UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0304

September Term, 2014

ERIC GLEN BANKS

v.

STATE OF MARYLAND

Krauser, C.J.,
Graeff,
Friedman

JJ.

Opinion by Graeff, J.

Filed: June 30, 2016

After a seven-day jury trial in the Circuit Court for Anne Arundel County, Eric Banks, appellant, was convicted of second degree murder in the shooting and stabbing death of Darren Bell. The court imposed a sentence of thirty years.

On appeal, appellant presents the following three questions for this Court's review, which we have rephrased slightly, as follows:

1. Did the trial court err in admitting a text message that was not properly unauthenticated and constituted hearsay?

2. Did the trial court err in limiting the cross-examination of a state witness?

3. Did the trial court err in issuing an incorrect and confusing jury instruction on reasonable doubt?

For the reasons set forth below, we shall affirm the judgment of the circuit court.

FACTUAL AND PROCEDURAL BACKGROUND

The Murder

During the early morning hours of January 27, 2013, Mr. Bell made two calls to 911. The first was made at approximately 3:15 a.m., and Mr. Bell repeatedly whispered "track my call" and said something about being in "the woods." The 911 operator identified the call as coming from Tanyard Cove Road near Solley's Cove Park. After determining that the 911 call was made from a cell phone registered to "Derrick Hell [sic], DOB 04/17/1989," the 911 operator called that phone number, but no one answered. At approximately 3:30 a.m., the operator noted: "will keep checks in the area."

The second call was made at 4:05 a.m., and Mr. Bell again asked for help, and he more clearly said: "[T]rack my call, please, I think I'm about to get killed." Immediately thereafter, a gunshot occurred, followed by Mr. Bell stating: "They shot me! They shot me!

Erica Banks, she set me up!"[1] At that moment, 39 seconds into the call, the line disconnected. The 911 operator immediately called back, but there was no answer.

Corporal Simone,[2] a member of the Anne Arundel County Police Department, responded to dispatches regarding "shots fired in the area" and "man on the line advised he was shot." When Corporal Simone arrived at Tanyard Cove Road, a dirt road in a dark wooded area, the officer saw two vehicles pulled off the road with their motors running. Detective Brian Bielot arrived at the scene, and the two officers approached the burgundy Ford Explorer, where Ms. Banks sat in the driver's seat and Tremaine Calhoun was in the passenger seat.[3] When asked why they were there, Ms. Banks answered that they had stopped "[t]o take a piss." Detective Bielot asked to search the vehicle, and Ms. Banks consented.

An unoccupied white van was stopped directly behind the Explorer. While police were talking with Ms. Banks and Mr. Calhoun, appellant walked out of the woods ahead of the Explorer and asked: "What are you doing with my daughter?" Appellant had blood

[1] The recording of this call, admitted as State's Exhibit 4, is not clear enough for us to definitively confirm that this is exactly what Mr. Bell said after being shot. Appellant, however, states in his brief that this was the content of the call, and the State does not dispute this assertion.

[2] Corporal Simone's first name is not in the trial transcript or the record.

[3] Detective Bielot had responded to a dispatch regarding Mr. Bell's first call to 911, but he did not see anything suspicious in the Tanyard Cove Road area.

on his hands. His right thumb was cut and bleeding. He wore a black work-style glove on his left hand.

In the area from which appellant emerged, police found Mr. Bell's body. The assistant medical examiner determined that Mr. Bell, who was 6'7" tall and weighed 300 lbs., died from the combination of a gunshot to his chest and multiple stab wounds to the left side of his head and neck. The tip of a knife was embedded in Mr. Bell's skull.

The State's Case

The State charged appellant with first degree premeditated murder, second degree murder, manslaughter, conspiracy, and weapons offenses. The State's theory was that, when Ms. Banks decided to kill Mr. Bell, she called appellant, who came to her aid.[4]

Danielle Scott, Mr. Bell's fiancée, testified that Ms. Banks and Mr. Bell were close friends, but they had conflict because "he was supposed to sell marijuana for her but his friend got locked up with it," angering Ms. Banks and her girlfriend. On the night of the murder, Ms. Banks picked up Mr. Bell to go to a club. Mr. Bell called Ms. Scott when the club closed at approximately 2:00 a.m. He called three more times, first saying he "was in the woods," then at a gas station, and finally, that he was planning to be home in five to ten minutes.

At trial, Mr. Calhoun testified that Ms. Banks was upset with Mr. Bell after "he was getting smart on Facebook." Approximately two weeks before the murder, Ms. Banks

[4] Additionally, the State argued that appellant was guilty of first degree murder and conspiracy because he was aware of his daughter's plan, joined her, shot Mr. Bell, and was caught red-handed after dumping Mr. Bell's body.

asked Mr. Calhoun if he would beat someone up for her, stating that he was asked "to beat people up all the time." He agreed, and Ms. Banks showed him Mr. Bell's photograph on Facebook. The plan was to get Mr. Bell drunk at a party before assaulting him, but the party failed to materialize.

On the evening of the murder, Mr. Calhoun and a friend went to a bar in Dundalk. While there, Ms. Banks called and said she was coming to meet them with Mr. Bell. During the evening, she did not seem angry with Mr. Bell. When the bar closed at 2:00 a.m., Mr. Bell was intoxicated. Mr. Calhoun joined Ms. Banks and Mr. Bell in her Ford Explorer. They stayed in the parking lot for 30-45 minutes while Ms. Banks and Mr. Bell went "back and forth at each other" about "the Facebook stuff," and Ms. Banks made calls on her cell phone.

