Circuit Court for Baltimore City
Case Nos. 196057013, 196057014, 196057016

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 465

September Term, 2017

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ROBERT HARRIS

v.

STATE OF MARYLAND

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Kehoe,
Berger,
Zarnoch, Robert A.
(Senior Judge, Specially Assigned),

JJ.

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Opinion by Berger, J.

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Filed: July 26, 2018

This is the third time this case has been before this Court on appeal. Following a second re-trial before a jury, Robert Harris ("Harris"), appellant, was convicted of first-degree murder, conspiracy to commit murder, solicitation to commit murder, use of a handgun in the commission of a felony, and wearing and carrying a handgun in association with the shooting death of his fiancée, Theresa McLeod ("McLeod") in a murder-for-hire scheme. Harris received two life sentences for murder and conspiracy. Harris was also sentenced to twenty years' imprisonment for use of a handgun in the commission of a felony.[1] The court ordered that Harris's sentences were to run consecutively.

Harris raises seven issues in this appeal, which we have rephrased slightly as follows:

1. Whether the circuit court erred by ruling on a pretrial motion prior to considering Harris's motion to discharge counsel.

2. Whether the circuit court erred in connection with Harris's request to retract his waiver of counsel the day prior to trial.

3. Whether the circuit court erred by permitting Theresa McLeod's financial advisor to testify that McLeod inquired into making Harris the beneficiary of her life insurance policy.

4. If preserved, whether the circuit court erred by sustaining the State's objection to certain testimony by Terry Walker.

5. Whether the circuit court erred by permitting testimony from Terry Walker about the reason why he was incarcerated.

[1] The remaining offenses merged for sentencing purposes.

6. Whether the circuit court erred by declining to admit a "bill of sale" on the basis that it had not been properly authenticated.

7. Whether the circuit court erred in connection with its explanation to Harris that prisoner-witnesses would be required to testify in shackles.

For the reasons explained herein, we shall affirm the judgment of the circuit court.

## FACTUAL AND PROCEDURAL BACKGROUND

We set forth the facts giving rise to this appeal in the light most favorable to the State, the prevailing party below. We previously set forth the details of the murder-for-hire scheme and police investigation in an unreported opinion, *Robert Harris v. State*, No. 2738, Sept. Term 2011 (filed September 2, 2015), slip op. at 1-2, from which we draw here:

> [Harris] was convicted of killing his fiancee in a murder-for-hire scheme. On the evening of January 26, 1996, Teresa McLeod was shot six times with a Glock handgun registered to appellant. Five of the shots were fired at close range -- less than six inches --into Ms. McLeod's back; [Harris] suffered only a single gunshot wound in his thigh. Although [Harris] reported that they were ambushed and shot by a masked robber, he was charged with Ms. McLeod's murder.
>
> In April 1997, a jury found [Harris] guilty of murder and related crimes. *See Harris v. State*, 407 Md. 503, 506 (2009). Because the State did not disclose to the defense impeachment evidence relating to sentencing leniency for key prosecution witnesses, [Harris] obtained post-conviction relief and was granted a new trial, *id.* at 526, which took place in January 2012.
>
> The State's prosecution theory was that [Harris], who had financial troubles, hired Russell Brill as a "hit man," promised to pay him out of Ms. McLeod's life insurance proceeds, supplied Brill with a pager and the murder weapon, and drove Ms. McLeod to a pre-arranged location at Violetville Park, where Brill confronted them in a staged robbery. [Harris]

> then either ordered the murder or committed it himself.
>
> [Harris]'s defense was that the day before the shooting, Brill purchased the Glock from him on credit and arranged to pay [Harris] at the park, but instead robbed them. When Ms. McLeod hit back, [Brill] shot her and then [Harris].

Police arrived at the scene shortly after the shooting, where they found McLeod and Harris. McLeod was deceased. Harris told police officers that he and McLeod were in their vehicle when a tall thin black man wearing a camouflage jacket approached the car with his gun drawn and demanded money. Harris further explained that the gunman began to shoot after McLeod resisted. Harris subsequently described the shooting similarly to a friend who visited him at the hospital. Harris told police that the robber took his money clip and grabbed McLeod's necklace, but police recovered a watch, other jewelry, and cash from McLeod's body. McLeod's purse was found on the ground near her body. Investigators recovered a gold chain from the woods nearby.

Detective Darryl Massey was the primary homicide investigator. At the scene, Massey directed crime scene technicians and spoke with witnesses. When Harris was transported to the University of Maryland Shock Trauma Center, Massey went as well. Massey saw a nurse wiping Harris's left hand in a treatment room at the hospital. Massey immediately asked the nurse to stop wiping his hands so that a gunshot residue test could be performed. A gunshot residue test was performed, and no gunshot residue was found on Harris's hands.

The police investigation eventually led to Russell Brill and several of his associates. Brill ultimately led police to a package they had buried in the cemetery next to Violetville

Park which contained the murder weapon, a nine millimeter Glock; blood-stained jeans and a plaid flannel jacket that Brill had been wearing during the murder; gloves and a face mask; and bullets like those that killed McLeod.

Brill, who is white and does not match Harris's description of the robber, explained that Harris had approached him in mid-January 1996 and offered him $20,000 to kill McLeod. Brill made his living by selling and trading guns, selling drugs, and also committed robberies. Brill explained that the payment involved "[s]ome sort of insurance situation." Brill agreed to participate in the murder-for-hire scheme with "no hesitancy." Brill and Harris planned to stage McLeod's murder so that it would appear to be a robbery, including planning that Brill would shoot Harris in the leg. Harris and Brill planned to commit the murder in Violetville Park. Harris gave Brill a pager and planned to page Harris before driving McLeod to the park. Harris also provided Brill with the murder weapon.

