E060272

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT
DIVISION TWO

THE PEOPLE,
Plaintiff and Respondent,

v.

VIKTORS ANDRIS REKTE,
Defendant and Appellant.

Appeal from a judgment of the Riverside County Superior Court
The Honorable William A. Anderson, Commissioner
Riverside Superior Court Case No. RR182259VR

RESPONDENT'S BRIEF

SUBMITTED ELECTRONICALLY

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STATEMENT OF THE CASE

Appellant Viktors Andris Rekte was issued a ticket for violating California Vehicle Code ("CVC") Section 21453(a), running a red light, on October 26, 2012. (Reporter's Transcript of Proceedings, ("RT") May 7, 2013, pg. 1, lines 20-22). This violation was captured by an automated traffic enforcement system ("ATES") at the intersection of Tyler Street and the entrance to State Route 91 within the City of Riverside ("City"). RT, at pg. 6, lines 10-14.

At trial, held on May 7, 2013, before a traffic commissioner, Appellant presented a motion *in limine* to exclude the video captured by the ATES based on the grounds that the video captured by an automatic traffic enforcement system (ATES) of the violation was not made available to Appellant online and that the yellow light was allegedly below the minimum time required under the Traffic Manual of the Department of Transportation ("MUTCD")[1]. RT, at pg. 3, lines 11-15. Appellant requested to call an expert to testify as to the motion *in limine* and the trial court, after a brief mention of "People v. Gray"[2], denied the motion stating that the testimony of Appellant's expert, Sean Stockwell, can be heard as part of the case in chief. RT, at pg. 2, lines 14-17. The court did allow

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[1] http://www.dot.ca.gov/hq/traffops/engineering/mutcd/pdf/camutcd2012/CAMUTCD2012Hotlinkversion.pdf
[2] *People v. Gray*, 58 Cal. 4th 901 (2014).

and heard Appellant's expert testimony during Appellant's case in chief. RT, at pgs. 15-29.

During the trial, the City presented photographs and a video depicting the violation, along with testimony of Operator Don Teagarden ("Operator") who is an employee of the City of Riverside Police Department, and a Declaration of the Co-Custodian of Records for Redflex Traffic Systems, Inc. (Redflex). RT, at pgs. 4-7). The computer-based digital imaging system automatically takes a series of still photographs and a short video, approximately 12-seconds long, showing the vehicle approaching and entering the intersection against the red light. RT, at pg. 5, lines 2-8. Upon establishing when the photos and video were taken, the location depicted, that the photographs depicted the violator's face, the vehicle license plate, the vehicle behind the limit line, and the vehicle within the intersection while the light was red, and that the video depicted Appellant's vehicle approaching and entering the intersection against the red light, those four color photographs and video were admitted into evidence. RT, at pgs. 4-7. The Operatory testified that the evidence he reviewed showed Appellant's vehicle behind the limit line when the signal light had been red at least 0.96 seconds, that the vehicle failed to stop for the red light, and continued to make a right turn. RT, at pg. 6, lines 7-22. The Operator testified that for a dedicated right turn lane, the yellow light requirement is 3.0 seconds, but that

the yellow time at this intersection was 3.65 seconds. RT, at pg. 6, lines 19-22. At no time during the trial did Appellant deny that the pictures and video depicted him driving his vehicle into the intersection against a red light in violation of CVC section 21453(a). RT, at pgs. 1-31.

During the trial, the Operator was cross-examined by Appellant as to the training he received regarding the ATES, monthly inspections of the ATES, the triggering of the ATES (when a vehicle goes through the red light) at 15 mph, the method of transmission of the video and photographic information, the criteria in reviewing each incident (such as being able to see the driver and the vehicle), site visits by City's operators, and checking amber light phase times. RT at pgs. 8-15.

Appellant was represented by counsel and presented engineer Sean Stockwell as an expert witness in his defense. RT, at pgs. 15-29. Appellant's witness testified that he visited the intersection of Tyler Street and the 91 freeway on three occasions: twice before Appellant was cited for running the red light (September 14th, 2012, and September 17, 2012) (RT, at pg. 18, lines 13, 21), and once after (April 3, 2013) (RT, at pg. 19).

