Filed 1/13/15 **Opinion on remand from Supreme Court**

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE,

Plaintiff and Respondent,

v.

ANNETTE BORZAKIAN,

Defendant and Appellant.

B229748

(Los Angeles County
Super. Ct. No. BI20734)

APPEAL from a judgment of the Superior Court of Los Angeles County. Carol J. Hallowitz, Commissioner. Affirmed.

Annette Borzakian, in pro. per., for Defendant and Appellant.

Dapeer, Rosenblit & Litvak, William Litvak and Caroline K. Castillo for Plaintiff and Respondent.

Sheppard, Mullin, Richter & Hampton, Michael D. Stewart, Gregory P. Barbee and John M. Hynes; City of Santa Ana City Attorney's Office, Joseph Straka, Jose Sandoval and Melissa M. Crosthwaite, as Amici Curiae for Plaintiff and Respondent People of the State of California.

Wilson, Elser, Moskowitz, Edelman & Dicker and Robert Cooper, as Amicus Curiae for Defendant and Appellant Annette Borzakian.

Law Offices of Joseph W. Singleton and Joseph W. Singleton as Amicus Curiae for Defendant and Appellant Annette Borzakian (representing Michel Rabiean).

INTRODUCTION

Annette Borzakian appeals from her conviction for failure to stop at a red traffic light at an intersection equipped with an automated traffic enforcement system (ATES). (Veh. Code, §§ 21453, subd. (a), 21455.5.) In our prior opinion filed on January 23, 2012, we found the trial court had erred in admitting the evidence against Borzakian and reversed her conviction. Shortly thereafter, in a similar appeal of a red light camera violation, Division Three of this district affirmed the motorist's conviction, and our Supreme Court then granted review in both cases (*People v. Goldsmith*, review granted, May 9, 2012, S201443; *People v. Borzakian* (2012) 203 Cal.App.4th 525, review granted May 9, 2012, S201474), with further action in this matter deferred pending consideration and disposition of the related issue in *People v. Goldsmith*.

The California Supreme Court has now decided *People v. Goldsmith* (2014) 59 Cal.4th 258 (*Goldsmith*) and transferred the matter to this court, with directions to vacate our prior decision and reconsider the cause in light of *Goldsmith, supra,* 59 Cal.4th 258. Upon remand, Borzakian filed a supplemental brief, arguing that *Goldsmith* does not compel a different result, while the People contend *Goldsmith* fully disposes of the questions raised in this appeal. In light of *Goldsmith*, we now affirm.

FACTUAL AND PROCEDURAL SUMMARY

Annette Borzakian was cited for failing to stop at a red light at the intersection of Beverly Drive and Wilshire Boulevard in the City of Beverly Hills on June 3, 2009, in violation of Vehicle Code section 21453, subdivision (a).[1] Her citation (entitled "Traffic Notice to Appear[—]Automated Traffic Enforcement System") indicated the violation

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[1] Vehicle Code section 21453, subdivision (a), provides: "A driver facing a steady circular red signal alone shall stop at a marked limit line, but if none, before entering the crosswalk on the near side of the intersection or, if none, then before entering the intersection, and shall remain stopped until an indication to proceed is shown, except as provided in subdivision (b) [permitting a right turn (or left turn where turning from a one-way to a one-way street) after stop where no sign prohibits such a turn]."

was not committed in the presence of the declarant identified on the citation (C. Williams), but rather was "based on photographic evidence." (See Veh. Code, § 21455.5.)[2]

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[2] As relevant, Vehicle Code section 21455.5 provides:

"(a) The limit line[or] the intersection . . . where a driver is required to stop, may be equipped with an automated enforcement system if the governmental agency utilizing the system meets all of the following requirements:

"(1) Identifies the system by signs that clearly indicate the system's presence and are visible to traffic approaching from all directions, or posts signs at all major entrances to the city, including, at a minimum, freeways, bridges, and state highway routes.

"(2) If it locates the system at an intersection, and ensures that the system meets the criteria specified in Section 21455.7 [('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,' and '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.')].

"(b) Prior to issuing citations under this section, a local jurisdiction utilizing an automated traffic enforcement system shall commence a program to issue only warning notices for 30 days. The local jurisdiction shall also make a public announcement of the automated traffic enforcement system at least 30 days prior to the commencement of the enforcement program.

"(c) Only a governmental agency, in cooperation with a law enforcement agency, may operate an automated enforcement system. As used in this subdivision, 'operate' includes all of the following activities:

"(1) Developing uniform guidelines for screening and issuing violations and for the processing and storage of confidential information, and establishing procedures to ensure compliance with those guidelines.