On January 26, 1996, the plan was put into action. Brill was at the home of a friend, Nicholas Jantz, while waiting for a page from Harris. Brill was wearing black jeans, a flannel jacket, a mask, and gloves. Only the skin around Brill's eyes was exposed. Brill went to the park after receiving the page, where he hid in a wooded area near the parking lot. Brill waited for approximately five minutes until Harris's car arrived. When Harris's car arrived, Brill approached the vehicle while holding the gun. He ordered Harris and McLeod to exit the car and demanded money.

Brill testified that he was supposed to shoot McLeod at that point, but he "chickened out" and "started to back away." Brill then told Harris that "I can't do it." Brill testified Harris grabbed the gun from Brill's hand and shot McLeod approximately six or seven times. Brill and Harris then engaged in a tussle during which Brill took back the gun. Brill shot Harris in the leg and ran away in the direction of his brother Joseph's house. Brill testified that he had pulled a necklace off McLeod's neck, but threw the necklace into the bushes as he ran away.

Brill arrived at the home shared by Joseph, his girlfriend, Jennifer Pettie, and their child. Brill told Joseph that he had shot somebody. Brill put his clothing in a bag and Joseph hid the clothing and gun. Brill testified that the gun was hidden rather than destroyed because Harris wanted the gun back after the murder.

Brill initially told the police that he had shot McLeod himself. He explained that he had done so because he "didn't want to be a rat" or "tell on anybody." Brill told police that the murder was staged to appear like a robbery and that Harris was going to pay him for his involvement after receiving and insurance payout. Brill was charged with murder, conspiracy to commit murder, and handgun charges. He ultimately reached a plea agreement with the State and agreed to testify against Harris. Brill received a sentence of life imprisonment with all but thirty years suspended for first-degree murder, use of a handgun in the commission of a crime of violence, and conspiracy.

Brill's "best friend," Nicholas Jantz, corroborated Brill's account of the murder-for-hire plot. Jantz testified that Brill had told him about the planned murder before it took

place. Jantz testified that Brill told him that a man had offered to pay him $20,000 to kill his fiancée. Jantz testified that Brill told him that Brill and Harris had agreed that Brill should shoot McLeod and that the death was meant to look like a robbery. Jantz further testified that Harris gave Brill a pistol and a pager a few weeks before the murder. Jantz was with Brill on the night of the murder when Brill received a page from Harris. Brill told Jantz that he was going to Violetville Park and left to go to the park. Brill seemed "very anxious" and "very worried" when he left. Jantz testified that Brill was wearing gloves, a face mask, jeans, and a flannel jacket when he left for the park.

Jennifer Pettie, who was living with Brill's brother Joseph Brill at the time, further corroborated Brill's testimony. Pettie testified that Brill had agreed "to shoot a lady for money." She recalled that on the night of the murder, Jantz and Brill left the house together after Brill received a page. Brill was carrying a gun and wearing a mask, hat, and gloves. Pettie was home when Brill returned later that evening. Brill was visibly upset and said he "couldn't believe that he did it." Brill, his brother, and Jantz wiped off the gun and Brill took off his clothes. Brill stashed the gun behind a vent in the apartment.

Another witness for the State was Donnell Bartee. He testified pursuant to a plea agreement regarding unrelated offenses. Bartee testified that he met Brill and Harris in 1996. According to Bartee, Harris approached him and asked him to testify that it was Brill's idea to blame McLeod's shooting on a black man. Harris offered to pay Bartee $1,500 in exchange for his testimony. Bartee spoke with his attorney about Harris's alleged offer and subsequently met with police. Bartee was offered a favorable plea deal in a

pending case in exchange for his testimony against Harris.

Additional facts shall be discussed as necessitated by our consideration of the issues on appeal.

## DISCUSSION

### I.

The first issue Harris raises in this appeal is based upon the circuit court's handling of his motion to discharge counsel. In advance of a pretrial hearing on July 14, 2016, Harris had filed a *pro se* motion to discharge counsel pursuant to Md. Rule 4-215. The issue before the court at the pretrial hearing was the State's motion *in limine* to admit testimony from Harris's prior trial from witnesses who had since died. The circuit court judge acknowledged that Harris wanted to discharge his counsel, but explained that she was inclined to address the State's motion *in limine* prior to addressing Harris's motion to discharge counsel. Harris was represented at the time by a public defender, who argued that the court should deny the State's motion to admit prior testimony on confrontation and due process grounds. The circuit court granted the State's motion except as to one witness.[2]

After ruling on the State's motion *in limine*, the court addressed Harris's motion to discharge counsel. Harris had not raised any issue about the order in which the motions would be considered prior to this point. When Harris addressed the court, he explained

[2] The circuit court deferred ruling on whether the prior testimony of Barbara Arthur, the victim's mother, would be admitted. At the time of the hearing, Ms. Arthur was incapacitated and unable to testify. By the time of the third trial, Ms. Arthur had died and the circuit court permitted her prior testimony to be read into evidence.

that he "object[ed] to everything that has just taken place earlier" with respect to the State's motion *in limine*. Harris argued that he "should have been able to argue that motion" rather than defense counsel. This exchange followed:

