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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Yolo)

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THE PEOPLE,

Plaintiff and Respondent,

v.

ALGEREY MCKINLEY,

Defendant and Appellant.

C066956

(Super. Ct. No.  
095032)

Following a jury trial, defendant Algerey McKinley was convicted of possession of cocaine base for sale (Health & Saf. Code, § 11351.5) and possession of methamphetamine for sale (Health & Saf. Code, § 11378). The trial court sustained prior narcotics conviction (Health & Saf. Code, § 11370.2) and prior

prison term (Pen. Code, § 667.5) enhancements, and sentenced defendant to nine years eight months in prison.

On appeal, defendant contends the trial court erred in admitting text messages, and a witness improperly disclosed his criminal history. We shall affirm.

#### **FACTS**

In 2009 members of the Yolo County Narcotics Enforcement Team (YONET) made two undercover methamphetamine purchases at 612 and 614 Welland Way in West Sacramento. YONET members observed Marsha Bertagna exit the home at 614 Welland and walk across the lawn to 612 Welland, where she sold methamphetamine to undercover informants. YONET officers later executed a search warrant on the two residences.

Officers entering the 614 Welland residence found defendant in the dining room, about two to three feet from a computer desk. A search of the desk revealed a mechanic's glove containing saleable amounts of cocaine base and methamphetamine in individual packages, a letter addressed to defendant, and a pay/owe sheet in the top left drawer. There were several baggies of marijuana and a scale in the center drawer, and a letter to defendant with a Sacramento address in the top right drawer.

Defendant had a wallet containing over \$700 in cash and his driver's license. The southeast bedroom closet held a jacket with \$6,000 in cash and a wallet with defendant's Social Security card, along with a glass jar containing two packages of methamphetamine weighing 13.9 grams and 27.8 grams. A bathrobe

in the closet held a digital scale, a glass pipe, and six packages of methamphetamine, each weighing .5 to .6 gram, and one package of methamphetamine weighing 1.8 grams. A bedroom dresser contained a cellular phone bill in defendant's name, showing the 612 Welland address. A purse containing a pill bottle in Bertagna's name was also found in the bedroom.

Defendant dropped a cellular phone he was holding when the officers entered the 614 Welland residence.<sup>1</sup> Text messages from the phone were admitted over defendant's objection.

At the time of the search, 67-year-old Herman Mitchell had been renting a room from defendant at 614 Welland for three days. He identified a picture of Bertagna as defendant's girlfriend, who shared a bedroom with defendant. At trial, Mitchell denied getting rock cocaine from defendant but had previously admitted to a YONET officer that he got the drug from defendant.

Bertagna testified that she had known defendant for about 32 years and started a romantic relationship with him when she left her abusive husband. She lived at 614 Welland, while defendant lived at 612 Welland. The \$6,000 in cash was part of her \$25,105 winnings from a slot machine at the Jackson Rancheria Casino. Defendant was in her house to fix the back door on the day of the search, and she had paid him \$600 to \$700 in cash.

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<sup>1</sup> The phone bill found in the dresser was not for this phone.

Bertagna claimed the methamphetamine in the closet was hers. She obtained the drugs from Mitchell and sold them through one of her husband's friends. She never saw defendant possess or sell methamphetamine. As a result of the raid, Bertagna pleaded no contest to possession of methamphetamine for sale and was sentenced to state prison.

Prior to trial, Bertagna told a YONET officer that she sold the methamphetamine to the informant. Defendant gave her the methamphetamine, and after completing the transaction, she gave defendant the proceeds. Bertagna admitted she sold drugs many times. She also admitted that defendant lived with her at 614 Welland, sharing the southeast bedroom.

Tapes of three telephone calls from defendant while in jail to Bertagna were played to the jury. Videos of the two undercover drug buys were also presented to the jury.

Defendant's son, Michael Allen, testified that he lived at 614 Welland with Mitchell and Bertagna at the time of the search. Allen claimed he got the methamphetamine and cocaine base from Mitchell and sold the drugs for him. Allen never sold drugs to his father or had his father sell drugs for him. The cell phone was his, although Allen let defendant use it.

