

Circuit Court for Baltimore City
Case No. 114268003

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1636

September Term, 2016

DOMINIC DESCHAMPS

v.

STATE OF MARYLAND

Wright,
Graeff,
Raker, Irma S.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Raker, J.

Filed: November 22, 2017

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

Appellant Dominic Deschamps appeals his conviction in the Circuit Court for Baltimore City of first-degree murder and conspiracy to commit first-degree murder.¹ He presents the following question for our review, which we have rephrased as follows:

Did the circuit court err in admitting evidence of a jail call purportedly between Mr. Deschamps and his co-defendant when the call was incapable of being authenticated and any probative value was substantially outweighed by its prejudicial effect?

We shall hold that the circuit court did not err or abuse its discretion in admitting into evidence the jail call recording. Accordingly, we shall affirm.

I.

Appellant was indicted by the Grand Jury for the Circuit Court for Baltimore City with crimes related to the homicide of Bruce Paige. The jury convicted appellant of first-degree murder and conspiracy to commit first-degree murder, and acquitted him of use of a handgun in the commission of a felony. The circuit court sentenced appellant to two concurrent life sentences.

The following evidence was presented at trial: On August 5, 2014, Alyasha Scott saw two men chase the victim, Mr. Paige. One of the men, whom Ms. Scott recognized as appellant's co-defendant Che McDowell, shot Mr. Paige. The second man encouraged McDowell to kill the victim, after which McDowell shot Mr. Paige again. The two men

¹ Appellant was tried with co-defendant Che McDowell (Case No. 1579/16) in a joint trial. Their appeals were consolidated, but presented separate questions relating to distinct events at the trial. Because the issues in each appeal are separate and distinct, we file separate opinions.

ran away in different directions, the unknown man running directly past Ms. Scott. Ms. Scott saw no other people in the area.

When questioned by police, Ms. Scott did not recognize the second man, but confirmed McDowell’s identity as the shooter from a photo array. The police arrested McDowell on August 6, and Detective Joseph Chin monitored McDowell’s phone calls from the Baltimore City Detention Center.

On August 12, McDowell made a phone call from jail. During the call, he asked to speak to Nick, and had two conversations with Nick² at different times during the call. Based on the monitored call, Detective Chin searched police databases for affiliates of McDowell’s named “Nick” and found appellant. McDowell and appellant had previously been arrested together at the location of Mr. Paige’s murder, and they had both been witnesses to an unrelated homicide at the same location. Based on these connections, the detective presented Ms. Scott with a photo array and, after viewing the photographs, she identified appellant as the second man from the night of the homicide. Police arrested appellant based on that identification. While being interviewed by detectives, appellant indicated that he goes by the name Nick.

The State first tried appellant and McDowell together for the murder of Mr. Paige in February 2016, resulting in a hung jury. A retrial in April 2016 resulted in the conviction of both defendants. Before the first trial, appellant moved *in limine* to suppress a recording

² The person on the other end of the call never identified himself as Nick, but that is who McDowell asked for.

of the August 12 jail call that the State planned to introduce. Appellant argued that the lack of authentication of Nick’s identity would make the call unfairly prejudicial to his defense, reasoning as follows:

“[DEFENSE COUNSEL]: [McDowell] makes a call out to a cell phone number and he speaks to somebody on that phone and there’s a conversation that occurs. And basically, our problem with that is, you know, in my discussions with the State, nobody, no witness for the State, is going to actually take the stand and say that is Dominic Deschamps on the other line because –

THE COURT: Your client, who was the alleged recipient of the phone call?

[DEFENSE COUNSEL]: Alleged, yes.

THE COURT: Right.

[DEFENSE COUNSEL]: And I think that lack of certainty of identification, I don’t anticipate that Mr. Deschamps will be taking the stand in his own defense at this point. So without the jury being able to hear his voice, without a voice recognition expert, or without him making some sort of direct admission that yes, I was on that phone call, I don’t think that the State can say with certainty that that is the man who was on the other end of the phone.

