Circuit Court for Baltimore County
Case No. C-03-CR-20-003585

UNREPORTED

IN THE APPELLATE COURT

OF MARYLAND**

No. 1974

September Term, 2021

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ISAIAH DARIUS FOGG

v.

STATE OF MARYLAND

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Leahy,
Beachley,
Sharer, J. Frederick
(Senior Judge, Specially Assigned),

JJ.

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Opinion by Beachley, J.

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Filed: January 31, 2023

*At the November 8, 2022, general election, the voters of Maryland ratified a constitutional amendment changing the name of the Court of Special Appeals of Maryland to the Appellate Court of Maryland. The name change took effect on December 14, 2022.

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

A jury, sitting in the Circuit Court for Baltimore County, convicted Isaiah Darius Fogg, appellant, of attempted second-degree murder, first-degree assault, armed robbery, and related firearms offenses. The court sentenced appellant to an aggregate term of 70 years' incarceration. On appeal, he presents three questions for our review, which we have rephrased as follows:[1]

> I. Did the court erroneously rule that exigent circumstances justified the warrantless search of real-time cell site location information ("CSLI") for appellant's phone?
>
> II. Did the court abuse its discretion by permitting voice identification testimony?
>
> III. Did the court impose an inherently illegal twenty-year sentence for use of a firearm in the commission of a felony or crime of violence?

Although we answer the first two questions in the negative, as to the third question we agree that appellant's conviction and sentence for use of a firearm in the commission of a felony or crime of violence must be vacated.

[1] In his brief, appellant articulated the questions presented as follows:

> 1. Whether [appellant] was unlawfully arrested through the illegal use of real-time cell phone tracking?
>
> 2. Whether the trial court erred in denying [appellant's] motion in limine?
>
> 3. Whether the conviction and sentence for use of a handgun in the commission of a crime of violence are illegal?

## BACKGROUND

In November 2020, N.H., the victim in this case, made a living as a prostitute out of the Quality Suites on Beaver Dam Road in Cockeysville, where she resided with her fiancé, J.T., and their minor daughter, S.[2] N.H. advertised her services on a website called "Mega Personals" and communicated with customers using "Text Now," a smartphone application that permits users to send and receive text messages through telephone numbers other than their own.

At 8:12 a.m. on November 24, 2020, N.H. received text messages sent to her Text Now account inquiring whether she was "available" for sexual services. N.H. quoted the prospective patron a price of $150. After confirming that he was not a member of law enforcement, N.H. provided him with the address of the Quality Suites and asked that he text her five minutes before his estimated time of arrival**.** When the prospective client confirmed that he was five minutes away, J.T. and S. exited the hotel room. At 8:44 a.m., the would-be client confirmed that he had arrived at the hotel and asked N.H. for her room number. Two minutes after N.H. answered, she received a text message indicating that he had arrived at her hotel door. When she opened the door, N.H. was met by a man whom she later described as a tall man wearing dark blue sweatpants, a dark blue hoody with "a long silver . . . zipper on the side," and a "dark blue" hat.

[2] To protect the victim's privacy, as well as that of her fiancé and minor daughter, we will refer to them by their respective initials.

After the man entered the hotel room, N.H. sat on the bed waiting for him to tender payment via "Cash App," a mobile payment service. When he did not promptly transfer the agreed-upon funds, N.H. grew nervous and asked, "[W]hat's going on?" The man responded by drawing a firearm, pressing its muzzle against N.H.'s forehead, and demanding all of her money. N.H. replied, "[I]f you want to kill me, go ahead, because I don't have nothing for you." She then "smacked the gun" and grabbed her cell phone and called J.T. The assailant pushed N.H. onto the bed, causing her to hit the bed face-first and then slip onto the floor. He then approached N.H. from behind, pressed the muzzle of the gun against her right shoulder, and shot her. The assailant attempted to silence N.H.'s ensuing screams, demanding that she "shut up." When N.H. complied, he grabbed her phone and ran out of the room.

J.T., who had been on the phone with N.H. when she was shot, sprinted toward the hotel room, "dragging [his] daughter" behind him. As he ran, J.T. observed a tall man wearing a blue sweatshirt no more than ten feet away from the door to N.H.'s and his hotel room. J.T. momentarily froze and watched as the man fled the scene. J.T. then resumed running toward the hotel room. Upon entering the room, J.T. removed his shirt and used it to apply pressure to N.H.'s gunshot wound in an effort to stop the bleeding. He then escorted their daughter to the next-door neighbor's room and called the police.

Emergency medical technicians responded to the hotel and transported N.H. to shock trauma. Upon arriving at the scene at approximately 8:50 a.m., Detective Bryan Trussell of the Violent Crimes Unit ("VCU"), and his partner, Detective Candace

Covington, canvassed the area for potential witnesses and video surveillance. Although the Quality Suites' surveillance camera was not operational, Baltimore County police officers retrieved footage from a nearby building, which showed a figure wearing dark sweatpants, a matching hoodie with a light-colored zipper, and a white pair of tennis shoes. While holding what appeared to be a cell phone, the figure could be seen walking in the direction of the Quality Suites at approximately 8:44 a.m. The police extracted still photographs from that footage, which the State introduced at trial.

