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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. TERRY ALEXANDER, Defendant and Appellant.	B232522 (Los Angeles County Super. Ct. No. BA372093)
THE PEOPLE, Plaintiff and Respondent, v. JEFFREY SHANN, Defendant and Appellant.	B234050

APPEAL from a judgment of the Superior Court of Los Angeles County. Jose I. Sandoval, Judge. Affirmed as to defendant Terry Alexander. Affirmed as modified as to defendant Jeffrey Shann.

Janice Wellborn, under appointment by the Court of Appeal, for Defendant and Appellant Jeffrey Shann.

Lisa M. Bassis, under appointment by the Court of Appeal, for Defendant and Appellant Terry Alexander.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, James William Bilderback II, Sonya Roth, Linda C. Johnson and Ryan M. Smith, Deputy Attorneys General, for Plaintiff and Respondent.

Following a joint jury trial, defendants and appellants Jeffrey Shann and Terry Alexander were convicted of second degree burglary (Pen. Code, § 459, subd. (a))[1] and receiving stolen property (§ 496, subd. (a)); Shann was also convicted of petty theft with a prior (§ 666) and Alexander was convicted of misdemeanor petty theft (§ 484, subd. (a)).[2] On appeal, Alexander and Shann both contend the burglary conviction is not supported by substantial evidence. Alexander separately contends a recording played to

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

[2] Alexander and Shann were jointly charged by information with second degree burglary (count 6); Shann was also charged with petty theft with a prior (count 1) and receiving stolen property (count 2); Alexander was also charged with receiving stolen property (counts 3 and 4) and misdemeanor petty theft (count 5). As to Alexander, it was further alleged that he suffered six prior Three Strikes law convictions (§ 1170.12, subd. (a)-(d); § 667, subd. (b)-(i)) and eight prior convictions for which he served a prison term (§ 667.5, subd. (b)); as to Shann, it was further alleged that he suffered one prior Three Strikes law conviction and two prior convictions for which he served a prior prison term (§ 667.5, subd. (b)). A jury convicted both defendants of the substantive charges. Following denial of his motion for new trial, Alexander admitted the alleged priors and was sentenced to 11 years and 4 months in prison. Shann also admitted the alleged priors and was sentenced to 32 months in prison. Both defendants timely appealed. We consolidated their appeals for purposes of oral argument and opinion.

the jury was inadmissible hearsay and its admission into evidence denied Alexander his Sixth Amendment right to confront the hearsay declarant. Shann separately contends: (1) it was error to deny bifurcation of the prior conviction from the petty theft charge; and (2) imposition of concurrent terms on counts one and six violated section 654. We modify the judgment and affirm as so modified.

FACTUAL AND PROCEDURAL BACKGROUND[3]

A. Count 2 (Shann: Receiving Stolen Property)

On April 28, 2010, after victim Michael Block put various personal items, including his computer bag, wallet, and phone, in the trunk of his boss's BMW, his boss drove him to Pan Pacific Park for a company baseball game. They left the car parked in the Pan Pacific parking lot a little before 7:00 p.m. When they returned to the car at about 8:30 or 9:00 p.m., Block's boss opened the trunk. It was then that Block discovered the items he left in the trunk before the game had been taken. Block never saw his things again.

From the CVS Pharmacy located on the corner of Fairfax and Third Street (a few blocks from Pan Pacific Park), police obtained video from a surveillance camera at the store's front door, which showed people entering the store at about 7:00 p.m. on April 28th. Four still photographs were taken from the video. Block identified the computer bag held by the person in the photos as Block's stolen computer bag. The police officer who searched Shann's residence after he was arrested testified that the person holding Block's computer bag in the still photograph was wearing the same gray sweatshirt the officer found in Shann's sleeping area at the residence.

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3 We state the fact in accordance with the usual rules of appeal from a criminal conviction. (*People v. Zamudio* (2008) 43 Cal.4th 327, 357-358 (*Zamudio*).)

B. Count 1 (Shann: Petty Theft with a Prior), Count 5 (Alexander: Misdemeanor Petty Theft) and Count 6 (Alexander and Shann: Burglary)

Three weeks later, at about 3:30 p.m. on May 18, 2010, victim Elaine Lewis left her black Mitsubishi Outlander in the Pan Pacific Park parking lot while she went to the park. Lewis recalled locking the doors and activating the alarm system.