Stockwell testified that the yellow light at this approach was "3.50 seconds - - 3.50, plus or minus .07 seconds" (RT, at pg. 20, lines 7-8, pg. 23, lines 24-25), but also testified that he was able to tell "within plus or minus

seven milliseconds" (RT, at pg. 19, line 18). Stockwell admitted that he was not an expert on the MUTCD standards. RT, at pg. 28, lines 9-10. However, he testified that his measurement of "3.50, plus or minus .07 seconds" or "within plus or minus seven milliseconds" and "was below the requirements of the MUTCD. RT, at pg. 19, line 18, pg. 24, line 19 through pg. 25, line 2. He also testified affirmatively that "a driver in the right-hand turn lane looking ahead would have to turn left 20 degrees in order to see the stop light." RT, at pg. 27, lines 3-10.

The MUTCD does not apply to ATES as to the design, placement, and angles of the ATES because ATES is not a traffic control device as defined in the MUTCD and are expressly excluded from the application of the MUTCD. The only compliance requirement for ATES is that the yellow time is at least the minimum required under MUTCD for that roadway. Here, the Appellant was in the dedicated right turn lane, which yellow light time was required to be at least 3.0 seconds under the MUTCD. Even Appellant's expert witness testified that the yellow time was above that minimum, and that the angle of the signal light was within the requirements of the MUTCD.

PROCEDURAL HISTORY

Appellant was charged with a violation of CVC section 21453(a). RT at p. 2, lines 20-22. Appellant waived formal arraignment and entered a plea of

not guilty. RT, at pg. 1, lines 22-23. Appellant's trial was held in the traffic court before the Honorable Commissioner William A. Anderson and was found guilty. RT at p. 31. He now appeals his conviction on the grounds that the court erred in denying his motion *in limine* based on the court's reference to *People v. Gray*, 58 Cal. 4th 901 (2014), based on an alleged violation of *Brady v. Maryland*, 373 U.S. 83 (1963), based on hearsay objections to the photographic and video evidence, based on the alleged non-compliance of the ATES and yellow light time with MUTCD standards.

ISSUES PRESENTED FOR REVIEW

(1) Whether the Court erred by referencing *People v. Gray*, *supra*, and if so, did that reference constitute a miscarriage of justice such that the conviction should be overturned on appeal.

(2) Whether the Court erred in the application of Evidence Code Sections 1552 and 1553.

STANDARD OF REVIEW

Sufficiency of the evidence is reviewed on an abuse of discretion standard. "The test on appeal is whether substantial evidence supports the trier of fact, not whether evidence proves guilt beyond a reasonable doubt. *People v. Johnson*, 26 Cal. 3d 557, 576 (1980). "In reviewing the sufficiency of the evidence, we must determine whether, after viewing the evidence in the light

most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *People v. Davis*, 10 Cal. App. 4th 465, 509 (1995). "In making this determination, the reviewing court must consider the evidence in the light most favorable to the judgment and presume the existence of every fact the trier could reasonable deduce from the evidence in support of the judgment." *People v. Crittenden*, 9 Cal. App. 4th 83, 139 (1994). "If circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also be reconciled with a contrary finding does not warrant a reversal of the judgment." *People v. Bean*, 46 Cal. 3d 919, 932-33 (1988) (internal quotation marks omitted). In other words, all reasonable inferences and conflicts must be resolved in favor of the judgment. *People v. Poe*, 74 Cal. App. 4th 826, 830 (1999).

LEGAL ARGUMENT

I. THE COURT DID NOT COMMIT REVERSIBLE ERROR WHEN IT REFERENCED *PEOPLE v. GRAY*, AND THERE WAS NO MISCARRIAGE OF JUSTICE.

A. The Commissioner Heard and Admitted Evidence and Testimony of Appellant's Expert and Did Not Blindly Follow Unpublished Precedent.