After canvassing the area, Detectives Trussell and Covington drove to the shock trauma center, where they interviewed N.H. During that interview, N.H. recounted the events that led to the shooting and described her assailant. Using J.T.'s cell phone, N.H. also accessed her Text Now account and showed the detectives the text messages that the gunman and she had exchanged**.** While examining those texts, Detective Trussell identified the telephone number from which the suspect's messages had been sent as [XXX]-[XXX]-9351.

Upon returning to the police station, Detective Trussell accessed the jail call database and discovered that Calvin Fogg, appellant's brother and an inmate at the Baltimore County Detention Center, had placed three calls to the 9351 telephone number that morning. The first such call was made at 8:42 a.m.—approximately five minutes before the assailant arrived at N.H.'s hotel room. The second was placed at 9:25 a.m. and the third at 10:37 a.m.

Detective Trussell submitted an exigent request to the cell phone carrier for N.H.'s phone, asking that it "ping" her phone to reveal its approximate geographical location. The carrier granted the request and provided VCU with CSLI for N.H.'s phone, indicating that it was located in the Lutherville-Timonium area. VCU detectives relayed that information to members of the Criminal Apprehension Support Team ("CAST"), whose assistance they elicited in locating N.H.'s phone. At approximately 12:00 p.m., CAST member Detective Anthony Armetta located N.H.'s phone and retrieved it from a sewer at the intersection of Old Pine and Gailridge Roads.

While Detective Armetta was recovering N.H.'s cell phone, VCU submitted a second exigent "ping" request to AT&T, seeking the location of the cell phone associated with the 9351 number associated with appellant. As a result of AT&T's grant of that request, CAST determined that the phone was located in Baltimore City. CAST members also obtained the still photos of the suspect that had been extracted from the surveillance footage to aid them in their search.

At 1:20 p.m. that same day, CAST members observed appellant walking on North Calvert Street. Appellant was clad in attire identical to that worn by the assailant. CAST members surrounded and arrested him. During a search incident to that arrest, the officers recovered appellant's driver's license and M&T Bank card, as well as two cell phones, one of which was a red flip phone. Following his arrest, appellant proclaimed: "[W]e know why I'm here. . . . I was just trying to get some p∗∗∗y. . . . [S]he should not be selling that ass. I know my DNA out there on the scene. I should have ran faster. I didn't do anything."

After arresting appellant, CAST members transported him to Baltimore County Police Headquarters, where Detectives Trussell and Covington interviewed him. During that interview, appellant admitted to having been at the scene of the shooting but claimed that he had merely paid for sexual services.

Detective Trussell conducted a warranted search of the red flip phone. The search revealed that the phone corresponded to the 9351 telephone number and had been used to send the solicitous text messages to N.H.'s Text Now telephone number on the morning of the shooting.

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

## DISCUSSION

### I.

Appellant challenges the admissibility of physical evidence found during the search incident to his arrest, as well as any evidence derived therefrom and the incriminating statements he made thereafter. Claiming that he "was unlawfully arrested through the use of illegally obtained cell phone tracking information," appellant asserts that the court should have excluded such evidence. He advances two arguments in support of that position.

Appellant claims that "[i]t is clear . . . that police used a cell site simulator to locate [him] and his cell phone" without first obtaining a court order as required by Md. Code

(2018 Repl. Vol., 2022 Supp.), § 1-203.1(b) of the Criminal Procedure Article ("CP").[3] The State responds that appellant failed to preserve this issue for appellate review because the basis for appellant's objection was "limited to challenging the constitutionality of the warrantless request for an 'exigent ping' from the cell phone service provider." We agree. In both his oral motion *in limine* and his objection at trial, appellant challenged the evidence derived from the "exigent ping" of his cell phone "based on *Carpenter* [*v. United States*, 138 S. Ct. 2206 (2018)]." At no time before the circuit court did appellant either assert that the police had impermissibly employed a cell site simulator or allege that they had violated CP § 1-203.1(b). Therefore, this issue is not preserved for our review.[4]

[3] "A cell-site simulator . . . is a device that locates cell phones by mimicking the service provider's cell tower (or 'cell site') and forcing cell phones to transmit 'pings' to the simulator. The device then calculates the strength of the 'pings' until the target phone is pinpointed." *United States. v. Lambis*, 197 F. Supp. 3d 606, 609 (S.D.N.Y. 2016). Accordingly, "[a] cell-site simulator allows police officers who possess a person's telephone number to discover that person's *precise location* remotely and at will." *Jones v. United States*, 168 A.3d 703, 713 (D.C. 2017) (emphasis added). The CSLI derived from the exigent ping of a cell phone is less precise. As Detective Trussell testified, an "exigent ping" entails "geographical location data bouncing off one of the towers, which would give a general, an approximate area where the phone or the device that's associated with that number would be." Detective Armetta similarly testified that an exigent ping provides CSLI between "a couple meters" and "a couple hundred meters" of the target phone. While this Court has held that the use of a cell site simulator by law enforcement constitutes a Fourth Amendment search, *State v. Andrews*, 227 Md. App. 350, 395 (2016), we have yet to specifically address the real-time cell tower tracking of a cell phone by a third-party wireless carrier.