A YONET officer testified that Allen said the methamphetamine was not his, and defendant lived with him at 614 Welland.

## DISCUSSION

### I

Defendant contends the trial court committed prejudicial error in admitting the text messages from the cell phone.

The People presented three text messages, made on October 27, 2009. At 11:28 a.m., the phone received the following text from a Rebecca30: "AY can you front me a dime or a dub until later, please? I'm selling my text bike later today for, like, sixty or eighty bucks, so as soon as the person gets off work. Please." At 11:32 a.m., the following text was sent from the phone to Rebecca30: "Your credit is bad. You know why, but we are still friends." Two minutes later, Rebecca30 texted: "I paid you all except for thirty. You told me if I give you a ride -- or if I gave you a ride that one time that I wouldn't owe you it. We'd be even."

Defendant objected to the texts as inadmissible hearsay lacking a sufficient foundation that he sent and received them. The trial court denied the objections, finding the texts from Rebecca30 were not admitted for the truth of their statements, the text sent from the seized phone was a party admission, the phone was in defendant's possession, and any foundational claims by defendant could be addressed in closing argument.

The trial court instructed the jury that any text messages from the phone were evidence, but incoming messages could not be considered for the truth of the statements, only as context for the outgoing message. After the three text messages were

presented to the jury, the trial court struck the third text, finding it did not place the outgoing message in context.

Defendant asserts the trial court erred in overruling the foundation objection with the statement: "That is a matter that can be dealt with in argument . . . ." He also argues the incoming messages were inadmissible hearsay because they provided no context unless the jury considered them for the truth of what was stated -- that the discussion was about a drug deal.

Defendant's foundation claim addresses the texts' authenticity. A writing must be authenticated before it may be admitted into evidence. (Evid. Code, § 1401, subd. (a).) Authentication is "(a) the introduction of evidence sufficient to sustain a finding that it is the writing that the proponent of the evidence claims it is or (b) the establishment of such facts by any other means provided by law." (Evid. Code, § 1400.)

After the trial court makes a preliminary finding that sufficient facts exist to authenticate a document, "the authenticity of the document becomes a question of fact for the trier of fact." (*McAllister v. George* (1977) 73 Cal.App.3d 258, 262; see *People v. Garcia* (1988) 201 Cal.App.3d 324, 328-329.) The trial court's ruling is reviewed for abuse of discretion. (*People v. Tafoya* (2007) 42 Cal.4th 147, 165.) Documents may be authenticated in various ways. "Circumstantial evidence, content and location are all valid means of authentication.

[Citations.]” (*People v. Gibson* (2001) 90 Cal.App.4th 371, 383.)

The text messages in question were either sent or received by a phone held by defendant when the officers entered the house. This was sufficient evidence for the trial court to make the preliminary finding that the incoming text was sent to defendant and that he sent the outgoing text. Once the trial court made this finding, the ultimate question of whether the texts were authentic was left to the jury. The trial court followed this procedure and therefore committed no error.

The text from Rebecca30 -- “AY can you front me a dime or a dub until later, please? I am selling my text bike later today for, like, sixty or eighty bucks, so as soon as the person gets off work. Please.” -- was not hearsay. The text was not admitted to prove the truth of the matter asserted, that a person with the moniker “Rebecca30” wanted to sell her bike for a certain amount; rather, it was offered to place defendant’s response in context and thus show he used the phone to facilitate his drug business. (See *People v. Scalzi* (1981) 126 Cal.App.3d 901, 907 [where declarant’s statement imparting information is not offered for truth of the information but to show hearer’s subsequent actions were in conformity with the information, declarant’s statement is not hearsay].)<sup>2</sup> There was no error in admitting the texts.