Appellant argues on appeal that because the Commissioner mentioned *People v. Gray*, 58 Cal. 4th 901 (2014), which was under review by the California Supreme Court at the time, that "the Court simply borrowed the following decisional algorithm from *People v. Gray: Does the video appear to show the defendant running the red light? Yes?... Guilty!"* (Appellant's Opening Brief ("AOB"), pg. 8.) Appellant argues that no evidence whatsoever was offered by the City as to whether Appellant ran the red light in violation of CVC Section 21453(a). However, this is untrue.

Operator Teagarden testified that he reviewed the ATES-captured photographic and video evidence that showed Appellant was driving his 2011 Toyota Camry, with the CA license plate of 6PKK372, was driving six feet behind the limit line when the signal light had been red for 0.96 seconds, failed to stop for the red light, and continued to make a right turn. RT, at pg. 6, lines 7-22. The Operator specifically testified that the MUTCD requires that the minimum yellow light time for a dedicated right turn lane is 3.0 seconds, but that the yellow time at that intersection was 3.65 seconds. RT, at pg. 6, lines 19-22.

No evidence or argument was proffered by Appellant at trial that he was not driving the vehicle or that he stopped at the red light before entering the

intersection against a red light to make a right turn. Appellant offered no such argument that he was not in violation of CVC Section 21453(a).

The Commissioner heard and admitted evidence compiled by defense's purported expert to include a PowerPoint slide presentation and testimony regarding yellow light timing, angle and positioning of traffic signal faces, etc., as discussed further, *infra*. Clearly, the trial court did not blindly follow unpublished precedent. Rather, from the defense's own brief, it would appear that the Commissioner considered the content and credibility of both witnesses and, as the finder of fact, made a determination based on the evidence presented at trial. As such, it cannot be said that the defense suffered from a "miscarriage of justice". There is no reversible error here.

B. The ATES Did Not Violate the Standards in the MUTCD.

1. MUTCD Minimum Yellow Signal Time is 3.0 Seconds.

Appellant claims that the traffic court erred at trial when it "consciously ignor[ed] evidence in the form of significant violations of the MUTCD". (AOB, pg. 9). This is incorrect.

The court did not simply preclude or ignore evidence by Appellant's witness. The court was well within its discretion to permit the witness to testify, to consider the analysis or reasoning used in *Gray*, and to consider the weight of the testimony of Stockwell as to the alleged MUTCD violations in this case.

However, there was no violation of the MUTCD in this case. There was no miscarriage of justice and there was no reversible error.

The 2012 MUTCD defines, in Section 1A.13 on page 91, as follows:

"238. Traffic Control Device—a sign, signal, marking, or other device used to regulate, warn, or guide traffic, placed on, over, or adjacent to a street, highway, private road open to public travel, pedestrian facility, or shared-use path by authority of a public agency or official having jurisdiction, or, in the case of a private road open to public travel, by authority of the private owner or private official having jurisdiction.

239. Traffic Control Signal (Traffic Signal)—any highway traffic signal by which traffic is alternately directed to stop and permitted to proceed."

The MUTCD Section 1A.08 Standard, ¶ 6 specifies:

"These signs and other devices are not considered to be traffic control devices and provisions regarding their design and use are not included in this Manual. Among these signs and other devices are the following:

. . . B. Devices whose purpose is to assist fire or law enforcement personnel. Examples include markers that identify

fire hydrant locations, signs that identify fire or water district boundaries, speed measurement pavement markings, small indicator lights to assist in enforcement of red light violations, **and photo enforcement systems**." MUTCD, pg. 67, ¶ 6B, (emphasis added).

Compliance with the MUTCD is not a prerequisite to enforcement of a violation of CVC 21453(a). Compliance is not an element required to be proven in the prima facie case by the prosecution, and is therefore not a mandatory element of the violation, but rather directory. *See, People v. Gray*, 58 Cal.4th 901 (2014), *City of Santa Monica v. Gonzales*, 43 Cal. 4th 905 (2008). It is clear from the language contained within the MUTCD that ATES is not considered a traffic control device subject to the requirements of the MUTCD. The only requirement that is imposed on the ATES as it relates to the MUTCD is found in CVC 21455.7, which states:

"(a) At an intersection at which there is an automated enforcement system in operation, the minimum yellow light change interval shall be established in accordance with the Traffic Manual of the Department of Transportation.

