

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 2532

September Term, 2015

LAWRENCE J. FORBES

v.

STATE OF MARYLAND

Woodward,
Leahy,
Friedman,

JJ.

Opinion by Friedman, J.

Filed: March 13, 2017

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

Lawrence J. Forbes, appellant, was convicted by a jury in the Circuit Court for Montgomery County of second-degree assault and third-degree burglary. The court sentenced Forbes to three years' incarceration for second-degree assault, with all but 60 days suspended, and to a concurrent 18 month term for third-degree burglary with all but 60 days suspended, to be followed by a period of two years' supervised probation.

On appeal, Forbes presents two questions for our consideration, which we have rephrased slightly:

1. Did the trial court err in excluding from evidence an e-mail which Forbes sought to introduce to explain the cause of his actions on the night of July 12, 2015?
2. Was the evidence sufficient to support Forbes' convictions for third-degree burglary and second-degree assault?

For the reasons set forth below, we affirm.

BACKGROUND

Evidence adduced at trial revealed that on July 11, 2015, Forbes was dating Jasmine Jones, whom he had been dating since November 2014. Jasmine had previously dated Sean Boyd from October 2013 to May 2014. Jasmine characterized her relationship with Sean as “toxic,” consisting of fighting, and verbal and physical altercations. Jasmine testified that she had asked Sean to stop contacting her after they stopped dating, but he continued to send her text and e-mail messages, and on one occasion, he appeared at her place of work unannounced and pushed her against a car in the parking lot. Jasmine told Forbes about the text and e-mail messages that she had received from Sean and her encounter with

Sean at her work. In February 2015, Forbes sent Sean an e-mail from Jasmine’s e-mail account that said, “please stay away from my girlfriend.” Sean sent a response e-mail saying, “fuck you[.]” Sean testified that following this e-mail exchange, he continued to text Jasmine “on occasion” when he “would drink” which was “probably once a week” until April 2015, and then he texted her “more like twice a month from April to July [2015]”.

In the early hours of July 11, 2015, Jasmine received a “threatening” e-mail, which she showed to Forbes. Later that same night, Sean sent Jasmine a “drunk text” that he described as “sexual” in nature, and which she described as “lewd” and “very inappropriate.” The next morning Sean sent Jasmine a text message apologizing for the previous night’s text message.

That evening, two groups—apparently independently and unbeknownst to each other—went to Sean Boyd’s home in Derwood, Maryland: Forbes and LaToya Jones in one car; Jasmine and her cousin Eric Hopkins in another. All four had been at a family celebration at Jasmine’s aunt’s house where Jasmine discussed with her sister, LaToya, and their aunt the e-mail that Jasmine had received.

LaToya testified that while she, Jasmine, and their aunt were discussing the e-mail that Jasmine had received, LaToya noticed that Forbes was upset and she went outside to sit with him in his car to try to “figure out why this keeps on happening.” LaToya was in the car with Forbes as he drove to Sean’s house. When Forbes and LaToya arrived at Sean’s house, they talked in the car briefly before Forbes exited the car to “[try] to talk to them, have them stop this.” LaToya stayed in the car, texting her mother. Once LaToya saw her

cousin, Eric Hopkins, approaching the house, she exited the car and walked up to the house with Eric. LaToya heard yelling as she reached the doorway of the house, where Forbes was standing. Mr. Boyd was asking, “what’s going on,” and LaToya responded, “you know what your son did to my sister.” LaToya then grabbed Forbes and they left the house.

