Supreme Court Copy

In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, **Plaintiff and Respondent,** **v.** **DANNY LEE SKILES,** **Defendant and Appellant.**	Case No. S180567

Fourth Appellate District, Division Three, Case No. G040808
Orange County Superior Court, Case No. 08HF0799
Daniel Barret Mc Nearney, Judge

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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"Are faxed copies of certified court records admissible to establish that a prior conviction qualifies as a serious or violent felony for purposes of the three strikes law?"

INTRODUCTION

After a jury found appellant guilty of burglary and receiving stolen property, a bifurcated court trial was held on whether his manslaughter conviction from Alabama qualified as a serious or violent felony under the Three Strikes law in California. The prosecutor submitted a certified copy of appellant's plea form in the Alabama case, showing that appellant pled guilty to Count 1, manslaughter. However, only a certified copy of the second page of the Alabama indictment was submitted, charging appellant with Count 3, which was not the count appellant pled to. No other document submitted described the facts underlying appellant's manslaughter conviction. After a court recess, the prosecutor obtained from the Alabama court clerk, and provided the trial court, with a copy of a certified copy of the first page of the same indictment, which contained the count that appellant pled to in Alabama. The trial court admitted the copy, over defense counsel's objection, and considered it in finding appellant suffered a serious or violent felony under California's Three Strikes law.

The admission of the copy was proper. The plain language of the Evidence Code reflects the purpose of the California Legislature to simplify the rules of evidence to favor admissibility of relevant evidence and to give trial courts wide discretion over the admission of evidence, particularly of secondary evidence of the contents of writings.

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[1] The issue presented is taken from the Court's April 28, 2010 order granting appellant's petition for review.

The copy of a certified copy of appellant's Alabama indictment is an "original" as defined by California Evidence Code[2] section 255, and thus admissible as a certified copy of an official record under section 1530 [copy of writing in official custody]. Additionally, it is also a duplicate under section 260. As such, the secondary evidence rule permits the copy in this case to prove the contents of the certified copy of the first page of appellant's Alabama indictment. Thus, the copy of the certified copy of the document is admissible under section 1521 [secondary evidence rule], as there was no genuine dispute of the material terms of the writing and admitting the copy was not unfair.

STATEMENT OF THE CASE

On October 12, 2007, Saida Hudson and her fiancé, Ishan Basu-Kesselman, returned to their motel room to find the window screen missing, the window ajar, and the room in disarray. (1 RT 26-31.) Hudson and Basu-Kesselman noticed several items of personal property were missing from their room, and called the police. (1 RT 32-37.) Matthew McCarthy, a neighbor at the motel, saw appellant in front of Hudson and Basu-Kesselman's room. (1 RT 49-51, 99-100, 102-103.)

Costa Mesa Police Officer Jenny Padilla found four rings, a watch, and a set of headphones in appellant's pockets; these items had been taken from Hudson's motel room. (1 RT 54-55, 77, 142-144, 152.) Padilla also found checks with Hudson's name on them on appellant's person. (1 RT 77, 152.) Appellant's fingerprints were found on the outside of Hudson's windowpane, smeared in a westerly direction, consistent with appellant pushing the window open from the outside. (1 RT 93-94, 112-114, 119, 139-140.)

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[2] All statutory references are to the California Evidence Code unless otherwise specified.

On May 19, 2008, the Orange County District Attorney filed an information alleging appellant committed one count of residential burglary (Pen. Code, §§ 459, 460, subd. (a)) and one count of receiving stolen property (Pen. Code, § 496, subd. (a)). (CT 105-106.) The information also alleged appellant had one out-of-state strike conviction, which also served as a prior serious felony conviction (Pen. Code, §§ 667, subd. (a)-(i), 667.5 (b), 1170.12, subd. (b)-(c)(1), 1192.7). (CT 106-107.) On July 17, 2008, a jury found appellant guilty of both counts. (CT 167-168, 171.)

That same day, a court trial was held to determine whether appellant suffered a prior serious conviction in Alabama, and whether that conviction qualified as a strike conviction in California. (CT 172; 3 RT 271-272.) To prove the allegation that appellant had a prior strike conviction, the prosecutor presented and the trial court admitted into evidence certified copies of a minute order, guilty plea, booking documents, fingerprints, and one page of an indictment from appellant's prior Alabama manslaughter conviction. (3 RT 272-273; CT 191-205.) That packet of documents was marked as People's Exhibit 16 ("Exhibit 16"). (3 RT 272-273; CT 191, 205.) The trial court noted that although the documents in Exhibit 16 showed that appellant pled guilty to manslaughter in Alabama, none of the documents in Exhibit 16 provided any information regarding the factual basis of the manslaughter conviction. (3 RT 276-277.)