(b) For purposes of subdivision (a), the minimum yellow light change intervals relating to designated approach speeds provided

in the Traffic Manual of the Department of Transportation are mandatory minimum yellow light intervals.

(c) A yellow light change interval may exceed the minimum interval established pursuant to subdivision (a)."

MUTCD Section 4D.26 states:

"Standard:

14b The minimum yellow change interval shall be in accordance with Table 4D-102(CA). The posted speed limit, or the prima facie speed limit established by the California Vehicle Code (CVC) shall be used for determination of the minimum yellow change interval for the through traffic movement.

14c **The minimum yellow change interval for a protected left-turn or protected right-turn phase shall be 3.0 seconds**." MUTCD, pg. 886, ¶¶ 14b, 14c (emphasis added).

The photographs and video evidence considered and admitted by the court clearly show that Appellant was driving in the right most dedicated right turn lane as he was headed southbound and approaching SR91. (See, Motion to Augment, Exhibit 1). As is clear from the evidence before the trial court, Appellant drove through the red light without stopping and made a right turn from the number five lane, which is a solo dedicated right-turn-only lane.

Motion to Augment, Exhibit 1; RT, at pg. 6, lines 18-19, pg. 8, lines 4-7. As the Operator testified, the minimum yellow light for the right-turn-only lane is 3.0 seconds, but the yellow interval is actually set for 3.65, and is depicted on the photograph data bar. Motion to Augment, Exhibit 1; RT, at pg. 6, lines 19-22. Even the time measured by Appellant's witness on three different occasions indicated a yellow interval of 3.50 seconds, plus or minus .07 seconds at the most. RT, at pg. 19, line 18, pg. 20, lines 4-8, pg. 23, lines 24-26, pg. 24, lines 4-19, 26-28, pg. 25, lines 1-2. Even if the court only considered Stockwell's testimony as to the yellow time measured at the intersection, it still could not ignore the MUTCD standard which requires only a minimum of 3.0 seconds for a dedicated right-turn-only lane. There was no violation of the MUTCD as to the yellow time interval for the right-turn-only lane in which Appellant was driving when he made the right turn without stopping.

2. MUTCD Standards for Traffic Lights Do Not Apply to ATES; However, MUTCD Standards Were Still Met.

As discussed, *supra*, ATES red light cameras are not included in the MUTCD's definition of traffic control devices and traffic control signals, in Section 1A.13. Further, MUTCD Section 1A.08 Standard, ¶ 6B expressly excludes photo enforcement systems from the requirements of the traffic control devices. MUTCD, pg. 67, ¶ 6B.

Further, Appellant contends that CVC Section 21400 and Government Code Section 11340.9(h) were violated in the installation of the ATES at this intersection. CVC Section 21400 states: "the Department of Transportation shall, after consultation with local agencies and public hearings, adopt rules and regulations prescribing uniform standards and specifications for all official traffic control devices". As stated above, Section 1A.08 of the MUTCD which is issued by the CA DOT specifically provides that photo enforcement systems are not included within the definition of "traffic control device".

Government Code Section 11340.9(h) governs administrative regulations and specifically excludes "traffic control devices", which again does not include ATES.

Appellant argues that the ATES and stop light at the intersection violate the standards of MUTCD because a driver in the right hand turn lane has a more obstructed view of the signal and the ATES because the stop light is improperly installed. Despite the arguments at trial or in Appellant's brief, the testimony of Stockwell actually reflects that the traffic control signal face was properly installed.

Appellant contends that while the ATES camera located in the center median of the roadway has a "good view of the signal", a driver in the right hand turn lane has a more obstructed view because the "stop light" is aimed 20

degrees to the left. Again, as above, ATES is not subject to the MUTCD standards. However, even if it were, the standards were met here.