[4] Even if appellant had properly preserved this issue for our review, he would not prevail. CP § 1-203.1(f) permits "a law enforcement officer [to] use a cell site simulator . . . for a period not to exceed 48 hours . . . in exigent circumstances[.]" As we discuss below, the officers in this case were presented with exigencies that justified the warrantless use of appellant's real-time CSLI. The same exigent circumstances which rendered that

Alternatively, appellant argues that the officers' warrantless use of real-time CSLI from his cell phone carrier constituted an unlawful search in violation of the Fourth Amendment to the United States Constitution and Article 21 of the Maryland Declaration of Rights.[5] The State rejoins that "the collection of real-time CSLI from a phone carrier d[oes] *not* constitute a search" within the meaning of the Fourth Amendment. (Emphasis retained). In the State's view, "even if the request for the phone carrier to send an 'exigent ping' constituted a warrantless search . . . the minimal intrusion was reasonable given the exigent 'need to pursue a fleeing suspect' . . . in the immediate aftermath of an attempted murder involving the use of a firearm." (Quoting *Carpenter*, 138 S. Ct. at 2223).

Following jury selection and before opening statements, appellant made two pretrial motions. Relying on the United States Supreme Court's holding in *Carpenter*, one of those motions challenged the admissibility of any evidence derived from the warrantless "pinging" of his cell phone by AT&T at the request of the Baltimore County Police Department. Appellant, through counsel, argued, in pertinent part:

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search reasonable under the Fourth Amendment also excused the officers from obtaining a court order authorizing the use of a cell site simulator pursuant to CP § 1-203.1(b).

[5] Although appellant refers to Article 21 of the Maryland Declaration of Rights, it is, in fact, Article 26 that prohibits unreasonable searches and seizures, and provides:

> That all warrants, without oath or affirmation, to search suspected places, or to seize any person or property, are grievous and oppressive; and all general warrants to search suspected places, or to apprehend suspected persons, without naming or describing the place, or the person in special, are illegal, and ought not to be granted.

> [T]he police were able to contact the phone service provider and get information concerning exactly where the phone was through, I guess, cell tower information.
>
> So, they were, they were basically able to enlist the, the cell provider's assistance in tracking the phone, figuring out exactly where the phone had traveled, and they were able to then find and apprehend my client and seize the phone based on doing that.
>
> * * *
>
> They can't simply do what the police did in this case. They need a warrant, they need to go to a Court, they need to ask permission. A Judge has to grant permission and, basically, issue a warrant for the police to have the permission and right to that, track the phone as they did in this case.
>
> So, I would argue that that was, in essence, a violation of my client, my client's constitutional rights based on *Carpenter*[.]

The court denied appellant's motion, ruling: "I find that to the extent a warrant was required[,] there . . . were exigent circumstances that justified the warrantless actions . . . in this case."

At trial, Detective Armetta testified that on the date of the shooting "Detective Trussell . . . was on a cell phone that belonged to [the] victim, and he was conducting electronic surveillance on that. And he was requesting that we go out and locate the phone or try to find it." Apparently anticipating that the State's subsequent questions would pertain to the CSLI and real-time tracking of appellant's phone, defense counsel requested a continuing objection and asked to approach the bench. During an ensuing bench conference, defense counsel articulated the scope of his requested continuing objection, stating:

> So, what we're getting into, and this is all going to relate to . . . the efforts to track the, the cell phone through the cell provider. And of course, I made an objection to that, and I litigated that, you know, cited the case of *Carpenter*, you made your ruling on that. But I think in order to preserve that objection, I need to make an objection to any of this coming in, any testimony with regard to the tracking of, the following of the phone and any, anything that happened as a result of the tracking of the phone to my client and everything that followed from that.

The court granted appellant a continuing objection "on that basis."

We begin our analysis of appellant's constitutional challenge to the exigent ping of his cell phone by setting forth the applicable standard of review:

> We extend great deference to the findings of the hearing court with respect to first-level findings of fact and the credibility of witnesses unless it is shown that the court's findings are clearly erroneous. Moreover, we view those findings of fact, and indeed the record as a whole, in the light most favorable to the State. We review the court's legal conclusions *de novo*, however, making our own independent constitutional evaluation as to whether the officers' encounter with appellant was lawful.

*Daniels v. State*, 172 Md. App. 75, 87 (2006) (internal citations omitted).

"The Fourth Amendment of the United States [Constitution], made applicable to the States by the Fourteenth Amendment, guarantees individuals the right to be secure in 'their persons, houses, papers, and effects, against unreasonable searches and seizures.'" *Whiting v. State*, 389 Md. 334, 346 (2005) (citations omitted). To invoke the protections afforded by the Fourth Amendment, an individual must "establish that he or she maintained 'a legitimate expectation of privacy' in the house, papers, or effects searched or seized." *Id.* (citations omitted). Thus, in order "to enjoy Fourth Amendment standing, a defendant must

have both 1) an actual subjective expectation of privacy and 2) an expectation that is objectively reasonable." *State v. Savage*, 170 Md. App. 149, 182 (2006).