Eric testified that he was at a family function with Jasmine, LaToya, and Forbes on July 12, 2015, when Jasmine asked him to take her to Sean’s house. Eric had seen an e-mail addressed to Jasmine from the previous day, and he felt obligated to protect her and to be her support. Eric and Jasmine tried to find Forbes to let him know they were leaving, but could not find him. When they arrived at Sean’s house, Eric and Jasmine parked two houses away and sat in the car talking and deciding whether they should go to the Boyds’ house together or whether Jasmine should go alone. Eric did not see Forbes arrive, but Eric observed him at the front door of the Boyds’ house. Once Eric heard screaming, he ran up to the front door. Jasmine remained in the car. Eric entered the house and saw Mrs. Boyd on the floor. Forbes was upset and yelling, “You need to check your son’s room. He threatened my girlfriend,” and “ask him about the gun.” After LaToya pulled Forbes out of the house, Eric stayed and spoke to the Boyds and the police.

Sean Boyd testified that at about 8:45 p.m. that night, he was at home with his parents when he heard the doorbell ring and he went to answer it. Sean testified that he opened the door partially to see who it was, and standing there was a person he had never seen before, whom he identified in court as Forbes. Sean stated that Forbes asked him, “Where’s Sean?” or “I need to know where Sean is right now.” Sean responded by asking Forbes, “Who are you?” and “Why do you need to know?” but Forbes continued

demanding to know where Sean was, raising his voice. At that point, Sean’s mother came upstairs from the basement because she heard Forbes yelling.

Sean saw that Forbes was holding some type of weapon behind his back. Sean and his mother tried to close the door, but Forbes “forced his way with the bat in his hand and he pushed it open.” Once inside, Forbes started swinging at Sean, yelling repeatedly, “I’m going to fucking kill you.” Forbes swung the bat at Sean’s face, but Sean put his arms up to block it, and the bat hit him in the elbow. Sean was knocked to the ground and the bat hit Sean’s right shoulder. Sean got to his feet, and Forbes swung at him again, but missed, and Sean ran to the basement of the house. Mrs. Boyd tried to push Forbes out the door, but he pushed her to the ground. Mrs. Boyd managed to get away from Forbes and run to the kitchen.

When Jeffrey Boyd, Sean’s father, heard his wife scream, he ran upstairs from the basement of his home. Mr. Boyd did not see his wife upstairs, but he saw Forbes and Eric Hopkins, whom he did not know, standing in the foyer. Mr. Boyd asked them who they were and why they were there. Sean then came back upstairs and announced that he had called 911. According to Mr. Boyd, Forbes was raising the bat and yelling at Sean, “I’m going to fucking kill you,” and yelling that Sean had a gun. Mr. Boyd observed Jasmine’s sister, LaToya, on the front steps, initially encouraging Forbes, but once the police were called, she attempted to pull Forbes back out of the house. Mr. Boyd heard LaToya yelling about a threatening e-mail that Sean had sent to Jasmine that they had tracked down as being sent from Sean.

Forbes testified in his own defense. He testified that Jasmine was “frightened” and “very alarmed” by Sean’s repeated e-mails and text messages to her, and that she was very upset following her encounter with Sean at her place of work. Forbes felt that it was his duty to protect her. Forbes was with Jasmine when she received the e-mail that he characterized as “threatening” and “frightening,” and he stated that Jasmine was “freaked out” and could not sleep after reading it. Forbes explained that the e-mail was frightening because it referenced the fact that Forbes had been out-of-town for a week and a half, which was accurate. In an attempt to trace the e-mail, Forbes learned that the e-mail came from Derwood, Maryland, and he knew that the Boyds’ residence was on Azaela Drive in Derwood, Maryland. Forbes overheard Jasmine, LaToya, and their aunt discussing the e-mail, and he decided to drive to Sean’s house. While Forbes was in his car researching Sean’s address, LaToya joined him in the car and they drove to Sean’s house.

