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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. RICKY LEE BLAND, Defendant and Appellant.	B284205 (Los Angeles County Super. Ct. No. BA443230)

APPEAL from an order of the Superior Court of Los Angeles County, Frederick Wapner, Judge. Reversed.

Renée Paradis, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Steven E. Mercer and Eric J. Kohm, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Over defendant's objections that the prosecution failed to authenticate or lay a foundation for the admissibility of recorded telephone calls, the trial court received a compact disc (CD) into evidence. Based solely on that evidence, the trial court determined defendant made a series of telephone calls to the person with whom he was prohibited, by the terms of his felony probation, from having any contact. The trial court revoked defendant's probation and sentenced him to the upper term of four years in prison. We reverse.

FACTUAL AND PROCEDURAL BACKGROUND

Defendant has had a lengthy and periodically violent relationship with victim Ryan W. On May 17, 2016, as part of a plea bargain in which certain allegations were stricken, defendant pleaded no contest to one felony count of violating Penal Code section 273.5, subdivision (a).[1] At that hearing, the deputy district attorney noted she had not spoken with Ryan W., who declined to cooperate with the prosecution, evaded service of a subpoena, and failed to voluntarily appear for any court proceeding.

Defendant was sentenced to five years of probation under various terms and conditions, including that he serve one year in jail, obey all laws, and have no contact with Ryan W. Defendant stated he understood a violation of any term of probation could

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[1] All undesignated statutory references are to the Penal Code.

Section 273.5, subdivision (a) provides the willful infliction of corporal injury on a cohabitant or former cohabitant may be punished as a felony or a misdemeanor.

result in imposition of a state prison sentence "for up to four years."

On April 7, 2017, and April 10, 2017, Ryan W. reported separate domestic violence incidents perpetrated by defendant. Defendant was arrested and taken into custody after the April 10, 2017 incident. The police report indicated defendant was on both summary and formal probation and had been issued three restraining orders identifying Ryan W. as the protected person. The police report noted the victim and defendant had one child in common and the victim was pregnant with their second child.

On April 12, 2017, the Los Angeles County District Attorney filed a motion to revoke defendant's probation in this case. The declaration accompanying the motion advised defendant violated probation by committing new offenses, specifically, the most recent assault on Ryan W., battery on a "different date" against a cohabitant or former cohabitant, and misdemeanor vandalism for breaking a door handle in a police car. The motion attached police reports from the April 10, 2017 altercation and vandalism incidents and a declaration by the deputy district attorney advising a new criminal case would be filed. The declaration added, "The People hereby move to present evidence at the defendant's preliminary hearing to establish the defendant violated the terms and conditions of his[ ] probation."

New allegations were filed against defendant; and after a preliminary hearing, he was charged in an information with felony infliction of corporal injury within seven years of a previous conviction (§ 273.5, subd. (f)(1)), felony violation of a protective order (§ 166, subd. (c)(4)), misdemeanor battery (§ 243,

subd. (e)(1)), and misdemeanor vandalism (§ 594, subd. (a)). (Super. Ct. No. BA456334)[2]

Jury voir dire in case No. BA456334 began on July 10, 2017. The following day, before the prospective jurors returned to the courtroom, the trial court entertained the prosecution's motion under Evidence Code section 1390[3] to admit out-of-court statements by victim Ryan W. The prosecution intended to establish the victim was unavailable to testify at trial as a direct result of defendant's "wrongdoing," i.e., his contacting the victim to dissuade her from coming to court. At the outset of this hearing, the trial court confirmed it "would do the probation violation concurrent with the trial which includes . . . this motion as part of the trial."

The prosecution called two witnesses for the Evidence Code section 1390 motion/probation revocation hearing. An investigator with the district attorney's office testified she had one telephone call with the victim, who stated she would not cooperate with the prosecution. The investigator never met the victim in person and did not check a number of sources or databases to locate an address or telephone number for her. It was established during the hearing that the victim had at least

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[2] Only selected documents from this matter are included in the record on appeal. The CD at the core of this appeal is actually part of the superior court record in case No. BA456334.