"Subject to a few well-delineated exceptions, warrantless searches are *per se* unreasonable under the Fourth Amendment." *State v. Andrews*, 227 Md. App. 350, 374 (2016) (quotation marks omitted) (quoting *City of Ontario, Cal. v. Quon*, 560 U.S. 746, 760 (2010)). "Although the underlying command of the Fourth Amendment is always that searches and seizures be reasonable, *what is reasonable depends on the context within which a search takes place*." *Id.* at 373-74 (quoting *State v. Alexander*, 124 Md. App. 258, 265 (1998) (emphasis retained)).

"'[I]n the absence of a warrant, a search is reasonable only if it falls within a specific exception to the warrant requirement." *Carpenter*, 138 S. Ct. at 2221 (quoting *Riley v. California*, 573 U.S. 373, 382 (2014)). One well-recognized exception to that requirement "applies when '"the exigencies of the situation" make the needs of law enforcement so compelling that [a] warrantless search is objectively reasonable under the Fourth Amendment.'" *Id.* at 2222-23 (quoting *Kentucky v. King*, 563 U.S. 452, 460 (2011)). "Such exigencies include the need to pursue a fleeing suspect, protect individuals who are threatened with imminent harm, or prevent the imminent destruction of evidence." *Id.* at 2223.

In determining whether exigencies justify a warrantless search, courts "consider the facts as they appeared to the officers at the time" thereof. *Williams v. State*, 372 Md. 386, 403 (2002). Factors relevant to that case-by-case determination include: "the gravity of

the underlying offense, the risk of danger to police and the community, the ready destructibility of the evidence, and the reasonable belief that contraband is about to be removed." *Id.*

Although appellant appears to have abandoned his misplaced reliance on *Carpenter*, the United States Supreme Court's decision in that case is a suitable starting point for our analysis. In *Carpenter*, the Government applied for court orders pursuant to the Stored Communications Act seeking historic CSLI for the defendant's cell phone. 138 S. Ct. at 2212. The Stored Communications Act "required the Government to show 'reasonable grounds' for believing that the records were 'relevant and material to an ongoing investigation.'" *Id.* at 2221 (quoting 18 U.S.C. § 2-703(d)). Federal magistrate judges granted the Government's applications, thereby directing the defendant's wireless carriers to divulge "'cell/site sector [information] for [the defendant's] telephone[] at call origination and at call termination for incoming and outgoing calls' during the four-month period when [a] string of robberies [had] occurred." *Id.* at 2212 (citation omitted). In complying with the court orders, the defendant's two telephone companies produced records collectively spanning 127 days. *Id.* The Government charged the defendant with six counts of robbery and six counts of possession of a firearm during the commission of a violent crime. *Id.* Invoking the Fourth Amendment, the defendant moved to suppress the CSLI, arguing that "the Government's seizure of the records . . . had been obtained without a warrant supported by probable cause." *Id.* The United States District Court for the Eastern District of Michigan denied the defendant's motion, and he "was convicted on all

but one of the firearm counts and sentenced to more than 100 years in prison." *Id.* at 2212-13.

The United States Supreme Court concluded that the Government's acquisition of the defendant's *historic* CSLI violated the Fourth Amendment, holding that "an individual maintains a legitimate expectation of privacy in the record of his physical movements as captured through CSLI." *Id.* at 2217. The Court reasoned, in part:

> [S]ociety's expectation has been that law enforcement agents and others would not—and indeed, in the main, simply could not—secretly monitor and catalogue every single movement of an individual's car for a very long period.
>
> Allowing government access to cell-site records contravenes that expectation. Although such records are generated for commercial purposes, that distinction does not negate Carpenter's anticipation of privacy in his physical location. Mapping a cell phone's location over the course of 127 days provides an all-encompassing record of the holder's whereabouts. As with GPS information, the time-stamped data provides an intimate window into a person's life, revealing not only his particular movements, but through them his familial, political, professional, religious, and sexual associations.

*Id.* (quotation marks and citations omitted). The Court carefully confined the narrow scope of its holding and expressly left open the question of whether governmental collection of *real-time* CSLI constitutes a "search" for Fourth Amendment purposes. *Id.* at 2220. The Court further emphasized that "even though the Government will generally need a warrant to access CSLI, case-specific exceptions may support a warrantless search of an individual's cell-site records under certain circumstances," *id.* at 2222, including "the need to pursue a fleeing suspect, protect individuals who are threatened with imminent harm, or prevent the imminent destruction of evidence." *Id.* at 2223. The Court concluded, "As a

result, if law enforcement is confronted with an urgent situation, such fact-specific threats will likely justify the warrantless collection of CSLI." *Id.*

We are persuaded that the exigencies of the situation in this case justified the warrantless use of appellant's real-time CSLI. Detective Trussell submitted the exigent ping request mere hours after an attempted armed robbery and potentially fatal shooting. The suspect fled the scene with what, at the time of the exigency request, seems to have been the only physical evidence tying him to the crimes (*i.e.*, the cell phones with which N.H. and he conversed and the firearm used in the commission of the crimes), all of which were readily disposable. Indeed, as the State observes, the suspect's cell phone was the primary means of pursuing him and "each passing moment pose[d] an obvious risk of that primary means of pursuit being terminated—either . . . discarding . . . [,] disconnecting . . . [,] or destroying it." Finally, the suspect—who upon learning of the futility of his robbery attempt elected to shoot the victim rather than merely abandon his criminal enterprise—was presumably still armed or had access to the firearm and therefore posed an ongoing danger to the public.