Forbes intended to speak to Sean “man to man,” and find out if Sean had sent the threatening e-mail, and if so, why he sent it. Forbes took a baseball bat from the trunk of his car trunk, where he kept various sports equipment, and brought it to the Boyds’ door as a “precaution.” Forbes placed the bat down near the front door and rang the doorbell. Forbes asked the individual who opened the door, “May I speak to Sean” and “Is Sean home?” When Sean identified himself, Forbes asked him if he knew Jasmine, but Sean stared at him without answering. Forbes explained the events that followed:

And then Sean had kind of opened it up a little bit more. And then it looked like he was coming out, like it looked like he was opening it up a little bit more. And then, you know, he was coming out where I was coming in. And so I took one step forward.

And then the mother [said] just like, ‘No, you need to leave.’

And then I get, Sean had, Sean had swung the door and slammed it. And by that time, my foot was already up onto the ledge right there, and as the door came closing, I kind of curled like this, and as the door did, he slammed the door and it hit my foot and my shoulder.

At that time, the door swung open, and the mother ran to the left with, over there by the light switch I believe it was, and Sean had back up into, behind the door.

Forbes explained that he saw Sean “reach up” from the area of his pockets out toward his middle chest area. At that point, Forbes reached back and grabbed his bat and swung twice in the area behind the front door. Forbes “got another step in,” and saw Sean behind the door so he swung a third time, and struck him. Forbes testified that when he swung the bat, he was attempting “to hopefully get whatever [it] was out of [Sean’s] hand.”

Sean fell to the ground, and as Forbes stood over him, a “lightbulb clicked in [his] head,” and he thought, “This isn’t me, what am I doing, I’m tripping right now. I’m going crazy so I need to stop.” Forbes turned to leave, but Mrs. Boyd started “charging” him, and started hitting him, and then she “flopped ... down to the ground.” Forbes reached out his hand and asked if she was okay, but she screamed. Mr. Boyd appeared and asked what was going on and Forbes responded: “You need to check your son... I’m going to kill your son. He literally sent threatening e-mails and he has a gun[.]” Mr. Boyd told Forbes that he was crazy because Sean did not have a gun. Forbes then left with LaToya.

DISCUSSION

Forbes contends that the trial court erred in excluding from evidence the e-mail that Jasmine received that he claims “caused Jasmine and [Forbes] to become so disturbed and

troubled after reading that it became the cause of their actions on the night of July 12, 2015.” The State argues that the trial court properly exercised its discretion in excluding the e-mail because it was not properly authenticated and its potential for prejudice outweighed its probative value.

Prior to trial, the State moved in limine to exclude the e-mail on the ground that it was not properly authenticated. The State argued that the e-mail address from which the e-mail had been sent did not belong to Sean, and was not associated with him, as it was registered to an Alec Johnson. Defense counsel acknowledged that he was unable to verify that the e-mail came from Sean. Defense counsel argued that the e-mail was admissible, however, to show Forbes’ motivation and state of mind, specifically why Forbes believed that his actions were reasonable under the circumstances based on what he perceived Sean’s propensity for violence to be.

The proffered e-mail read:

I know you think it’s over, but it’s only just begun. Not even your boyfriend can keep you safe. Especially when he’s out of the country for a week and a half at a time. We’re always watching you, bitch. One day I will get my hands on you and you will die a long and painful death. Slut.

Yours truly.

According to defense counsel, the e-mail was admissible because it was not being offered for its truth, but to explain Forbes’ actions.

The trial court ruled:

[U]nless there’s something specifically tying these e-mails to [Sean], and it sounds like there isn’t, I would be inclined not to admit the e-mails. So at this point, I’m going to grant a motion in limine. If something comes up during the trial or you have some other theory or, you know, proof, I mean, I’ll

reopen that and hear from you about it. But those e-mails without authentication, I think would be significantly prejudicial to the State, and I don't see that they're really probative of an issue that's going to be before that jury.

The trial court further ruled that defense counsel would be permitted to reference the existence of the e-mail, but the defense was prohibited from reciting the language of the e-mail.

