B231678

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Superior Court of California
County of Los Angeles

March 16, 2011

Second Appellate District
300 South Spring Street
2nd Floor
North Tower
Los Angeles, CA 90013

Dear Sir,

Please find enclosed the opinion in the matter of the People of the State of California vs. [redacted]Goldsmith, case number BR048189. Pursuant to California Rules of Court, Rule 8.887(B) the copy bears the notation, "This opinion has been certified for publication in the Official Reports. It is being sent to assist the Court of Appeal in deciding whether to order the case transferred to the court on the court's own motion under rules 8.1000-8.1018."

To further assist you, I have enclosed certified copies of the record and appellant's brief. No other documents were filed in the matter pursuant to California Rules of Court, Rule 8.1007(b).

If I can be of further assistance, please let me know.

Sincerely,

Connie L. Hudson

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Assigned to DIVISION THREE

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This opinion has been certified for publication in the Official Reports. It is being sent to assist the Court of Appeal in deciding whether to order the case transferred to the court on the court's own motion under rules 8.1000-8.1018.

FILED
SUPERIOR COURT OF CALIFORNIA
COUNTY OF LOS ANGELES
FEB 14 2011
John A. Clarke, Executive Officer/Clerk
By Connie L. Hudson Deputy
CONNIE L. HUDSON

CERTIFIED FOR PARTIAL PUBLICATION*

APPELLATE DIVISION OF THE SUPERIOR COURT

OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. [redacted]GOLDSMITH, Defendant and Appellant.	No. BR 048189 (Inglewood Trial Court No. 102693IN) **OPINION**

APPEAL from a judgment of the Los Angeles Superior Court, Inglewood Trial Court, John R. Johnson, Commissioner. Affirmed.

John J. Jackman for Defendant and Appellant.

Inglewood City Attorney for Plaintiff and Respondent.

* * *

Assigned to Division Three

*Pursuant to California Rules of Court, rules 8.1100 and 8.1110, this opinion is certified for publication with the exception of part III(B), (C) and (D).

I. INTRODUCTION

On March 13, 2009, a notice to appear was issued to appellant pursuant to the automated traffic enforcement statutes (Veh. Code, §§ 21455.5-21455.7), alleging she failed to stop at a red signal light located at the intersection of Centinela Avenue and Beach Avenue in the City of Inglewood. Following a court trial wherein photographic evidence obtained from an automated traffic enforcement system (ATES) was admitted, appellant was convicted of failing to stop at a red signal light (Veh. Code, § 21453, subd. (a)).

Appellant presents the following contentions: (1) the photographs depicting the traffic violation were inadmissible because no foundation was established that the photographs were a reasonable representation of what they were alleged to portray, and they constituted hearsay; (2) the yellow light interval of the traffic light did not conform to the requirements of Vehicle Code section 21455.7; (3) the prosecution's use of photographic evidence violated appellant's Sixth Amendment right to confront witnesses; and (4) the prosecution failed to prove appellant was the driver depicted in the photographs.

In affirming the judgment, we acknowledge the appellate division of the Orange County Superior Court has held that claims similar to those addressed in part III.A. warrant reversal of the judgment. (*People v. Khaled* (2010) 186 Cal.App.4th Supp. 1.) Specifically, *Khaled* held photographs from an ATES purporting to show the defendant driving through a red light were inadmissible because the testifying officer: (1) was not a percipient witness and, therefore, could not establish that the photograph was a "'"reasonable representation of that which it is alleged to portray . . . ."' [Citations.]"; or (2) could not, like a person who set up a "'nanny cam,'" establish the time the camera was set to record and the method used to retrieve the photographs. (*Id.* at p. Supp. 5.) In addition, *Khaled* held the photographs constituted inadmissible hearsay in that they were not admissible business records (Evid. Code, § 1271) or official records (Evid. Code, § 1280). (*Khaled,* at pp. Supp. 6-9.)