"(2) Performing administrative functions and day-to-day functions, including, but not limited to, all of the following:

Borzakian's trial on this infraction took place on January 21, 2010, before Commissioner Carol J. Hallowitz. The People's case was presented through the testimony of Officer Mike Butkus of the Beverly Hills Police Department and the automated enforcement evidence, comprised of three digital photographs with data box text, maintenance logs, a certificate of mailing and notice to appear. No prosecutor was present. Borzakian (representing herself) moved to exclude the People's evidence but was unsuccessful; she cross-examined Officer Butkus but did not testify on her own behalf.

Borzakian was found guilty of violating Vehicle Code section 21453, subdivision (a), and ordered to pay a fine in the amount of $435 and to attend a 12-hour traffic school.

On January 26, Borzakian filed a notice of appeal, indicating she wished to proceed with a record of the oral proceedings in the trial court in the form of a statement

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"(A) Establishing guidelines for selection of location.

"(B) Ensuring that the equipment is regularly inspected.

"(C) Certifying that the equipment is properly installed and calibrated, and is operating properly.

"(D) Regularly inspecting and maintaining warning signs placed under paragraph (1) of subdivision (a).

"(E) Overseeing the establishment or change of signal phases and the timing thereof.

"(F) Maintaining controls necessary to assure that only those citations that have been reviewed and approved by law enforcement are delivered to violators.

"(d) The activities listed in subdivision (c) that relate to the operation of the system may be contracted out by the governmental agency, if it maintains overall control and supervision of the system. However, the activities listed in paragraph (1) of, and subparagraphs (A), (D), (E), and (F) of paragraph (2) of, subdivision (c) may not be contracted out to the manufacturer or supplier of the automated enforcement system."

on appeal.[3] On February 11, she timely filed her proposed statement on appeal, indicating she had objected to and requested the exclusion of the People's evidence for lack of foundation, hearsay and violation of *Melendez-Diaz v. Massachusetts* (2009) 557 U.S. 305 [174 L. Ed. 2d 314, 129 S.Ct. 2527], and without this evidence there was insufficient evidence supporting the judgment.

In her proposed statement, Borzakian submitted the following summary of Officer Butkus's initial testimony with respect to all trials scheduled that day (as bullet points): Officer Butkus "testified that he was employed by the Beverly Hills Police Department[; h]e had been so employed for 25 years[; h]e had 5 years experience in photo enforcement[; h]e had undertaken 40 hours of training in photo enforcement[; h]e reviewed the photos [and] videos and determined whether a citation should issue[; h]e testified [to] Vehicle Code section requirements, including each element that was necessary for the People to prove their case[; r]egarding the requirement that the equipment be calibrated and maintained regularly, he stated that the Beverly Hills Police Department contracts with a [c]ompany called Red[]flex Systems[and t]hat they are in charge of maintaining and servicing the equipment used for photo enforcement[; h]e testified briefly regarding the triggering mechanism which causes the camera to take pictures and video[; and h]e took questions from the audience seated in court." Borzakian also set out her argument of her motion in limine, objecting to the People's exhibit on foundation and hearsay grounds as well as violation of her right of confrontation under *Melendez-Diaz v. Massachusetts, supra*, 557 U.S. 305 [129 S.Ct.

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[3] "In contrast to felony appeals, in which a verbatim reporter's transcript of most of the oral proceedings is part of the normal record on appeal (see [Cal. Rules of Court, rule] 8.320(b)) and the settled statement is rarely necessary, appeals in misdemeanor and infraction cases are routinely heard on statements on appeal." (Appeals and Writs in Criminal Cases (Cont.Ed.Bar 3d ed. 2011) Procedural Aspects of Appellate Representation, § 3.17, pp. 125–126.) "A statement on appeal is a summary of the trial court proceedings that is approved by the trial court." (Rule 8.916(a) [all further rule references are to the California Rules of Court].)

2527], and included her cross-examination of Officer Butkus in question-and-answer format.

Borzakian said the officer did not testify to qualifications to lay a foundation for the exhibits he wished to enter, citing evidence including the following testimony: A company by the name of Redflex Traffic Systems prepared the job maintenance sheet which contained the description of maintenance and the party responsible for maintaining and calibrating the equipment which caused the photographs and video to be recorded; Officer Butkus was not employed by Redflex nor was he its custodian of records; he did not perform the maintenance or calibration of the machines himself; he was not present when the calibration was performed; he did not inspect the photo enforcement unit in this case; he was not present when the inspection was supposed to have taken place; it was not part of his job duties to inspect or to calibrate the photo enforcement unit; he did not take the photos or video in the case and was not present when they were taken; he had no independent knowledge that the information on the maintenance log was true and accurate; he was only reading what was written; his testimony was based "not on [his] observation but on this sheet of paper."