After they left, Ms. Banks made several stops. Along the way, Mr. Calhoun's "antennas went up" given the previously discussed plan.

Ms. Banks first drove to a closed gas station, parked, and again made phone calls. After ten to fifteen minutes, at approximately 3:00 a.m., she drove to a wooded area along Tanyard Cove Road, where all three exited the vehicle to urinate. Mr. Calhoun testified that, as Mr. Bell was getting some toilet tissue from the back of the vehicle, Ms. Banks pointed a silver handgun at Mr. Bell, but then lowered it. Mr. Bell "didn't see it."

The group then drove to a convenience store, where video surveillance footage showed that, at approximately 3:12 a.m., Ms. Banks and Mr. Calhoun went in and out

together, and Mr. Bell entered and exited by himself. A few minutes later, Mr. Bell made his first call to 911, asking police to track his phone.

Ms. Banks then drove to her mother's house to get some clothes. After twenty minutes, she returned carrying a black bag and saying that her girlfriend's house key was lost, so they were going back to Tanyard Cove Road to look for it.

Ms. Banks drove to where they had stopped earlier. With the vehicle headlights on, the three looked for the lost key. After a couple minutes, a white van pulled in behind Ms. Banks' vehicle. Ms. Banks said she did not know who it was. Mr. Calhoun pulled out his pocket knife, which he carried at all times.

Appellant got out of the van. He spoke to his daughter for a couple seconds, after which Ms. Banks "pointed towards [Mr. Bell]" and said: "That's him." Appellant walked toward Mr. Bell, raised his hand, and fired a single shot. Mr. Bell groaned and ran toward the woods. Appellant pursued him.

Shortly thereafter, Mr. Calhoun saw Mr. Bell coming out of the woods. Appellant tripped him, sending the wounded man face-down on the ground. Appellant then "kneeled down on top" of Mr. Bell, pinning him to the ground, and he demanded that Mr. Calhoun give him his knife. Mr. Calhoun complied. With Mr. Bell's head pressed to the ground, appellant repeatedly stabbed the exposed left side of his head and neck. Appellant stopped when a car came up the road.[5]

[5] At approximately 4:00 a.m. on January 27, 2013, Matthew Donnick was driving friends to their camper located at the end of Tanyard Cove Road. They passed two vehicles parked with their motors running but did not see "anything or anybody."

Appellant told Ms. Banks to get "his stuff off of him," and she complied, taking things out of Mr. Bell's pocket. Once the vehicle drove past them, Mr. Calhoun helped appellant drag Mr. Bell's body away from the road, with appellant at the victim's head and Mr. Calhoun at his feet.

Mr. Calhoun testified that appellant and Ms. Banks "had latex gloves on," but he did not. Mr. Calhoun asked appellant for his knife back; he did not want to get "framed" for the murder. He put the knife into his front pocket, causing his pants and the basketball shorts he wore underneath to become stained with Mr. Bell's blood.

Ms. Banks went back to her truck. When Mr. Calhoun joined her, she "was on the phone," saying: "What do you want me to do now?" At that point, a police vehicle was driving slowly down the road. Mr. Calhoun threw the knife down next to the Explorer. While police were talking with Ms. Banks, appellant was "still in the woods," but he eventually "came out," with "blood all over his pants."

Mr. Calhoun already had pleaded guilty to conspiring with Ms. Banks to commit first degree murder, but he had not yet been sentenced. His plea deal provided for the State to recommend a sentence of no less than fifteen years.

After Ms. Banks was transported to the police station, the police found, in her outer clothing, a wallet and cell phone. That pocket also contained hand sanitizer, a dryer sheet, and an inverted latex glove. Inside both the Explorer and the van were cleaning supplies, which belonged to the owners of the vehicles.

On the ground, near the passenger door of the Explorer, police recovered the bloody knife with a broken tip. DNA recovered from the blade was from Mr. Bell and appellant. Appellant was the major DNA contributor on the handle of the knife, and Mr. Bell was a minor contributor. The work glove that appellant was wearing on his left hand had a blood stain on the palm, which had DNA from both appellant and Mr. Bell.

Police found a loaded silver .25 caliber handgun in the center console of Ms. Banks' vehicle, but it was not the gun used to shoot Mr. Bell. Nor was it operable, likely incapacitated by an improperly placed firing pin. Police never recovered the gun used to shoot Mr. Bell.[6] Gunshot residue was recovered from the hands of Ms. Banks and Mr. Calhoun, but no gunshot residue was found on appellant's hands.

Cell phone records showed that, on January 27, at 4:08 a.m., appellant received a text message from Ms. Banks' cell phone number, stating: "that's him at truck." In addition, there were multiple calls between appellant's cell phone and Ms. Banks' cell phone during the relevant time frame, including five calls in the hour between Ms. Banks' first trip to Tanyard Cove Road and the arrival of police at the murder scene.[7]

[6] The State suggested that appellant concealed the gun used to shoot Mr. Bell as police arrived, and Ms. Banks retrieved it after the crime scene was no longer secure. The heavily wooded crime scene was "released" by 5:33 a.m. on January 28, and Ms. Banks, who initially was charged only with a handgun offense, was released on bail on January 29. She was re-arrested on murder charges on January 31. It was not until February 4 that police were able to conduct a "line" search using recruits from the police academy.