This Court has defined the standard of review governing a trial court's decision to admit or exclude evidence as follows:

Determinations regarding the admissibility of evidence are generally left to the sound discretion of the trial court. This Court reviews a trial court's evidentiary rulings for abuse of discretion. A trial court abuses its discretion only when no reasonable person would take the view adopted by the [trial] court, or when the court acts without reference to any guiding rules or principles.

Baker v. State, 223 Md. App. 750, 759-60 (2015) (internal quotations omitted).

Maryland Rule 5-901(a) governs the authentication of documentary evidence and provides: “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.” Other than business records, no documentary evidence may be allowed into evidence unless the document is properly authenticated. *Hadid v. Alexander*, 55 Md. App. 344, 350 (1983) (citation omitted). And unless the document is self-authenticating, some witness must testify as to what it is. *Id.* Evidence may be authenticated, for example, 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.” Md. Rule 5–901(b)(4). The admission of

evidence that is not properly authenticated by its proponent constitutes error. *Washington v. State*, 406 Md. 642, 655, 657 (2008) (concluding that a videotape that was compiled from several cameras and created by an unknown person using an unknown process, was not properly authenticated, and admission of the tape was not harmless error).

In the instant case, Forbes failed to provide any evidence to authenticate the e-mail message. Defense counsel explained to the trial court that some effort had been made to track the e-mail and determine that it was sent from the block where Sean lived, but counsel admitted that the tracking efforts would not be admissible in court, and no further information was provided to authenticate the e-mail. During the course of trial, Forbes again attempted to introduce the e-mail by demonstrating that multiple witnesses had read the e-mail, but the court maintained its ruling that the e-mail remained inadmissible because it had not been authenticated.

Forbes' argument that the e-mail was admissible as non-hearsay is unavailing. The requirement of authentication or identification is a condition precedent to admissibility. *Champion Billiards Cafe, Inc. v. Hall*, 112 Md. App. 560, 565 (1996) (determining that authentication of proffered medical bills was a condition precedent to admissibility, citing Md. Rule 5-901(a)). The fact that the e-mail was offered for a non-hearsay purpose did not overcome the admissibility hurdle that it was not properly authenticated, as there was no evidence that the e-mail originated from Sean.

Moreover, as the trial court explained, the probative value of the e-mail was substantially outweighed by the danger of unfair prejudice to the State:

But basically, you're using that [to] attribute[] that to the victim. And there's no evidence that ties that to him. There's no admissible evidence that ties that to him. And you're saying, well, but its goes to your client's motivation. I understand that and there are other ways to do that other than using a piece of evidence that is extremely prejudicial and really doesn't have probative value that I can see in terms of an issue in the case.

Whether a particular piece of evidence is unfairly prejudicial is determined by “balancing the inflammatory character of the evidence against the utility the evidence will provide to the jurors’ evaluation of the issues in the case.” *Smith v. State*, 218 Md. App. 689, 705 (2014). “Evidence is prejudicial when it tends to have some adverse effect ... beyond tending to prove the fact or issue that justified its admission.” *Id.* (citations and internal quotation marks omitted).

In the instant case, the e-mail was not probative of any material issue before the jury pertaining to Forbes’ burglary and assault charges. The e-mail did, however, pose a significant risk that the jury would attribute the threatening e-mail to Sean and view him as the initial aggressor. Accordingly, the trial court did not abuse its discretion in determining that the probative value of the e-mail, if any, was substantially outweighed by the unfair prejudice to the State.

We also note that even if the trial court abused its discretion in excluding the e-mail, that error would be harmless. *See Dionas v. State*, 436 Md. 97, 108 (2013) (an error is harmless when a reviewing court is “satisfied that there is no reasonable possibility that the evidence complained of—whether erroneously admitted or excluded—may have contributed to the rendition of the guilty verdict”) (quoting *Dorsey v. State*, 276 Md. 638, 659 (1976)). Forbes referred to the e-mail throughout trial, and established through the

testimony of several witnesses that the e-mail was threatening in nature; that Jasmine and Forbes were extremely upset by the e-mail; and that Forbes decided to go to Sean’s home and confront him about the e-mail. We discern no actual prejudice to Forbes from the exclusion of the e-mail because the admission of the e-mail would have been cumulative, and would not have impacted the jury’s verdict. Thus, the exclusion of the e-mail was harmless beyond a reasonable doubt.