Borzakian argued Officer Butkus was not qualified to authenticate the People's evidence. "Underlying all this [evidence] are the maintenance logs," but Officer Butkus was not able to lay a foundation as he was not the individual who made or kept the records. "Without the maintenance log there is no evidence that the camera and video were working properly." "The officer himself stated that the logs were a necessary element of the People's case in chief showing that the equipment was regularly inspected, correctly installed and calibrated, and operating properly," but failed to lay the necessary foundation for this evidence with the Redflex custodian of records or the person who calibrated and inspected the machines, and it should have been excluded. "Furthermore, the Court placed the burden on the Defendant," by telling her that "instead of complaining that the custodian of records was not present in court, she should have

subpoenaed the witness herself."

On February 22, the trial court filed its "Order Concerning Appellant's Proposed Statement on Appeal." According to the "[s]ummary of [t]estimony" in the trial court's (proposed and ultimately certified) settled statement (CR-144), "Officer Mike Butkus of the Beverly Hills Police Department was sworn and testified.[4] His initial testimony was in the form of a presentation to all of the motorists in court that morning for red light camera ticket trials. He testified about his background, training, and experience, what the City had to do before being allowed to operate the red light camera ticket system, how the system works and how it is maintained. Everyone, including [Borzakian], was given a packet containing two or more photographs of their alleged violation, maintenance logs for before and after their citation was issued and other documents relating to their citation. Officer Butkus testified about the data boxes imprinted on the photographs and the letters and numbers contained in them. He explained what the letters and numbers mean, how they are generated and how they relate to the citation. During his testimony he used blown-up photographs for purposes of demonstration and urged everyone, including [Borzakian], to follow his testimony on their own photographs so they could see how this testimony related to their own citation.

"Once Officer Butkus completed his initial testimony, motorists were called up individually for the balance of their trial. When [Borzakian] came forward she indicated that she understood the charge in her citation and that she was ready for the balance of her trial. However, she did want to make an oral Motion in Limine to exclude the People's evidence. The Court allowed [Borzakian] to make the motion [on the grounds of lack of foundation and hearsay, citing *Melendez-Diaz v. Massachusetts*, *supra*, 557 U.S. 305 [129 S.Ct. 2527] in support of her position] and subsequently denied it.

"With respect to [Borzakian's] citation, Officer Butkus testified that her alleged

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4 There was no court reporter, court recorder or other official recording of the proceedings.

violation occurred at approximately 7:08 p.m. on Wednesday, June 03, 2009, as [Borzakian] travelled northbound on Beverly Drive in the number two lane at Wilshire Boulevard in the City of Beverly Hills. Officer Butkus further testified that he reviewed the technicians' logs and that the cameras were working properly on the date and at the time of [Borzakian's] alleged violation. Officer Butkus stated that he also reviewed the video and the photographs taken by the cameras installed at the particular intersection and concluded that the light had been yellow for 3.15 seconds before it turned red which is legally sufficient when the speed limit is 25 miles per hour as it is at this intersection. The officer also testified that the light had been red for .28 seconds when [Borzakian] traversed the limit line at a speed of 29 miles per hour. He also testified that the photograph of the driver appeared to be a photograph of [Borzakian]. He then played the video of the alleged violation two times: first in real time and then again in slow motion. [Borzakian] confirmed that she did see the video both times. The photographs and documents that supported Officer Butkus'[s] testimony were marked as People's #1 for identification and offered into evidence.

"[Borzakian] objected to the introduction of People's #1 into evidence on the same grounds she had argued with respect to her Motion in Limine. She asked to take Officer Butkus on voir dire and was allowed to do so. [T]here was no official recording of the proceedings, so the Court can[]not explain how [Borzakian] purports to be reproducing a verbatim account of what was said. Without an explanation for this from [Borzakian], the Court suspects [she] either surreptitiously recorded the proceedings in violation of California Rule of Court 1.150(d) or that she is simply making things up and using quotation marks to make the statements appear authentic.[5] Once again, the Court

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5 "The judge may permit inconspicuous personal recording devices to be used by persons in a courtroom to make sound recordings as personal notes of the proceedings. A person proposing to use a recording device must obtain advance permission from the judge. The recordings must not be used for any purpose other than as personal notes." (Cal. Rules of Court, rule 1.150(d).)

rejected [Borzakian's] arguments, found there was sufficient foundation laid by the testimony of Officer Butkus to admit the evidence, and that the *Melendez-Diaz* case was distinguishable and inapplicable to the case at bar. People's [Exhibit] #1 was then admitted into evidence over [Borzakian's] objection." As "Additional Points," the court noted, "The court did explain to [Borzakian] that the testimony of employees of Redflex is not required in order to authenticate and lay the foundation for the admissibility of the People's exhibits. The People have never been required to have Redflex employees such as the custodian of records or the field service technicians present in court in order for the People's exhibits to be admissible. Officer Butkus is perfectly capable of authenticating the documents and laying the necessary foundation for their admissibility and in the Court's opinion had done both in this matter. It was explained to [Borzakian] that she could have filed a discovery motion or issued her own subpoenas, as many motorists do, had she cared to do so."