Viewing the facts as they appeared at the time of the exigent ping request and in the light most favorable to the State as the prevailing party, *see Williamson v. State*, 413 Md. 521, 531-32 (2010), we find no error in the circuit court's conclusion that "exigent circumstances . . . justified the warrantless actions . . . in this case." Accordingly, we affirm

the court's denial of appellant's motion to exclude the challenged evidence.[6]

**II.**

Appellant next contends that the circuit court erred by permitting Detective Trussell to testify that he recognized appellant's voice on recorded jail calls. In appellant's view, because the record only reflects "that Detective Trussell 'spoke to' [defendant] on a single occasion" for an unspecified period of time and there is no indication whether appellant's "voice possessed any distinctive characteristics," "a determination of the reliability of the identification was not possible and the testimony of [Detective] Trussell should not have been allowed." The State rejoins that "[g]iven the circumstances under which Detective Trussell had heard [appellant's] voice firsthand—*i.e.*, a sustained face-to-face custodial interview in a closed room of the police station—the detective's testimony that he recognized [appellant's] voice in the jail call recordings was sufficiently reliable to be considered by the jury."

In addition to challenging the warrantless search of real-time CSLI for appellant's phone, appellant filed a second pretrial motion that sought to exclude Detective Trussell's identification of appellant's voice on the jail calls.[7] In so doing, defense counsel argued:

[6] Appellant's reliance on Article 26 of the Maryland Declaration of Rights fares no better than his Fourth Amendment challenge, as the exigent circumstances exception to the warrant requirement applies with equal vigor to both the federal and state constitutional provisions. *See Gahan v. State*, 290 Md. 310, 319 (1981) ("This Court has said many times that Art. 26 is in pari materia with the Fourth Amendment.").

[7] At trial, appellant waived any objection to the admissibility of the recordings themselves by declining to object to their admission in evidence.

> I think one of the things that the State intends to do is call the primary detective in this case as a witness to say that he recognized the voice on those calls as that of my client, based on his interviews with my client and, I guess, based on other experiences in this case.
>
> My position is that that is usurping the province of the jury. It would be the same thing if . . . somebody is on a video, a surveillance video, and the State's theory is that that person committed a certain crime and the person is sitting in Court and the jury is in a position to look at that person and look at the video and decide whether it's that person.
>
> And the State calls a police officer to say I recognize the person in that video, that's so and so, the person who is, you know, who is on trial here. I think that would be inappropriate and my position is that it[] would be inappropriate for the primary detective to offer that testimony in this case.
>
> Because the jury is in just as good a position to make that determination and it is their determination to make. They will have the opportunity to hear my client's voice, because he . . . was interviewed by the police and they will have the opportunity to determine whether . . . the voice of the person who was interviewed by the police is the same voice on those calls.
>
> So, I don't think it would be fair to also let the primary detective offer his opinion that it is my client's voice. So, that would be . . . my argument in regards to those . . . jail calls and the admissibility of the detective testifying that that is my client on them.

The court denied appellant's motion and, over appellant's objection, permitted Detective Trussell to testify that he recognized appellant's voice as one of the voices on the jail calls.

As the State correctly notes, appellant's argument on appeal differs from that raised before the circuit court. In support of his pretrial motion, appellant asserted that permitting Detective Trussell to testify that he recognized appellant's voice on the jail calls would usurp the function of the jury. On appeal, by contrast, he claims that it was "not possible" for the court to assess the reliability of Detective Trussell's voice identification. We need

not delve into the question of preservation, however, because we conclude that the court did not abuse its discretion in admitting this evidence.

Maryland Rule 5-901 governs the authentication of 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." Md. Rule 5-901(a). The Rule sets forth a non-exhaustive list of "examples of authentication or identification conforming" therewith, which includes: "Identification of a voice, whether heard firsthand or through mechanical or electronic transmission or recording, based upon the witness having heard the voice at any time under circumstances connecting it with the alleged speaker." Md. Rule 5-901(b). "[T]he 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.'" *Dickens v. State*, 175 Md. App. 231, 239 (2007) (emphasis retained) (quoting *United States v. Safavian*, 435 F. Supp. 2d 36, 38 (D.D.C. 2006)).

The admissibility of voice identification testimony is entrusted to the sound discretion of the trial court. *Donati v. State*, 215 Md. App. 686, 740 (2014). "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."'" *Id.* at 708-09 (quoting *King v. State*, 407 Md. 682, 697 (2009)).

When exercising its discretion to permit witnesses to identify a voice, "the court

must assess whether the evidence is relevant and reliable."[8] *Id.* at 740. Courts assess the reliability of a voice identification using the following five-factors test: "(1) the ability of the witness to hear the assailant speak, (2) the witness's degree of attention, (3) the accuracy of any prior identifications the witness made, (4) the period of time between the incident and the identification, and (5) how certain the witness was in making the identification." *Id.* (quoting *Hopkins v. State*, 352 Md. 146, 160-61 (1998)).