Witness Herman Nash worked as a fitness trainer at Pan Pacific Park. Around 3:30 p.m. that day, Nash noticed Alexander in the driver's seat and Shann in the passenger seat of a white SUV with paper license plates parked in the Pan Pacific parking lot, next to a black Mitsubishi Outlander. Nash walked to a bus stop about 30 yards away to watch Alexander and Shann without being observed. Nash saw Shann get out of the white SUV, enter the black Outlander, and rummage around inside of it. Although Shann had nothing in his hands when he entered the Outlander, he was holding a cell phone when he got out of the car less than a minute later. Shann then jumped back into the white SUV, and the two left the scene.

When Lewis later returned to her car, she discovered that her iPhone and wallet containing several credit cards were missing. Nash approached Lewis when she was seated in her SUV and asked Lewis if she was missing anything.

C. Count 4 (Alexander: Receiving Stolen Property)

At about 2:20 p.m. the next day, victim Sandra Clark parked her white Ford Explorer in the Pan Pacific Park parking lot with the intention of taking a walk.[4] Clark felt uncomfortable and noticed a man leering at her. After placing her purse in the car and covering it with a sweater, Clark locked the doors and started walking. When Clark returned to her car about 45 minutes later, she saw that the back window of her car had been shattered; her purse containing about $100 in cash, some credit cards and

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[4] Because Clark was pregnant and due to give birth soon, her testimony was videotaped prior to the start of trial and the video shown to the jury. The DVD of Clark's testimony was introduced into evidence as People's Exhibit 15. The significance of this testimony is discussed in Discussion, Part B, *post*.

medication was missing. Also missing was an audio digital recorder and a silver Canon camera, both of which she used in her job as a journalist.

Clark told the police officer who took her statement that it was a Panasonic brand audio digital recorder that was taken from her car. At trial, Clark first testified that it was a Panasonic brand recorder that was taken, then corrected herself and said it was an Olympus brand. She identified People's Exhibit 5, a photograph of an Olympus brand audio digital recorder which police found in Alexander's white SUV, as the audio digital recorder taken from her car. Clark attributed her confusion about the brand of the recorder (Panasonic or Olympus) to the fact that she was pregnant on the date of the theft, and was in fact due to give birth on the day after her trial testimony. Clark was 100 percent sure that the recorder depicted in People's Exhibit 5 was her recorder and that it would have her voice on it.

The actual recorder pictured in People's Exhibit 5 was introduced into evidence as People's Exhibit 14. Over defendant's hearsay and Confrontation Clause objections, the trial court allowed the prosecutor to play 60 seconds of the content of the recorder to give the jury an opportunity to determine whether, as Clark testified, her voice was on the recorder. Before the tape was played, the trial court instructed the jury that it was "simply going to be asked to hear – to determine whether or not the voice you hear is similar to the voice you heard from the witness, Ms. Clark, who testified by video."

The recording was so difficult to hear that the court reporter was unable to transcribe it. The only information we have as to the content of the recording is from the colloquy about its admissibility, during which Alexander's counsel stated: "My problem with it is . . . . The point where it's nice to meet you, nice to meet you – I believe the other person says nice to meet you Sandra. . . ." The prosecutor agreed that "the word Sandra is said twice." Although the prosecutor offered to pick a different portion of tape that did not include any reference to "Sandra," the court directed that the portion already selected be used so that the jury, which had already been waiting 20 minutes, would not be further inconvenienced.

In its final charge to the jury, the trial court instructed: "A voice recording was presented in support of count 4. The subject or content of that recording is not at issue. You may consider that evidence only for the purpose of determining whether any of the recorded voices was witness Sandra Clark's voice."

D. Count 3 (Alexander: Receiving Stolen Property)

Four days later, at about 2:00 p.m. on May 23, 2010, Sung Bun Moon parked her Toyota Camry in the Pan Pacific parking lot, locked the door, and then played baseball for about two and a half hours. Upon returning to her car, Moon discovered that her Garmin GPS, Ralph Lauren sunglasses, MP3 player, Louis Vuitton wallet containing about $100, and a friend's wallet, were all missing from the glove box and trunk. A week and a half later, the police emailed Moon a photo of a GPS device, which she identified as the one stolen from her car.

E. The Arrest

Sometime before 11:30 a.m. on June 2, 2010, fitness trainer Nash notified police when he saw Shann and Alexander in the same white SUV parked once again in the Pan Pacific Park parking lot. Alexander and Shann were taken into custody and the white SUV and Shann's residence were searched. In the SUV, police found a GPS system, an Olympus audio digital recorder (People's Exhibit 14) and a California driver's license in Alexander's name. In Shann's sleeping area in the residence, police found a gray hooded sweatshirt.