On March 2, Borzakian filed her objection to the court's order and requested a hearing before a court reporter, asserting "a factual dispute about material aspect[s] of the trial proceeding." Citing *People v. Jenkins* (1976) 55 Cal.App.3d Supp. 55 [127 Cal. Rptr. 870], she said the court's proposed statement was a prohibited "conclusionary statement" and did not comply with the duty to set forth the evidence "'fairly and truly.'" In particular, she said, "the dialogue of the voir dire [of Officer Butkus] is an essential part of the trial record," but the "Proposed Statement makes no mention of the testimony of Officer Butkus admitting that he did not work for Redflex, that he is not employed by them, that he was not the custodian of records for them, that he did not inspect the photo enforcement unit in this case, that he was not there when the inspection was purportedly done, that it was not a part of his job duty to inspect or calibrate the unit, that he did not prepare the logs that he sought to admit, that he did not make the entries in the maintenance log, that the person who made the entries did not work at the Beverly Hills Police Department, that [Officer Butkus] did not calibrate[] the machines, that he does

not know the qualifications of the person who inspected the machine, that he was not present when the photos were taken, that he did not take the photos, etc." Borzakian said she had taken "great care to create this record during trial" as her motion in limine was "read from written form prepared before trial" so she was able to provide a record of it and she "recorded … Officer Butkus's responses contemporaneously in her notes, which contained each question[] she asked in Court."

Further, she said, the court's proposed statement did not include the specifics of the People's evidence which she had sought to exclude, a "necessary element of the [a]ppeal." "The officer sought to admit photographs, maintenance logs prepared by an Australian company and [v]ideo taken by the video maintained by the Australian company.[6] These are critical facts that are omitted from the Court's Proposed Statement. There is not one mention of the fact that the officer testified that the cameras and the video recorder were maintained by an Australian company and not the Beverly Hills Police Department. There is no mention of the fact that the officer admitted to not being the custodian of records for the Australian company who prepared the maintenance logs. This is the basis for [my] appeal. Without these facts, the record before the Appellate Court will be inaccurate and prejudicial to [me]."

On March 3, the trial court filed its response, overruling Borzakian's objection, denying her request for a hearing before a court reporter, and certified the court's previously submitted statement on form CR-144 and dated February 22, 2010, as a complete and accurate summary of trial court proceedings in the matter.

The Appellate Division of the Los Angeles Superior Court affirmed the trial court's decision.

Borzakian then filed a petition to transfer the case to this court "to secure uniformity of opinion or to settle an important question of law," citing the decision in

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6 The record on appeal does not contain any video evidence. In her opening brief, Borzakian says the online video was not preserved for appeal.

People v. Khaled (2010) 186 Cal.App.4th Supp. 1 [113 Cal. Rptr. 3d 796] (*Khaled*) in which the Appellate Division of the Orange County Superior Court reversed a conviction in a "photo enforcement" citation trial "on the exact same facts."

On January 5, 2011, we granted Borzakian's petition. (Cal. Rules of Court, rule 8.1002.)

DISCUSSION

Like the cited motorist in *Goldsmith,* Borzakian argues the trial court erred in admitting the ATES photographic and video evidence over her foundation and hearsay objections. For the reasons addressed in *Goldsmith, supra,* 59 Cal.App.4th 258, Borzakian's argument fails.

ATES Evidence and the Standard of Review.

Photographs and video recordings with imprinted data are "writings" within the meaning of the Evidence Code. (*Goldsmith, supra,* 59 Cal.4th at p. 266, citing Evid. Code, § 250 [all further statutory references are to the Evidence Code unless otherwise indicated].) To be admissible, a writing must be relevant and authenticated (§§ 305, 1401); it must be an original or otherwise admissible secondary evidence of the writing's content (§§ 1520, 1521); and it must not be subject to any exclusionary rule. (*Goldsmith, supra,* 59 Cal.4th at p. 266.)

We review challenges such as Borzakian's to a trial court's ruling on the admissibility of evidence for an abuse of discretion, and we will not disturb the trial court's ruling "'except on a showing the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice.' [Citation.]" (*Goldsmith, supra,* 59 Cal.4th at p. 266.)

The Trial Court Did Not Err in Rejecting Borzakian's Objection to the ATES Evidence for Lack of Foundation.