During the noon recess, the prosecution contacted a clerk of the court in Alabama and obtained a copy of a certified copy of the first page of appellant's Alabama indictment, which had been missing from People's Exhibit 16. (3 RT 276-278.) The first page of appellant's prior Alabama indictment, containing the count to which appellant pled, was marked as People's Exhibit 18 ("Exhibit 18"). (3 RT 278-279; CT 207.) Appellant's trial counsel raised a foundational objection to Exhibit 18, stating that it appeared to be a photocopy. (3 RT 287.) The trial court agreed, but

indicated that the document appeared to be the preceding page to the indictment in People Exhibit 16, which was also certified. (CT 206-207; 3 RT 279, 287.) Appellant's trial counsel's sole objection to the admission of Exhibit 18 was that it was a photocopy. (3 RT 287, 289.) The trial court admitted Exhibit 18 into evidence, over appellant's trial counsel's objection. (3 RT 289.)

The Alabama court clerk's certification is apparently stamped on Exhibit 18, stating, "I certify that the above is a true and correct copy of the original on file in this office." (CT 207.) The certificate is signed by a deputy court clerk, Missy Homan Hibbett. The certification and signature on Exhibit 18 appear to be the same as those on the certified original copies that had been admitted into evidence without objection as Exhibit 16. The only difference is that someone also apparently initialed Exhibit 18, and the certification on Exhibit 18 appeared to be a photocopy. (3 RT 278.)

The challenged document shows appellant was indicted with manslaughter of Jason Latham by recklessly running a red light and striking Latham's vehicle. (CT 207.) The Alabama indictment, Exhibit 18, alleged in Count 1 that "Danny Lee Skiles. . . did recklessly cause the death of Jason Troy Latham by failing to yield the right of way. . . by running a red light and did thereby cause the motor vehicle which he was driving to strike a motor vehicle being operated by the said Jason Troy Latham. . . ." (CT 207.) The trial court found that, based on the language of the indictment and other documents submitted by the prosecution, that during appellant's prior Alabama offense, he personally inflicted great bodily injury on a person other than an accomplice and that his prior foreign conviction qualified as a strike in California. (3 RT 290-292, 295-297.) The trial court sentenced appellant to nine years in state prison. (CT 184, 189-190.)

On appeal, appellant argued the trial court improperly considered the indictment from his out-of-state strike conviction because the indictment

was not properly authenticated. The Court of Appeal affirmed the trial court's finding that appellant's out-of-state strike conviction qualified as a strike conviction in California, finding a copy of a certified copy was admissible under Evidence Code sections 1530 and 1521, where there was no genuine dispute regarding its authenticity. (*People v. Skiles* (2010) 103 Cal.Rptr.3d 873, 877-878.)

Appellant filed a petition for review, asserting a copy of a certified copy of a court document is not admissible, that the trial court could not consider the out-of-state indictment, and that he was entitled to a jury trial on the truth of his prior strike conviction. On April 28, 2010, this Court granted review on the limited issue of whether faxed copies of certified court records are admissible to establish that a prior conviction qualifies as a serious or violent felony. The document at issue in this case ("Exhibit 18") appears to be a photostatic scan or copy of a certified copy of an indictment, and does not appear to be a facsimile copy. However, regardless of method, the document at issue is an original and duplicate of a certified copy of one page of an indictment, and the analysis is the same.

ARGUMENT

I. A COPY OF A CERTIFIED COPY IS ADMISSIBLE UNDER EVIDENCE CODE SECTION 1530 AS AN ORIGINAL COPY OF AN OFFICIAL DOCUMENT; IT IS ALSO ADMISSIBLE UNDER EVIDENCE CODE SECTION 1521 WHEN THERE IS NO MATERIAL DISPUTE AS TO THE RELIABILITY OR AUTHENTICITY OF THE DOCUMENT

This case involves questions of statutory interpretation of the California Evidence Code. The legislative intent behind these provisions is clear: it is to ensure that our evidentiary rules be construed as broadly as possible to adapt to changing technology and apply to a wide range of factual scenarios while also protecting the reliability of evidence. Here, there was a certified copy of the court record, so the requirements for

permitting copies of writings in official custody (sections 1453, 1530, and 1531) were complied with. The certified copy of the court record was a document that was statutorily admissible under section 1530. The copy admitted as Exhibit 18 was an original certified copy admissible under section 1530; alternatively, Exhibit 18 was a duplicate of the original certified copy admissible under section 1521 so long as it did not fall under either of the exclusions under that section. Because there was no substantive challenge to the authenticity, accuracy, or fairness to Exhibit 18, the trial court's admission of the evidence reflected the Legislature's desire to prevent rigid and technical rules from excluding relevant and reliable secondary evidence.

A. Principles of Statutory Construction

The principles of statutory construction are well established. As this Court has observed, "The fundamental purpose of statutory construction is to ascertain the intent of the lawmakers so as to effectuate the purpose of the law." (*People v. Pieters* (1991) 52 Cal.3d 894, 898.) In approaching the task, a court "must first look at the plain and common sense meaning of the statute because it is generally the most reliable indicator of legislative intent and purpose." (*People v. Cochran* (2002) 28 Cal.4th 396, 400.) If there is "no ambiguity or uncertainty in the language, the Legislature is presumed to have meant what it said," and it is not necessary "to resort to legislative history to determine the statute's true meaning." (*Id.* at pp. 400-401.) However, "'[t]he intent prevails over the letter, and the letter will, if possible, be so read as to conform to the spirit of the act.'" (*People v. Pieters, supra*, 52 Cal.3d at p. 899.) Courts do not construe statutes in isolation, but rather "read every statute 'with reference to the entire scheme of law of which it is part so that the whole may be harmonized and retain effectiveness.' [Citation.]" (*Ibid.*) Namely, the words must be considered

"""in context, keeping in mind the nature and obvious purpose of the statute. . . ." [Citation.]'" (*People v. Murphy* (2001) 25 Cal.4th 136, 142.)