DISCUSSION

A. Substantial Evidence Supports the Burglary Convictions (Count 6)

Appellants contend their respective convictions of second degree burglary were not supported by substantial evidence, pointing specifically to the evidence as to whether Lewis's car was locked. Alexander also argues there was no evidence of forced entry.

As to the second point, we may dispose of it in short moment. Forced entry is not an element of auto burglary. (*People v. Allen* (2001) 86 Cal.App.4th 909, 916 (*Allen*); *In re James B.* (2003) 109 Cal.App.4th 862, 868 (*James B.*).) For example, opening a car door with an unauthorized key may constitute a burglary. (*People v. Mooney* (1983) 145 Cal.App.3d 502, 505.) Appellants are correct that one of the elements of auto burglary is that the car was locked (*James B.* at p. 868), and we turn next to the contention that there was insufficient evidence of that.

The standard of review of a claim insufficiency of the evidence is well settled. We review the whole record to determine whether there is evidence that is reasonable, credible, and of solid value from which any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. "In applying this test, we review the evidence in the light most favorable to the prosecution and presume in support of the judgment the existence of every fact the jury could reasonably have deduced from the evidence. [Citation.] 'Conflicts and even testimony [that] is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends. [Citation.] We resolve neither credibility issues nor evidentiary conflicts; we look for substantial evidence. [Citation.]' [Citation.] A reversal for insufficient evidence 'is unwarranted unless it appears "that upon no hypothesis whatever is there sufficient substantial evidence to support" ' the jury's verdict. [Citation.]" (*Zamudio, supra*, 43 Cal.4th at p. 357.)

Section 459 defines auto burglary as entry into "any . . . vehicle . . . when the doors are locked . . . with intent to commit grand or petit larceny or any felony. . . ." Auto burglary can be committed only by entering a locked vehicle. (*Allen, supra*, 86 Cal.App.4th at p. 914.) In *James B.*, for example, the evidence established that the vehicle owner locked the car doors but left the windows open one to four inches for ventilation, and the minor gained entry by reaching through the window to unlock the door. The *James B.* court concluded that the minor entered a locked vehicle without the owner's consent by illegally unlocking it, which satisfied the "locked" element of the

crime. (*James, supra,* 109 Cal.App.4th at p. 871; compare *People v. Woods* (1980) 112 Cal.App.3d 226 [removing items from locked car through window intentionally left open, without unlocking or entering the car, does not constitute auto burglary].) An owner's testimony that it is his or her usual practice to lock the vehicle or that she believed she did on the occasion in question constitutes substantial evidence that the vehicle was locked. (*In re Charles G.* (1979) 95 Cal.App.3d 62, 66; Evid. Code, § 1105 [evidence of habit or custom is admissible to prove conduct on a specified occasion in conformity with the habit or custom].)

Here, Lewis's testimony that she believed she locked the doors and activated the alarm constitutes substantial evidence that her car was locked. That the alarm did not sound when Shann entered the vehicle does not suggest otherwise. One reasonable inference is that Lewis locked the car, but did not activate the alarm. Another is that the alarm malfunctioned. In any case, conflicts in the evidence were for the jury to resolve, and here the jury resolved those conflicts against appellants.

B.. Any Error in Admitting the Recording As to Alexander Was Harmless (Count 4)

Alexander contends that allowing the prosecutor to play 60 seconds from the audio digital recorder, a photograph of which Clark identified as the one taken from her car, was prejudicial error. He argues that the recording was not adequately authenticated, it was inadmissible hearsay, and its admission violated the Confrontation Clause. We find no merit in the authentication and Confrontation Clause contentions. To the extent the recording constitutes inadmissible hearsay, we find any error in admitting it harmless.

a. Standard of Review

As usual, we begin with the standard of review. A trial court's ruling on the admission of evidence over a hearsay objection is reviewed under the abuse of discretion standard. (*People v. Waidla* (2000) 22 Cal.4th 690, 717 (*Waidla*).) This same standard applies to rulings on authentication and foundation of evidence. (*People v. Smith* (2009) 179 Cal.App.4th 986, 1001.) We review de novo whether a statement was testimonial

and therefore subject to the requirements of the Confrontation Clause. (*People v. Seijas* (2005) 36 Cal.4th 291, 304.)

b. Authentication

Alexander contends that the People did not lay a sufficient foundation for admission of the recording into evidence because no party to the recording testified that it was an accurate recording of the conversation. Alexander's argument misses the mark because the recording was not introduced to prove that the recorded statements were made. Rather, the recording was admitted as evidence of the physical characteristics of the recorded voices, without regard to the words spoken. From that evidence, it was for the jury to determine whether one of the voices was that of witness Sandra Clark. In any event, Clark authenticated the photo of the digital recorder.