[3] Evidence Code section 1390 permits the introduction into evidence of an unavailable witness's hearsay statements "against a party that has engaged, or aided and abetted, in the wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness."

one outstanding arrest warrant, but the investigator never learned of that fact.

The second witness was Los Angeles Police Department Officer Isaac Gonzalez. Before the officer testified, defense counsel advised the court that his "understanding is . . . the purpose of this witness is to testify that the voice on the alleged jail calls is [defendant's] voice" and he would "be objecting to the calls based on lack of foundation and . . . lack of authenticity." The trial court responded it would "hear the evidence first."

Officer Gonzalez testified he detained defendant on April 10, 2017. The officer transported defendant from the location of his arrest to the police station, a hospital, and, finally, the jail. The entire process took approximately five or six hours. The officer never saw defendant in the presence of, or even near, the victim.

Officer Gonzalez was not asked if he had any contact with the victim; based on the police reports, it appears he did not. Nor was he asked about the pending vandalism charge, even though the police report indicated the damage occurred to Officer Gonzalez's patrol vehicle and in his presence.

The prosecutor announced she had "a series of jail calls" on a CD and asked that they be marked for identification as "People's 1." She provided dates for each call, although the recordings themselves were not marked with any dates or times.[4]

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[4] The prosecutor also provided the trial court and defense counsel with transcripts for each recorded telephone call. The transcripts were never received into evidence. When this court issued an order on September 11, 2018, for production of the CD, the district attorney's office sent the transcripts to this court as well. As the trial court noted, the transcripts include dates and

The prosecutor then played six telephone calls. Each recording involved a conversation between a male caller and one or more females. In most of the calls, defendant did not use the name of the person to whom he was speaking, but called her "Princess." In one call, the male speaker talked about Ryan W. to a female he addressed as "Danielle." In another, he addressed the individual with whom he was speaking as "Granny." In several of the calls, the male appeared to be very careful not to use the given name of the person to whom he was speaking, prompting a female in one of the calls to ask, "Who is Princess?"

Officer Gonzalez recognized the male voice on each call as defendant's based on the length of time he spent with a "talkative" defendant three months earlier. The officer testified he identified defendant's voice "[d]ue to similar speech," "[t]he tone of his voice, and [defendant] has a little accent." The trial court accepted, but made no ruling at the time, on defendant's "continuing" lack of foundation and lack of authentication objection to each played call.

Defense counsel did not cross-examine Officer Gonzalez. No evidence was offered to demonstrate the calls were made to any telephone number associated with the victim. No one attempted to identify any of the female voices.

After argument, the trial court overruled defendant's objections based on lack of foundation and failure to authenticate the recordings. The trial court noted, "notwithstanding that [the prosecutor] kept referring to these as jail calls, quote unquote, there's no evidence per se that they are jail calls. [¶] [a]nd I do

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purport to identify each speaker by name, although none of that information is found on the recordings.

not accept the dates . . . that are on the front of these transcripts, nor do I take the transcripts as the evidence. [¶] I take what I heard as the evidence." The CD was received into evidence on the basis it contained statements by an adverse party. The trial court agreed with the defense that the CD was not admissible as a business record, as no foundation for admissibility under that exception to the hearsay rule had been laid.

The trial court acknowledged the "voice recognition [was] not the strongest testimony in the world," but concluded that factor went "to the weight and not to the admissibility." The trial judge observed the voice on the recording "[d]idn't sound that distinctive to me,"[5] but observed that Officer Gonzalez spent an unusually long time with defendant and the court dates mentioned in the calls "seem[ed] to be consistent with somebody talking about [defendant's] case." The trial court found defendant "clearly" had telephone contact with the victim and the "Princess" references were not "fooling anybody."