In support of his argument, Appellant cites MUTCD Section 4D.12, which states the "primary consideration in signal face placement, aiming, and adjustment shall be to optimize the visibility of signal indications to approaching traffic." Although this is an accurate reading of Section 4D.12, Appellant fails to address the fact that the photographic and video evidence submitted by both witnesses show that this stretch of roadway contains five lanes of traffic: four lanes proceeding straight for thru traffic, and a dedicated solo right-turn-only lane. All five lanes are controlled by the same two signal heads. There is no right turn exclusive signal face. Since there are only two signal lights controlling five lanes, the two signal heads must be visible to ALL lanes of oncoming traffic – not just the dedicated right turn lane in which Appellant was traveling.

The MUTCD allows for two signal heads irrespective of number of lanes controlled by those signal heads where the speed limit is less than 45mph (MUTCD Sections 4D.12 and 4D.11). The Operator testified that the posted speed limit on this stretch of roadway is 35 mph. RT, at pg. 6, lines 12-13.

MUTCD Section 4D.13 requires "one [signal head] making an angle of **approximately 20 degrees** to the right of the center of the approach extended,

and the other making an angle of **approximately 20 degrees** to the left of the center of the approach extended". MUTCD Section 4D.13. Based on the above, it is clear that the MUTCD contemplated and deemed acceptable that a driver may be required to adjust their line of sight to some degree to the left, right and/or even upwards as they progress toward the signal face. There was no violation of the MUTCD as to the signal or ATES as to positioning at the intersection of Tyler Street and SR91. There was no reversible error.

II. IT WAS NOT REVERSIBLE ERROR TO ADMIT THE VIDEO AND PHOTOGRAPHIC EVIDENCE BECAUSE IT WAS PROPER AND ADMISSIBLE.

A. Appellant Failed to Present Sufficient Evidence That The Photographs or Video Were Inaccurate or Unreliable to Shift the Burden of Presumption of Accuracy.

Courts review claims of evidentiary error for abuse of discretion. *People v. Dixon*, 153 Cal. App. 4th 985, 997 (2007). "Under [that] standard, 'a trial court's ruling will not be disturbed, and reversal of the judgment is not required, unless the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice.' [Citation.]" *People v. Hovarter*, 44 Cal. 4th 983, 1004, (2008).

California Evidence Code ("CEC") Sections 1552 and 1553 presumes that the data from the automated traffic enforcement system and the digital images it captured were "an accurate representation" of the information or images contained therein. Under these statutes, the burden of producing evidence casting doubt on the accuracy or reliability of the photographs and video fell on Appellant. Without sufficient material evidence of inaccuracy, the photographs were properly presumed to be accurate and authenticated. *Cal. Evid. Code* § 1553(a). The vehicle failed to stop and entered the intersection on a red light. There was no competent evidence to dispute this.

Appellant misapplies CEC Sections 1552 and 1553.

B. Appellant Misapplies CEC Sections 1552 and 1553 to the Positioning of the Signal Light and ATES.

California Evidence Code sections 1552(a) and 1553(a) establish evidentiary presumptions that printed representations of computer information and digital photographs and video are accurate representations of what they purport to represent. (*Cal. Evid. Code* §§ 1552(a), 1553(a).) The party opposing such evidence has the burden of producing evidence to cast doubt on the accuracy of such information, and no such evidence was introduced here. *People v. Daugherty*, 199 Cal. App. 4th Supp. 1 (2011). Much like in the *Doggett* case, the City presented unrefuted evidence as to when the photographs

were taken, where the photographs were taken, and that the defendant was the person driving the automobile depicted in the photographs. This showing was sufficient for their admission into evidence and was not an abuse of discretion.

The photos and video are captured at the exact moment of the events they depict; that is the very nature of photographic evidence. *People v. Cooper*, 148 Cal. App. 4th 731 (2007).