As foundation for his voice identification testimony, Detective Trussell testified that he had listened to the jail calls multiple times. Detective Trussell further confirmed that he conducted a face-to-face interview with appellant during which he heard him speak. Detective Trussell then repeatedly and definitively testified that he recognized a voice on two of the jail calls as that of appellant. As the State met its burden of establishing that Detective Trussell had, at least, "minimal familiarity" with appellant's voice, the issue regarding admissibility was resolved, leaving only the jury question of what weight to afford Detective Trussell's voice identification. *See United States v. Schoolfield*, 282 Fed. Appx. 274, 275 (10th Cir. 2008) ("[A]ll that is required under [Federal Rule of Evidence 901(b)(5)] is that the witness have 'minimal familiarity' with the speaker's voice; once minimal familiarity is satisfied, it is for the jury to assess any issues regarding the extent of the witness's familiarity with the voice."). *Cf. Buzbee v. State*, 58 Md. App. 599, 612 (1984) (holding that the "certainty, or lack thereof," with which the victim made a voice

[8] Appellant does not challenge the relevance of Detective Trussell's voice identification testimony.

identification "[was] a question of weight for the jury, not one of admissibility unless the uncertainty is tantamount to no identification at all" (citations omitted)). We conclude that the trial court properly admitted Detective Trussell's voice identification testimony.

**III.**

Finally, appellant challenges the legality of the twenty-year consecutive sentence (the first five to be served without the possibility of parole) imposed by the court for use of a firearm in the commission of a felony or violent crime. Relying on the Supreme Court of Maryland's opinion in *Jones v. State*, 384 Md. 669 (2005), appellant contends that because "the jury never announced, in open court, a guilty verdict as to the charge of use of a [firearm] in the commission of a crime of violence[,] . . . the conviction and sentence for that charge [are] illegal and must be vacated."

The State urges us to reject appellant's assertion on non-preservation grounds, arguing:

> [Appellant] did not raise this issue below at the time when it could still have been addressed. Allowing [appellant] to say nothing at the time the verdict was rendered, and thereafter raise this issue for the first time on appeal after the opportunity for addressing the issue has passed, would undermine the animating policy of the preservation requirement and subvert the important, but exceedingly narrow, purpose of Rule 4-345(a).[9]

Following deliberations, the foreperson announced the jury's verdicts:

> CLERK: Ladies and gentlemen, have you reached . . . a verdict?
>
> JURORS: Yes.

[9] Maryland Rule 4-345(a) provides: "The court may correct an illegal sentence at any time."

> CLERK: Mr. Foreman, would you please stand. What do you say in the case of the State of Maryland versus Isaiah Darius Fogg in case C-03-CR-20-3585, to attempted second degree murder?
>
> JUROR: Guilty.
>
> CLERK: Assault in the first degree?
>
> JUROR: Guilty.
>
> CLERK: Robbery with dangerous weapon?
>
> JUROR: Guilty.
>
> CLERK: Firearm possession with felony conviction?
>
> JUROR: Guilty.
>
> CLERK: Counsel, would you like the jurors polled?
>
> [DEFENSE COUNSEL]: Yes, please.

The courtroom clerk then polled the jury, asking each juror whether their verdicts were the same as those announced by the foreperson. Each juror answered in the affirmative. Thereafter, the clerk hearkened the jury to its verdicts, asking:

> CLERK: Ladies and gentlemen of the jury, hearken your verdict as the Court has recorded it, attempted second degree murder, guilty, assault first degree, guilty, robbery with dangerous weapon, guilty, . . . *firearm use felony violent crime*, guilty, firearm with possession, with felony, with felony conviction, guilty, say you all?

(Emphasis added). Again, the jurors answered in the affirmative. At no point did defense counsel object to the omission of the count for use of a firearm in the commission of a felony or crime of violence from the foreperson's announcement of the verdict or the

clerk's poll of the jury. The court excused the jury and set sentencing for December 10, 2021.

At sentencing, the court recounted, again without objection: "The jury convicted [appellant] of attempted second degree murder, first degree assault, armed robbery, use of a firearm in the commission of a felony or crime of violence and firearm possession with a felony conviction." The court then imposed a twenty-year sentence for "use of a firearm in the commission of a felony or crime of violence[.]"

Maryland Rule 4-345(a) establishes a narrow exception to the normal preservation requirements and provides: "The court may correct an illegal sentence at any time." For purposes of Rule 4-345(a), an "illegal sentence" is one "in which the illegality 'inheres in the sentence itself; *i.e.*, there either has been no conviction warranting any sentence for the particular offense or the sentence is not a permitted one for the conviction upon which it was imposed and, for either reason, is intrinsically and substantively unlawful.'" *Colvin v. State*, 450 Md. 718, 725 (2016) (quoting *Chaney v. State*, 397 Md. 460, 466 (2007)). In other words, where a verdict is fatally flawed as a matter of law because, among other things, the court failed to ensure that it was unanimously reached, the ensuing sentence is inherently illegal and subject to correction "at any time" pursuant to Rule 4-345(a). The Rule is inapplicable, however, to "procedural challenges to a verdict," which must, therefore, be raised by contemporaneous objection. *Id.* at 728.

