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Recent Development: Sublet v. State: Authentication of Evidence from Social Networking Websites Requires a Trial Judge to Find Sufficient Proof From Which a Reasonable Juror Could Conclude That the Evidence is What the Proponent Claims it to Be

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RECENT DEVELOPMENT

SUBLET V. STATE: AUTHENTICATION OF EVIDENCE FROM SOCIAL NETWORKING WEBSITES REQUIRES A TRIAL JUDGE TO FIND SUFFICIENT PROOF FROM WHICH A REASONABLE JUROR COULD CONCLUDE THAT THE EVIDENCE IS WHAT THE PROPONENT CLAIMS IT TO BE.

By: Denise A. Blake

The Court of Appeals of Maryland, in three consolidated cases, held that a trial judge must determine that evidence from a social networking website meets the “reasonable juror” standard of authentication as a condition precedent to admissibility. *Sublet v. State*, 442 Md. 632, 678, 113 A.3d 695, 722 (2015). This standard requires a preliminary determination by the trial judge that a reasonable juror could find the evidence is what the proponent claims it to be. *Id.*

In the first case, Albert Sublet IV (“Sublet”) allegedly assaulted Chrishell Parker (“Parker”) and her family. At trial, Sublet sought to introduce into evidence four pages of Parker’s Facebook posts about the incident. Parker admitted the Facebook page was hers and that she had written some posts about the incident, but denied writing the entries on the fourth page. The trial judge sustained the State’s objection to the admission of the posts because it was not clear whether Parker was responsible for all of the posts. The judge held because Parker’s password was not secret, other people could have accessed her Facebook page, and her denial had not been contradicted by expert testimony.

In the second case, Tavares Harris (“Harris”) allegedly shot Jared C. and Wasima Gary. At trial, the State attempted to introduce Harris’ direct messages and tweets, which alluded to retaliation for an earlier incident involving Jared C. The State planned to authenticate the social media messages through expert testimony about the forensic examination of cell phones. Over objection, the trial judge admitted the evidence after determining the posts had been properly authenticated by the expert testimony and independent witness verification of Harris’ Twitter account.

In the third case, Carlos Alberto Monge-Martinez (“Monge-Martinez”) allegedly stabbed his former girlfriend. The State tried to introduce Facebook messages allegedly sent by Monge-Martinez to prove he had intentionally assaulted his former girlfriend. Over objection, the trial judge allowed the victim to testify as to the distinct characteristics of the messages she received and admitted the messages into evidence.

Sublet, Harris, and Monge-Martinez were convicted in their respective circuit court and subsequently appealed. The Court of Special Appeals of Maryland affirmed the lower courts’ decisions in Sublet and Monge-Martinez. Both defendants petitioned the Court of Appeals of Maryland for a writ of

certiorari, which were granted. The court granted certiorari in *Harris* sua sponte due to the similar subject matter, and consolidated all three cases.

The Court of Appeals of Maryland previously established a standard for authenticating evidence from social networking websites in *Griffin v. State*. *Sublet*, 442 Md. at 662, 113 A.3d at 712 (citing *Griffin v. State*, 419 Md. 343, 346-47, 19 A.3d 415, 417 (2011)). Pursuant to Md. Rules of Evid. § 5-901(b)(1) and (4), the court recommended three non-exclusive methods of authenticating social media evidence. *Sublet*, 442 Md. at 663, 113 A.3d at 713. To confirm that the alleged author created the content in question, the court will allow counsel to: (1) ask the alleged author to verify his or her social networking profile and the post(s) in question; (2) examine the internet history and hard drive of the alleged author's computer to determine whether it originated from that computer; and (3) use any additional information provided by the social networking website that confirms the allegations. *Id.* (internal citations omitted).

Due to the increased use of social media evidence, the court of appeals decided to refine the *Griffin* authentication standard. *Sublet*, 442 Md. at 663-64, 113 A.3d at 713-14. The court adopted the standard established by the United States Court of Appeals for the Second Circuit in *United States v. Vayner*. *Id.* at 664, 113 A.3d at 714 (citing *United States v. Vayner*, 769 F.3d 123 (2d Cir. 2014)). The *Vayner* standard requires the trial judge to make a preliminary "context-specific determination whether . . . sufficient proof [has been introduced from which] a reasonable juror could find . . . that the evidence is what the proponent claims it to be." *Sublet*, 442 at 666, 113 A.3d at 715 (internal citations omitted). The proof may be direct or circumstantial and does not have to be of a specific type or quantity. *Id.* at 667, 113 A.3d at 715. After the evidence is authenticated, opponents may challenge its reliability, minimize its significance, or propose alternative explanations, just as any other piece of evidence. Determining the reliability of the evidence is left to the jury. *Id.* at 668-69, 113 A.3d at 717 (citing *United States v. Tropeano*, 252 F.3d 653, 661 (2d Cir. 2001)).

Applying the *Vayner* standard, the court of appeals affirmed the convictions in each consolidated case respectively. *Sublet*, 442 Md. at 671, 673, 676-77, 113 A.3d at 718-19, 721-22. In *Sublet*'s case, the court held that the trial judge did not err in excluding the Facebook posts allegedly authored by Parker because there was not sufficient proof of authenticity. *Id.* at 673, 113 A.3d at 719. Parker denied authoring the posts and no proof of distinct characteristics was presented. *Id.* at 672-73, 113 A.3d at 718-19.

In *Harris*, the court of appeals held that the trial judge did not abuse her discretion by admitting Twitter messages and tweets authored by Harris. *Sublet*, 442 Md. at 675-76, 113 A.3d at 720-21. The Twitter username, accompanying photographs, and message content were distinct characteristics that constituted sufficient proof to allow a reasonable juror to possibly find the messages and the tweets to be authentic. *Id.* In *Monge-Martinez*, the court of appeals held that the trial judge did not err in admitting Facebook posts authored by Monge-Martinez. *Id.* at 677, 113 A.3d at 722. The messages

were sufficient proof of authentication because they were written soon after the incident, in Spanish, and contained expressions of remorse. *Id.* at 677, 113 A.3d at 721.

In *Sublet*, the Court of Appeals of Maryland held that a trial judge must determine that sufficient proof has been offered so that a reasonable juror may find evidence from a social networking website to be authentic. The court should provide more stringent guidelines as to the appropriate methods of authenticating social media evidence. Without such, trial judges may apply the standard inconsistently and with too much discretion, resulting in jurors considering insufficiently authenticated evidence.