B. History of California's Former Best Evidence Rule and Current Secondary Evidence Rule

The best evidence rule was originally developed in the eighteenth century, at a time when manual copying was the only means of reproducing documents, but the rule began to fall out of favor with the advent of broad pretrial discovery rules and technological developments "such as the dramatic rise in the use of facsimile transmission and electronic communications," as well as photocopies. (*Best Evidence Rule* (Nov. 1996) 26 Cal. Law Revision Com. Rep. (1996) pp. 369, 373, 378.) The best evidence rule was replaced in California by the secondary evidence rule, which was intended to be a simpler and more efficient doctrine, and to shift the presumption of secondary evidence to prove the content of a writing from inadmissible to being generally admissible. (*Id.* at p. 377.)

1. Former Best Evidence Rule

Previously, the best evidence rule provided that "no evidence other than the original of a writing is admissible to prove the content of a writing." (Former § 1500, added by Stats. 1965, ch. 299, § 2, p. 2269 and repealed by Stats. 1998, ch. 100.) The purpose of the rule was "'to minimize the possibilities of misinterpretation of writings by requiring the production of the original writings themselves, if available.'" (*People v. Panah* (2005) 35 Cal.4th 395, 475.)

When the California Law Revision Commission developed the Evidence Code in the 1960's, there were still persuasive justifications for the rule and it was codified in California as Evidence Code section 1500 and in the Federal Rules of Evidence as Rule 1002. However, when the best evidence rule was enacted, it included a number of statutory exceptions for certain types of secondary evidence, including the following:

1. Secondary evidence of writings that have been lost or destroyed without fraudulent intent of the proponent of the evidence. (Former §§ 1501, 1505, added by Stats. 1965, ch. 299, § 2.)

2. Secondary evidence of unavailable writings. (Former §§ 1502, 1505, added by Stats. 1965, ch. 299, § 2.)

3. Secondary evidence of writings an opponent has but fails to produce as requested. (Former §§ 1503, 1505, added by Stats. 1965, ch. 299, § 2.)

4. Secondary evidence of collateral writings that would be inexpedient to produce. (Former §§ 1504, 1505, added by Stats. 1965, ch. 299, § 2.)

5. Secondary evidence of writings in the custody of a public entity. (Former §§ 1506, 1508, added by Stats. 1965, ch. 299, § 2.)

6. Secondary evidence of writings recorded in public records, if the record or an attested or certified copy is made evidence of the writing by statute. (Former §§ 1507, 1508, added by Stats. 1965, ch. 299, § 2.)

7. Secondary evidence of voluminous writings. (Former § 1509, added by Stats. 1965, ch. 299, § 2.)

8. Copies of writings that were produced at the hearing and made available to the other side. (Former § 1510, added by Stats. 1965, ch. 299, § 2.)

In 1983, another exception was adopted into law for printed representations of computer information and computer programs. (Former § 1500.5, added by Stats. 1983, ch. 933, § 1; see § 1552.) The increasing number of such exceptions led to rigid and unwieldy applications of a best evidence rule swallowed by exceptions, which produced "'results that not only waste[d] precious judicial time but that are clearly unjust.'" (*Best Evidence Rule, supra*, 26 Cal. Law Revision Com. Rep. at p. 385.)

In 1985, the California Legislature greatly relaxed the best evidence rule by enacting section 1511, which brought California into line with the Federal Rules of Evidence[3] on the admissibility of duplicates. (Former § 1511, added by Stats. 1985, ch. 100, § 2; 2 Witkin, Cal.Evidence (3d ed. 1986) § 929, pp. 888-889.) Former section 1511 provided that "[a] duplicate is admissible to the same extent as an original unless (a) a genuine question is raised as to the authenticity of the original or (b) in the circumstances it would be unfair to admit the duplicate in lieu of the original." (*Osswald v. Anderson* (1996) 49 Cal.App.4th 812, 819.) This change was advocated by the California Law Revision Commission as early as 1975, because "'[t]he development of accurate methods of copying documents and writings and the commonplace use of methods of reproduction which produce copies identical to the original have resulted in a reexamination by the courts and evidence authorities of the need for the production of original writings as required by the "best evidence rule."'" (*People v. Garcia* (1988) 201 Cal.App.3d 324, 328.)

Since the time when the best evidence rule was enacted in 1965, the breadth and use of pretrial discovery expanded, and "technological developments such as the dramatic rise in use of faxes and electronic communications pose[d] new complications" in applying the best evidence rule and its exceptions. (*Best Evidence Rule, supra,* 26 Cal. Law Revision

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[3] Enacted in 1974, Federal Rule of Evidence 1003 states: "A duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original." Under Federal Rule of Evidence 1003, the burden is on the opponent to raise a genuine issue as to authenticity of the original or to show that under the circumstances it would be unfair to use the duplicate in lieu of the original. (*People v. Garcia, supra*, 201 Cal.App.3d at p. 329; *United States v. Morgan* (9th Cir. 1977) 555 F.2d 238, 243.)

