Circuit Court for Harford County
Case No. 12-K-18-000131

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 3085

September Term, 2018

JAMAR LEE HOLMES

v.

STATE OF MARYLAND

Fader, C.J.,
Shaw Geter,
Raker, Irma S.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Raker, J.

Filed: February 3, 2020

Appellant Jamar Lee Holmes was convicted by a jury in the Circuit Court for Harford County of attempted first-degree murder, attempted second-degree murder, first-degree assault, and second-degree assault. Appellant presents two questions for our review, which we have rephrased as follows:

1. Did the court err in admitting a photo found by a detective on social media, which was offered as a depiction of appellant and his girlfriend together on New Year's Eve in 2017?

2. Is the evidence sufficient to sustain appellant's convictions for attempted first-degree murder and attempted second-degree murder?

Finding no error, we shall affirm.

I.

Appellant was indicted by the Grand Jury for Harford County of attempted first-degree murder, attempted second-degree murder, first-degree assault, and second-degree assault. The jury convicted him of all charges. The court imposed a term of life imprisonment for attempted first-degree murder and merged the remaining counts for sentencing purposes.

On New Year's Eve 2017, Joshua Ellis was at his brother's house in Aberdeen, Maryland, drinking and smoking marijuana with his friends Chris Johnson and Dee Laswell. Just after midnight, Mr. Ellis went to the backyard of the house and observed a man and a woman arguing on a nearby sidewalk. After they separated and walked in different directions, Mr. Ellis approached the woman to check that she was okay. Without saying anything to Mr. Ellis, the woman motioned with her hand for him to turn around.

As Mr. Ellis turned back, the man came from Mr. Ellis's side, punched him in the face, and stabbed him in his arm, causing Mr. Ellis to fall to the ground. Mr. Ellis stood up and tried to punch back but was unable to use his injured arm. Instead he grabbed the man, and they started to wrestle.

Around this time, Mr. Johnson came out of the house and saw Mr. Ellis on the ground and the man on top of him. Mr. Laswell followed Mr. Johnson and saw Mr. Johnson break up the fight from about fifteen to twenty feet away. The man entered the passenger side of a car parked several feet away, and the car drove away. Mr. Ellis suffered stab wounds to his liver, lungs, and arm and lost half the blood in his body. He was transported by helicopter to a shock trauma center to undergo treatment for these injuries. He was hospitalized for two weeks, followed by two or three weeks of bed rest and six months of physical therapy. He sustained permanent nerve damage to his arm and fingers.

On January 3, 2018, Deputy Daniel Testerman, the primary detective on the case, spoke with appellant's girlfriend, Tatiana Walton. Ms. Walton gave two written statements to the police. Initially, she stated that a person named Joshua Rodriguez attacked Mr. Ellis. After detectives showed her photos from her public Facebook account of her with appellant and told her that the only Joshua Rodriguez they found did not match the description of the assailant, Ms. Walton made a second statement and identified appellant as the assailant.[1]

The central issue at trial was the identity of the assailant. On January 3, the police displayed a photo array to Mr. Laswell. He identified a person named Diamond Ward as

[1] When Deputy Testerman revisited Ms. Walton's Facebook account a day after the interview, he saw that all the photos of Ms. Walton and appellant had been removed.

the assailant and wrote on the photo line-up instructions sheet under the question, "If an identification is made, *without using a numeric scale*, tell me how certain you are," that he was "100% positive." Appellant's photo was not in the photo array. At trial, Mr. Laswell testified that he was fifteen to twenty feet away from the altercation and that he had chosen Mr. Ward's photo because Mr. Ward looked most like the assailant. Mr. Laswell also testified that the woman he saw had blond hair.

In their respective identifications on January 9 and February 9, Mr. Ellis and Mr. Johnson identified appellant as the assailant from photo arrays that included Mr. Ward's photo. Mr. Ellis wrote on his line-up instructions sheet that "[f]rom what I remember, I am certain that this is the guy" and told the police that his level of certainty was "eight out of ten." Mr. Johnson wrote on his line-up instructions sheet, "I am certain that the individual . . . was the person who stabbed Joshua Ellis on New Year[']s Day."

At trial, Mr. Ellis, Mr. Johnson, and Mr. Laswell each made an in-court identification of appellant as the assailant. Mr. Ellis and Mr. Johnson testified that the scene of the attack was brightly lit and that they had unobstructed views of appellant's face. Mr. Johnson further testified that he heard the assailant say to Mr. Ellis as he attacked him, "I told you to mind your f****** business." Mr. Laswell testified that he heard the assailant say before entering the car, "[y]ou better recognize this is what happens."