THE COURT: Because –

[DEFENSE COUNSEL]: There are nicknames that are used, shortened versions of names –

THE COURT: Right, that’s what I was going to ask.

[DEFENSE COUNSEL]: – and things like that. Now I know that the State thinks that the use of nicknames is a lot more reliable than, than I do. But I would offer to the Court without testimony identifying Mr. Deschamps as the other one on the

other end of the line that that’s overly prejudicial and it’s not waved by the fact that we can definitively say that that’s him.

[DEFENSE COUNSEL]: So, or allegedly, allegedly by nickname, and I think without somebody testifying and saying yes, that’s definitely him, [] without him making an admission down the road, you know, to a detective at some sort of interview, well is this your voice on the tape, yeah, it’s me, you know some sort of authentication, that it’s not reliable enough to outweigh the prejudicial effect of the call to say or to present to the jury as fact.”

The State explained that it would use the recording both to demonstrate McDowell’s knowledge of the crime and the witness (who had not been identified publicly) and to attribute Nick’s knowledge to appellant. The prosecutor argued that Nick’s knowledge of the witness and crime demonstrated that Nick was at the crime scene. Although no direct evidence proved appellant was Nick, the combination of Nick’s knowledge on the call, Ms. Scott’s identification of appellant at the crime scene, and appellant’s nickname gave rise to a totality of circumstances that was probative of Nick’s identity as appellant.

Appellant later clarified that “I think technically what my motion would be on the jail call would be to move *in limine* to keep anybody from referring to the person on the other line as definitively Dominic Deschamps. . . . I just don’t want the State to . . . get up there and say it is him.” The State replied that its “intention in trial is to introduce the jail call and have it speak for itself. There will be no testimony about anyone’s opinion of that jail call. The testimony from the detective would just be what he did as a result of hearing

that jail call and what investigative steps he took to determine who he believed Nick on the jail call was.”

The trial court then heard the recording of the August 12 call, including a conversation with Nick as follows:

“[MCDOWELL]: It’s one person, right?

[NICK]: Yep.

[MCDOWELL]: I’m not, that’s what I’m saying, bro, I’m not worried about that, bro. (inaudible) worrying, bro. Like, bro?

[NICK]: Yeah?

[MCDOWELL]: Longs, longs that’s the only thing, bro, I’m good. I’m trying to tell you, longs that’s the only thing, then I’m good, I’m trying to tell you.

[NICK]: (inaudible) I saw the papers.

[MCDOWELL]: Huh?

[NICK]: I saw the papers.

[MCDOWELL]: All right, well then I’m good (inaudible). My public defender came to see me, right. And he was like (inaudible) the only thing they got here is somebody pointing me out in the photo arrays. He said no that shit should be dropped (inaudible). And I’m like, I’m like, uh, I’m like you know how the State is, you feel me. They going to try and make it like they got more evidence and make it fit for real but I’m not copping out to something, (inaudible) as long as my homies got my back then I’m good, like I’m (inaudible).

[NICK]: Yeah, I know, (inaudible) everything you tell me is (inaudible).

[MCDOWELL]: (inaudible)

[NICK]: Yeah.

[MCDOWELL]: Hey, I (inaudible) you just told me about who we was talking about, right, and I said I already know.

[NICK]: Yeah.

[MCDOWELL]: That's across the bridge, right?

[NICK]: No.

[MCDOWELL]: No? I don't know then. Oh, (inaudible). The same person that, um, the (inaudible) that called you?

[NICK]: The same person that called –

[MCDOWELL]: The (inaudible) that called you?

[NICK]: (inaudible)

[MCDOWELL]: You know about that? Did you hear what I just said? (inaudible)

[NICK]: No, no.

[MCDOWELL]: The person that was out there?

[NICK]: I don't know, man.