We respectfully disagree with *Khaled.* As explained below, it is our view that photographs taken by an ATES may be admissible even if the testifying officer was not a percipient witness to the violation and was not personally responsible for setting up the camera. We conclude the accuracy of the photographs is subject to a rebuttable presumption pursuant to Evidence Code sections 1552, subdivision (a), and 1553. Moreover, apart from such a presumption, the photographs may be authenticated by a law enforcement officer who has knowledge about the methods used by the ATES to transmit the photographs to the officer's law enforcement agency. Finally, the data and images on the photographs did not constitute hearsay because they did not amount to a "statement" from a human declarant.[2]

II. FACTS

Only one witness testified at trial — Investigator Dean Young of the Inglewood Police Department. Investigator Young was assigned to the Traffic Division, Red Light Camera Photo Enforcement. Based on more than six years of experience in this division, as well as the knowledge he acquired from city engineers and the company that maintained the ATES, he explained the issuance of the traffic citation as set forth below.

The ATES located at the intersection of Centinela Avenue and Beach Avenue was implemented in September 2003. It is operated by the police department but maintained by Redflex Traffic Systems (Redflex).

On a monthly basis, Investigator Young visually inspects the traffic signal to ensure the duration of the yellow light interval complies with the minimum guidelines established by the California Department of Transportation. On February 16, 2009, and March 16, 2009, he conducted timing checks of the traffic signal's yellow light interval, which showed averages of 4.11 and 4.03 seconds respectively. These test results were "well above 3.9 as established by the [California] Department of [Transportation] for [a

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[2]In the unpublished portion of the opinion, we reject appellant's remaining contentions.

40 miles-per-hour] highway."

The ATES is programmed to obtain three digital photographs and a 12-second video when its sensors detect a vehicle in the intersection during a red light phase: a "pre-violation photograph" showing the vehicle behind the limit line; a "post-violation photograph" showing the vehicle in the intersection; and a photograph of the vehicle's license plate. A "data bar" containing the date, time, location, and red light interval is printed on each photograph. The ATES operates independently once triggered, and information from the system is stored on a computer at the scene and retrieved by Redflex technicians through an Internet connection.

As indicated in the data bar printed on the photographs of appellant's violation, the signal light was in the red light phase for 0.27 seconds when the "pre-violation photograph" was taken. In the "post-violation photograph" taken 0.66 seconds later, appellant was shown in the intersection while the signal light remained in the red light phase.

III. DISCUSSION

A. Authentication and Hearsay

"We review claims of evidentiary error [for] abuse of discretion . . . . [Citation.]" (*People v. Dixon* (2007) 153 Cal.App.4th 985, 997.) "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* (2008) 44 Cal.4th 983, 1004.)

1. Authenticity of a Photograph

The authenticity of a photograph is a preliminary fact that must be established by the photograph's proponent before it may be admitted into evidence. (Evid. Code, § 1401, subd. (a) [requiring authentication of a "writing"]; *People v. Beckley* (2010) 185 Cal.App.4th 509, 514 [noting that a photograph is a "writing" under the Evidence Code].)

Evidence Code sections 1552[3] and 1553[4] establish a presumption that the data from the ATES 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 fell on appellant. She provided no evidence on this point. Without any evidence of inaccuracy, the photographs were properly presumed to be accurate and authenticated.

In any event, notwithstanding the presumption of accuracy, there was sufficient evidence of authentication. "A photograph or other writing may be authenticated by 'the introduction of evidence sufficient to sustain a finding that it is the writing that the proponent of the evidence claims it is' (Evid. Code, § 1400) . . . ." (*People v. Beckley*, *supra*, 185 Cal.App.4th at p. 514.) Authentication does not require the person who takes a photograph to testify in order to lay a proper foundation for admission of the photograph into evidence. (*Holland v. Kerr* (1953) 116 Cal.App.2d 31, 37.) Rather, authentication of a photograph "may be provided by the aid of expert testimony . . . although there is no one qualified to authenticate it from personal observation." (*People v. Bowley* (1963) 59 Cal.2d 855, 862.)