> THE COURT: Well, I actually observed you consult with your counsel and I also paused to give you an opportunity to do that and to see if there was anything else, sir. Do you want to be heard on them?
>
> MR. HARRIS: Yes. I'd just like to note my objection --
>
> THE COURT: Okay.
>
> MR. HARRIS: -- to me not participating and me not representing myself in arguing that motion that you just did.
>
> THE COURT: Well, what would you like to tell me about those motions, sir?
>
> MR. HARRIS: Well, I would -- well, actually, Your Honor, I wasn't privy to anything about that motion. I didn't see any of the paperwork. I haven't received anything form the State about this motion, so I'm kind of blindsided. I don't even know what the motion looks like. I don't know what the motion's about. I don't even know the title of the motion. It wasn't stated before the Court, so I didn't hear it and I wasn't given a copy of anything.
>
> So, you know, you ask me --
>
> THE COURT: Well, that's because at the time you were represented by counsel.
>
> MR. HARRIS: Right.
>
> THE COURT: And the State did exactly what they should do which is file it with your attorneys.
>
> MR. HARRIS: Right. So I don't -- see, that's the problem that I have with being represented.

The court heard some of Harris's additional explanations about why he wanted to

discharge counsel, but ultimately determined that it was appropriate to refer Harris's motion to discharge to the administrative judge's designee. The administrative judge's designee granted the motion to discharge counsel and postponed the trial. On appeal, Harris does not challenge the administrative judge's ruling as to his motion to discharge counsel. Rather, he challenges only the circuit court's decision to consider the State's motion *in limine* prior to addressing the motion to discharge, arguing that the court erred by considering any other matter prior to the motion to discharge counsel.

Maryland Rule 4-215 governs waiver of the right to counsel and provides the following with respect to discharge of an attorney whose appearance has already been entered:

> If a defendant requests permission to discharge an attorney whose appearance has been entered, the court shall permit the defendant to explain the reasons for the request. If the court finds that there is a meritorious reason for the defendant's request, the court shall permit the discharge of counsel; continue the action if necessary; and advise the defendant that if new counsel does not enter an appearance by the next scheduled trial date, the action will proceed to trial with the defendant unrepresented by counsel. If the court finds no meritorious reason for the defendant's request, the court may not permit the discharge of counsel without first informing the defendant that the trial will proceed as scheduled with the defendant unrepresented by counsel if the defendant discharges counsel and does not have new counsel. If the court permits the defendant to discharge counsel, it shall comply with subsections (a)(1)-(4) of this Rule if the docket or file does not reflect prior compliance.

Md. Rule 4-215(e).

Harris asserts that the circuit court's decision to hear argument and render a decision

on the State's motion *in limine* prior to considering Harris's motion to discharge counsel violated Rule 4-215 and deprived Harris of his right to represent himself in arguing the motion *in limine*. To be sure, Rule 4-215 provides a "precise rubric" which requires "strict compliance." *State v. Graves*, 447 Md. 230, 241 (2016). "The purpose of Rule 4-215 is to 'protect that most important fundamental right to the effective assistance of counsel, which is basic to our adversary system of criminal justice.'" *Williams v. State*, 435 Md. 474, 485 (2013) (quoting *Parren v. State*, 309 Md. 260, 281 (1987)).

Rule 4-215, however, is silent as to the order in which motions must be considered by the court. There is nothing in the rule stating that the circuit court must, upon receiving a motion to discharge counsel, immediately consider only the motion to discharge before considering any other pending motions. Maryland Rule 4-252, which governs motions practice, specifies that motions "shall be determined before trial and, to the extent practicable, before the day of trial." No rule sets forth the order in which motions must be considered, but the trial judge is vested with "wide discretion . . . to control the course of the trial and the exercise of such discretion will not be reversed on appellate review except on those rare cases where there has been a clear abuse of that discretion." *Weathers v. State*, 231 Md. App. 112, 113 (2016) (quotations and citations omitted).

In the present case, the circuit court chose to consider the State's motion *in limine* prior to Harris's motion to discharge counsel because Harris's attorney had been served with the State's motion and was prepared to argue in response to the motion. Furthermore, the record reflects that Harris conferred with his attorney during the argument on the State's

motion. Harris was also given the express opportunity to comment personally in response to the State's motion. The circuit court's decision to take the motions in a particular order was a discretionary determination that we will not disturb on appeal. Accordingly, we reject Harris's contention that reversal is required because the circuit court considered the State's motion *in limine* prior to addressing his motion to discharge counsel.

**II.**

Harris further asserts that the circuit court erred by refusing to exercise discretion in response to his request for the appointment of a panel attorney the day prior to trial. As we shall explain, the circuit court did not err in denying Harris's last minute request for an attorney the day before trial.

In addition to setting forth the procedure a circuit court must follow when a defendant seeks to waive the right to counsel, Rule 4-215 addresses "the possibility that a defendant, having expressly waived the right to counsel, might have a change of mind and desire to withdraw the waiver and secure counsel." *Jones v. State*, 175 Md. App. 58, 79-80 (2007), *aff'd*, 403 Md. 267 (2008). The rule provides: "After there has been an express waiver no postponement of a scheduled trial or hearing date will be granted to obtain counsel unless the court finds it is in the interest of justice to do so." Md. Rule 4-215(b). Rule 2-415(b) does not "prohibit[] a defendant from changing his or her mind before trial and seeking representation by counsel," observing that "[s]uch a reading could well run afoul of the right to counsel embodied in the Sixth Amendment and Article 21 [of the Maryland Declaration of Rights]." *Jones, supra*, 175 Md. App. at 80.

There are, however, limits to the right. We explained:

> The rule nevertheless is plain that a defendant who undertakes to pursue that course of action is not entitled to an automatic postponement of a scheduled trial or hearing date to obtain counsel. Indeed, the rule makes clear that, to secure a postponement under that circumstance, the onus is upon the defendant to persuade the court to find that a postponement is in the "interest of justice."