The State called Ms. Walton and her aunt Christina Horns. Both testified that they attended a house party in Aberdeen with appellant in the evening in question. Ms. Walton testified that she argued with appellant on the street outside the house after midnight and that a passerby approached her and asked her if she was okay.

The State's forensic scientist Tiffany Keener testified that the DNA sample recovered from a broken vodka bottle at the scene of the altercation produced a mixed profile from two male contributors. She testified that Mr. Ellis was excluded as a contributor but that appellant was not—in terms of probability, the mixed DNA sample was "approximately 1.9 quadrillion times more likely to [have] originate[d] from [appellant] and an unknown African-American individual than from two unknown African-American individuals." Deputy Testerman testified that when he told appellant that he had a warrant to collect a DNA sample from appellant, appellant said, "I don't know why you need my DNA because you already have fingerprints from the bottle." Deputy Testerman had not mentioned a bottle to appellant.

The State introduced three photos of appellant and Ms. Walton posing together, which Ms. Walton authenticated. Ms. Walton had dark hair in the two photos from August 2017 but had blond hair in the photo from December 27, 2017. The State also sought to introduce a photo that Deputy Testerman testified to finding on a Facebook account labeled "Keep Positive" that seemingly depicted appellant, Ms. Walton with blond hair, and a "Happy New Year" filter. The State told the court that it was introducing the photo "to show the two of them together on New Year's Eve."[2] Defense counsel objected, claiming that the evidence was not relevant and, even if it were, was not authenticated properly. The court overruled the objection and admitted the photo, explaining as follows:

> "As long as [Deputy Testerman] is able to authenticate it, even without Ms. Walton here to say that he obtained this from her

[2] The State did not specify the year in its proffer, but we assume that 2017, the only relevant year, was implied and understood.

> Facebook profile page, and he is able to identify who the individuals are that are depicted in the picture, it is up to the jurors to determine whether or not that is the case. And a juror looking at this could make that determination that this is a picture of two individuals and it appears to be related to New Year's because there's Happy New Year posted on it. And this case concerns a New Year's Eve incident going into New Year's Day. So with proper authentication it would be admissible, if that's the basis of your argument.
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> It's relevant because it shows the two of them together and at issue is whether or not they were together. She's testified that they were together on New Year's Eve. . . . It's up to the jury to make a determination as to was Ms. Walton with [appellant] on that particular day. It's relevant on that issue. I've already indicated that, in terms of authentication, the officer has testified that he took this photograph from her Facebook, then it's authenticated."

The defense called appellant's sister Ashra Holmes, who testified that appellant arrived at the party in Aberdeen at 10:00 p.m. and left at 10:45 p.m. Ms. Holmes left the party at 11:30 p.m. and did not know if appellant returned to the party after she left.

On the fourth day of trial, the defense called Travis Brown. Mr. Brown testified that appellant was at a party in a different neighborhood in Riverside both before and after midnight. The State moved to strike his testimony because he had not been disclosed as an alibi witness prior to trial, as required by Md. Rule 4-263(e)(4).[3] Defense counsel

[3] Md. Rule 4-263(e)(4) states as follows:

> "(e) Disclosure by defense. Without the necessity of a request, the defense shall provide to the State's Attorney:
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acknowledged that this omission was an oversight. The court found that the defense's failure to disclose the alibi was a "substantial" discovery violation.

After discussion with the court, the State accepted the remedy of a weekend recess to investigate the purported alibi. When the trial resumed the following week, the State informed the court that it intended to introduce recorded jail calls,[4] which would show appellant "discuss[ing] creating an alibi with [Mr.] Brown" and disclose necessarily to the jury that appellant had been incarcerated. Following the State's proffer, the court listened to the calls outside the presence of the jury and admitted the calls into evidence, reasoning that "a rational juror could find that there was a concerted effort to have Mr. Brown be an alibi witness . . . to set up a story concerning an alibi." The recordings were published to the jury through the testimony of Lieutenant Lisa Cole, Chief of Security in charge of the inmate telephone system in the jail. In one of the calls, appellant described to Mr. Brown the clothes he was wearing on New Year's Eve.

The jury convicted appellant, the court imposed sentence, and this timely appeal followed.

> (4) Alibi witnesses[.] If the State's Attorney has designated the time, place, and date of the alleged offense, the name and, except when the witness declines permission, the address of each person other than the defendant whom the defense intends to call as a witness to show that the defendant was not present at the time, place, or date designated by the State's Attorney[.]"

[4] Each call begins with a recording stating that calls are recorded and monitored.

II.