[7] The State argued in closing that these calls corroborated Mr. Calhoun's account of appellant's role in the murder, as did, *inter alia*, Mr. Bell's 911 call accusing Ms. Banks of "setting him up," rather than "shooting" him, Ms. Banks' text message identifying the victim, and the presence of appellant's DNA on the handle and blade of the knife.

Defense Case

Appellant's defense theory was that he arrived too late to stop Ms. Banks from shooting Mr. Bell and then failed in his effort to stop Mr. Calhoun from stabbing Mr. Bell. When Mr. Bell died, appellant panicked, and as he and Mr. Calhoun dragged Mr. Bell's body into the woods, appellant became bloodstained and injured. Mr. Calhoun then lied to police about appellant's role in order to obtain a favorable plea deal.

Demetrius Brown, who was present at the convenience store while Ms. Banks, Mr. Calhoun, and Mr. Bell were there, testified that Ms. Banks and Mr. Calhoun came in separately and were talking in a denigrating manner, apparently about Mr. Bell. When Mr. Bell came in, Ms. Banks and Mr. Calhoun went back outside together. Because Mr. Brown became suspicious of an impending robbery, he spoke to Mr. Bell, telling him there was a police officer nearby. After they left, Mr. Brown called 911, asking police to check on the store because it seemed like "something was ready to go down."

Appellant testified in his own defense, insisting that he was not part of the murder plot and that he went to the murder scene only to stop his daughter after she told him she was trying to shoot someone. At approximately 11:00 p.m. that night, Ms. Banks called him, saying she would do her cleaning jobs for his cleaning company at a later time. At approximately 2:00 a.m., she called again, this time "a little tipsy." After informing her that he had already cleaned the three bank branches that she was assigned for that evening, appellant went to bed.

Sometime after 3:00 a.m., Ms. Banks called again, this time "highly upset." She accused appellant of doing something to her gun, explaining that she "went to use it" and it did not work, and then saying that she was headed to her mother's house, where appellant knew she had other firearms. In that and ensuing phone conversations, Ms. Banks told appellant she tried to shoot someone who "disrespected" her, stating that their dispute was over marijuana and Facebook arguments.

Appellant left home, hoping to intervene, as he had on prior occasions, before Ms. Banks did anything "stupid." Appellant recounted that, in 2011, while Ms. Banks was living with her mother, he received a call asking him to come pick up a bag containing three guns belonging to Ms. Banks. After hiding the bag, appellant told Ms. Banks that he "threw it away." Eventually, he told her where to find the bag and she retrieved it. She was "highly upset" about the incident and did not communicate with him for three months, until she needed a job.

Concerned that Ms. Banks was going to "do something stupid" appellant tried to intercept her. Although appellant talked to her while en route to her mother's house, by the time he arrived, Ms. Banks' vehicle was gone. When appellant called Ms. Banks, demanding to know why she left her mother's house and where she was, she directed him to Tanyard Cove Road.

Appellant testified that, when he arrived, Ms. Banks was standing in the road with two men. Ms. Banks looked toward him. As appellant was parking his van, he heard what sounded like a single gunshot. Although he did not see the shot, he saw Ms. Banks with a

gun in her hand. As he ran over, he saw Mr. Bell drop his hand down from where he had been holding his cell phone next to his head. When Mr. Bell "lunged," Mr. Calhoun reacted. Mr. Calhoun appeared to be repeatedly punching the left side of Mr. Bell's head. Appellant pushed Mr. Calhoun away from Mr. Bell, but Mr. Calhoun came back with what appellant then could see was a knife. As Mr. Bell moved toward the woods, Mr. Calhoun continued to stab him on the left side.

Once Mr. Bell went down, Ms. Banks took his wallet and ran back toward her vehicle. Along the way, she called out, "car!" As a single vehicle slowly drove past, appellant and Mr. Calhoun crouched down in the woods. "[P]anicked," appellant told Mr. Calhoun that they had to move Mr. Bell's body. With appellant lifting from the victim's armpits and Mr. Calhoun carrying his legs, the two men took the body into the woods. In the process, appellant fell twice, landing underneath the body. Mr. Calhoun pulled appellant up, grabbing his hand. Mr. Calhoun "took off" while appellant tried to "get [him]self together." At that point, Ms. Banks called to say the police were there. Appellant told her he was "in pain," but eventually, he walked out into the road.[8]

On cross-examination, appellant admitted that, in a recorded call with his wife from jail, he told her that "[Ms. Banks] shot the dude" and "was out there fighting" while he "was trying to break it up." He subsequently stated that he lied to his wife because he knew their call was being recorded.

[8] After his arrest, appellant was treated at a hospital for a strain of his chest wall muscles.

In closing, defense counsel argued that appellant had no reason to kill Mr. Bell and that the gunshot residue evidence put the gun in the hands of those who did, Ms. Banks and Mr. Calhoun. Counsel suggested that appellant's DNA was on the knife as a result of transference from Mr. Calhoun, who grabbed appellant's bleeding hand to help him up shortly before throwing the knife down beside Ms. Banks' vehicle.

The jury acquitted appellant of first degree murder, conspiracy to commit first degree murder, use of a handgun in the commission of a crime of violence, and carrying a handgun. It found appellant guilty, however, of second degree murder.

DISCUSSION

I.