*Id.* The decision to grant a postponement is discretionary. *Id.* at 81.

On July 14, 2016, the circuit court granted Harris's motion to discharge counsel. Harris clearly articulated that he wished to proceed *pro se*, explaining that he "had planned on representing [him]self from the beginning."[3] The circuit court held another hearing on July 20, 2016, in order to place on the record that it had complied with all portions of Rule 4-215(a).[4] Over the following several months, the circuit court held multiple hearings on various motions filed by Harris and delayed the trial date in order to address Harris's motions. Harris did not seek to revisit his waiver of the right to counsel at any time between his discharge of counsel in July 2016 and the day before trial was scheduled to begin.

On January 3, 2017, the parties appeared before the circuit court for a hearing at which the court intended to address pretrial motions. For the first time, Harris indicated that he no longer wished to represent himself. Harris explained that he wanted a panel attorney appointed to represent him. The circuit court responded that it was not possible

[3] Harris asked the court for hybrid representation, but the circuit court denied his request.

[4] Rule 4-215(a) sets forth the procedures that must be followed when a defendant first appears without counsel. Harris does not dispute that the court complied with the requirements of Rule 4-215(a).

for Harris to have a panel attorney because there was no co-defendant involved in his case and the Public Defender's Office only refers a case for representation by a panel attorney when there is a conflict. The circuit court further explained that Judge Peters, the administrative judge's designee, had already ruled upon Harris's motion to discharge counsel.

In our view, the circuit court was not required to address the merits of Harris's request for a panel attorney on the eve of Harris's third trial. Indeed, "the right to counsel does not give an accused the unfettered right to discharge current counsel and demand different counsel shortly before or at trial. Although the right to counsel generally embodies a right to retain counsel of one's choice, a defendant may not manipulate this right so as to frustrate the orderly administration of criminal justice." *Fowlkes v. State*, 311 Md. 586, 605 (1988). *See also Jones v. State*, 403 Md. 267, 301-02 (2008) (holding that the circuit court did not abuse its discretion in denying, on the day of trial, a defendant's request to withdraw his prior waiver of counsel and to postpone the trial). Harris had previously been found to have a non-meritorious reason for discharging counsel. Therefore, he was not entitled to the appointment of a panel attorney. *Compare Dykes v. State*, 444 Md. 642 (2015) ("If an indigent defendant has discharged appointed counsel *for a meritorious reason* and the Office of the Public Defender is unable or unwilling to provide new counsel, the trial court may appoint counsel for that defendant pursuant to its inherent authority.") (Emphasis added).

Harris expressly represented to the court that he desired to represent himself and

that he did not want to be represented by an attorney. Harris was entirely unequivocal on this point. When Harris requested to discharge his appointed public defender, at no point did he request that a panel attorney be appointed to represent him. Indeed, Harris maintained this position for several months, and at multiple court appearances. It was only on the literal eve of trial that Harris raised any issue whatsoever relating to the appointment of a panel attorney. In light of the unique procedural posture of this case, and particularly Harris's clear and unequivocal express representation that he wished to represent himself at trial, we hold that the circuit court did not err nor abuse its discretion by declining to revisit the waiver issue on the day before trial.

**III.**

Harris's third appellate claim is that testimony regarding McLeod's statement to her financial adviser constituted inadmissible hearsay. At trial, the State sought to introduce evidence that McLeod had inquired about changing her life insurance policy to make Harris the beneficiary. Specifically, the State sought to admit McLeod's policy documents, which listed McLeod's mother and son as beneficiaries. Harris objected on the basis of relevance, arguing that because Harris was not a beneficiary, the policies were irrelevant as to motive. The State responded that it was going to present evidence of McLeod's "future intent with regard to the policies," specifically, that McLeod intended to change the beneficiary on the policy after becoming engaged to Harris. Harris objected, arguing, "I object to that whole line of questioning. We're talking about her intent. She's not here for me to cross examine her." The circuit court overruled Harris's objection, commenting that "[i]t is contrary to

Defense's belief in an area and a topic which is highly relevant."

Thereafter, Adam Miller, McLeod's financial adviser, testified as follows:

> [THE PROSECUTOR]: Mr. Miller, I want to draw your attention to the fall of 1995. Did you receive a call in 1995 from Teresa McLeod?
>
> [MILLER]: Yes, sir.
>
> [THE PROSECUTOR]: What was the context of her call?
>
> [MILLER]: Teresa had called to tell me that she had gotten engaged to Mr. Harris and that she'd like to change the beneficiary of her life insurance policies to Mr. Harris.
>
> [THE PROSECUTOR]: During the course of the conversation, did you hear anyone else's voice outside of Teresa's?
>
> [MILLER]: I heard a male voice in the background.

Mr. Miller advised McLeod that she would need to submit paperwork in order to change the beneficiary on her policies. McLeod never submitted the paperwork and Harris was never made a beneficiary.

The question of whether evidence constitutes hearsay is reviewed *de novo*. *Brooks v. State*, 439 Md. 698, 709 (2009). "Hearsay" is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Md. Rule 5-801(c). "Except as otherwise provided by [the Maryland] rules or permitted by applicable constitutional provisions or statutes, hearsay is not admissible." Md. Rule 5-802. An out-of-court statement is admissible if it (1) is not being offered for the truth of the matter asserted; or (2) falls within one of the recognized exceptions to the hearsay rule. *Jarrett v. State*, 220 Md. App. 571, 582 (2014).