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<sup>2</sup> Since the trial court struck the second text from Rebecca30, we do not need to decide whether the same analysis applies. The

## II

Defendant contends evidence of his criminal record was improperly admitted during tape recordings of his phone conversations with Bertagna. (AOB 17)

Defendant filed an in limine motion to exclude all evidence of taped calls between defendant and Bertagna under the hearsay rule and Evidence Code section 352. The trial court ruled the tapes were admissible, and counsel could listen to the tapes and request that particular parts be excised.

The tapes were next addressed in the middle of Bertagna's testimony. The trial court listened to three tapes and asked for comments from defense counsel. Counsel renewed his objections, and noted the third tape contained several references to defendant's parole status, his prior record, and the time he spent in prison. The trial court declared it would allow the first two tapes to be played in their entirety, and deleted three statements made by defendant in the third tape -- "I am a black man on parole," "I could never get on the stand because of my history," and "I am on parole." Defense counsel replied it was unfair for the prosecution to present tapes that included references to his parole status at this point in the trial. The trial court stated it had already indicated the references to his parole status would not be included. Defense counsel agreed but asserted that admitting only portions of the

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text from defendant in reply to Rebecca30's initial text was admissible as a party admission. (Evid. Code, § 1220.)

tape would be misleading. Counsel then raised unspecified Fourth, Fifth, and Sixth Amendment objections, which the trial court denied.

The People next played the first two tapes for the jury. The third tape was played later, near the conclusion of the People's case. Defendant then moved for a mistrial based on the contents of the third tape.

Defense counsel asserted the tape contained four improper references to his criminal history and parole status from defendant -- "'Then they find we've been on parole. If they find anything, I am getting locked up anyway,'" "'They want me because of my history,'" "'You know, and after I was gone for all those years, five and a half years,'" and "'I can never get on the stand because of my history.'"

The trial court ruled the last three statements did not refer to defendant's parole status and deferred ruling on the first statement until further review of the tape. After listening to the tape seven times, the trial court determined the first statement did not refer to defendant's being on parole, but instead addressed other people who defendant believed set him up. Noting it had already deleted specific references to defendant's criminal history, the trial court denied the motion.

Defendant contends the four statements were prejudicial references to his criminal history. We disagree.

References to a defendant's criminal history contain an inherent danger that the jury will convict him based on his past

conduct. (*People v. Calderon* (1994) 9 Cal.4th 69, 75.) A mistrial should be granted if the court is apprised of prejudice that it judges incurable by admonition or instruction.

(*People v. Wallace* (2008) 44 Cal.4th 1032, 1068.) Whether a particular incident is incurably prejudicial is by its nature a speculative matter, and the trial court is vested with considerable discretion in ruling on mistrial motions. (*Ibid.*) On review, we apply the deferential abuse of discretion standard. (*Ibid.*)

We begin by noting defendant forfeited his claim by failing to identify the alleged improper statements before the third tape was played. At the in limine hearing on the tapes, the trial court told defense counsel he could request that particular parts of the tape be excised. When the tapes were again addressed at trial, the court ordered deletion of several references to defendant's criminal history. In reply, defense counsel did not identify the four statements that were not deleted, instead waiting to raise them in his mistrial motion after the tape was played. Failing to raise these specific objections to the tape before it was played forfeits those contentions on appeal. (Evid. Code, § 353; *People v. Rogers* (1978) 21 Cal.3d 542, 548.)

Defendant's contention also fails on the merits. Having listened to the recording in question, we agree with the trial court that the first statement, while difficult to understand, refers to the parole status of the people who he believed informed on him. The remaining statements, general references

to defendant's history or his having been gone for five and one-half years, contain no specific reference to prior criminal conduct. Such general references to defendant's past are not so prejudicial as to warrant a mistrial. In sum, the trial court committed no abuse of discretion.

**DISPOSITION**

The judgment is affirmed.

\_\_\_\_\_ RAYE \_\_\_\_\_, P. J.

We concur:

\_\_\_\_\_ BUTZ \_\_\_\_\_, J.

\_\_\_\_\_ MAURO \_\_\_\_\_, J.