Admission of Text Message

Appellant contends that the trial court erred in allowing Detective Shelley Rattell to read a text message sent from Ms. Banks' phone to appellant's phone, stating "that's him at truck." In support, he asserts that the State failed to "establish that the phone and its contents were in exactly the same condition as they were at the time of their seizure more than a year prior to trial defeating both the authentication and chain of custody requirements for admissibility of the evidence." He argues that, absent direct or circumstantial evidence that the text message was sent to him by Ms. Banks, or "expert testimony confirming the integrity of the contents of the phone, the State failed to establish either authenticity or chain of custody under any standard." He further asserts that the

message constituted hearsay that did not qualify for admission under the exception for declarations by a coconspirator.

The State contends that appellant's "authentication and chain of custody objections are not preserved" for this Court's review. In any event, it asserts that all of appellant's contentions "are incorrect." Finally, the State argues that admission of the text message was harmless error because "Banks was acquitted of the conspiracy charge," as well as the charge of first degree murder, and the evidence of his involvement in the murder itself was wholly unrelated to the text message.

A.

Proceedings Below

The State initially addressed the text message in opening statement. Defense counsel objected, arguing that the State had not identified the police officer who extracted the text from the phone as an expert witness.[9] The trial court precluded further reference to the text message until later.

At the end of that first day of trial, the court and counsel discussed the text message outside the presence of the jury. The State argued that the police officer would not be giving an expert opinion, explaining that he "extracts the information off of the phone. It is not an opinion as to what is on the phone. It is physically what is on the phone." The

[9] The police obtained search warrants for the contents of appellant's and Ms. Banks' phones, which were seized after the murder. A detective then downloaded the contents of the phone to a police computer.

court stated that it was "inclined to think that it would need expert testimony of some kind [to] explain [] the download and print out process."

The prosecutor subsequently proffered that she intended to proceed with the detective looking "in the phone to testify about any text messages on that evening." The court and counsel then addressed the admissibility of the text message, in a discussion comprising almost thirty pages of transcript. Defense counsel objected on two grounds.

First, counsel discussed concerns that, "after a year of being in storage . . . would there be any type of integrity problems with the cell phone that would be of concern forensically speaking." She stated that she had spoken with a computer forensics analyzer, and there were concerns that, if "forensically sound procedures" were not performed in "the collection, the storage, the charging up, and the transfer of information during this acquisition, it could [af]fect the integrity of the telephone, the integrity of the data that is collected, and make it not a forensically sound piece of evidence." She explained:

> It is something that the data collection, once a phone is charged, there is communications between certain cell phones – I am not thinking of the proper word here – networks, there are transmissions that go back and forth, if it is not done in a properly shielded environment. And if you cannot sit here and say that what we are producing through these text messages are forensically sound, and we are not in a position to intelligently cross-examine whoever presents this evidence, it certainly puts us in a position that we would not have been had we gotten notice that this issue would have arisen, that it was something we needed to prepare for in terms of addressing this evidence at trial.

Defense counsel agreed with the court's inquiry that she was "afraid that the data elsewhere on the phone could be corrupted or lost," and it "could impede the accuracy of what is on the telephone." Counsel explained:

So, for example – and, again, just to give the Court a sense of what we are talking out, one of the examples he used is with Blackberry. If it is not properly contained, transferred, and shielded in something called a shielding bag or a Faraday bag that prevents it from communicating.[10]

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Or if it is taken out during the time that it has been in property and charged up. Once a telephone is charged up, it is communicating. And data is coming in and data is going out. Specific to a Blackberry, for example, the example he used is that they have this specific safety operational device. It is called scrubbing. If a Blackberry is left on and left idle for somewhere between 10 and 30 minutes, it automatically, as a security device, scrub[s] unused data, including, something that would be relevant, would be deleted data.

So if someone were using a Blackberry cell phone, had deleted text messages, it is going to clear them. And they are not accessible. They are not going to be something that we can view. They are not something that we can consider. In the context of how the State is introducing this testimony, we would not be able to say, well, wait a minute, there was this other message that was deleted or this came in before and after. This puts it into context. It is gone.

And that is just one example of what can happen just by turning the cell phone on with that particular model. []

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That was the example he used for those particular phones. So we would not be able to tell on that phone, now that it has been charged up, or even if it had been prior to today, whether data has been erased or taken off or added or anything like that.

So it is an incomplete – it is not, again, forensically sound to introduce this evidence.

[10] Faraday bags "are essentially sandwich bags made of aluminum foil: cheap, lightweight, and easy to use" for the purpose of preventing "[r]emote wiping" of cell phones seized by police by blocking radio waves from reaching the phone. *Riley v. California*, 134 S. Ct. 2473, 2487 (2014).

The court then confirmed with the prosecutors that messages were not deleted, noting that the messages on the phone were downloaded shortly after the murder, and defense counsel had known that.[11] The prosecutor stated that, "if they had some concerns back when they were downloaded that they could have been altered and things were erased or whatever, they could have had an expert looking at it then. But that never happened."

Defense counsel then argued that the text was inadmissible for a second reason, i.e., that it was hearsay and did not fall under the coconspirator exception to the hearsay rule. In support, she argued that appellant had not read the message prior to the murder, and the State "failed to lay a proper foundation that the existence of the conspiracy was there and that [appellant's] participation in it, which in part has to do with the fact that he never received this message." The prosecutor countered that a conspiracy had been established, noting the number of phone calls going back and forth between appellant and Ms. Banks during the relevant time period.