"Authentication" 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" or "the establishment of such facts by any other means provided by law." (§ 1400.) The

"proof that is necessary to authenticate a photograph or video recording varies with the nature of the evidence that the photograph or video recording is being offered to prove and with the degree of possibility of error." (*Goldsmith, supra*, 59 Cal.4th at p. 267.) Here, just as in *Goldsmith,* the ATES evidence was "offered to show what occurred at a particular intersection in [a particular city] on a particular date and time when the traffic signal at the intersection was in its red phase. The ATES evidence was offered as substantive proof of defendant's violation, not as demonstrative evidence supporting the testimony of a percipient witness to her alleged violation." (*Ibid.*)

Ordinarily, a photograph or video recording is authenticated "by showing it is a fair and accurate representation of the scene depicted. [Citations.]" (*Goldsmith, supra*, 59 Cal.4th at p. 267.) This foundation may—but need not be—supplied by the photographer or by a person who witnessed the event being recorded; in addition, authentication "may be supplied by other witness testimony, circumstantial evidence, content and location" and "also may be established 'by any other means provided by law' (§ 1400), including a statutory presumption. [Citation.]" (*Goldsmith, supra,* 59 Cal.4th at p. 268.)

Here, as in *Goldsmith,* the People argue sections 1552 and 1553 provide such a presumption of authenticity for ATES images and data. Under *Goldsmith, supra*, 59 Cal.4th 258, these statutory presumptions "partly, but not completely, supply the foundation for admission of ATES evidence." (*Id.* at p. 268.)

As relevant here, subdivision (a) of section 1553 provides that "[a] printed representation of images stored on a video or digital medium is presumed to be an accurate representation of the images it purports to represent. . . . If a party to an action introduces evidence that a printed representation of images stored on a video or digital medium is inaccurate or unreliable, the party introducing the printed representation into evidence has the burden of proving, by a preponderance of evidence, that the printed representation is an accurate representation of the existence and content of the images that it purports to represent." Similarly, subdivision (a) of section 1552 provides such a

presumption for "[a] printed representation of computer information or a computer program."[7] As the *Goldsmith* court noted, in 2012, the Legislature added a subdivision (b) to both statutes "to expressly clarify the applicability of the statutes to printed representations of video or photographic images stored by an ATES and printed representations of computer-generated information stored by an ATES. (§§ 1552, subd. (b) ['Subdivision (a) applies to the printed representation of computer-generated information stored by an automated traffic enforcement system.'], 1553, subd. (b) ['Subdivision (a) applies to the printed representation of video or photographic images stored by an automated traffic enforcement system.']; [citations].)"[8] (59 Cal.4th at p. 268, fn. omitted.)

"Because sections 1552 and 1553 provide a presumption for both 'the existence and content' of computer information and digital images that the printed versions purport to represent (§§ 1552, subd. (a), 1553, subd. (a)), the presumptions operate to establish, at least preliminarily, that errors in content have *not* been introduced in the course of printing the images and accompanying data." (*Goldsmith, supra*, 59 Cal.4th at p. 269, italics added; and see *People v. Hawkins* (2002) 98 Cal.App.4th 1428, 1450 ["the

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[7] "Sections 1552 and 1553 were added to the Evidence Code as part of the 1998 legislation that repealed the best evidence rule (former § 1500) and adopted the secondary evidence rule (§§ 1520-1523; Stats. 1998, ch. 100, §§ 4, 5, pp. 634-635.)[] Under the secondary evidence rule, the content of a writing may now be proved either 'by an otherwise admissible original' (§ 1520) or by 'otherwise admissible secondary evidence' (§ 1521, subd. (a); see *People v. Skiles* [(2011)] 51 Cal.4th [1178,] 1187). Sections 1552 and 1553 permit the writings that they describe to be introduced as secondary evidence. Thus, the presumptions in sections 1552 and 1553 eliminate the basis for any objection that a printed version of the described writings is not the 'original' writing." (*Goldsmith, supra*, 59 Cal.4th at p. 269; and see *People v. Skiles, supra,* 51 Cal.4th at p. 1187 ["to be 'otherwise admissible,' secondary evidence must be authenticated"].)

[8] "Because the statutes were intended to be declarative of existing law," the *Goldsmith* court found no question of retroactive application was presented. (*Goldsmith, supra,* 59 Cal.4th at p. 269, fn. 2.)

presumptions essentially operate to establish that 'a computer's print function has worked properly"].) As applicable here, just as in *Goldsmith*, "the presumptions provided by sections 1552 and 1553 support a finding, *in the absence of contrary evidence*, that the printed versions of ATES images and data are accurate representations of the images and data stored in the ATES equipment."[9] (*Goldsmith, supra,* 59 Cal.4th at p. 269, italics added.)