An audio recording is the equivalent of a writing. (Evid. Code, § 250.) A writing must be authenticated before it may be received into evidence. (Evid. Code, § 1401, subd. (a); *People v. Patton* (1976) 63 Cal.App.3d 211, 220 (*Patton*).) Authentication of a writing is done by introducing evidence sufficient to sustain a finding that it is the writing that the proponent of the evidence claims it is. (Evid. Code, § 1400.) For example, in *People v. Fonville* (1973) 35 Cal.App.3d 693, the defendant challenged admission of a surreptitiously recorded jail conversation between him and his uncle. The appellate court rejected the defendant's argument that there was no evidence as to the identification of the voices on the recording. The court reasoned that the trial judge and jury could use the defendant's recorded statement to police as a basis for comparison and authentication of the voice on the challenged tape. (*Id*. at p. 709.)

Here, there is no dispute that the 60-second recording came from People's Exhibit 14. That People's Exhibit 14 was, as the prosecutor claimed, the audio digital recorder found by police in a search of the white SUV on June 2, 2010, was established by the testimony of Police Officers Geoffrey Taff and Peter Andres. Taff testified he found an audio digital recorder during his inventory search of the white SUV, which he turned over to Andres. Andres testified he booked the recorder given to him by Taff into

evidence under DR 100710099; Andres identified People's Exhibit 14 as the recorder he booked into evidence and which he took out of the property room and brought to court the morning of trial. Thus, the People authenticated the recording as being what they claimed it to be – a recording from the audio digital recorder found by the police in the June 2, 2010 search of the white SUV. Under the reasoning of the court in *Fonville*, it was within the province of the jury to assess whether it was Clark's voice on the tape. Alexander's criticism of the quality of the tape goes to the weight of the evidence, not the adequacy of the authentication.

c. Admission of the recording was not a violation of Alexander's Confrontation Rights

The Confrontation Clause protects the right of a criminal defendant "to be confronted with the witnesses against him. . . . ." (U.S. Const., 6th Amend.) It "prohibits 'testimonial hearsay' from being admitted into evidence against a defendant in a criminal trial . . ." [Citations.]" (*People v. Jennings* (2010) 50 Cal.4th 616, 651, citing *Crawford v. Washington* (2004) 541 U.S. 36, 59.) " 'Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.' [Citations.]" (*People v. Livingston* (2012) 53 Cal.4th 1145, 1158-1159.)

Here, the challenged recording was not testimonial – none of the statements on the tape was made in response to police interrogation. The recording of course was made before the recorder was ever stolen. Accordingly, its admission was not barred by the Confrontation Clause.

d. To the Extent the Recording Contained Hearsay, it's Admission Was Harmless

Alexander contends the recording was inadmissible hearsay. He argues that in particular the statement "Nice to meet you Sandra" by one of the voices in the 60-second snippet constitutes an out of court statement that the other recorded voice belongs to someone named Sandra; because the recording was admitted to prove that victim Sandra Clark's voice is one of the voices on the recording, the recording is an out of court statement received to prove the truth of the matter asserted. We agree, but find any error in admitting the tape harmless.

Evidence Code section 1200, subdivision (a) defines "hearsay evidence" as "evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated." With exceptions not relevant here, hearsay evidence is inadmissible. (Evid. Code, § 1200, subd. (b).)

Statements that are not offered to prove the truth of the matter asserted do not constitute "hearsay." (*Jazayeri v. Mao* (2009) 174 Cal.App.4th 301, 316; *DiCola v. White Bros. Performance Products, Inc.* (2008) 158 Cal.App.4th 666, 680.) "Where ' "the very fact in controversy is whether certain things were said or done and not . . . whether these things were true or false, . . . in these cases the words or acts are admissible not as hearsay[,] but as original evidence." ' [Citations.] For example, documents containing operative facts, such as the words forming an agreement, are not hearsay. [Citations.]" (*Jazayeri* at p. 316.) *Patton, supra*, 63 Cal.App.3d 211, is instructive. In that case, on appeal from a conviction for pandering, the defendant argued a tape recording of a telephone conversation in which the defendant urges a woman to work for him as a prostitute was inadmissible hearsay. (*Id*. at p. 218.) The appellate court held that the tape was not susceptible to a hearsay objection because it was "direct evidence of the contents of the conversation. The conversation itself was not hearsay because it was not offered for the truth of the matters asserted. Defendant's statements to [the woman] constituted the substantive offense with which he was charged, and therefore were 'operative facts.' [Citations.]" (*Id*. at pp. 219-220.)