[MCDOWELL]: The bridge, the bridge.

[NICK]: (inaudible)

[MCDOWELL]: No, no, no, no. Your home girl. Has some poppy eyes. (inaudible) Whatever, well anyway. (inaudible) Yeah, yeah, yeah, I know who you're talking about. I know who you're talking about. Light skinned?

[NICK]: Yeah.

[MCDOWELL]: Yeah. And one other thing, bro, uh, uh, uh, I think the reason why they trying to hold me is because on my paper, on my paper and shit it says there was a bloody fingerprint on a black car. I think they trying to prove that's my (inaudible) and I know it ain't, you feel me.

[NICK]: I, I don't know. Me and you were in the (inaudible), so –

[MCDOWELL]: That's what I said, I ain't worried about it. I said that's the reason why he trying to hold me, for real.

[NICK]: That's what they charged?

[MCDOWELL]: Yeah, I think, that's what it say on my paper, that there was a bloody handprint on a black car.

[NICK]: (inaudible) Man. (inaudible)

[MCDOWELL]: They ain't got shit.

[NICK]: Yeah, whatever you think. (inaudible)"

The judge denied the motion “to suppress the jail call as being admissible, of evidence of identification of [appellant] as the recipient of the call,” agreeing that the phone call was probative of appellant’s identity as the second man.

Before the second trial, the trial court preserved its rulings on pre-trial motions from the first trial, leaving in place the denial of the motion to suppress the jail call.

During the second trial, the jail call was mentioned four times. The prosecutor, in opening statement, described the call and ensuing identification as follows:

“One of the phone calls that [McDowell] makes is to a family member and as he’s on the phone with the family member, he says, ‘Put Nick on the phone.’”

Nick gets on the phone and Nick starts talking to Mr. McDowell about who the witness is that was out there that night. A mere six days after the crime has occurred, the only thing that is written down is a Statement of Probable Cause which only has the facts of the case and no details about the witness, yet Nick is on the phone with Mr. McDowell describing who the witness is, what she looks like, how Mr. McDowell knows her, where she live, where she was standing that night. And based on that conversation, Detective Chin believes that Nick is the second person out there. He's the only other person that could know who the witness was without any other information, is the second person out there.

So Detective Chin investigates who is associated with Mr. McDowell named Nick and he comes with an individual named Dominic Deschamps. Dominic Deschamps has been associated with Mr. McDowell in the 1900 block of West Franklin Street on several occasions.”

During the trial, the State introduced the call, which the trial court admitted over appellant's objection. Detective Chin testified that Nick's description of Ms. Scott attracted his interest because he had not released any information about the witness. He “[c]onducted further investigation with what I had discovered, and through a Baltimore Police database, was I able to determine that Dominic Deschamps became a person of interest based on 1902 West Franklin Street.” Based on that association, Detective Chin presented a photo array to Ms. Scott, who identified appellant as the second man at the murder scene.

Later in the trial, the judge refused to allow Detective Chin to identify appellant as Nick in response to a general question about communications between the defendants.

Finally, the prosecutor, in closing argument, addressed the call as follows:

“[Detective Chin] has to figure out who else could have been with Mr. McDowell that night. He begins listening to some of Mr. McDowell’s phone calls and in one of the phone calls Mr. McDowell is talking to a person named Nick. And Nick and [McDowell] are discussing who the witness is out there that night and Nick tells Mr. McDowell [], you know, your home girl, light-skinned, poxy eye, with the braids, over the bridge. He’s describing Ms. Scott. And the reason he knows it was Ms. Scott is because he was out there and he saw it that night.

So the detective goes with the name Nick, knows that he’s calling Mr. McDowell and tries to figure out if there’s anybody named Nick that Mr. McDowell associates with. And Det. Chin comes up with the name Dominic Deschamps. Dominic Deschamps is known to have associated with Che McDowell on several occasions in the 1900 block of West Franklin Street.”