The *Goldsmith* court emphasized "the presumptions in sections 1552 and 1553 do not in themselves fully supply the necessary foundation for admission of ATES evidence." (59 Cal.4th at p. 271.) Authentication is still required. (*Ibid.*, citing *People v. Skiles, supra,* 51 Cal.4th at p. 1187; and see § 1401, subd. (b) ["Authentication of a writing is required before secondary evidence of its content may be received in evidence."].) However, in *Goldsmith*, the testimony of a single witness (an investigator with the Inglewood Police Department) was sufficient—even though the City's ATES

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9 "The rebuttable presumptions set forth in sections 1552 and 1553 affect the burden of producing evidence regarding a preliminary fact necessary for the admission of evidence. As their presumptions affect the admissibility of the described writings when offered by any party, but do not require any weight to be given to the evidence if admitted, sections 1552 and 1553 do not reduce the prosecution's burden of proof to show defendant's violation beyond a reasonable doubt." (*Goldsmith, supra,* 59 Cal.4th at p. 270.)

We note that, in *Goldsmith,* our Supreme Court also addressed the claim traffic court defendants "appear almost universally in propria persona and . . . they lack the motive, means, or opportunity to engage in discovery prior to trial or to spend thousands of dollars on expert fees" so the presumptions stated in sections 1552 and 1553 deny traffic court defendants a fair opportunity to "repel" the presumptions. The court responded, "We will not speculate that traffic defendants lack motivation to contest their tickets. And, contrary to defendant's claim, traffic defendants have sufficient means and opportunity to contest their alleged violation because individuals charged with infractions are accorded the same rights as individuals charged with misdemeanors to subpoena witnesses and documents, to present testimony and other evidence, and to cross-examine the prosecution's witnesses." (*Goldsmith, supra*, 59 Cal.4th at p. 270, fn. 5, citing Pen. Code, § 19.7 ["Except as otherwise provided by law, all provisions of law relating to misdemeanors shall apply to infractions … ."].)

was maintained by Redflex Traffic Systems, Inc. (Redflex), just as in this case. Like Borzakian, Goldsmith argued "it was necessary for the prosecution as part of its foundational showing to additionally present the testimony of a Redflex technician regarding the operation and maintenance of the system that generated the ATES evidence . . . ." (*Id.* at p. 272.) Our Supreme Court expressly rejected the argument. "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." (*Ibid.*) "Contrary to [Goldsmith]'s assertion," the court observed, "the record contains no evidence that the ATES evidence was materially altered, enhanced, edited or otherwise changed; rather it consisted of entirely automatically produced photos and video and contemporaneously recorded data. No elaborate showing of accuracy is required. (See 2 [Broun,] McCormick [on Evidence (7th ed. 2013)] § 227, p. 111 [accuracy of an individual computer's basic operations will not be scrutinized unless specifically challenged, and even perceived errors go to the weight of the evidence, not its admissibility].) We decline to require a greater showing of authentication for the admissibility of digital images merely because in theory they can be manipulated. [Citation.]" (*Goldsmith, supra,* 59 Cal.4th at p. 272.)

In *Goldsmith,* the court determined the police investigator's testimony was adequate to show the ATES photographs were from Inglewood's ATES equipment at the particular intersection where the defendant motorist's violation had occurred. (59 Cal.4th at p. 271.) "From his explanation regarding the independent operation of the ATES camera system, it can be reasonably inferred that the ATES system automatically and contemporaneously recorded the images of the intersection and the data imprinted on the photographs when it was triggered." (*Ibid.*) The *Goldsmith* court noted that the investigator "was asked when the 'photo system' was last calibrated" and "answered that 'there is no calibration of this [photo] system.'" (*Id.* at p. 271, fn. 6.) The motorist argued such testimony revealed Inglewood's "failure to comply with the statutory

requirements that the ATES equipment be regularly inspected and certified to have been properly installed and calibrated and to be operating properly. (Veh. Code, § 21455.5, subds. (c)(2)(B), (C), (d).)" (*Goldsmith, supra,* 59 Cal.4th at p. 271, fn. 6.) Rejecting the argument, our Supreme Court stated: "In context, it appears [the investigator] understood that question and the followup question regarding calibration to ask only about the connection between the ATES camera and the traffic signal. He responded that the systems operate independently and that the only connection is an electrical connection that lets the camera know that the light is in its red phase." (*Ibid.*) The court noted defense counsel "did not clarify or pose further followup questions regarding calibration of the ATES system" and "did not ask any questions concerning Inglewood's or the police department's *oversight* of Redflex's maintenance and certification of the installed ATES equipment at this intersection." (*Ibid.*, italics added; *id.* at p. 271 [the investigator "was not asked anything about the city's or the police department's records or supervision of Redflex's maintenance or certification of the equipment"].)