Here, McLeod's out-of-court statements were not hearsay because they were not offered for the truth of the matter asserted. At trial, the prosecutor argued that the testimony was admissible because it was an expression of McLeod's future intent. See Md. Rule 5-803(b)(3) (setting forth an exception to the rule against hearsay for "[a] statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), offered to prove the declarant's then existing condition or the declarant's future action, but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of a declarant's will."). Because we shall hold that the challenged testimony did not constitute hearsay, we need not reach the issue of whether Md. Rule 5-803(b)(3) provides a separate basis for admissibility.

Miller's testimony was not introduced to show that McLeod actually intended to change the beneficiary designations on her insurance policies. Rather, it was introduced for the purpose of proving that McLeod *had inquired* about changing her beneficiary designation. Indeed, McLeod never actually changed her beneficiary designation. Because McLeod's statements were not offered for the truth of their truth, they are non-hearsay. The State, therefore, was not required to establish that the testimony fell within an exception to the general rule against hearsay.

Harris further asserts that Miller's testimony that he heard a male voice in the background was inadmissible. First, we observe that this issue is not preserved for our consideration on appeal because no objection was lodged below. *See* Md. Rule 4-323 ("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."). Further, assuming *arguendo* that the issue had been preserved, Miller's testimony about hearing "a male voice" is plainly non-hearsay. Hearsay is a statement that is offered for the truth of the matter asserted. A reference to a voice absent any specific statement made by the voice does not constitute hearsay. We, therefore, reject Harris's assertion that the circuit court erred by permitting the State to present Miller's testimony about McLeod's inquiry as to the process for changing beneficiaries of her life insurance policies.

**IV.**

Harris further asserts that the circuit court erred by sustaining the State's objection to certain testimony by Terry Walker. Walker, a defense witness, testified at trial that he had accompanied Harris to a meeting with Brill prior to the January 26, 1996 shooting. Walker testified that Brill agreed to pay Harris for a gun.

Walker testified as follows:

> [HARRIS]: [D]id Russell [Brill] agree to purchase that handgun from me?
>
> [WALKER]: Yes.
>
> [HARRIS]: Did he agree to pay me $500 for that handgun?
>
> [WALKER]: I don't remember the exact amount, but I remember him saying he would pay for it.
>
> [HARRIS]: And that he didn't have the money at the time?
>
> [THE PROSECUTOR]: Object to the --

[WALKER]: Yes.

[THE PROSECUTOR]: -- form, Your Honor.

THE COURT: Sustained.

[THE PROSECUTOR]: Thank you.

[HARRIS]: What, if anything, did Russell Brill say at the time?

[THE PROSECUTOR]: Objection.

THE COURT: Sustained.

[HARRIS]: What, if anything, was said in reference to the money for the gun?

[THE PROSECUTOR]: Objection.

THE COURT: Sustained, and presumably said by someone other than the Defendant?

[THE PROSECUTOR]: That's correct, Your Honor.

THE COURT: Thank you.

In this appeal, Harris asserts that the circuit court erred by sustaining the State's objection to Harris's question asking Walker what, if anything, Russell Brill said at the meeting. Harris did not provide a proffer of the testimony he planned to elicit, but on appeal he contends that "it was apparent from his opening and his examination of a prior witness that he was trying to elicit that Brill said he would pay him for the [handgun] at a later date." Harris asserts that the testimony should have been admitted because it was non-hearsay introduced to show its effect on the listener. Harris explains that he was seeking to prove that Brill's statement led Harris to believe that Brill would pay him at a later date, which he asserts would have supported the defense theory of the case that Harris

went to meet Brill on January 26 with the expectation that Brill would be paying him at that time.

Harris acknowledges that he did not proffer the testimony he sought to elicit from Walker. "[T]he exclusion of evidence is ordinarily not preserved for appellate review absent a formal proffer of what the contents and relevance of the excluded testimony would have been." *Jorgensen v. State*, 80 Md. App. 595, 600 (1989). Nonetheless, a proffer is not always mandatory. *Id.* "[W]here the tenor of the questions and the replies they were designed to elicit is clear, a proffer in the record is not a necessary prerequisite for a review of the ruling." *Peregoy v. W. Md. Ry. Co.*, 202 Md. 203, 209 (1953). *See also Grandison v. State*, 341 Md. 175, 271 n.19 (1995) ("Where no proffer is made as to the relevance of testimony a party seeks to have admitted, an issue can still be preserved for appeal if the questions eliciting the testimony clearly generate the issue[.]").

In our view, this is not a case where the questions Harris asked of Walker rendered a proffer unnecessary. The testimony Harris sought to elicit from Walker was far from clear based upon the questions asked. There was no way for a trial judge to deduce, based upon Harris's questions, that he sought to introduce Walker's testimony about the specific previous out-of-court conversation he had overheard between Brill and Harris for a non-hearsay purpose. The onus was on Harris to inform the trial court, via proffer, of the substance of the testimony he sought, its relevance, and the basis for its admissibility. Because Harris failed to do so, this issue is not properly before us on appeal.

**V.**

Next, Harris asserts that the circuit court erred by permitting Walker to testify, on cross-examination, that he was incarcerated for armed robbery in approximately 2001. Harris contends that this was reversible error by the circuit court because the armed robbery conviction was over fifteen years old and inadmissible pursuant to Maryland Rule 5-609.