Before this Court, appellant argues that the trial court abused its discretion in admitting, over his objections based on authentication and relevancy, the photo allegedly depicting appellant and Ms. Walton together on New Year's Eve 2017. In appellant's view, the State could have called Ms. Walton to testify, based on her personal knowledge of the photo, that she posted the photo on Facebook, but did not. Other than the fact that the photo (1) allegedly contained Ms. Walton's image, which is insufficient to authenticate the authorship of a photo on social media, and (2) had a "Happy New Year" filter, appellant contends that the State did not present "any proof" that Ms. Walton posted the photo herself or that the photo was taken on New Year's Eve 2017. Appellant argues that the error is not harmless because the improperly admitted evidence "disproved" his alibi defense.

Additionally, appellant argues that the evidence is insufficient to sustain his convictions for attempted first-degree murder and attempted second-degree murder because the State failed to prove premeditation and intent to kill. Because he and Mr. Ellis were strangers, appellant argues that the altercation, which transpired in less than a minute, was likely fueled by drug and alcohol consumption. He argues that this establishes his intent at most to cause serious physical injury, not to kill. Appellant further argues that the fact that Mr. Ellis "engaged" appellant after he was stabbed in the arm "does not allow for the inference" that appellant intended to kill Mr. Ellis or premeditated such a killing.

The State argues that the court did not abuse its discretion in overruling the authentication objection because a reasonable juror could have found that the photo was

what the State purported it to be—a picture of appellant and Ms. Walton together on New Year's Eve 2017. The State argues that the jury could (1) make a direct assessment as to whether the photo depicted appellant and Ms. Walton, who were both present in the court room, and (2) attach significance to elements in the photo like Ms. Walton's hair color and the "Happy New Year" filter to determine whether it was from New Year's Eve 2017. The State further argues that whether the photo showed that appellant and Ms. Walton were together that night does not depend on whether it was Ms. Walton who posted the photo on Facebook. Furthermore, the State argues that the photo is relevant because it tended to make it more probable, especially taken together with the other evidence, that appellant was at the location of the altercation at the time of the altercation. The State points out that the weight of the evidence is a matter for the jury to determine. The State also argues that any error regarding the admission of the photo is harmless because there was other evidence that collectively undermined appellant's alibi.

As to the sufficiency of the evidence, the State argues that the evidence is sufficient to establish beyond a reasonable doubt that appellant acted with premeditation to kill Mr. Ellis. Appellant stabbed and punched Mr. Ellis repeatedly, severed Mr. Ellis's ulnar nerve and bicep, and caused his liver and lungs to fail. In the State's view, the natural and probable consequence of appellant's actions was death; the evidence supported a finding of specific intent to kill and, therefore, the conviction of attempted second-degree murder. Regarding attempted first-degree murder, the State argues that the evidence is sufficient because the span of time between any of the four subsequent stabs after the first one permits the inference, beyond a reasonable doubt, that appellant demonstrated premeditation and

intent to kill.

III.

We review a trial court's finding of authentication for abuse of discretion. *Darling v. State*, 232 Md. App. 430, 456 (2017) (citing *Miller v. State*, 421 Md. 609, 622 (2011). Maryland Rule 5-901(a) states that "[t]he 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." (Emphasis added). The burden of this threshold authentication showing is "slight." *Jackson v. State*, 460 Md. 107, 116 (2018). The trial court determines whether "there is proof from which a reasonable juror *could* find that the evidence is what the proponent claims it to be." *Sublet v. State*, 442 Md. 632, 678 (2015). If a reasonable juror could find the evidence authentic, the evidence comes in, and the jury decides the ultimate question of authenticity. *Gerald v. State*, 137 Md. App. 295, 305 (2001).

Rule 5-901(b) sets forth "[b]y way of illustration only" examples of how evidence might be authenticated, such as comparison with "specimens that have been authenticated" and 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." Rule 5-901(b)(3), (4).

We hold that the court did not abuse its discretion in finding that there was sufficient evidence that the photo at issue is what the State purported it to be—"show[ing] the two of them together on New Year's Eve" 2017. As to the question of who is depicted in the

photo, the presence of appellant and Ms. Walton in the courtroom during the trial and three authenticated photos of appellant and Ms. Walton from August 2017 and December 27, 2017 enabled the court and jurors to assess directly the identify of those in the photo. As to the question of when the photo was taken, a reasonable juror could have found that it was taken on New Year's Eve 2017 based on: (1) the fact that Ms. Walton had blond hair in the photo and in the authenticated December 27, 2017 photo but had dark hair in the authenticated August 2017 photos, (2) Mr. Laswell's testimony that the woman he saw with the assailant had blond hair, and (3) appellant's recollection, in his jail call to Mr. Brown, of what he wore on New Year's Eve matching his clothes in the photo, and (4) the "Happy New Year" filter superimposed across the photo.