The *Goldsmith* court emphasized that the defendant motorist did not argue the police investigator's testimony was "insufficient to demonstrate that the evidence was properly *received* in the normal course and manner of Inglewood's operation of its ATES program." (59 Cal.4th at p. 271, italics added; see *Grail Semiconductor, Inc. v. Mitsubishi Electric & Electronics USA, Inc.* (2014) 225 Cal.App.4th 786, 797-798 [foundational evidence need not be presented by custodian of record or employee who personally prepared it for admission of exhibit as business record under section 1271].) Moreover, the *Goldsmith* court observed, "the content of the photographs themselves may be considered and here the content supplied further support for a finding that the images were genuine." (*Goldsmith, supra,* 59 Cal.4th at p. 271.) "Specifically, given [the police investigator]'s testimony regarding how the ATES system operates, the fact that in this case it produced a photograph showing defendant driving her vehicle at or before the limit line with the signal light in its red phase and then another photograph of defendant driving her vehicle in the intersection with the signal light in its red phase, as

well as a 12-second video showing defendant's vehicle crossing the intersection and the transition of the traffic signal light phases, including a four-second yellow light, is circumstantial evidence that the system was working properly." (*Id.* at p. 271, fn. 7.) On the record presented, the *Goldsmith* court concluded that, "in conjunction with the operation of the presumptions of sections 1552 and 1553, sufficient evidence was submitted to the court to sustain a finding (§ 403, subd. (a)(3)) that the ATES evidence 'is the writing that the [prosecution] claim[ed] it is' (§ 1400) and the trial court properly exercised its discretion to admit the evidence." (59 Cal.4th at p. 272.)

Here, Borzakian argues Officer Butkus's testimony was inadequate to authenticate the ATES evidence because he admitted the system was maintained by Redflex, he admitted he was not an employee of or custodian of records for Reflex who prepared the maintenance log and "[w]ithout the maintenance log there is no evidence that the camera and video were working properly." Under *Goldsmith*, *supra*, 59 Cal.4th 258, on this record and in the absence of any evidence the ATES was materially altered in any way, Borzakian's argument is unavailing.[10] (*Id.* at p. 272 ["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"].)

According to the certified statement on appeal, not only did Officer Butkus "testif[y] that he reviewed the technicians' logs and that the cameras were working properly on the date and at the time of [Borzakian's] violation," but he also testified he

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[10] As our Supreme Court stated in *Goldsmith*, subdivision (d) of Vehicle Code section 21455.5 specifies that a governmental agency operating an ATES may "contract[] out" the requirements of (1) ensuring that the equipment is regularly inspected (Veh. Code, § 21455.5, subd. (c)(2)(B)) and (2) certifying that the equipment is properly installed and calibrated and is operating properly (Veh. Code, § 21455.5, subd. (c)(2)(C)) "if it maintains overall control and supervision of the system." (59 Cal.4th at p. 271.) As in *Goldsmith*, Borzakian's questioning of Officer Butkus did not address the City's or police department's *oversight or supervision* of Redflex's performance of these activities. (59 Cal.4th at p. 271 & fn. 6.)

"reviewed the video and the photographs taken by the cameras installed at the particular intersection and concluded that the light had been yellow for 3.15 seconds before it turned red which is legally sufficient when the speed limit is 25 miles per hour as it is at this intersection. [He] also testified that the light had been red for .28 seconds when [Borzakian] traversed the limit line at a speed of 29 miles per hour. He also testified that the photograph of the driver appeared to be a photograph of [Borzakian]. He then played the video off the alleged violation two times: first in real time and then again in slow motion. [Borzakian] confirmed that she did see the video both times."

Officer Butkus testified to his background, training and experience and explained "what the City had to do before being allowed to operate the red light camera ticket system, how the system works and how it is maintained." He "testified about the data boxes imprinted on the photographs and the letters and numbers contained in them" and "explained what the letters and numbers mean, how they are generated and how they relate to the citation." In her own proposed statement, Borzakian acknowledged Officer Butkus testified regarding the "triggering mechanism which causes the camera to take pictures and record video." Just as in *Goldsmith*, "it can be reasonably inferred that the ATES system automatically and contemporaneously recorded the images of the intersection and the data imprinted on the photographs when it was triggered." (59 Cal.4th at p. 271.) Under *Goldsmith*, "in the absence of contrary evidence," the presumptions set forth in section 1552 and 1553 support a finding the printed versions of ATES images and data are accurate representations of the data stored in the ATES equipment, and errors in content have not been introduced in the course of printing the images and accompanying data. (*Id*. at p. 269.) Just as in *Goldsmith*, the "content of the photographs themselves may be considered and here the content supplied further support for a finding that the images were genuine." (*Id.* at p. 272.) Moreover, the photographs and video depicting the violation "in real time" constitute "circumstantial evidence that the system was working properly." (*Id.* at p. 271, fn. 7.)

It follows that the trial court did not abuse its discretion in overruling Borzakian's objection of lack of foundation. (*Goldsmith, supra,* 59 Cal.4th at p. 273.)