After confirming that the defense had prior knowledge of the text, the court issued its ruling. It stated:

> I will continue to find that if you can just open the phone and see an existing text message on the face of it [] that that is sufficient of a common experience without the need for intervening technology that officers can say I saw on plain view on his cell phone when I seized it search incident to the arrest X – I think . . . that it is admissible without an expert.

[11] One text message from Ms. Banks to appellant had been erased from appellant's phone, but the State had it from Ms. Banks' phone. It proffered the content but stated that it would not introduce that text message.

> And if you want to cross-examine on . . . could it have been corrupted or fabricated [or] forged in some way, you are welcome to do that, if you think there is a basis for it.

Defense counsel stated that she could not "intelligently cross-examine on the mechanics of a phone when I don't have an expert to assist me in doing that in an area that . . . is not common knowledge to me or anyone on the counsel team." She argued that "other possible communications" could have been erased or scrubbed. The court was not persuaded, stating:

> I have not heard a scintilla of evidence to suggest that there was something else. I mean, if there was another source of knowing that there was such other possible exculpatory evidence on the phone, I would be happy to hear from you. But I have asked you a couple of times to proffer, and you have not proffered.
>
> So I am going to overrule the objection for that reason and stick with the original ruling.

With respect to the hearsay objection, the court stated:

> [W]hen you look the whole picture, I think that there is arguable sufficient evidence to say that there is a conspiracy between [Ms. Banks] and [appellant] that she is trying to get him there to complete what [Mr.] Bell feels is in progress, an effort to get him killed, and that she called him because he has a gun that works and she has a gun that doesn't work.
>
> And her telling [appellant], or attempting to tell him, he is the one by the truck, I think, is consistent with that.

Detective Rattell then testified about calls between Ms. Banks and appellant, and he opened appellant's phone and read the message received from Ms. Banks' phone at 4:08 a.m., stating "that's him at truck." Pursuant to the parties' stipulation, the jury was instructed that this message was unread.

B.

Authentication

"Maryland Rule 5-901(a) addresses the requirements to authenticate evidence, including electronically stored evidence." *Donati v. State*, 215 Md. App. 686, 709, *cert. denied*, 438 Md. 143 (2014). It provides: "The requirement of authentication . . . 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).

Appellant argues that the State did not authenticate that the text message found on his phone was from Ms. Banks because there was no direct or circumstantial evidence that she actually sent the text, and there was no expert confirming the integrity of the contents of the phone. In particular, he asserts that the procedure used to admit the text message into evidence did not "establish that the phone and its contents were in exactly the same condition as they were at the time of their seizure more than a year prior to trial[,] defeating both the authentication and chain of custody requirements for admissibility of the evidence."

Initially, the State argues that appellant's argument was not raised below, and therefore, it is not preserved for review. We agree with the contention as it relates to appellant's argument that the State "offered no direct or circumstantial identifying information that could establish that Ms. Banks sent the message and [a]ppellant was its intended recipient." The transcript reflects that counsel made no such argument below, and the court and counsel proceeded on the premise that Ms. Banks sent the text message

to appellant. Accordingly, we agree with the State that this issue is not preserved for review, and we will not address it. *See Carpenter v. State*, 196 Md. App. 212, 230 (2010) (accused did not preserve cell phone authentication argument that was raised for first time on appeal). *Accord* Md. Rule 8-131(a) (Court generally will not decide an issue "unless it plainly appears by the record to have been raised in or decided by the trial court.").

Defense counsel did, however, object to the integrity of the contents of the phone. Accordingly, to the extent his appellate contention is based on that issue, we will address it.

"[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.'" *Sublet v. State*, 442 Md. 632, 666 (2015) (quoting *U.S. v. Vaynor*, 769 F.3d 125, 130 (2d Cir. 2014)). "The 'proof of authentication may be direct or circumstantial.'" *Id.* at 667 (quoting *Vaynor*, 769 F.3d at 130).

Authentication may be accomplished through the "[t]estimony of a witness with knowledge that the offered evidence is what it is claimed to be" or through "[c]ircumstantial evidence, such as appearance, contents, substance, internal patterns, location, or other distinctive characteristics that the offered evidence is what it is claimed to be." Md. Rule 5-901(b)(1), (4). To authenticate physical or "real" evidence seized by police at the crime scene, "[t]he proof negating the probability of changed conditions

between the crime and the trial, is spoken of as proving the chain of custody." *Amos v. State*, 42 Md. App. 365, 370 (1979). "Chain of custody evidence is necessary to demonstrate the 'ultimate integrity of the physical evidence.'" *Easter v. State*, 223 Md. App. 65, 75 (quoting *Best v. State*, 79 Md. App. 241, 256 (1989)), *cert. denied*, 445 Md. 488 (2015). "[T]here is a natural inference or presumption of continuance in the same condition," although the strength of "that inference varies in each case with the nature of the subject matter and the time element." *Amos*, 42 Md. App. at 370. "[T]he circumstances surrounding its safekeeping in that condition in the interim need only be proved with a reasonable probability." *Id. See Cooper v. State*, 434 Md. 209, 227 (2013), *cert. denied*, 134 S. Ct. 2723 (2014). "The existence of gaps or weaknesses in the chain of custody generally go to the weight of the evidence and do not require exclusion of the evidence as a matter of law." *Easter*, 223 Md. App. at 75.