Appellant argues that the State had to prove that Ms. Walton was the owner of the Facebook account where the photo was posted and that Ms. Walton posted it. Appellant relies on *Griffin v. State*, 419 Md. 343 (2011), in which the State "sought to introduce Griffin's girlfriend's, Jessica Barber's, MySpace profile to demonstrate that, prior to trial, Ms. Barber had allegedly threatened another witness called by the State" by posting a threatening message. *Id*. at 348. *Griffin* held that the evidence should not have been admitted for that purpose in the absence of foundational proof sufficient to support a finding that the profile belonged to Ms. Barber and that she posted the message at issue. *Id.* at 351. We agree with the State that *Griffin* is inapposite because the need for foundational proof regarding owner status and authorship is dependent on the purpose for which the evidence is offered. In the case at bar, the State offered the photo at issue to show appellant and Ms. Walton together on New Year's Eve. The photo's owner status

and authorship is immaterial for this purpose.

We review a trial court's determination of relevancy of evidence for abuse of discretion. *Decker v. State*, 408 Md. 631, 649 (2009). Trial courts have wide discretion in weighing the relevancy of evidence. *State v. Simms*, 420 Md. 705, 724 (2011). Evidence is relevant and potentially admissible if it tends to "make the existence of any fact that is of consequence to the determination of the action more probable or less probable . . . ." Rule 5-401. This threshold "is a very low bar to meet." *Williams v. State*, 457 Md. 551, 564 (2018).

We hold that the court did not abuse its discretion in finding that the photo was relevant. We agree with the State that whether appellant and Ms. Walton were at the New Year's Eve party in Aberdeen was relevant for determining whether it was appellant who attacked Mr. Ellis outside of that party on that day. The photo at issue was taken with a "Happy New Year" filter, depicted appellant wearing clothes that are consistent with his recorded statement about his attire on New Year's Eve 2017, and depicted a woman with blond hair. The photo had a direct tendency to make the existence of the fact that appellant was at the party more probable. Appellant contends that there was insufficient proof that the photo "was taken on December 31, 2017, at the relevant time." The photo was admissible, and it was up to the jury to determine the weight, if any, of the evidence.

In reviewing the legal sufficiency of evidence, we ask whether, viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Taylor v. State*, 346 Md. 452, 457 (1997). We do not reweigh the evidence and instead examine whether the verdict

was supported by sufficient evidence, direct or circumstantial, which could convince a rational trier of fact beyond a reasonable doubt. *Id*. We view not just the facts, but all rational inferences that arise from the evidence in the light most favorable to the State. *Id.* at 458.

Because "intent is subjective and, without the cooperation of the accused, cannot be directly and objectively proven, its presence must be shown by established facts which permit a proper inference of its existence." *Spencer v. State*, 450 Md. 530, 568 (2016) (internal quotation omitted). A fact-finder may infer "that one intends the natural and probable consequences of his act." *Chilcoat v. State*, 155 Md. App. 394, 403 (2004). Specifically, a fact-finder may infer an intent to kill from the use of a deadly weapon directed at a vital part of the human body. *State v. Raines*, 326 Md. 582, 591 (1992).

Attempted second-degree and first-degree murder require the defendant's specific intent to kill; attempted first-degree murder further requires premeditation. *See Burch v. State*, 346 Md. 253 (1997); *Handy v. State*, 201 Md. App. 521 (2011). "If the killing results from a choice made as a consequence of thought, no matter how short the period between the intention and the act, the crime is characterized as deliberate and premeditated." *Wagner v. State*, 160 Md. App. 531, 565 (2005); *see also Bryant v. State*, 393 Md. 196, 215 (2006) (holding that the time between firing the first and second shot can be enough for premeditation).

Viewing the evidence in the light most favorable to the State, we hold that a rational trier of fact could have found beyond a reasonable doubt that appellant acted with a premeditated intent to kill Mr. Ellis. As for intent to kill, appellant stabbed Mr. Ellis five

times—twice in his right arm, once in his left arm, once in his right side, and once in his chest. From these stabs to vital parts of the body, a rational juror could reasonably infer that the natural and probable consequence of appellant's actions was death. Therefore, the evidence was sufficient to support a conviction for attempted second-degree murder.

As for intent to kill with premeditation, the span of time between any of the four stab wounds that appellant inflicted after the first one was sufficient to permit a rational juror to draw, beyond a reasonable doubt, an inference of premeditated action. The evidence was sufficient to sustain a conviction for attempted first-degree murder.

Appellant argues that because Mr. Ellis "engaged" appellant after appellant stabbed him the first time, appellant did not intend to kill him or premeditate such a killing. We agree with the State that the fact that Mr. Ellis fought back in response to an unexpected and violent stabbing by appellant, who was standing a foot away from Mr. Ellis and facing him, does not undermine the findings by a rational trier of fact of intent to kill or premeditation. The evidence was sufficient for appellant's convictions of attempted first-degree and second-degree murder.

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