"The requirement of unanimity is . . . a constitutional right set forth in Article 21 of the Maryland Declaration of Rights, which states that 'every man hath a right . . . to a

speedy trial by an impartial jury, without whose unanimous consent he ought not to be found guilty[.]'" *Jones*, 384 Md. at 683. "A jury verdict that is not unanimous is defective and will not stand." *Caldwell v. State*, 164 Md. App. 612, 635 (2005). "A verdict is defective for lack of unanimity when it is unclear whether all of the jurors have agreed to it." *Id.* at 636. "Whether a verdict satisfies the unanimous consent requirement is a . . . mixed question of law and fact, which we review *de novo*, considering the totality of the circumstances." *Id.* at 643.

Maryland Rule 4-327 implements the right of a criminal defendant to a unanimous verdict by an impartial jury and provides, in pertinent part:

> (a) **Return.** The verdict of a jury shall be unanimous and shall be returned in open court.
>
> * * *
>
> (d) **Two or more counts.** When there are two or more counts, the jury may return a verdict with respect to a count as to which it has agreed, and any count as to which the jury cannot agree may be tried again.
>
> (e) **Poll of jury.** On request of a party or on the court's own initiative, the jury shall be polled after it has returned a verdict and before it is discharged. If the sworn jurors do not unanimously concur in the verdict, the court may direct the jury to retire for further deliberation, or may discharge the jury if satisfied that a unanimous verdict cannot be reached.

We find *Jones* instructive to the resolution of this issue. There, the State charged the defendant with, among other things, (i) attempted robbery with a dangerous and deadly weapon, (ii) attempted robbery, (iii) use of a handgun in the commission of a crime of violence, and (iv) possession of a firearm with a felony conviction. *Jones*, 384 Md. at 673-

75. After deliberating for approximately two hours, the jury returned to the courtroom. *Id.* at 675. Although the verdict sheet reflected that the jury had convicted the defendant of all four counts, the court clerk did not inquire nor did the foreperson orally announce a verdict as to the charge for possession of a firearm following a felony conviction. *Id.* at 676-77. When polling and hearkening the jury, the clerk again omitted the felon in possession of a firearm count. *Id.* Thereafter, the court excused the jury. *Id.* at 677. Although the jury had not orally announced in open court a verdict as to that fourth charge, the court nevertheless sentenced the defendant as to all four counts. *Id.*

The Supreme Court of Maryland reversed, holding that "the trial court could not legally impose a sentence for a verdict that was not orally conveyed in open court and to which the jury was neither polled nor hearkened." *Id.* at 678. The Court explained that "the 'return' of a verdict by a jury [is] comprised of three distinct procedures, each fulfilling a specific purpose." *Id.* at 682. The first such step consists of "the foreman, speaking for the jury, orally answer[ing] the inquiry of the clerk and stat[ing] the verdict to the trial court." *Id.* (citing *Givens v. State*, 76 Md. 485, 487 (1893)). On request by either party, the jurors must then be polled "to ensure the unanimity of the verdict prior to its entry on the record." *Id.* (citing *Smith v. State*, 299 Md. 158, 166 (1984)). Finally, "the jury is hearkened to its verdict as 'the traditional formality announcing the recording of the verdict.'" *Id.* at 684 (quoting *Smith*, 299 Md. at 166). "Hearkening of the jury to the verdict, like polling the jury, is conducted to 'secure certainty and accuracy, and to enable the jury to correct a verdict, which they have mistaken, or which their foreman has

improperly delivered.'" *Id.* (quoting *Smith*, 299 Md. at 165). The Court concluded "that *for a verdict to be considered final in a criminal case it must be announced orally* to permit the defendant the opportunity to exercise the right to poll the jury to ensure the verdict's unanimity." *Id.* at 685 (emphasis added). *See also Ogundipe v. State*, 424 Md. 58, 72-73 (2011) ("[A]ny questions on the verdict sheet that were not announced orally in court cannot be considered verdicts in themselves. The verdict sheet is merely a tool used to aid the jury in reaching its verdict; it therefore does not bind the jury or the court to its contents."); *Ogundipe v. State*, 191 Md. App. 370, 385 (2010) ("The 'verdict of the jury' is 'returned in open court' by the court clerk asking the jury foreman to declare the verdict." (quoting Md. Rule 4-327)).

Rather than attempt to distinguish the instant case from *Jones*, the State analogizes it to *Colvin* in support of its assertion that the omission of the use of a firearm count from the announcement of the verdicts and poll of the jury amounted to a mere procedural error to which Rule 4-345(a) does not apply. In our view, that reliance is misplaced. Following deliberations in that case, the clerk asked the jury foreperson for the verdicts as to a litany of offenses with which the defendant had been charged. *Colvin*, 450 Md. at 721-22. The foreperson orally answered the clerk's questions, thereby announcing the various verdicts the jury had rendered. *Id.* Thereafter, defense counsel asked the clerk to poll the jury. *Id.* at 722. In so doing, however, the clerk neglected to ask the foreperson whether her verdicts were the same as those she had just announced. *Id.* The clerk then hearkened the verdicts, asking:

> As to first degree murder not guilty, as to felony murder guilty, assault with intent to murder guilty, robbery deadly weapon guilty, use of a handgun in the commission of a crime of violence guilty, possession of a handgun guilty and so say you all?