Having resolved the admissibility issue, the trial court turned to the Evidence Code section 1390 motion. The trial court denied the motion, finding the investigator's efforts to locate the victim and secure her presence for trial did not meet its threshold burden to show the victim was unavailable. Without a finding of the victim's unavailability, the trial court concluded Evidence Code section 1390 was inapplicable. At that point, the trial court granted the deputy district attorney's motion to dismiss all charges in the current prosecution.

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[5] We listened to the phone calls, too, and agree there does not appear to be anything particularly distinctive about the male caller's voice.

The prosecution offered no additional evidence in the probation revocation portion of the hearing. The defense renewed its lack of foundation and authentication objections to the recorded telephone calls and rested without presenting any evidence. Relying solely on the telephone calls, the trial court found defendant violated the terms of his probation and sentenced him to the upper term of four years.

DISCUSSION

Defendant raises two issues on appeal. In the first, he contends his constitutional right to due process was violated because he did not receive sufficient notice of the probation violations alleged against him. The Attorney General argues defendant forfeited this argument by failing to raise it in the trial court. We need not reach this issue, however, because we find merit in defendant's second claim. (*People v. Mosley* (2015) 60 Cal.4th 1044, 1071.) We conclude reversal is required because the trial court prejudicially erred in admitting the recorded telephone calls into evidence. (*People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*).)

I. Applicable Law

An order revoking probation is appealable as an order made after judgment affecting a defendant's substantial rights. (Pen. Code, § 1237, subd. (b); *People v. Vickers* (1972) 8 Cal.3d 451, 453, fn. 2.) Our standard of review for evidentiary error is abuse of discretion. (*People v. Goldsmith* (2014) 59 Cal.4th 258, 266; *People v. Rodriguez* (2017) 16 Cal.App.5th 355, 373.)

An audio recording is a writing, as defined in Evidence Code section 250. Before an audio recording may be received into evidence, it must be relevant and authenticated. (Evid. Code, §§ 350, 1401; *People v. Gonzalez* (2006) 38 Cal.4th 932, 952.) No

California statute purports to "limit the means by which a writing may be authenticated or proved." (Evid. Code, § 1410.)

Writings may be "self-authenticating," i.e., "[a] writing may be authenticated by evidence that [it] refers to or states matters that are unlikely to be known to anyone other than the person who is claimed by the proponent of the evidence to be the author of the writing." (Evid. Code, § 1421.) Typically, however, the proponent of a writing must produce evidence that demonstrates its authenticity, i.e., "the document is what it purports to be." (*Jazayeri v. Mao* (2009) 174 Cal.App.4th 301, 321.) "[C]onflicting inferences [concerning authenticity go] to the document's weight as evidence, not its admissibility." (*Ibid.*)

Our colleagues in Division Three explained a trial court's ruling that an audio recording has been authenticated and is therefore admissible "is made as a preliminary fact ([Evid. Code,] § 403, subd. (a)(3)) and is statutorily defined as the 'introduction of evidence sufficient to sustain a finding that it is the writing that the proponent of the evidence claims it is' . . . . When the object sought to be introduced is a writing, this preliminary showing . . . usually entails some proof that the writing is authentic—i.e., that the writing was made or signed by its purported maker. [Citation.] [¶] Other items of writing, such as audio recordings, must also be shown to be what they purport to be, i.e., that [they are] genuine for the purposes offered. [Citation.] Essentially, what is necessary is a prima facie case. . . . [¶] . . . [T]he foundation [for an audio recording] may . . . be supplied by the person witnessing the event being recorded. It may be supplied by other witness testimony, circumstantial evidence, content and location, or any other means provided by law, including statutory presumption." (*People v.*

Dawkins (2014) 230 Cal.App.4th 991, 1002, most internal quotation marks omitted (*Dawkins*).)