As is clear from the statute, the witness authenticating business records need not be the person who actually prepared the record. *People v. Remiro,* 89 Cal. App. 3d 809, 846 (1979); *People v. Williams,* 36 Cal. App. 3d 262, 275 (1972); *People v. Utter,* 24 Cal. App. 3d 535, 553 (1972) [overruled on unrelated grounds as stated in *People v. Morante,* 20 Cal. App. 4th 403, 421, fn. 10 (1999)]. That is the very purpose the qualified custodian serves: to obviate the need to call every organizational employee involved in the preparation of a business record. *People v. Williams*, 36 Cal. App. 3d at 275. Nor is it necessary that the authenticating witness be an employee of the recording business. *People v. Martinez*, 22 Cal. App. 4th 106, 132 (2000) [finding that county district attorney's paralegal was qualified, based on prior training and experience, to authenticate uncertified records prepared and maintained by the State Department of Justice]. Further, evidence prepared by electronic means may be authenticated by a trained and knowledgeable user, even though the

witness was not a computer expert and even though some of the operation steps necessary to produce the final records were taken by others. *People v. Lugashi,* 205 Cal. App. 3d 632, 640-641 (1988).

Appellant attempts to rebut the presumption by arguing that the images and video produced by the ATES are unreliable or inaccurate, not because of failures with the camera or computer, but because the placement and angle of the traffic control signal face do not comply with MUTCD requirements. This is an improper application of CEC Sections 1552 and 1553, and a misstatement of facts. These evidentiary presumptions go to the issue of authentication of printed representations of computer information, programs, images, or video. They provide for a rebuttable presumption of accuracy that what the computer or camera "saw" is what it produced. Issues regarding the placement and angles of the signal lights is a completely different issue and does not amount to evidence of inaccuracy or unreliability sufficient to shift the burden of presumption.

The California Supreme Court, in *People v. Goldsmith*, California Supreme Court No. S201443, slip op. June 5, 2014) refused to create a heightened standard for authentication of photographs and videos captured by ATES, and held:

"A photograph or video recording is typically authenticated by showing it is a fair and accurate representation of the scene depicted. (Citation) This foundation may, but need not be, supplied by the person taking the photograph or by a person who witnessed the event being recorded. (Citation) It may be supplied by other witness testimony, circumstantial evidence, content and location. (Citation) Authentication also may be established "by any other means provided by law" (Citation), including a statutory presumption. (Citation)

The People argue that sections 1552 and 1553 provide such a presumption of authenticity for ATES images and data. The People are correct that sections 1552 and 1553 are applicable here. These statutes' presumptions partly, but not completely, supply the foundation for admission of ATES evidence." *People v. Goldsmith*, No. S201443, slip op. at 9 (June 5, 2014) (internal citations omitted).

"We disagree that the testimony of a Redflex technician or other witness with special expertise in the operation and maintenance of the ATES computers was required as a prerequisite for authentication of the ATES evidence." *Id.*, at 15.

In the case at bar, the trial court heard testimony from the Operator as to the accuracy of the representation in the photographs and video of the intersection of Tyler Street and SR91 on October 26, 2012. RT, at pg. 6, lines 7-22, pg. 8, lines 4-7. Even without the presumptions in the CEC, the Operator provided expert testimony regarding the operation and maintenance of the ATES located at Tyler and SR 91. He explained that, the yellow light timing for the approach at issue is set at 3.65 seconds and that he and the other operators conduct routine inspections of the yellow light timing using stopwatches to ensure that the yellow light timing is what they expect it to be in addition to the monthly maintenance checks performed by Redflex technicians. RT, at pg. 13, lines 1-27.

The Court was also presented with separate and additional authenticating testimony of the co-custodian of records for Redflex which verified the statement of technology and attested that the photographs and video in the court packet are true and accurate copies of those captured by the ATES camera technology at the time of the violation. RT, at pg. 7, lines 9-19; Motion to Augment, Exhibit 1. There was more than enough evidence to authenticate the photographs and video captured by the ATES system.

C. Appellant Misapplies CEC 1552 and 1553 to the Yellow Light Timing.

Appellant has failed to provide sufficient evidence that the yellow light timing captured by the ATES was inaccurate or unreliable to shift the burden of proof to the prosecution.

The Appellant asserts that the trial court erred in denying Appellant's Motion *in limine*, and in admitting photographic and videotaped evidence, despite the foundation laid.