Com. Rep. at p. 373.) As recognized by the California Legislature, "the rationale for the [best evidence rule] no longer withstands scrutiny. A simpler doctrine, making secondary evidence other than oral testimony generally admissible to prove the content of a writing, provides sufficient protection" against misinterpretation of writings, is more efficient and just, and easier to apply. (*Ibid.*)

Thus, repeal of the best evidence rule was intended to recognize technological advances, avoid difficulties in interpretation, eliminate traps for unwary litigants, and reduce injustice and waste of scarce judicial resources.

2. Secondary Evidence Rule

The secondary evidence rule merely simplified and consolidated the exceptions to the best evidence rule that already existed, including former section 1511. (*Best Evidence Rule, supra*, 26 Cal. Law Revision Com. Rep. at pp. 373, 377-378, 388.) The California Legislature determined that the new secondary evidence rule and the normal motivation of parties to present convincing evidence are sufficient protections against the use of unreliable secondary evidence. (*Id.* at pp. 389-390.) Section 1521, subdivision (a), provides that "[t]he content of a writing may be proved by otherwise admissible secondary evidence," except when "[a] genuine dispute exists concerning material terms of the writing and justice requires the exclusion" or when "[a]dmission of the secondary evidence would be unfair."

The California Legislature intended to make secondary evidence generally admissible to prove the content of a writing, to release courts from the rigid constraints of the technical best evidence rule and its exceptions, and give trial courts broad discretion in determining whether to admit secondary evidence. (*Best Evidence Rule, supra*, 26 Cal. Law Revision Com. Rep. at pp. 385-388.) In determining whether to admit

secondary evidence under section 1521, a trial court may consider a broad range of factors, such as:

> (1) whether the proponent attempts to use the writing in a manner that could not reasonably have been anticipated, (2) whether the original was suppressed in discovery, (3) whether discovery conducted in a reasonably diligent (as opposed to exhaustive) manner failed to result in production of the original, (4) whether there are dramatic differences between the original and the secondary evidence (e.g., the original but not the secondary evidence is in color and the colors provide significant clues to interpretation), (5) whether the original is unavailable and, if so, why, and (6) whether the writing is central to the case or collateral.

(Cal. Law Revision Com. com., 29B Pt. 4 West's Ann. Evid. Code (2009 supp.) foll. § 1521, p. 127.)

Additionally, because discovery in criminal matters is narrower than in civil matters, section 1522 additionally requires secondary evidence be excluded "if the trial court determines that the original is in the proponent's possession, custody, or control, and the proponent has not made the original reasonably available for inspection at or before trial." However, section 1522 does not apply to a "duplicate as defined by Section 260," or to a "copy of a writing that is recorded in the public records, if the record or a certified copy of it is made evidence of the writing by statute." (§ 1522, subds. (a)(1) & (a)(4).)

As the California Legislature has repeatedly demonstrated during the past half century, the Evidence Code was drafted and amended as broadly as possible so that changing technology would not render it obsolete. (See *Recommendation Proposing an Evidence Code* (1965) 7 Cal. Law Revision Com. Rep. p. 34 ["the Evidence Code is deliberately framed to permit the courts to work out particular problems or to extend declared principles into new areas of law"].) The secondary evidence rule was intended to create a

simplified doctrine of admissibility, and to grant trial courts broad discretion to apply the rule as efficiently and uniformly as possible.

C. The Copy of Appellant's Alabama Indictment Was Properly Certified Under Sections 1530 and 1531

A purported copy of a writing in the custody of a public entity is prima facie evidence of the existence and content of the writing if: (1) the office in which the writing is kept is in the United States; and (2) the copy is attested or certified as a correct copy of the writing or entry by a public employee having legal custody of the writing. (§ 1530, subd. (a)(2).)

Here, Exhibit 18 appears to be a copy made from a document that the Alabama court clerk apparently stamped and signed, stating, "I certify that the above is a true and correct copy of the original on file in this office," comporting with section 1531. (CT 207; § 1531 ["certificate must state in substance that the copy is a correct copy of the original"].) The certificate is signed by a deputy court clerk, Missy Homan Hibbett, which comports with section 1453. (§ 1453 [a signature is presumed genuine if it purports to be the signature, affixed in the official capacity of a public employee].) Thus, it appears the document from which Exhibit 18 was copied would have been admissible under section 1530.

Appellant concedes that the original copy of his Alabama indictment, certified by the Alabama court clerk, would have been admissible under section 1530. (AOBM 15-16.) His objection is solely that a photocopy of that copy was not admissible.

D. The Copy of the Certified Copy of Appellant's Alabama Indictment Qualified as An "Original" Document, and Was Thus Admissible Under Section 1530

Exhibit 18 was admissible as an "original" certified copy under section 255, and thus admissible under section 1530. A document that is a "copy" in the colloquial sense of the word may qualify as an "original"

document legally. An "original" of a writing is defined as "the writing itself or *any counterpart intended to have the same effect* by a person executing or issuing it." (§ 255, emphasis added.) Nothing in section 1530 requires that the certification of an official document be "original" in the colloquial sense of the word. Exhibit 18 qualifies as a section 255 "counterpart," and thus meets the requirements of section 1530.