As discussed *supra*, appellant was convicted and sentenced. This timely appeal followed.

II.

Before this Court, appellant argues that authentication of the speakers is a condition precedent to admission of phone call evidence, and the State provided no such evidence. No witnesses confirmed appellant’s voice on the recording or saw him talking on the phone McDowell called. Despite this lack of evidence, appellant asserts that the jury was allowed to infer that he was “Nick” and attribute personal experience and knowledge of the crime to appellant. He argues that the lack of authentication eliminated any probative value of the call.

The State agrees that authentication is a condition precedent to admitting evidence of this kind, but asserts that the burden of proof requires only a *prima facie* showing that the evidence is genuine in order to admit it for the jury’s consideration. It maintains that the abuse of discretion standard of review should be applied, and that a judge’s ruling not be reversed unless “no reasonable jurist would similarly rule.” The circumstantial evidence of appellant’s relationship to McDowell coupled with Ms. Scott’s identification from the photo array, the State argues, is sufficient to meet this burden. The State points out that appellant’s counsel stated in the pre-trial hearing that the jury should get to consider the call as long as no one in the trial explicitly asserted that Nick was appellant.

III.

We review the trial court’s decision whether to admit relevant evidence under an abuse of discretion standard. *Taneja v. State*, 231 Md. App. 1, 11 (2016). A trial judge abuses its discretion by “exercis[ing] discretion in an arbitrary or capricious manner or . . . act[ing] beyond the letter or reason of the law.” *Cooley v. State*, 385 Md. 165, 175 (2005) (quoting *Jenkins v. State*, 375 Md. 284, 295–96 (2003)). To apply this standard, we will not second-guess any reasonable ruling on the admission of evidence, even if it could have gone the other way. *Peterson v. State*, 196 Md. App. 563, 585 (2010).

Neither party argues that the call is not relevant evidence.³ Md. Rule 5-402 specifies that “all relevant evidence is admissible” unless it falls into an exception. Therefore, the call is not admissible if it falls into an exception. Appellant argues that the call falls into two exceptions under the Maryland Rules of Evidence: lack of authentication and danger of unfair prejudice substantially outweighing its probative value.

“In order to render testimony of a telephone conversation admissible, some preliminary testimony, either direct or circumstantial, must be presented to establish the identity of the other person to the conversation.” *Knoedler v. State*, 69 Md. App. 764, 773 (1987) (quoting *Basoff v. State*, 208 Md. 643, 649 (1956)). *7 Wigmore on Evidence* explains that this requirement demands authentication of the party or parties to the call. § 2155(1) (1978). Call evidence requires authentication because “if a party could be held responsible for statements made by a person who has not been identified, the door would be open for fraud and imposition.” *Knoedler*, 69 Md. App. at 773 (quoting *White v. State*, 204 Md. 442, 446–47 (1954)). The State, in order to introduce the call into evidence against appellant, bears the burden of proof to authenticate Nick as the speaker, and hence, as appellant.

Md. Rule 5-901(a) explains that “[t]he requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to

³ Md. Rule 5-401 defines relevant evidence as evidence that has “any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.”

support a finding that the matter in question is what its proponent claims.” Rule 5-901(b) presents illustrations that sufficiently authenticate evidence, including three pertinent examples:

“(b) **Illustrations.** By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this Rule:

* * *

(4) *Circumstantial Evidence.* Circumstantial evidence, such as appearance, contents, substance, internal patterns, location, or other distinctive characteristics, that the offered evidence is what it is claimed to be.

(5) *Voice Identification.* 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.

(6) *Telephone Conversation.* A telephone conversation, by evidence that a telephone call was made to the number assigned at the time to a particular person or business, if

(A) in the case of a person, circumstances, including self-identification, show the person answering to be the one called, or

(B) in the case of a business, the call was made to a place of business and the conversation related to business reasonably transacted over the telephone.”