Sufficiency of the Evidence

Forbes contends that the evidence was insufficient to support his convictions for third-degree burglary and second-degree assault. The State argues that Forbes’ claim as to the second-degree assault conviction is unpreserved because Forbes failed to make the argument at trial that he now raises on appeal, and that Forbes’ challenges to the sufficiency of the evidence of the remaining convictions are without merit.

A.

Preservation

Pursuant to Maryland Rule 4-324 (a), a criminal defendant who moves for judgment of acquittal must “state with particularity all reasons why the motion should be granted[,]” and “is not entitled to appellate review of reasons stated for the first time on appeal.” *Starr v. State*, 405 Md. 293, 302 (2008) (citations omitted). In *Mulley v. State*, this Court recently recognized that “[a] large number of appellate opinions in this State have consistently emphasized the requirement that alleged deficiencies in the evidence must be pointed out ‘with particularity’ at the time of trial ... to preserve for appellate review a challenge to the sufficiency of the evidence.” 228 Md. App. 364, 387 (2016). Thus, “the issue of sufficiency

of the evidence is not preserved when [the defendant]’s motion for judgment of acquittal is on a ground different than that set forth on appeal.” *Id.* at 388 (citations omitted).

Forbes moved for judgment of acquittal at the close of the State’s case on the following grounds:

[DEFENSE COUNSEL]: And with respect to Count 1, which is a first degree burglary charge, the State has got to prove that the defendant broke and entered the premises; that he did so with a specific intent to commit the crime of first degree assault...

So for purposes of the record, that would, we would submit to Your Honor that **there is insufficient evidence to show that the defendant had the specific intent to commit a first degree assault, in that his purpose in going there was not to inflict the type of serious physical injury that is required by how that is defined in the statute; that in fact, no serious physical injury was effected.**

Physical, serious physical injury is defined by the statute and requires “permanency, disfigurement,” other specific things that are described in the statute, not simply a bruising that was evidenced by the limited testimony of the medical injuries in this case.

So there was no actual, physical injury. There’s insufficient evidence to establish that it was his intent to inflict that type of injury that was, essentially, life endangering. And for that reason, the State has failed to establish that element.

It also failed to establish that the defendant broke and entered. The door was open. He made entry, but we would submit that the evidence is insufficient to show that it was the type of breaking and entering required under the statute as to Count 1.

Forbes now argues that when Sean attempted to close the door on Forbes’ foot, he caused Forbes to “fall towards [Sean] and end up inside the house,” and therefore Forbes’ presence in the house was “accidental and not effected with the intent to commit[.]”

“When ruling on a motion for judgment of acquittal, the trial court is not required to imagine all reasonable offshoots of the argument actually presented.” *Starr*, 405 Md. at 304. Here, Forbes failed to argue before the trial court that he “accidentally” fell into the Boyds’ home and we do not consider that argument to be a reasonable extension of the argument presented at trial: that there was no evidence that Forbes had intent to commit the crime of first degree assault because “there was no actual physical injury” and there was no breaking and entering because the “door was open.” *See id.* Accordingly, Forbes did not preserve this argument for our review.

Even if we were to consider Forbes’ claim, there was sufficient evidence to support his convictions for third-degree burglary and second-degree assault.

B.

Merits

The standard for our review of the sufficiency of the evidence is “whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *Hobby v. State*, 436 Md. 526, 538 (2014) (quoting *Derr v. State*, 434 Md. 88, 129 (2013)) (emphasis in original). In applying the test, “[w]e defer to the fact finder’s ‘opportunity to assess the credibility of witnesses, weigh the evidence, and resolve conflicts in the evidence.’” *Neal v. State*, 191 Md. App. 297, 314 (2010) (citation omitted).