The record shows that the Alabama court clerk sent a counterpart intended to have the same effect as the original writing. The clerk was sending via either fax or internet a certified copy of a document that she had the authority to authenticate and over which she, as a public official, had dominion. The clerk intended for the copy to be received and to have the same effect as a certified copy, and thus, as the original indictment.

While there are no California cases on point, states with more restrictive evidentiary rules than California's secondary evidence rule have come to the same conclusion. In *State v. Smith* (Wash.Ct.App. 1992) 66 Wash.App. 825, 832 P.2d 1366, a fax of a certified driving record was admitted at a criminal trial for the offense of driving with a suspended license. In response to a challenge to the admissibility of this fax, the court found:

> An "original" of a writing or recording is the writing or recording itself or any counterpart intended to have the same effect by a person executing or issuing it. Since the fax of the seal exactly resembles the original seal and since the Department of Licensing intended the fax to be a certified copy of the driving record, it qualifies as an original document. Admission of the fax is authorized by the rules of evidence and is in keeping with the spirit of statutes . . . which aim to keep current with modern technology.

(*Id.* 66 Wash.App. at p. 828-829; see also *Eglund v. State* (Tex.Ct.App. 1995) 907 S.W.2d 937, 939-940 (conc. opn. of Cohen, J.).)

Thus, the copy of the Alabama indictment was an "original" certified copy under section 255, and was properly admitted by the trial court as self-authenticated under section 1530.

E. The Copy of a Certified Copy of Appellant's Alabama Indictment Was a "Duplicate" of the Original Certified Copy of an Official Court Record Thus Admissible Under Section 1521

Alternatively, regardless of whether the scanned copy constitutes an original for the purposes of section 255, Exhibit 18 was admissible under the secondary evidence rule as a duplicate of the original certified copy of a court document.

1. Secondary Evidence Rule

Section 1521, subdivision (a), provides that "[t]he content of a writing may be proved by otherwise admissible secondary evidence," except when "[a] genuine dispute exists concerning material terms of the writing and justice requires the exclusion" or when "[a]dmission of the secondary evidence would be unfair."

Under the secondary evidence rule, any secondary evidence, including copies of copies, is admissible. (§ 1521.) The secondary evidence rule does not automatically require admission of a facsimile or photocopy of a document per se, and provides safeguards against unreliable secondary evidence. All secondary evidence must be authenticated and is subject to exclusion if there is a genuine dispute regarding the content or if it would be unfair. (Evid. Code, § 1521.)

Recognizing the accuracy of modern methods of reproducing writings, former section 1511 and current section 1521 rely on the wide discretion of trial courts to determine those particular circumstances in which it is unfair to use a duplicate in lieu of the original. A trial court's exercise of discretion in admitting or excluding evidence is reviewable for

abuse (*People v. Alvarez* (1996) 14 Cal.4th 155, 201) and will not be disturbed 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 (*People v. Jones* (1998) 17 Cal.4th 279, 304).

Appellant has not demonstrated that the trial court abused its discretion, therefore the trial court's ruling should be upheld.

2. Analysis

Before the secondary evidence rule was enacted, an exception to the best evidence rule under former section 1511 allowed a copy of a certified copy of an official record to be admitted unless there was a genuine question as to the authenticity or contents of the original, or it would have been unfair to admit the copy in lieu of the original. (*People v. Atkins* (1989) 210 Cal.App.3d 47, 55, (*Atkins*).) In *Atkins,* to prove the defendant had served a prior prison term for receiving stolen property, the prosecution introduced copies of prison records and a copy of a certification from the custodian of records stating the copies of the prison records were from prison files. (*Atkins, supra*, 210 Cal.App.3d at p. 53.) Defense counsel objected to the admission of the records because the certification was a copy. The trial court overruled the objection and admitted the documents, finding them to be authentic. (*Ibid.*) On appeal, the defendant argued admission of the evidence violated the best evidence rule, which required admission of the original of a writing to prove the content of the writing. (*Atkins, supra*, 210 Cal.App.3d at p. 54.) The appellate court rejected the defendant's argument, concluding the copy of the certification fell within the exception to the best evidence rule that permitted the admission of a copy in lieu of an original unless a genuine question is raised as to the authenticity of the original, or it would be unfair to admit the copy in lieu of the original. (*Id.* at p. 55.)

