial without manifest necessity. Flowers, moreover, never requested

any advice to the jury. Flowers does not suggest, even at this remove, what he might have wished such advice to be. Such advice, moreover, might only have impressed on the jurors' minds a passing phrase that they might otherwise easily have missed. Judge Alpert kept the trial on the tracks and kept it moving toward a tidy conclusion, free of any meaningless distractions. In that, we see no abuse of discretion.

JUDGMENTS AFFIRMED; COSTS TO BE PAID BY APPELLANT.