This Court reviews a decision to admit evidence over an authentication or chain of custody objection for clear error in the lower court's factual findings and for abuse of discretion in its admission of the evidence. *See Cooper*, 434 Md. at 228; *Easter*, 223 Md. App. at 74-75.

Here, defense counsel argued that the State failed to negate the possibility that the contents of appellant's BlackBerry device, including this text message, were compromised during the extraction or the charging of that device, that there might be "scrubbed" (i.e., automatically deleted) text messages that potentially could provide context for the

challenged message, and more generally, that the extraction process might have compromised the contents of the phone.

The trial court concluded that, despite the theoretical possibility of automatic "scrubbing" proffered by defense counsel, there was no evidence that this occurred. Indeed, as defense counsel conceded at trial, the State disclosed in discovery all of the information from the police extraction, so that the texts recovered right after the murder, including the existence, timing, and content of the text message at issue, were known to defense counsel prior to trial.

Moreover, the State proffered that Ms. Banks' phone calls and text messages had been downloaded separately, at the same time as appellant's, so all text messages stored on both phones at the time they were seized appeared on the printout provided to defense counsel in discovery. According to the prosecutor, the challenged message "correspond[ed]" on both phones.

Given this evidence, and the trial court's factual finding that "not a scintilla of evidence" existed that the phone had been altered or there were "scrubbed" text messages providing exculpatory context, we conclude that the trial court did not abuse it discretion in determining that there was sufficient evidence that the text message was the same at trial as it was when appellant's phone was seized, and therefore, in admitting the text message over appellant's authentication and chain of custody objections.

C.

Hearsay Objection

Appellant next contends that, even if the State sufficiently authenticated the text message, it was inadmissible hearsay. He asserts that the text message did not fall under the exception for coconspirator statements because the State did not establish a *prima facie* conspiracy between appellant and Ms. Banks.

The State disagrees. It contends that there was sufficient evidence to admit the text message as the statement of a coconspirator.

This Court makes a *de novo* determination of whether a statement constitutes hearsay. *Parker v. State*, 408 Md. 428, 436 (2009). "'Hearsay' is 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). Unless it fits within an established exception, "hearsay is not admissible." Md. Rule 5-802.

One exception to the rule against hearsay is for "[a] statement made by "a coconspirator of the party during the course and in furtherance of the conspiracy." Md. Rule 5-803(a)(5). The proponent "must present evidence that the defendant and the declarant were part of a conspiracy, that the statement was made during the course of the conspiracy, and that the statement was made in furtherance of the conspiracy." *Shelton v. State*, 207 Md. App. 363, 376 (2012). The existence of a conspiracy may be shown without direct proof of an overt agreement, "by circumstantial evidence, from which a common design may be inferred." *Mitchell v. State*, 363 Md. 130, 145 (2001).

Here, there was evidence that Ms. Banks asked Mr. Calhoun to hurt Mr. Bell, and Mr. Calhoun, who pleaded guilty to conspiring with Ms. Banks to commit first degree murder, testified that Ms. Banks raised her gun and pointed a gun at Mr. Bell, and Mr. Bell ultimately told 911 that he was shot and Ms. Banks "set [him] up." In the hours preceding the murder, appellant and Ms. Banks exchanged numerous phone calls. And immediately after the murder, Ms. Banks called appellant as police were arriving, asking appellant what to do.

This evidence was sufficient, even if not found by a jury beyond a reasonable doubt, to establish the existence of a conspiracy between Ms. Banks and appellant. Accordingly, the trial court did not err or abuse its discretion in admitting the text message over appellant's hearsay objection.

II.

Restriction of Cross-Examination

Appellant next contends that the trial court erred in restricting his cross-examination of Mr. Calhoun about two matters that appellant believes could have "revealed his involvement," as either the perpetrator of the murder or Ms. Banks' willing accomplice. Specifically, appellant argues that the trial court erred in precluding defense counsel from questioning Mr. Calhoun regarding: (1) a previous handgun conviction; and (2) a rejected plea offer. For the reasons explained below, we are not persuaded.

"The Confrontation Clause of the Sixth Amendment of the United States Constitution and Article 21 of the Maryland Declaration of Rights guarantee a criminal

defendant the right to confront the witnesses against him." *Martinez v. State*, 416 Md. 418, 428 (2010). This right is satisfied when defense counsel has been "'permitted to expose to the jury the facts from which jurors, as the sole triers of fact and credibility, could appropriately draw inferences related to the reliability of the witness.'" *Id.* (quoting *Davis v. Alaska*, 415 U.S. 308, 318 (1974)).

Within this constitutional constraint, "the scope of an inquiry on cross-examination is subject to the trial judge's sound discretion." *Robinson v. State*, 298 Md. 193, 201 (1983). Although a prosecution witness generally may be impeached through questioning about "'such matters and facts as are likely to affect his credibility, . . . show his relation to the parties or cause, his bias, or the like,'" *Lyba v. State*, 321 Md. 564, 569 (1991) (citation omitted), "'trial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about . . . prejudice, confusion of the issues . . . or interrogation that is repetitive or only marginally relevant.'" *Smallwood v. State*, 320 Md. 300, 307 (1990) (quoting *Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986)). *See also* Md. Rule 5-403 ("Although relevant, evidence maybe excluded . . . by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."). The trial court abuses its discretion only when the "limitations upon cross-examination inhibited the ability of the defendant to receive a fair trial." *Pantazes v. State*, 376 Md. 661, 681-82 (2003).