The exception referred to by the *Atkins* court has been replaced with the secondary evidence rule. (Cal. Law Revision Com. com., 29B Pt. 4 West's Ann. Evid. Code (2009 supp.) foll. § 1521, p. 127.) The Legislature is presumed to be aware of existing laws and judicial decisions and to have enacted or amended statutes in light of this knowledge (*People v. Overstreet* (1986) 42 Cal.3d 891, 897), and the Legislature was, in fact, aware of the decision in *Atkins*. (*Best Evidence Rule, supra,* 26 Cal. Law Revision Com. Rep. at p. 388, fn. 52.) It is significant that, in light of this case law, the Legislature explicitly stated that the secondary evidence rule "is not a major departure from former law, but primarily a matter of clarification and simplification." (Cal. Law Revision Com. com., 29B Pt. 4 West's Ann. Evid. Code (2009 supp.) foll. § 1521, p. 127.) Thus, the Legislature has apparently approved of the decision in *Atkins*. Appellant acknowledges the decision in *Atkins*, but does not distinguish *Atkins* from the current case and simply suggests that *Atkins* is inconsistent with the language and purpose of the secondary evidence rule and section 1530. (AOBM 16-17.) This contention is belied by the Legislature's comments that the secondary evidence rule was a clarification of the former best evidence rule and its exceptions, and that language in section 1521 was "modeled on the exceptions to former Section 1511 and to Rule 1003 of the Federal Rules of Evidence." (Cal. Law Revision Com. com., 29B Pt. 4 West's Ann. Evid. Code (2009 supp.) foll. § 1521, p. 127.)

The secondary evidence rule differs from the rule applied in *Atkins* only in that the secondary evidence rule does not obviate the requirement for a writing to be authenticated before it is admitted into evidence. (§§ 1401, subd. (b), 1521, subd. (c).) Appellant claims the prosecutor failed to present sufficient evidence to establish the first page of the indictment was what she claimed it to be, or that the purported copy was a true copy of the original. (AOBM 27.) However, there is no genuine dispute as to the

authenticity of the document in Exhibit 18. ((*People v. Hovarter* (2008) 44 Cal.4th 983, 1014 ["If any suspicion hangs over the instrument, or that it is designedly withheld, a rigid inquiry should be made into the reasons for its non-production. But where there is no such suspicion, all that ought to be required is reasonable diligence to obtain the original — in fact, courts in such cases are extremely liberal."].) Appellant does not contend in his brief on the merits to this court, nor does the record suggest, that he raised a genuine question as to the authenticity of the original transcripts of his trial or that under the circumstances it was unfair to admit the photocopy at his hearing. He merely asserts that a copy of a certified copy should never be admissible. Such an inflexible rule is not warranted.

A "duplicate" is defined by section 260 as "a counterpart produced by the same impression as the original, or from the same matrix, or by means of photography, including enlargements and miniatures, or by mechanical or electronic rerecording, or by chemical reproduction, or by other equivalent technique which accurately reproduces the original."

Here, a duplicate was admitted, and it was admissible under section 1521. The first criterion set forth in this section, authenticity, requires introduction of sufficient evidence for a trier of fact to find the writing is what the proponent claims it to be, or proof by other means, such as a stipulation, an admission, or a presumption, that the writing is what the proponent claims it to be. (*People v. Garcia, supra,* 201 Cal.App.3d at pp. 328-329; *McAllister v. George* (1977) 73 Cal.App.3d 258, 262; §§ 1400, 1410.) The means of authenticating a writing are not limited to those specified in the Evidence Code. (§ 1410.) "A finding by the trial judge that a writing is 'authenticated' merely means that enough evidence has been presented relative to its genuineness that the writing becomes admissible into evidence." (2 Jefferson, Cal. Evidence Benchbook (2d ed.1982) § 30.1, pp. 1051-1052; see also *People v. Morris (*1991) 53 Cal.3d

152, 205 ["The trial court was required to admit the document into evidence if the trier of fact was presented with sufficient evidence to support a finding of authenticity. [Citations.]"]; *People v. Garcia, supra*, 201 Cal.App.3d at p. 329 [conflicting inferences relate to weight rather than admissibility of duplicate].)

A writing can be authenticated by circumstantial evidence and by its contents. (*People v. Gibson* (2001) 90 Cal.App.4th 371, 383; *Young v. Sorenson* (1975) 47 Cal.App.3d 911, 915.) The last page of Exhibit 16 is an originally certified page of the Alabama indictment, charging appellant with Count 3, driving while intoxicated and causing the death of Jason Troy Latham. The bottom left corner of the page is numbered "51-157A." (CT 199.) The contents of Exhibit 18 logically precede the page in Exhibit 16, as Exhibit 18 is a page of the indictment charging appellant with Counts 1 and 2, manslaughter of Jason Troy Latham and driving under the influence. (CT 207.) Also, the bottom left corner of Exhibit 18 is numbered "51-157," and the top of the page shows the same date, term number, state, and county as the previously admitted page in Exhibit 16. (CT 199, 207.) Moreover, appellant raised no genuine issue of authenticity at trial. The contents of the document in Exhibit 18 support a determination the document was, in fact, part of the Alabama court record.

Appellant suggests that a certification is not a "writing" under sections 250 and 1521. (AOBM 23-25.) However, he cites no authority holding that a certification is not a writing. (AOBM 24-25; cf. *Bailey v. Superior Court* (1977) 19 Cal.3d 970, 976 [finding application of section 250 to deposition videotape was inapplicable under section 300 only because deposition evidence was "otherwise provided" for by Code Civ. Proc., § 2016].) Section 250 defines writing as:

> handwriting, typewriting, printing, photostating, photographing, photocopying, transmitted by electronic mail or facsimile, and

> every other means of recording upon any tangible thing, any form of communication or representation, including letters, words, pictures, sounds, or symbols, or combinations thereof. . .