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[3]"A printed representation of computer information or a computer program is presumed to be an accurate representation of the computer information or computer program that it purports to represent. This presumption is a presumption affecting the burden of producing evidence. If a party to an action introduces evidence that a printed representation of computer information or computer program 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 computer information or computer program that it purports to represent." (Evid. Code, § 1552, subd. (a).)

[4]"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. This presumption is a presumption affecting the burden of producing evidence. 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." (Evid. Code, § 1553.)

The officer provided expert testimony regarding the operation of the ATES and the photographs it produces based on information he had from city traffic engineers and Redflex as well as his experience with images obtained from the cameras. He explained that, once the automated system's sensors were triggered by appellant's entry into the intersection during a red light phase, it independently recorded data (i.e., the timing of appellant's violation) and photographs of her violation, and such digital information was then collected by Redflex employees and sent to the police department. His testimony provided the foundation necessary to demonstrate the photographs were a reliable portrayal of data and images contained therein.

Thus, even apart from appellant's failure to rebut the presumption of accuracy, the evidence sufficiently supported the trial court's determination that the photographs were what the prosecution claimed they portrayed, namely, a digital depiction of appellant entering the intersection against a red signal light.

2. The Photographs Were Not Rendered Inadmissible By the Hearsay Rule

"'Hearsay evidence' is 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." (Evid. Code, § 1200, subd. (a).) A "statement" in this context "'means (a) oral or written verbal expression or (b) nonverbal conduct of a person intended by him as a substitute for oral or written verbal expression.' [Citation.] '"Person" includes a natural person, firm, association, organization, partnership, business trust, corporation, limited liability company, or public entity.' [Citation.]" (*People v. Hawkins* (2002) 98 Cal.App.4th 1428, 1449.) Because "[t]he Evidence Code does not contemplate that a machine can make a statement," information generated from a machine does not fall within the bar created by the hearsay rule. (*Ibid.*)

The data bar affixed to the bottom of the photographs was not hearsay, insofar as it was not inputted by a person but, rather, was generated by the ATES once the system's sensors were triggered by appellant. The purpose of the hearsay rule is to subject the

declarant to cross-examination in order to bring to light any falsities, contradictions, or inaccuracies that may not be discernible in the declarant's out-of-court statement. (*People v. Hawkins*, *supra*, 98 Cal.App.4th at p. 1449.) Under no scenario could appellant have cross-examined the ATES to ask what time it recorded appellant's traffic violation. (See *ibid.* [noting that a machine cannot consciously misrepresent facts].) Simply put, the data bar was not a "statement" from a person that was subject to the hearsay rule.

As for the images depicted in the photographs, they were demonstrative evidence of appellant's crime and, hence, did not render the photographs inadmissible under the hearsay rule. (*People v. Cooper* (2007) 148 Cal.App.4th 731, 746 [holding that photographs and video "are demonstrative evidence, depicting what the camera sees," and "are not hearsay"].)

B. Duration of the Yellow Light Interval [Not Certified For Publication]

"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." (Veh. Code, § 21455.7, subd. (a).) The traffic manual in use at the time of appellant's traffic violation mandated a minimum yellow light change interval of 3.9 seconds based on a prima facie speed limit of 40 miles per hour for approaching vehicles. (Cal. Dept. of Transportation, Manual on Uniform Traffic Control Devices (2006) pp. 4D-11, 4D-50.)

The evidence demonstrated the intersection was tested twice and both tests resulted in average yellow light intervals well over 3.9 seconds. The trial court rejected appellant's argument that the two test results, which differed by 0.08 seconds, indicated the system was unreliable. As the trier of fact, the trial court was tasked with assessing witness credibility and weighing the evidence for purposes of determining the existence of an operative fact. (*People v. Vasco* (2005) 131 Cal.App.4th 137, 161.) "We do not reweigh the evidence; the credibility of witnesses and the weight to be accorded to the

evidence are matters exclusively within the province of the trier of fact. [Citation.]" (*People v. Upsher* (2007) 155 Cal.App.4th 1311, 1322.) Thus, we decline to disturb the trial court's factual determination that the yellow light interval at the intersection was at least 3.9 seconds.