Appellant's witness claims to have visited the intersection twice before the incident on September 14, 2012, and September 17, 2012, and once after the incident on April 3, 2013, and took video clips with his iPhone. Appellant's violation occurred on October 26, 2012 – almost 6 weeks after Stockwell's first two visits to the intersection, and approximately 6 months before Stockwell's third visit.

However, the ATES computer and camera captures the actual yellow light timing specific to that specific red light violation in question, and that data captured automatically by the computer is in turn automatically imprinted on the data bar on the photographs. As the California Supreme Court held in *People v. Goldsmith*, "[w]e have long approved the substantive use of

photographs as essentially a "silent witness" to the content of the photographs. (*People v. Bowley* (1963) 59 Cal.2d 855, 860.) As we stated in Bowley, "[t]o hold otherwise would illogically limit the use of a device whose memory is without question more accurate and reliable than that of a human witness. It would exclude from evidence the chance picture of a crowd which on close examination shows the commission of a crime that was not seen by the photographer at the time. It would exclude from evidence pictures taken with a telescopic lens. It would exclude from evidence pictures taken by a camera set to go off when a building's door is opened at night. (Id., at p. 861.)" *Goldsmith*, No. S201443, slip op. at 8-9 (June 5, 2014).

Appellant offered his purported expert's video clips captured by his iPhone 4S and downloaded to Windows Movie Maker alleged to have been taken before and after the event at issue in this case which he alleged reflected a yellow light time of 3.5 seconds with an error rate of plus or minus 0.07 seconds. The error rate was apparently calculated based on the fact that the iPhone 4s specifications indicate that video clips are recorded at 30 fps. RT, at pg. 18, lines 11-21, 28, pg. 19, lines 1-18. The testimony simply stated that using the Windows Movie Maker software, Stockwell was able to get a "time index" (which may have been a time counter of sorts, but was never explained), and from that, "was able to tell what the timing [of the yellow light] was within

plus or minus seven milliseconds." RT, at pg. 19, lines 12-18. Later, Stockwell stated that using the "time index" on the program to which the iPhone video was downloaded, Stockwell testified that the yellow time interval was consistently measured at 3.5 seconds with an error rate of .07 seconds. RT, at pg. 20, lines 7-8, and pg. 23, lines 24-25, pg. 24, lines 18-19. This purported expert interchangeably used "seven milliseconds" and "0.7 seconds" throughout his testimony, which is mathematically incorrect. If anything, the testimony of the purported expert witness evidences a tendency for inaccuracy, as opposed to the ATES computer technology which captured the yellow time intervals, the digital photographs, and the digital video.

It is of note that Appellant's witness never testified that the yellow light timing for the dedicated right-turn-only lane was below the 3.0 second minimum as stated in the MUTCD. As such, Appellant failed to shift the burden of presumption under the Evidence Code which would require Respondent to prove by a preponderance of the evidence the accuracy or reliability of the photographs or video. The court correctly admitted the photographic and video depiction of the Appellant's violation into evidence.

D. The Trial Court Did Not Abuse Its Discretion in Admitting the Photographic and Videotaped Evidence Over Appellant's Hearsay Objection Because They Were Not Hearsay.

Photographs are demonstrative evidence depicting what the camera sees. California courts routinely admit photographic and videotaped evidence that establish guilt beyond a reasonable doubt. In *People v. Doggett*, 83 Cal. App. 2d 405 (1948), the only evidence of a crime was a photograph. In this case, the photograph was admitted even though no human witness testified that it accurately depicted what it purported to show. The Court nonetheless found that evidence as to when the photograph was taken, the place the photograph was taken, and that the defendants were the persons shown in the photographs was sufficient to establish a foundation for the photograph's admissibility.

The Court, in *Goldsmith*, found "no legal ground for adopting heightened evidentiary requirements for infractions, specifically one type of alleged infraction — traffic violations in red light camera cases." *Goldsmith*, No. S201443, slip op. at 20 (June 5, 2014).

The *Goldsmith* court held that because CEC Section 1200 defines hearsay 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." (§ 1200, subd. (a), italics added.) A statement, in turn, is defined as an "oral or written verbal expression or . . . nonverbal conduct of a person intended by him as a substitute for oral or written verbal expression." (§ 225, italics added.) "'Person' includes a natural person, firm, association, organization, partnership, business trust, corporation, limited liability company, or public entity." (§ 175.)" *Id.*, at 18.