Under the plain meaning of the language, the clerk's certification is a combination of letters and handwriting or signature that qualifies as a writing under section 250. Such an interpretation is consistent with the purpose of section 250 to define writing "very broadly to include all forms of tangible expression." (Cal. Law Revision Com. com. to Evid. Code, § 250.) This is also consistent with the purpose of the secondary evidence rule, which "de-emphasizes the form of the writing. . . and properly focuses on the genuineness of secondary evidence and fairness of using it," and "directing attention to substance rather than technicalities." (*Best Evidence Rule, supra*, 26 Cal. Law Revision Com. Rep. at p. 388.) Thus, Exhibit 18, including the clerk's certification, falls under the application of section 1521, and "the content of [that] writing may be proved by otherwise admissible secondary evidence," i.e., a duplicate of the writing.

Appellant also argues that Exhibit 18 contains an individual's initials that were not on the other certified court documents in evidence in Exhibit 16. (AOBM 29.) Assuming this is an attack on the reliability of the document, he does not explain how the addition of an individual's initials implicates the accuracy of the document's contents. In any event, the import of any possible discrepancies goes to the weight rather than the admissibility of the photocopy, because conflicting inferences are for the trier of fact to resolve. (*People v. Martinez* (2000) 22 Cal.4th 106, 128; *McAllister v. George, supra*, 73 Cal.App.3d at 262, 263.) The evidence was sufficient to sustain a finding that Exhibit 18 was an accurate copy of a certified copy of a court document, therefore the authentication required for admission as a duplicate was satisfied.

Having been authenticated, section 1521 will only exclude secondary evidence when a genuine dispute exists concerning material terms of the writing or when admission of the secondary evidence would be unfair.

Appellant contends that the opponent of the evidence should not have the burden of raising an issue of accuracy or unfairness of secondary evidence. (AOBM 28-32.) However, such a burden has been held proper before the enactment of the secondary evidence rule. (*People v. Garcia, supra*, 201 Cal.App.3d at p. 330 [opponent of evidence has burden of showing unfairness, which must be based on substance, not mere speculation that the original might contain some relevant difference].) Again, the Legislature was aware of the existing judicial decision in *People v. Garcia*, and is presumed to have enacted the secondary evidence rule in light of this knowledge. (*People v. Overstreet, supra*, 42 Cal.3d at p. 897). Here, appellant did not raise a substantial challenge regarding the accuracy or unfairness of Exhibit 18 at trial.

There is no genuine dispute concerning the material facts contained in the first page of the indictment provided by the Alabama Court. Appellant's trial counsel examined the document offered and merely raised a general objection on the basis of foundation because the document was a photocopy. (3 RT 287, 289.) Had there been any material inaccuracies or discrepancies in the documents, defense counsel was in a position to identify them and call them to the trial court's attention. She did not do so. Appellate counsel also has not identified any material inaccuracies or discrepancies in the documents. There is no indication of any likelihood of a different result had the originally certified copy been admitted.

Additionally, there is nothing to suggest that justice requires exclusion of the first page of the Alabama indictment, which was submitted for the purpose of determining the facts of the charge to which appellant pled guilty. (See *People v. Garcia, supra*, 201 Cal.App.3d at p. 330; Cal. Law

Revision Com. com., 29B, pt. 4, West's Ann. Evid. Code (2007 supp.) foll. § 1521, p. 106 .) The opponent of the evidence has the burden of showing the unfairness; such a claim must be based on substance, not mere speculation that the original might contain some relevant difference. (*People v. Garcia, supra*, 201 Cal.App.3d at p. 330.) Appellant made no such showing at trial. Appellant had advance notice that these documents were to be introduced, and provided no objection to the substance of the documents, only to the form in which Exhibit 18 was produced.

Appellant also contends the certification requirement of section 1530, allowing copies of official records, should prevail over section 1521 because it is more specific and that the secondary evidence rule undermines section 1530. (AOBM 21-22.) However, while as a general matter "particular provisions will prevail over general provisions" (*In re James M.* (1973) 9 Cal.3d 517, 522), the application of the secondary evidence rule does not undermine, circumvent, or bar enforcement of section 1530. Here, the certification required by section 1530 was met when a copy of appellant's Alabama indictment was certified by the court clerk. (CT 207.) The copy of that certified copy was admitted under section 1521, after meeting the requirement of authenticity, and not falling under either of the exclusions in section 1521, subdivisions (a)(1) or (a)(2). In articulating the requirements for sections 1520 through 1523, the Legislature did not indicate that the secondary evidence rule was to apply "except as otherwise provided." This Court should not imply an exception where the Legislature did not create one. Moreover, in providing for additional grounds for excluding secondary evidence in criminal actions, the Legislature explicitly stated that such grounds did not apply to "duplicate[s] as defined in Section 260" (§ 1522, subd. (a)(1)), "cop[ies] of a writing in the custody of a public entity" (§ 1522, subd. (a)(3)), and "cop[ies] of a writing that is recorded in the public records, if. . .a certified copy of it is made evidence of the writing

by statute" (§ 1522, subd. (a)(4)). Thus, the Legislature apparently contemplated and approved of the use of secondary evidence of the types of evidence listed in section 1522, subdivision (a).