Third-degree burglary is committed by the breaking and entering of a dwelling of another with the intent to commit crime. Md. Code (2002, 2012 Repl. Vol.), Criminal Law Article (“C.R.”), § 6-204(a). “Breaking” includes “the pushing open” of a door kept closed

“merely by its own weight,” *Reagan v. State*, 2 Md. App. 262, 268 (1967), and the “further pushing open of a door or window left partly open.” *Jones v. State*, 2 Md. App. 356, 360 (1967). An “entry occurs when ‘any part of ... [the trespasser’s] person is within the house’ and that the entry is “sufficient if any part of the actor’s person intruded, even momentarily, into the structure.” *Hebron v. State*, 331 Md. 219, 236 (1993) (citation omitted).

According to Sean and Mrs. Boyd, Forbes “forced his way with the bat in his hand and he pushed [the door] open.” Forbes testified that, “[Sean] was coming out where I was coming in. And so I took one step forward,” and then Forbes stated that he “got another step in.” Based on the testimony of Sean, Mrs. Boyd, and Forbes, sufficient evidence existed to establish both the “breaking” and “entry” requirements for third-degree burglary.

Because of the difficulty associated with proving directly the intent of an accused who breaks into a dwelling, the intention at the time of the break may be inferred from the circumstances. *Winder v. State*, 362 Md. 275, 329 (2001). To reach a rational conclusion regarding the intention of the accused, a jury may consider the surrounding circumstances, including an accused’s acts and declarations. *Id.* Here, the jury could reasonably infer from the evidence that Forbes intended to commit a crime in the Boyds’ home based on the testimony of Sean and Mrs. Boyd that Forbes, once inside, began swinging a bat at Sean, and repeatedly yelling at Sean, “I’m going to fucking kill you.”

With respect to second-degree assault, Forbes claims that the evidence was insufficient to sustain his conviction in light of credible evidence supporting his belief that Sean was armed, and Forbes was merely defending himself when he hit Sean with the bat. There are three modalities of second-degree assault: (1) intent to frighten; (2) attempted

battery; or (3) battery. *Jones v. State*, 440 Md. 450, 455 (2014) (citation omitted); C.R., § 3-203 (a). The battery modality of assault is characterized as the “unjustified, offensive and non-consensual application of force.” *Hickman v. State*, 193 Md. App. 238, 251 (2010). To prove assault, the State must establish that: “the defendant caused offensive physical contact with, or harm to, the victim ...; that ... the contact was the result of an intentional or reckless act of the defendant and was not accidental; and ... that the contact was not consented to by the victim or was not legally justified.” *Nicolas v. State*, 426 Md. 385, 403-04 (2012).

We conclude that the State presented sufficient evidence to sustain Forbes’ conviction for second-degree assault. The jury could reasonably find that Forbes committed a battery based on the evidence that Forbes entered the house and swung a bat at Sean multiple times intending to strike him; that he, in fact, struck Sean with the bat, once in the elbow and again in the shoulder; and that he knocked Sean to the ground. Although it was for the jury to determine the credibility of Forbes’ explanation that he acted in self-defense during the encounter, Forbes’ testimony on that issue does not negate the sufficiency of the evidence adduced by the State as to the assault charge. *See Gilbert v. State*, 36 Md. App. 196, 206 (1977) (“The fact that [defense evidence] may be believed is enough to get the defense before the jury; the fact that it may not be believed is enough to keep the State’s case before the jury”). We conclude that the evidence was sufficient to sustain Forbes’ conviction for second-degree assault.

**JUDGMENTS OF THE CIRCUIT COURT
FOR MONTGOMERY COUNTY
AFFIRMED. COSTS TO BE PAID BY THE
APPELLANT.**