Maryland Rule 5-609 limits admission of prior convictions for the purpose of attacking the credibility of a witness, providing:

> (a) For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime shall be admitted if elicited from the witness or established by public record during examination of the witness, but only if (1) the crime was an infamous crime or other crime relevant to the witness's credibility and (2) the court determines that the probative value of admitting this evidence outweighs the danger of unfair prejudice to the witness or the objecting party.
>
> (b) Evidence of a conviction is not admissible under this Rule if a period of more than 15 years has elapsed since the date of the conviction, except as to a conviction for perjury for which no time limit applies.

Rule 5-609 is specifically applicable to evidence introduced for the purpose of attacking the credibility of a witness based upon the witness's criminal history. *Bells v. State*, 134 Md. App. 299, 306 (2000) ("The Rule . . . imposes limitations on the use of past convictions in an effort to discriminate between the informative use of past convictions to test credibility, and the pretextual use of past convictions where the convictions are not probative of credibility but instead merely create a negative impression of the [witness].") (quotation omitted).

During cross-examination, the prosecutor addressed Walker's relationship with

Brill, specifically focusing on the length of time that had passed since Walker had last interacted with Brill:

> [THE PROSECUTOR]: When was the last time that you saw Russell Brill?
>
> [WALKER]: Let me see. I'm thinking like 2001 or something like that.
>
> [THE PROSECUTOR]: And where did you see Mr. Brill then?
>
> [WALKER]: In prison.
>
> [THE PROSECUTOR]: In prison. Which prison?
>
> [WALKER]: I can't really remember off the top of my head, but it was in prison, though.
>
> [THE PROSECUTOR]: And what were you in prison for, sir?
>
> [WALKER]: Do I have to answer that?
>
> THE COURT: Yes, please, thank you.
>
> [HARRIS]: Objection, Your Honor.
>
> THE COURT: Overruled.
>
> [WALKER]: What I was in prison -- I was in prison doing my time.
>
> [THE PROSECUTOR]: For what crime?
>
> [WALKER]: For armed robbery.

The record reflects that the testimony about Walker's prior conviction was not introduced for the purpose of impeaching Walker's credibility due to his criminal history. The prosecutor did not seek to admit records of Walker's prior conviction, nor did the prosecutor inquire about any additional details relating to the conviction. Furthermore, the record reflects that neither party referenced Walker's prior conviction in closing

arguments. The prosecutor did not argue to the jury that Walker's credibility was in any way reduced because of his past criminal conduct.

Rather, the prosecutor inquired as to Walker's prior offense and incarceration for the purpose of showing how long ago Walker had interacted with Brill and highlighting the limited nature of their previous interactions, which would serve to reinforce why Walker was unable to remember details about a transaction he claimed to have witnessed twenty years earlier. The prosecutor similarly inquired as to the history of Walker's relationship with Harris, establishing that Walker first met Harris in 1994 or 1995, saw him one time in 1995, and did not see him at all in 1996. It is clear from the record that the prosecutor's questions were intended to establish that the events relating to the alleged handgun transaction occurred so long ago that the jury should not believe that Walker was able to clearly remember the details of the transaction.[5]

We review a circuit court's decision under Maryland Rule 5-609 for an abuse of discretion, reversing "only if the court exercise[d] discretion in an arbitrary or capricious manner or act[ed] beyond the letter or reason of the law." *Thomas v. State*, 422 Md. 67, 73 (2011) (quotations omitted). Here, because the State had a reasonable, non-impeachment basis for introducing the challenged testimony, we hold that the circuit

[5] Walker's vague memories about the alleged handgun transaction are also relevant to Harris's appellate issue about the purported "bill of sale," which we discuss *infra* in Part VI of this opinion.

court did not abuse its discretion by overruling Harris's objection.[6]

**VI.**

Harris raises an additional issue on appeal relating to a purported "bill of sale" which the circuit court excluded from evidence at trial. As we discussed *supra*, the defense theory of the case was that Harris had sold, on credit, a handgun to Brill the day prior to shooting. Harris claimed that he had arranged to meet Brill at the park to receive payment, but instead, Brill robbed and shot Harris and McLeod. At trial, Harris sought to have admitted a handwritten document which he claimed was a bill of sale. According to Harris, the bill of sale was a contract for him to sell Brill the handgun that was used to kill McLeod. The bill of sale was a handwritten note on a piece of notebook paper containing the following:

> "**BILL OF SALE**" FOR HANGUN [sic]
>
> I, Robert Harris Hereby certify that I sold the Gun, Glock 19, on January 23rd, 1996 to the undersigned **Russell R. Brill III**, for he agreed upon price of $500. Cash. (Serial # BHV881), (9MM), (Brand New Condition - Never been fired)
>
> | BUYER | SELLER | WITNESS |
> |---|---|---|
> | [Brill's signature] | [Harris's signature] | [Walker's signature] |

The bolded text represents darker handwritten text.

Walker testified that he remembered meeting Brill with Harris. Walker testified that he "th[ought] it had something to do with [Brill] buying a firearm or something from

[6] We observe that if the prosecutor's reason for inquiring about Walker's prior incarceration was in any way ambiguous, Harris certainly could have requested a bench conference to specifically identify the basis of his objection, after which the prosecutor would have had the opportunity to respond.

[Harris] or something like that." Harris presented the "bill of sale" to Walker, asked him to read it, and then asked Walker whether the document refreshed his memory. The prosecutor noted an objection, after which the court explained to Harris that he needed to first lay a foundation to establish what Walker remembered about the transaction. Thereafter, Harris made multiple attempts to elicit testimony from Walker about the gun transaction, but the prosecutor made several objections, which were sustained. Harris asked Walker, "What, if anything, do you know of the transaction between me and Russell Brill?" Walker responded:

> I know that when we was in the car, that you all had discussed the handgun and he had talked about buying it. Now, I don't know if, in fact, that later on, that he bought it or what happened with that, but I remember him saying that he wanted to buy it.