A.

Prior Handgun Conviction

Before Mr. Calhoun testified, the prosecutor asked the trial court to address whether defense counsel would be permitted to question him about prior convictions, including a conviction for wearing, carrying, and transporting a handgun, which the prosecutor noted was not an impeachable offense. Defense counsel responded as follows:

> [Mr. Calhoun] indicates that he has been around people with guns, it is no big deal to him, things of that nature. And the question becomes, who is responsible for shooting Mr. Bell and it would be our position that this conviction for possession, wear and carry or transport a handgun . . . along with his testimony which is he is around people with guns all the time is relevant and it is also admissible to prove that he does have access to a murder weapon that was used.
>
> We don't know what gun was used in this case. We have no evidence of it. So it is relevant to indicate that he has access to what was one of the murder weapons in this case. The second murder weapon is his knife. And that is his knife that was used to stab Mr. Bell. And he admits that. So those two things combined when you look at it in its entirety, I think only indicates that it is relevant and it is admissible for those purposes.

When the court asked why his conviction was relevant, given Mr. Calhoun's statement to authorities "that he has access and a lot of friends with guns," counsel responded that, because "there was a point in time in his path when he was actually the one carrying the gun not just his friend but he himself was carrying it illegally," the prior conviction was relevant "for the relation and relevance to the case."

The court stated that it was "inclined to sustain the objection, finding it more prejudicial than probative especially in light of the fact that the defense is saying that there

is already some statement indicating that he is comfortable around guns and also the suggestion that it is not his gun." The court continued:

> That is a ruling in limine and you know if the evidence turns out in some strange way that I can't anticipate, I might reconsider but at this point, I am going to rule that it seems more prejudicial than probative and since he is allegedly saying that he is comfortable around guns anyway, it is kind of [a] moot point.

As appellant points out, the bar on other crimes evidence to prove the character of a person applies only to defendants, not witnesses. *See Sessoms v. State*, 357 Md. 274, 287 (2000). *Accord Moore v. State*, 390 Md. 343, 384 (2005), *cert. denied*, 549 U. S. 813 (2006). *Sessoms* and its progeny make clear that when a defendant seeks to use other crimes evidence against a prosecution witness (a tactic known as "reverse other crimes evidence"), the test is one of basic relevance. *See Allen v. State*, 440 Md. 643, 664 (2014). Whether evidence of a prior conviction may be admitted against a prosecution witness, therefore, depends on whether it is relevant, and not unfairly prejudicial. *See Id.* at 664-65; *Sessoms*, 357 Md. at 287.

Pursuant to Rule 5-401, evidence is relevant, and presumptively admissible under Rule 5-402, if it makes a disputed material proposition more likely or less likely to be true. Even if evidence is relevant, however, Rule 5-403 provides that it "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

Here, the State contends that the trial court acted within its discretion in precluding the admission of Mr. Calhoun's prior conviction for "an offense that was not admissible for impeachment purposes" because, even if such evidence "was marginally relevant," "there was a very strong likelihood that it would confuse the jury and cause unfair prejudice to the State," and appellant "was free to introduce" other relevant information. We agree.

As the trial court recognized, the probative value of that conviction was minimal at best because the defense did not contend that Mr. Calhoun supplied the gun used to shoot Mr. Bell, and Mr. Calhoun admitted in recorded statements to police that "he is around people with guns all the time." Moreover, defense counsel was permitted to elicit Mr. Calhoun's testimony that he was charged with carrying a gun in this case, that he had a history of "solving problems" for other people through assaults on others, and that he carried a weapon with him "all the time." Thus, the excluded evidence would have added nothing more than that Mr. Calhoun had been convicted of the same behavior that he readily admitted, and allowing evidence of the conviction for wearing and carrying a handgun would have permitted appellant to impeach the witness with a prior conviction that appellant admits was not admissible for impeachment purposes.

Given these circumstances, the circuit court properly weighed the minimal probative value versus the potential prejudice of Mr. Calhoun's prior handgun conviction. We perceive no abuse of discretion by the court in this regard.

B.

Rejected Plea Offer

Appellant next argues that the circuit court erred in preventing him from cross-examining Mr. Calhoun regarding the initial plea offer made by the State, despite that Mr. Calhoun rejected that offer. Specifically, defense counsel sought to elicit that "the initial plea deal is the State was going to be recommending 50 years, suspend all but 30 years," and Mr. Calhoun rejected that plea deal. Counsel stated:

> [T]he fact that he rejected the first plea and then the second plea is better than the first I think is very relevant to again his credibility. He wasn't willing to do this for only 30. He wants a better deal than what you've got, than what he was given initially. That goes to his bias.

Appellant contends that the court's ruling violated his right to cross-examine Mr. Calhoun because "the disparity between the original offer and the second offer with respect to how little time could be served, permitted an inference that the witness received a more significant benefit from testifying." The State contends that Mr. Calhoun's rejection of the State's first plea offer "had no conceivable relevance," stating "that the State's initial offer was modified through negotiations has no bearing on the witness's 'bias or motive to testify falsely.'" Even if there was some slight relevance, the State maintains that "introducing the earlier plea offer would necessitate a trial within a trial," requiring evidence from the prosecutor and Mr. Calhoun's defense attorney, along with waiver of attorney-client privilege. We agree.

It is clear that evidence that a witness has a plea agreement with the State may be used to impeach his testimony. *See Marshall v. State*, 346 Md. 186, 197-98 (1997).