The Trial Court Did Not Err in Rejecting Borzakian's Hearsay Objection to the ATES Evidence.

Like the defendant motorist in *Goldsmith, supra,* 59 Cal.4th 258, Borzakian also argues the ATES evidence should have been excluded on hearsay grounds. Again, for the reasons stated in *Goldsmith*, we disagree. (*Id.* at pp. 273-275.)

Here, as in *Goldsmith*, "the evidence before the trial court reflects that the digital photographs were taken automatically by the ATES. Admittedly, the ATES must be programmed to activate when certain criteria are met, but it is undisputed that at the time any images are captured by the digital image sensors in the ATES cameras, there is no . . . city employee, law enforcement officer or Redflex technician present watching the intersection and deciding to take the photographs and video.[] The ATES routinely monitors the intersection without human presence at the site. When the camera is activated and takes the video and the three digital photographs of the intersection, the computer also records various data regarding the captured incident, including the date, time, location, and length of time since the traffic signal light turned red. The information is imprinted on a data bar on the photographs. The photographs, video and data bar information are entirely computer produced." (59 Cal.4th at p. 273, fn. omitted.)

Under the Evidence Code, "[h]earsay" is defined 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)), and "[s]tatement" is defined to mean an "oral or written verbal expression or . . . nonverbal conduct of a person intended by him as a substitute for oral or written verbal expression."[11] (§ 225.)

The *Goldsmith* court determined the "ATES-generated photographs and video introduced . . . as substantive evidence of defendant's infraction are not statements of a

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11 "'Person' includes a natural person, firm, association, organization, partnership, business trust, corporation, limited liability company, or public entity." (§ 175.)

person as defined by the Evidence Code. (§§ 175, 225.) 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.]"[12] (*Goldsmith, supra,* 59 Cal.4th at p. 274.) Further, the determination that ATES evidence is not hearsay "necessarily requires the rejection" of any claim its admission violates a defendant's federal constitutional right to confrontation. (*Id.* at p. 275, citing *People v. Lopez* (2012) 55 Cal.4th 569, 583 ["Because, unlike a person, a machine cannot be cross-examined, here the prosecution's introduction into evidence of the machine-generated printouts . . . did not implicate the Sixth Amendment's right to confrontation"].)

We recognize, as Borzakian argues, there was no mention in *Goldsmith* of any maintenance logs created by a Redflex employee submitted as evidence by the City of Inglewood. The evidence in *Goldsmith* consisted of the three photographs and 12-second video generated by the ATES. (*Goldsmith, supra*, 59 Cal.4th at pp. 262 ["[Goldsmith] was found guilty of the traffic infraction based on evidence of several photographs and a 12-second video"], 264-265 [investigator testified photos and video images recorded and produced by the ATES consisted of three photographs (the first, the "previolation" photograph showing the vehicle at or before the crosswalk or limit line for the

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12 As the court observed in *Goldsmith*, the conclusion that ATES evidence does not constitute hearsay has been "confirmed by recent legislative action intended to clarify the nonhearsay status of ATES evidence. (Assem. Com. on Judiciary, Analysis of Sen. Bill No. 1303, *supra*, as amended June 26, 2012, 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.' (Italics added.)" (*Goldsmith, supra,* 59 Cal.4th at p. 274, fn. omitted.) Because the statute is "declarative of existing law, no question of retroactive application is presented." (*Id.* at p. 274, fn. 10.)

intersection with the traffic signal shown in the background during its red phase; the second, the "postviolation" photograph showing the vehicle within the intersection either in the process of making a right turn or going straight through the intersection; and the third, showing the vehicle's license plate), plus a 12-second video].) Nevertheless, the *Goldsmith* court affirmed the motorist's conviction. (*Id.* at p. 262.)

The thrust of Borzakian's argument is that there is no evidence the cameras were working properly without the maintenance logs. Yet, the *Goldsmith* court concluded, given the law enforcement testimony regarding how the ATES operates, the fact the system produced a photograph showing the defendant driving her car at or before the limit line with the signal light in its red phase and then another photograph of her driving through the intersection with the signal light in its red phase, as well as a 12-second video of these events, including the transition of the traffic signal's light phases showing the duration of the yellow light, constituted "circumstantial evidence the system was working properly." (*Goldsmith, supra,* 59 Cal.4th at p. 271, fn. 7.) Because the Supreme Court has upheld a conviction without evidence of maintenance records, any error in the admission of the maintenance logs in this case is harmless under *Goldsmith, supra,* 59 Cal.4th 258. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

DISPOSITION

The judgment is affirmed. The requests for judicial notice of documents never presented to the trial court are denied.

WOODS, Acting P. J.

We concur:

ZELON, J. **FEUER, J.***

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