*Id.*. The jury answered in the affirmative. *Id.* The defendant subsequently filed a motion to correct an illegal sentence pursuant to Rule 4-345(a), arguing that "the verdicts supporting his convictions were not unanimous . . . because the jury foreperson was not polled individually after she announced the jury's verdicts." *Id.* at 723. The circuit court denied the defendant's motion. *Id.*

On appeal, the Maryland Supreme Court affirmed the circuit court's judgment, holding that the defendant's contention was "not cognizable under Rule 4-345(a)." *Id*. at 727. The Court reasoned:

> [The defendant's] alleged claim . . . that the record does not reflect . . . a properly conducted polling process . . . , even if true, does not make a substantive allegation of a lack of juror unanimity without more: the additional lack of a proper hearkening of the jury to the verdict. The alleged lack of unanimity of the verdict is the lynchpin of Colvin's argument that the verdict, as rendered, is unconstitutional and therefore a "nullity" upon which no legal sentence can be imposed. Without that lynchpin, the fragile structure of Colvin's allegation of an illegal sentence collapses of its own weight.

*Id.* at 728.

*Colvin* is readily distinguishable from the instant case. In *Colvin*, the foreperson orally announced the verdicts as to all of the charges that had been submitted to the jury. *Id.* at 721-22. When polling and hearkening the jury, the clerk likewise included each of those counts. *Id.* at 722. The only defect in the return of the verdict in that case was the

clerk's failure to poll the foreperson. *Id.* It was, however, that same foreperson who had just announced the verdicts to which the remaining eleven jurors subsequently assented. *Id.* at 721-22. The foreperson's unequivocal recitation of the verdicts sufficed to show her individual agreement therewith and, therefore, "ensure[d] the unanimity of the verdict prior to its entry on the record," as is the purpose of polling the jury. *Jones*, 384 Md. at 682. *See also Strong v. State*, 261 Md. 371, 373-74 (1971) (holding that although the foreperson did not participate in the poll of the jury, her announcement of the verdicts demonstrated her assent therewith), *vacated on other grounds*, 408 U.S. 939 (1972); *Coby v. State*, 225 Md. 293, 299 (1961) ("The record shows that after the foreman had announced the verdict of guilty, *each of the other members of the jury* was asked individually if his verdict was the same as that of the foreman and each juror answered that it was. Thus, the polling of the jury clearly indicated the assent of each juror to the verdict[.]" (Emphasis added)).

Most significant to the instant case, the *Colvin* Court concluded that the alleged error in the polling process did "not make a substantive allegation of a lack of juror unanimity" where the hearkening of the jury was not alleged to be improper. 450 Md. at 728. Because lack of unanimity of the verdict is the "lynchpin" of an unconstitutional—and illegal—sentence, the Court rejected the defendant's illegal sentence argument. *Id.*

In contrast to *Colvin*, the court clerk and foreperson here entirely omitted the use of a firearm in the commission of a felony or violent crime count from the announcement of the verdicts. We note the importance of the foreperson's oral announcement of the verdict as its very purpose is to "prevent[] possible confusion during polling and hearkening where

there are multiple counts considered by the jury[.]" *Jones*, 384 Md. at 685. Because the clerk then omitted that same charge when polling the jury, the act of polling could not cure the defect in the foreperson's announcement of the verdict. *Id.* at 684. Finally, although the clerk ostensibly included the use of a firearm in the commission of a felony or violent crime count among those to which she hearkened the jury, the actual hearkening language used by the clerk, "firearm use felony violent crime," was less than clear when it was juxtaposed with "firearm with possession, with felony, with felony conviction."[10] The complete failure to poll the jurors on the use of a firearm in the commission of a felony or violent crime combined with the less than clear hearkening described above convinces us that the verdict on that count lacked the "certainty and accuracy" required "to enable the jury to correct [the] verdict." *Id.* (quoting *Smith*, 299 Md. at 165). Thus, unlike *Colvin*, appellant's argument goes to the heart of jury unanimity and, as such, can be challenged as an illegal sentence. Accordingly, we hold that appellant's conviction for use of a firearm in the commission of a felony or violent crime cannot stand and his corresponding twenty-year sentence must be vacated.

**CONVICTION AND SENTENCE FOR USE OF A FIREARM IN THE COMMISSION OF A FELONY OR CRIME OF VIOLENCE VACATED. JUDGMENTS OF THE CIRCUIT COURT FOR BALTIMORE COUNTY OTHERWISE AFFIRMED. COSTS TO BE PAID 2/3 BY APPELLANT AND 1/3 BY BALTIMORE COUNTY.**

[10] Because we recognize that jury hearkening frequently amounts to a rote and rapid recitation of the verdicts, the importance of clarity in hearkening cannot be overlooked.