Harris again sought to introduce the "bill of sale," but the court advised Harris that he first needed to establish that Walker had some knowledge of the document. The court observed that Walker had just testified that "he doesn't have any knowledge of the sale." Thereafter, the following exchange occurred.

> [HARRIS]: Mr. Walker, do you remember me signing a bill of sale?
>
> [WALKER]: When we was in the car, I remember you looking for an ink pen or something to write with . . . I remember, like, when was in the car, looking for an ink pen or something, but, like, I don't -- like, it was so long ago, like, I don't know what it was that you signed or what you all was like in the front seat doing, but I remember you all looking for something to write with.
>
> [HARRIS]: Do you remember signing the bill of sale as a witness?

[THE PROSECUTOR]: Object, Your Honor.

THE COURT: Sustained.

[HARRIS]: Do you recall if any at all signing the bill of sale as a witness?

[WALKER]: No. I don't remember.

[HARRIS]: Will this refresh your memory?

* * *

[WALKER]: All right. That's my signature.

[HARRIS]: Does that refresh your memory?

[WALKER]: It's been so long ago, I mean --

[HARRIS]: I know. It's been a long time.

[WALKER]: Yeah.

Although Walker acknowledged that his signature appeared on the bill of sale, Walker did not testify that he actually signed it. Nor did Walker testify that he recognized the bill of sale or had ever seen the document before.

Harris subsequently sought to have the bill of sale admitted into evidence. The State objected, after which the following exchanged occurred:

[THE PROSECUTOR]: The basis of the objection is, number one, it's hearsay. Number two, this witness essentially said he didn't have any recollection. He didn't know what Mr. Harris was giving to Mr. Brill or what Mr. Brill was giving to Mr. Harris. He doesn't recall --

THE COURT: He knew that they were discussing --

[THE PROSECUTOR]: -- signing anything.

THE COURT: -- a potential sale of a gun, but he didn't --

[THE PROSECUTOR]: Correct.

THE COURT: -- witness an exchange of the item or tangible personal property for money or anything of value --

[THE PROSECUTOR]: Correct.

THE COURT: -- incident to the purported agreement, correct?

[THE PROSECUTOR]: Correct.

THE COURT: He didn't recall signing that document, correct?

[THE PROSECUTOR]: Correct.

THE COURT: And he just recollected that the parties were having troubles finding an ink pen, as he called it, to even sign a document, correct?

[THE PROSECUTOR]: Yes, Your Honor.

[SECOND PROSECUTOR]: In 1994.

[THE PROSECUTOR]: And --

THE COURT: Right.

[THE PROSECUTOR]: -- this witness advised he did not see Mr. Harris in 1996. The last time he saw him was in 1995. I believe this document is dated January 23 --

[HARRIS]: He wasn't --

[SECOND PROSECUTOR]: Nineteen ninety-six.

[HARRIS]: He's guessing at the years and you know that. That's ridiculous. It was 21 years ago.

* * *

THE COURT: Because he's your witness. Okay. The objection is sustained because of the hearsay nature of the documents, because of the fact that that document was not authenticated through that witness, and because that witness had no knowledge of the existence of the document as it was presented to him here today in open court.

The circuit court informed Harris that he could potentially introduce the document through another witness, but remarked that Brill -- the only other person (other than Harris) whose named appeared on the document -- had already completed his testimony.

Maryland Rule 5-901 requires that a document be authenticated before it is admitted into evidence:

> 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.

Md. Rule 5-901(a). "Authentication has been defined as 'the act of proving that something (as a document) is true or genuine, esp[ecially] so that it may be admitted as evidence.'" *Sublet v. State*, 442 Md. 632, 655 (2015) (alteration in original) (quoting Black's Law Dictionary 157 (10th ed. 2014)). "The role of judge as 'gatekeeper' is essential to authentication, because of jurors' tendency, 'when a corporal object is produced as proving something, to *assume, on sight of the object, all else that is implied in the case about it*[.]'" *Id.* (quoting 7 J. Wigmore, Evidence § 2129 (Chadbourn Rev. 1978)).

"[T]he preliminary determination of authentication must be made by the trial judge and depends upon a context-specific determination whether the proof advanced is sufficient to support a finding that the item in question is what its proponent claims it to be, based upon sufficient proof . . . so that a reasonable juror could find in favor of authenticity or identification[.]" *Sublet v. State*, 442 Md. 632, 666 (2015) (internal quotation and citation omitted). "The simplest (and likely most common) form of authentication is through the testimony of a witness with knowledge that a matter is what it is claimed to be." *Id.*

(internal quotations and citations omitted). Authentication can be proved directly or circumstantially. *Id.* at 667. *See also* Md. Rule 5-901(b)(4) (providing that evidence can be authenticated via "[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."). "[W]hen a witness denies having personal knowledge of the creation of the item to be authenticated, that denial necessarily undercuts the notion of authenticity." *Sublet*, *supra*, 442 Md. at 672. *See Makowski v. Mayor & City Council of Baltimore*, 439 Md. 169, 197 (2014) ( "[The witness], however, testified that he had never seen the document before nor recognized it. Accordingly, [the opposing party] failed to authenticate the document.").

We review the circuit court's determination that the bill of sale had not been authenticated and was therefore inadmissible for abuse of discretion. *Blair v. State*, 130 Md. App. 571, 592-93 (2000) ("[I]t is ordinarily within the sound discretion of the trial court to determine the admissibility of evidence . . . Thus, we will not disturb a trial court's evidentiary ruling absent error or a clear abuse of discretion.") (internal citations omitted). "[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." *King v. State*, 407 Md. 682, 697 (2009) (internal quotations and citations omitted).