Appellant argues correctly that the State could not authenticate the identity of Nick with evidence that met the standards of (b)(5) and (b)(6). The State did not identify Nick’s voice, either from the recording or by witnesses who heard Nick’s side of the conversation.

Because the conversation occurred during a call McDowell placed to a family member, the phone number cannot authenticate Nick’s identity.

Those standards, however, are not the only means of authenticating evidence, even telephone call evidence.⁴ “[S]undry circumstances (including other admissions and the like) may suffice.” *Clark v. State*, 188 Md. App. 110, 119 (2009) (quoting *Knoedler*, 69 Md. App. at 772–74). We hold that the State provided sufficient sundry circumstantial evidence to meet the standards of (b)(4).

The burden of proof for authentication is meager, as 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) (quoting *United States v. Safavian*, 435 F.Supp.2d 36, 38 (D.D.C. 2006) (discussing Federal Rule 901, which was the source of Maryland Rule 5-901)). The State can meet this burden by showing that a speaker has information possessed only by a specific person. *Knoedler*, 69 Md. App. at 773–74. In one case, the combination of particular knowledge of the night of the crime and the use of nicknames constituted distinctive characteristics sufficient to authenticate a caller. *Walls v. State*, 228 Md. App. 646, 689 (2016).

During his conversation with McDowell, Nick seems to correct McDowell on someone’s identity that appears to be the eyewitness, Ms. Scott.⁵ The police had not

⁴ Rule 5-901(b) allows for authentication by means other than its illustrations: “By way of illustration only, and *not by way of limitation*, . . .” (emphasis added).

⁵ Nick also seems to indicate that he knows about the location of (footnote continued . . .)

released Ms. Scott’s role as a witness, and Nick mentions no other sources of information, which leads to a reasonable inference that Nick must have been at the homicide in order to identify Ms. Scott at the time of the call. Ms. Scott identified appellant as the only person at the crime scene besides herself and McDowell. Detective Chin confirmed that appellant and McDowell had associations in the police database. Although this evidence is circumstantial, the content and distinctive characteristics of the call satisfy the Rule 5-901(b)(4) illustration to authenticate Nick as appellant.

Reasonable triers of fact could come to different conclusions as to whether the evidence sufficiently authenticates the call,⁶ but reversal under the abuse of discretion standard would require that no reasonable judge could come to the same conclusion. We hold that the trial court did not abuse its discretion in finding that the phone call was authenticated sufficiently to be admitted into evidence.

IV.

Appellant argues that the call should have been excluded under Rule 5-403 because the danger of unfair prejudice from its admission substantially outweighed the call’s

the murder (“the bridge”), and that he was with McDowell at the time a fingerprint was left on a nearby car. However he also mentions that he has seen “the papers,” which could have been the charging papers that would include such details. Although these statements are circumstantial evidence, they are not as strong as the discussion of the witness and thus unnecessary to this analysis.

⁶ As the State points out, even appellant’s trial counsel said the call should be considered by the jury as long as appellant was never formally identified as Nick at the trial.

probative value. The unfair prejudice in Rule 5-403 is not merely evidence that hurts one party’s case, but evidence that might influence the jury to overlook other evidence (or the lack thereof) of the charges brought. *Odum v. State*, 412 Md. 593, 615 (2010). “Unfair prejudice” evidence is often introduced to evoke an emotional response or sympathy. *Id.* For example, evidence of a defendant’s gang membership is unfairly prejudicial due to its “highly incendiary nature” and requires proof that the crime is gang-related to be admitted. *Gutierrez v. State*, 423 Md. 476, 495–96 (2011).

The unfair prejudice described by appellant stemmed entirely from the non-authentication of the call. As the call was authenticated properly, it carries probative value and the jury is not likely to indulge in unfair emotional responses after hearing the call. The judge did not abuse his discretion in allowing the call into evidence under Rule 5-403.

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