"Where a witness has a 'deal' with the State, the jury is entitled to know the terms of the agreement and to assess whether the 'deal' would reasonably tend to indicate that his testimony has been influenced by bias or motive to testify falsely." *Id.*

Nevertheless, "to encourage plea bargaining and the open and candid discussions between prosecuting authorities and defendants," statements made in the course of plea discussions generally are inadmissible against a *defendant* who participated in the plea discussions. *See Elmer v. State*, 353 Md. 1, 11 (1999); Md. Rule 5-410(a). This exclusionary rule does not preclude use of statements made in plea negotiations involving someone other than the accused, such an accomplice testifying pursuant to his own plea deal. *Id*. at 11.

To be admissible, however, the evidence must be relevant. *See* Md. Rule 5-402 ("Evidence that is not relevant is not admissible."). As the State notes, there is no relevance "to the terms of a deal that the witness does *not* have with the State." Defense counsel was permitted to impeach Mr. Calhoun regarding the deal that he accepted, i.e., in exchange for testifying against appellant, the State would agree to a plea of guilty to conspiracy to commit first degree murder, a misdemeanor for which he could receive a sentence as low as fifteen years. We perceive no abuse of discretion by the circuit court in declining to permit cross-examination of the unaccepted plea negotiations.

III.

Reasonable Doubt Instruction

In his final assignment of error, appellant contends that "the trial court erred in issuing an incorrect and confusing jury instruction on reasonable doubt." In particular, he objects to the instruction given on reasonable doubt, which added to the current Maryland Pattern Jury Instruction ("MPJI-Cr") 2:02, the highlighted sentence, as follows:

> A reasonable doubt is a doubt founded upon reason. **It is not a fanciful doubt, a whimsical doubt, or a capricious doubt.** Proof beyond a reasonable doubt requires such proof that we convince you of the truth of the facts so that you would be willing to act upon such belief without reservation in an important matter in your own business or personal affairs.
>
> If you are satisfied to the Defendant's guilt to that extent you should find the Defendant guilty; however, if you are not satisfied of the Defendant's guilt to that extent, then reasonable doubt exists and the Defendant must be found not guilty.

In *Ruffin v. State*, 394 Md. 355, 361 (2006), the Court of Appeals noted that this "fanciful doubt" language was removed from the pattern instruction in 1999, after the Committee on Pattern Instructions received "numerous complaints that the language was confusing to jurors." In that case, the Court of Appeals held that trial courts must instruct the jury on the reasonable doubt standard of proof in a manner that "closely adheres to MPJI-Cr. 2:02," adding that "[d]eviations in substance will not be tolerated." *Id.* at 373. The Court reasoned that "[u]niformity in defining those terms for the jury, by giving the pattern instruction, ensures that all defendants will equally receive an appropriate definition of the presumption of innocence and reasonable doubt standard of proof." *Id.* at 372-73.

Here, although appellant challenges the instruction on appeal, defense counsel did not object below to the trial court's reasonable doubt instruction. Pursuant to Maryland Rule 4-325(e),

> [n]o party may assign as error the giving [of] an instruction unless the party objects on the record promptly after the court instructs the jury, stating distinctly the matter to which the party objects and the grounds of the objection. . . . An appellate court . . . may however take cognizance of any plain error in the instructions, material to the rights of the defendant, despite a failure to object.

Although this Court has discretion to review unpreserved errors, the Court of Appeals has emphasized that "appellate courts should rarely exercise" their discretion under Md. Rule 8-131(a) because considerations of both fairness and judicial efficiency ordinarily require that all challenges that a party desires to make to a trial court's ruling, action, or conduct be presented in the first instance to the trial court. *Chaney v. State*, 397 Md. 460, 468 (2007). This requirement ensures that (1) a proper record can be made with respect to the challenge, and (2) the other parties and the trial judge are given an opportunity to consider and respond to the challenge. *Id. Accord Kelly v. State*, 195 Md. App. 403, 431 (2010), *cert. denied*, 417 Md. 502, *cert. denied*, 131 S. Ct. 2119 (2011).

Recognizing the failure to object below, appellant requests that we exercise our discretion to review the argument for plain error. Plain error is error that "'vitally affects a defendant's right to a fair and impartial trial.'" *Conyers v. State*, 345 Md. 525, 563 (1997) (quoting *Rubin v. State*, 325 Md. 552, 588 (1992)). This Court has noted that "[w]e reserve our discretion to exercise plain error review for instances when the unobjected to error is 'compelling, extraordinary, exceptional or fundamental to assure the defendant a fair

trial.'" *Stone v. State*, 178 Md. App. 428, 451 (2008) (quoting *State v. Brady*, 393 Md. 502, 507 (2006)). *Accord Steward v. State*, 218 Md. App. 550, 566-67, *cert. denied*, 441 Md. 63 (2014). Appellate review based on plain error is "a rare, rare, phenomenon." *Morris v. State*, 153 Md. App. 480, 507 (2003), *cert. denied*, 380 Md. 618 (2004). This case is not one that we will review for plain error. *See Turner v. State*, 181 Md. App. 477, 485 (2008) (adding "fanciful doubt" language to reasonable doubt instruction does not warrant plain error relief because it "is technically correct" and does "not alter the State's substantial burden of proof").

JUDGMENT AFFIRMED. COSTS TO BE PAID BY APPELLANT.