In our view, the circuit court reasonably had concerns about whether the document offered by Harris as a bill of sale actually was what it was purported to be. Walker was

unable to identify the bill of sale or testify as to whether any bill of sale had been produced or signed at any time. The only link to the purported bill of sale was Walker's testimony that he recalled that Harris and Brill looked for a pen while discussing the sale. Furthermore, the document lacked additional distinctive characteristics that might have supported authentication. *See Sublet, supra*, 442 Md. at 667 (explaining that "a document can be authenticated by distinctive characteristics of the document itself, such as its [a]ppearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with the circumstances"). Although we have described authentication as an "undemanding burden," *Winston v. State*, 235 Md. App. 540, 566, (2018), *cert. denied sub nom. Mayhew v. State*, No. 7, Sept. Term, 2018 (Apr. 20, 2018), a proponent must present some evidence that the exhibit is what it purports to be. In this case, Harris failed to do so. The record reflects that the circuit court aptly fulfilled its role of "gatekeeper" in this case by excluding the purported bill of sale. S*ee Sublet*, *supra*, 422 at 655.

**VII.**

Finally, we address Harris's contention that the circuit court erred by refusing to exercise discretion when Harris asked that defense witnesses be permitted to testify without shackles. A careful examination of the record reflects that Harris never specifically requested that any witness be permitted to testify without shackles, nor did the circuit court issue any sort of ruling on whether witnesses would be permitted to testify without shackles.

On the sixth day of trial, near the end of the defense case, the circuit court asked

Harris whether certain witnesses who had been transported from the Division of Corrections would be called to testify. The following exchange occurred:

> THE COURT: [L]et me just ask, Mr. Harris, Mr. [c]lerk has asked whether the [c]ourt should make the call to the second-floor lockup here in Courthouse East for either Mr. Goldfarb or Mr. Watson, two of your witnesses who I had writted into court to testify in your defense at your request, whether you would like them brought to the courtroom.
>
> MR. HARRIS: No. I didn't realize that they would be shackled and everything and like paraded in front of the jury. So I'm not going to call them. I thought they would be like me, without cuffs on.
>
> THE COURT: Oh, absolutely not, sir.
>
> MR. HARRIS: Yeah. I didn't know that.
>
> THE COURT: It's a far different scenario because
>
> MR. HARRIS: Well, I think that affects
>
> THE COURT: -- like you they are in custody. However
>
> MR. HARRIS: Right.
>
> THE COURT: -- unlike you they are not on trial.
>
> MR. HARRIS: Right. But see, they weren't in custody when the crime happened. So back then, you know -- right.
>
> THE COURT: I understand that, but they are now. And in the interest of public safety, there are a myriad of cases where prisoners are brought into court to testify, whether it be on behalf of the State or the defense, and they are so shackled and in handcuffs.
>
> MR. HARRIS: Right.
>
> THE COURT: Certainly you'll recollect that in this very case, when the State called Mr. Russell Brill, Mr. Brill was handcuffed.

MR. HARRIS: Right.

* * *

THE COURT: Okay. Has anyone forced you to make that choice to abandon, if you will, that intention to call them as defense witnesses?

MR. HARRIS: No one has, just the circumstances has.

THE COURT: Okay. So you have considered

MR. HARRIS: Like I say

THE COURT: -- the totality of the circumstances

MR. HARRIS: Right. Exactly.

THE COURT: -- and as a strategy you're making the decision not to call them, correct?

MR. HARRIS: Well, yeah. I mean, it's like their credibility goes down when they march by the, you know, the jury with chains on.

THE COURT: I'm not going to speak to the

MR. HARRIS: Right

THE COURT: -- accuracy of your perception or not. And I certainly am not going to engage in any wordsmithing here. I just want to know whether anyone has forced you to not call them as witnesses, notwithstanding-

MR. HARRIS: No.

THE COURT: -- your prior intention to do so.

MR. HARRIS: Like I said, no, just the circumstances.

THE COURT: Okay. So are there any witnesses you would like to call today?

HARRIS: No, Your Honor.

Harris commented on what he perceived to be reduced credibility for witnesses

testifying in shackles and informed the court that this had influenced his decision, but he never actually asked the court to remove either witness's shackles. Harris offered no response to the court's explanation of the safety concerns at issue, nor did Harris argue that the witnesses should have been permitted to testify without shackles. Instead, Harris informed the court that he declined to call the witnesses to testify.

"Ordinarily, the appellate court will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court[.]" Md. Rule 8-131(a). The trial court issued no decision with respect to whether witnesses would be permitted to testify without shackles because Harris never asked that they be permitted to do so, nor did Harris proffer what relevant, admissible testimony the witnesses could provide. Because there is no ruling for this Court to review on appeal, we shall not address this issue.[7]

**JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED. COSTS TO BE PAID BY APPELLANT.**

[7] Harris acknowledges, as he must, that Maryland courts have never addressed this issue. Instead, he relies upon authority from other jurisdictions. In light of our determination that this issue is not properly before us, we shall not address the out-of-state authority cited by Harris. We observe, however, that Maryland law grants the trial judge broad discretion to maintain courtroom security. *Lovell v. State*, 347 Md. 623, 638-39 (1997). A trial judge's discretion can, in certain circumstances, be limited because allowing jurors to see a defendant in shackles or other restraints can be prejudicial. *Id.* at 639. Maryland courts have never extended this reasoning to apply to non-defendant witnesses.