C. Right to Confront and Cross-examine Witnesses [Not Certified For Publication]

1. The Absence of an Objection

In *Crawford v. Washington* (2004) 541 U.S. 36, 59 (*Crawford*), the United States Supreme Court held the confrontation clause prohibited "testimonial" hearsay from being used against a criminal defendant at trial if the defendant had no prior opportunity to cross-examine the unavailable declarant. In order to preserve a confrontation clause claim on appeal, it is incumbent on the appellant to raise an objection during the proceedings below on the same ground asserted on appeal. If no objection is raised with the trial court, the confrontation clause claim is forfeited on appeal. (*People v. Redd* (2010) 48 Cal.4th 691, 730; *People v. D'Arcy* (2010) 48 Cal.4th 257, 290.)

Although appellant raised numerous objections to the prosecution's evidence, at no time did she claim that the use of photographs from the automated system violated her Sixth Amendment right to confront and cross-examine witnesses. As a result, her *Crawford* claim is forfeited.

2. The Use of Photographic Evidence Did Not Violate the Confrontation Clause

Even if appellant had preserved her confrontation clause claim for appeal, appellant would not be entitled to relief because the prohibition articulated in *Crawford* is not applicable to demonstrative evidence. "Photographs and videotapes are demonstrative evidence, depicting what the camera sees. [Citations.] They are not testimonial and they are not hearsay, that is, '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. . . .' [Citation.]" (*People v. Cooper, supra,* 148 Cal.App.4th at p. 746.)

Nothing indicates the photographs, which were not transmitted to this court, constituted "testimonial" evidence. Based on the testimony of Investigator Young, the photographs depict appellant entering the intersection during the red light phase of the traffic signal and include a computer-generated data bar at the bottom specifying the precise timing of her violation relative to the duration of the red light interval. There is no suggestion that statements made by a person were contained in the photographs. Thus, the admission of the photographs did not run afoul of principles articulated in *Crawford.*

D. Identity of the Driver [Not Certified For Publication]

If, based on the evidence, a rational trier of fact could conclude the defendant was the perpetrator of the crime for which he or she was convicted, an appellate court is not at liberty to reverse the conviction on the ground that there is insufficient evidence of identity. (See *People v. Valdez* (2004) 32 Cal.4th 73, 104.) In other words, "[a]propos the question of identity, to entitle a reviewing court to set aside a [trier of fact's] finding of guilt the evidence of identity must be so weak as to constitute practically no evidence at all. [Citations.]" (*People v. Lindsay* (1964) 227 Cal.App.2d 482, 493.)

Referencing the definition of "automated enforcement system" in Vehicle Code section 210, appellant claims the prosecution was required to produce "a clear photograph of . . . the driver of the vehicle," and that the driver's face in the photographs was obscured by the rearview mirror. On this subject, the trial court observed that the mirror covered "more like 20 percent" of the driver's face, obscuring only "the right eye." Upon weighing the evidence, the trial court concluded, "It looks like it is the defendant to me." Like most factual issues resolved by the trier of fact, we do not reweigh the evidence. (*People v. Upsher*, *supra*, 155 Cal.App.4th at p. 1322.)

We decline to hold, as a matter of law, a trier of fact is unable to determine the identity of a person depicted in a photograph solely because approximately 20 percent of the person's face is obscured. Accordingly, the trial court's factual finding regarding identity is entitled to deference and is supported by sufficient evidence.

[The balance of the opinion is to be published.]

IV. DISPOSITION

The judgment is affirmed.

Kumar, J.

We concur:

P. McKay, P.J.

Dymant, J.