ATES-captured video and photographic evidence offered as substantive evidence of Appellant's violation of CVC 21453(a) are not statements of persons as defined above.

> "'Therefore, they do not constitute hearsay as statutorily defined. (§ 1200, subd. (a).) Because the computer controlling the ATES digital camera automatically generates and imprints data information on the photographic image, there is similarly no statement being made by a person regarding the data information so recorded. Simply put, "[t]he Evidence Code does not contemplate that a machine can make a statement." (Citations).
>
> Our conclusion that the ATES evidence does not constitute hearsay is confirmed by recent legislative action

> intended to clarify the non-hearsay status of ATES evidence. (Assem. Com. on Judiciary, Analysis of Sen. Bill No. 1303 (2011-2012 Reg. Sess.), *supra*, p. 14.) As amended in 2012, Vehicle Code section 21455.5, subdivision (e), now specifically provides that "[t]he printed representation of computer-generated information, video, or photographic images stored by an automated traffic enforcement system does *not* constitute an out-of-court hearsay statement by a declarant under Division 10 (commencing with Section 1200) of the Evidence Code.'" *Goldsmith*, No. S201443, slip op. at 18-19 (June 5, 2014).

The factual basis of the conviction is the photographic and videotaped evidence. A camera, or a computer, has no motivation to question – neither have the capacity to act with any sort of purposeful intent with which a person who "asserts" or "declares" a statement to be true acts. *People v. Hawkins*, 98 Cal. App. 4th 1428, 1449 (2002). Both devices have a memory that "is without question and more accurate and reliable than that or a human witness." *People v. Bowley*, 59 Cal. 2d 855, 861 (1963); *People v. Hawkins*, 98 Cal. App. 4th at p. 1449; *Cal. Evid. Code* sections 1552, 1553. As *Hawkins* made clear, a device is fundamentally incapable of making a "statement." The trial court did not commit error in admitting the video and photographic evidence at trial.

E. There Was No Brady Violation Because The Video and Photographic Evidence Were Inculpatory And Therefore *Brady* Did Not Apply.

Under *Brady v. Maryland*, 373 U.S. 83 (1963), there is a duty upon the prosecution to disclose all known exculpatory evidence favorable to the accused "where the evidence is material to either guilt or to punishment." *Brady v. Maryland*, 373 U.S. 83, 88 (1963).

Appellant argues that because the video captured by the ATES which was presented against him at trial was not voluntarily made available to him online, that a *Brady* violation occurred. It is undisputed that the video and photographic evidence was material as to the guilt or punishment of Appellant as to a violation of CVC 21453(a). However, all of this evidence was inculpatory and tended to show his guilt, and was not at all remotely exculpatory. As discussed above, the photographs and video depicted Appellant failing to stop at a red light, and entering an intersection against a red light to make a right turn. There was nothing about the photographs or video evidence that was favorable to Appellant in any way. There was no *Brady* violation.

Furthermore, while Appellant had every opportunity since receiving his citation for the October 26, 2012, violation of CVC 21453(a), he has not once requested any sort of discovery as to any evidence or possible witnesses that

might be presented against him at trial. Instead, Appellant has opted to sit on his heels and wait until trial to argue a motion *in limine* on faulty grounds. Had Appellant requested the video or photographs pursuant to subpoena or informal discovery as permitted by statute, it would have been provided to him. However, no request was ever made and Appellant cannot now claim that the fact that this video evidence was not automatically provided to him online somehow constituted a *Brady* violation. This is simply erroneous and flawed logic.

Brady does not impose upon the prosecution a duty to provide all inculpatory evidence without request. This is simply not the law. There was no *Brady* violation in this case and the Motion *in limine* was properly denied as to this basis.

CONCLUSION

For the foregoing reasons, Respondent respectfully submits that the judgment of the trial court should not be disturbed and should be affirmed on appeal.

DATED: June 6, 2014

Respectfully submitted,

By: _____/s/_____
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