Here, with the exception of the reference to "Sandra", the recording was not hearsay because it, like the tape in *Patton*, was not introduced to prove that the statements made by the voices on the tape were true. Instead, the recording was offered as direct evidence of the physical characteristics of the recorded voices. If the trial court had allowed the prosecutor to choose a different 60-second snippet that did not mention "Sandra," it would have ended our inquiry. But the trial court, apparently because of concern over delaying the jury, permitted the prosecutor to use the "Nice to meet you Sandra" portion. That statement was inadmissible hearsay because it constituted, in essence, an out of court statement that the other party to the recorded conversation was truly named Sandra. From that evidence, it could reasonably be inferred that "Sandra" was victim Sandra Clark and that the recorder was hers.

We find the error harmless. "A verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous admission of evidence unless . . . [t]he court which passes upon the effect of the error or errors is of the opinion that the admitted evidence should have been excluded on the ground stated and that the error or errors complained of resulted in a miscarriage of justice." (Evid. Code, § 353.) A miscarriage of justice occurs if it is reasonably probable a result more favorable to the appellant would have been reached absent the error. (*People* v. *Champion* (1995) 9 Cal.4th 879, 919 [no reasonable probability outcome of trial would have been different if challenged evidence had been excluded].) Because Clark identified the audio digital recorder depicted in People's Exhibit 5 as the recorder taken from her car and the jury had the opportunity to determine whether one of the recorded voices was Clark's, it is not reasonably probable that Alexander would have obtained a more favorable result if the prosecutor had played a snippet of the recording that did not mention "Sandra." (*People v. Garcia* (2008) 168 Cal.App.4th 261, 292 [applying harmless error standard articulated by *Watson* to admission of hearsay].)[5]

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5 *People v. Watson* (1956) 46 Cal.2d 818, 836-837.

C. Error in Admitting Shann's Prior Conviction Was Harmless (Count 1)

Shann contends, and the People agree, that the trial court erred in denying Shann's motion to bifurcate trial on the allegation in count 1 (petty theft with a prior) that Shann had suffered a prior conviction for which he served a prison sentence. (See *People v. Bouzas* (1991) 53 Cal.3d 467, 478 ["[T]he prior conviction requirement of section 666 is a sentencing matter for the trial court and not an 'element' of a section 666 'offense' that must be determined by a jury."]; see also *People v. Murphy* (2001) 25 Cal.4th 136 [like the Three Strikes law, § 666 establishes an alternate and elevated penalty for a recidivist convicted of petty theft].) However, the error requires reversal only if there is a reasonable probability of a different verdict had the jury not been informed of the defendant's prior conviction. (*Bouzas* at p. 1085 [applying *Watson* harmless error standard].) There is no such reasonable probability in this case.

The evidence supporting count 1 was strong. Lewis testified that her cell phone was missing when she returned to her car. Nash testified that he saw Shann enter Lewis's parked car empty-handed, rummage around inside of it, and emerge less than a minute later holding a cell phone. In light of this evidence, it is not reasonably likely Shann would have obtained a more favorable verdict if the jury had not been informed of the prior conviction.

D. Shann's Concurrent Sentences for Receiving Stolen Property and Auto Burglary (Counts 1 and 6) Violated Section 654

Shann was sentenced to a total of 2 years, 8 months in prison comprised of 16 months for petty theft with a prior (count 1) doubled pursuant to Three Strikes, plus a concurrent 16 months for receiving stolen property (count 2) and a concurrent 16 months for auto burglary (count 6). Counts 1 and 6 both involved the May 18th theft from Lewis's car. Shann contends, and the People agree, that imposition of concurrent sentences on counts 1 and 6 violated the section 654 proscription against multiple punishments. We agree and order the sentence on count 6 stayed.

DISPOSITION

As to defendant Alexander, the judgment is affirmed.

As to defendant Shann, the trial court is directed to modify the judgment to stay the concurrent 16-month sentence for auto burglary on count 6, and amend the judgment accordingly. The trial court shall forward the amended abstract of judgment to the Department of Corrections and Rehabilitation. In all other respects, the judgment as to Shann is affirmed.

RUBIN, J.

WE CONCUR:

BIGELOW, P. J.

GRIMES, J.