II. Analysis

The trial court determined the audio recordings were authenticated based on two factors: Officer Gonzalez's testimony that he recognized the male voice as defendant's and the content of the calls, which referred to hearing dates and courtroom locations consistent with those in defendant's then pending criminal matter. The trial court also found there was "no evidence per se" the calls were made from the jail, even though it appeared defendant had been "continuously in custody" since his April 10, 2017 arrest. The Attorney General concedes no participant in any of the calls testified and agrees the authentication evidence was entirely circumstantial.

As *Dawkins, supra,* 230 Cal.App.4th at page 1003 held, "computer systems that automatically record data in real time, especially on government-maintained computers, are presumed to be accurate. . . . No elaborate showing of the accuracy of the recorded data is required." Because of this presumed accuracy, "a witness with the general knowledge of an automated system may testify to his or her use of the system and that he or she has downloaded the computer information to produce the recording." (*Ibid.*) But no such evidence was offered here. There was no testimony or declaration under penalty of perjury concerning the creation of the CD or the chain of custody for it. While expert testimony is not required to authenticate a government-maintained audio recording (*ibid.*), credible evidence is necessary before a court may find the audio recording to be part of a government-maintained system and not a rogue or "manipulated"

digitization. (See, e.g., *People v. Beckley* (2010) 185 Cal.App.4th 509, 515 (*Beckley*).)

Nor may we conclude the audio recording was self-authenticating. The dates of defendant's court proceedings were matters of public knowledge, not confidential information "unlikely to be known to anyone other than [defendant]." (Evid. Code, § 1421.) There was no showing that "Princess," "Danielle," and "Granny" are appellations with a special significance to defendant.

O'Laskey v. Sortino (1990) 224 Cal.App.3d 241 (*O'Laskey*), disapproved on other grounds in *Flanagan v. Flanagan* (2002) 27 Cal.4th 766, 768, is also helpful to our analysis. As the Attorney General points out, the proponent of the evidence in *O'Laskey* sought to admit only the transcript of a recorded telephone call, not the audio recording itself. (*O'Laskey*, at p. 249.) Nevertheless, the Court of Appeal analyzed the issue as if the tape had been offered into evidence and concluded the evidentiary efforts were "wholly insufficient to authenticate the tape itself." (*Ibid.*)

The Court of Appeal in *O'Laskey* agreed the trial court properly excluded the transcript of a recorded telephone call: "There is no way to know whether the tape is what [the proponent of its admission] claims it is. No declaration or other sworn testimony of the [preparer and at least one participant to the conversation] was offered to describe when, where, how or by whom the tape was made. (See Evid. Code, § 1413; *People v. Spencer* (1963) 60 Cal.2d 64 . . . .) . . . [¶] Furthermore, [the proponent] failed to introduce any evidence regarding the completeness or accuracy of the tape. (*People v. Patton* (1976) 63 Cal.App.3d 211, 220, [133 Cal.Rptr. 533].) . . . [There was no

evidence concerning] the true and complete extent of the conversation—and . . . whether the tape had been altered or edited or whether it included the entire conversation. [¶] Since no foundation for the tape was laid, the trial court properly excluded the transcript and there was no error in this regard." (*O'Laskey, supra,* 223 Cal.App.3d at pp. 249-250, fn. omitted.) For the same reasons, no foundation was laid here.

The audio recording was the only evidence presented to support the finding that defendant violated the terms of his probation, and we cannot find the error in its admission to be harmless. (*Watson, supra,* 46 Cal.2d 818; *Beckley, supra,* 185 Cal.App.4th at p. 518.) Although defendant was charged in the new information with vandalism of a police vehicle—a crime that did not involve Ryan W.—and one term of his probation was that he violate no law, we cannot rely on that offense to support revocation of defendant's probation. The prosecutor did not elicit testimony from Officer Gonzalez concerning the vandalism; instead, she dismissed the charge without presenting any evidence the crime had been committed. Neither the prosecution nor the trial court relied on vandalism as a basis for revoking defendant's probation; nor may we.

DISPOSITION

The order is reversed.

DUNNING, J.*

We concur:

RUBIN, Acting P. J.

STRATTON, J.

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* Judge of the Orange Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.