The application of the secondary evidence rule to the copy of a certified copy in this case comports with the purpose of section 1521, which "de-emphasizes the form of the writing. . . and properly focuses on the genuineness of secondary evidence and fairness of using it," and by "directing attention to substance rather than technicalities." (*Best Evidence Rule, supra*, 26 Cal.L.Revision Comm'n at p. 388.) Since the preceding page of the indictment from the Alabama case was admissible under the secondary evidence rule and there was sufficient evidence to authenticate them, the trial court did not err in admitting them into evidence in the trial as relevant to whether appellant's prior Alabama conviction qualified as a strike conviction in California.

3. Other State and Federal Court Decisions

Appellant relies on the decisions of the supreme courts in four other states, one of which is not published, to support his contention that a bright-line rule should be adopted to exclude copies of certified copies. (AOBM 34-35.) However, state and federal courts of outside jurisdictions that have considered secondary documentary evidence have reached different conclusions regarding the admissibility of such evidence. In any event, his reliance on these four cases is misplaced because no other jurisdiction has adopted a secondary evidence rule similar to section 1521, and therefore no other courts have considered the application of an analogous rule.

In *Commonwealth v. Deramo* (2002) 436 Mass. 40, 762 N.E.2d 815 (*Deramo*), the prosecution presented a copy of a motor vehicle registry, which defense counsel challenged because the copy lacked an original attestation and differed from an originally attested copy obtained from the Registrar of Motor Vehicles. (*Id.* at p. 45.) There was an unexplained,

relevant difference between the copy of registry records in the clerk's file and the copy sought to be introduced by the prosecutor. (*Commonwealth v. Deramo, supra,* 436 Mass. at p. 46.) The prosecutor's set contained a copy of a notice dated October 17, 1996, which notified the defendant of the revocation of his license for "DWI Liquor," but the clerk's set of records did not contain the October 17, 1996, notice. (*Ibid.*) The Massachusetts Supreme Court's decision in *Deramo*, that the copy of a certified copy was inadmissible, is inapposite for two reasons. First, in *Deramo*, there were material discrepancies between the original and the copy of the certified copies at issue. (*Id.* at pp. 46, 49, 762 N.E.2d 815.) Second, the *Deramo* court never considered whether the copies of the certified copies were admissible under a rule similar to the secondary evidence rule.

Similarly, the Arizona and Kentucky Supreme Courts did not consider whether facsimile transmissions or copies of certified copies were admissible under a rule similar to the secondary evidence rule. (*State v. Stotts* (1985) 144 Ariz. 72, 84 (*Stotts*) [695 P.2d 1110]; *Little v. Commonwealth* (March 18, 2010) 2010 WL 1005865 (*Little)* [nonpub. opn. Ky].) In *Stotts*, the prosecution sought to introduce a copy of a certification that the attached "Agreement to Return" was a copy of the original, under the state evidentiary rule that certified copies of public records are self-authenticating. (*Stotts, supra*, 144 Ariz. at p. 84.) The Arizona Supreme Court found that "certified copies" do not mean "copies of certified copies" and found the copy of a certification inadmissible. (*Ibid.*) In *Little*, the prosecution sought to introduce a facsimile of the defendant's prior murder indictment to prove a prior conviction, which the Kentucky Supreme Court found inadmissible. (*Little, supra*, 2010 WL 1005865 at p. *2.) The Kentucky Supreme Court stated that the state rule of evidence providing that certified copies of public records are self-authenticating did not apply to copies of certified copies. (*Ibid.*) Neither the *Stotts* nor the *Little* courts

considered an evidentiary rule similar to former section 1511 or the secondary evidence rule.

In *Kelly v. State* (Ind. 1990) 561 N.E.2d 771 ("*Kelly*"), the prosecution presented purported copies of official records, and also presented a copy of a certificate of authenticity. (*Id.* at pp. 772-773.) The majority held that "a photostatic duplicate of a certification authenticating document copies does not provide certification necessary for proper authentication, and the document copies are not admissible" as a certified copy of a public record. (*Id.* at p. 773.) The majority further held that defense counsel's objection at trial that the purported certification was a mere copy was sufficient to raise a genuine question as to the authenticity of the duplicate in accordance with prior Indiana case law and Federal Rule of Evidence rule 1003. [4] (*Id.* at pp. 774-775.) The *Kelly* majority stated that the law of evidence "favors the enhanced assurance of reliability, and integrity of such exhibits that is provided by the requirement of an individualized original certification of authenticity." (*Kelly, supra*, 561 N.E.2d at p. 775.) Again, the Indiana Supreme Court did not conduct any analysis under a doctrine similar to California's secondary evidence rule.

None of the cases appellant relies upon from foreign jurisdictions has a secondary evidence rule, as had been enacted in California. The California Legislature explicitly intended to avoid the technical application of exclusionary rules of evidence as the courts in each of appellant's cited cases and focus on the substance of the evidence sought to be admitted, allowing trial courts the freedom to admit relevant and authentic secondary

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[4] Federal Rule of Evidence, rule 1003, provides: "A duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original."

evidence regardless of the form. (*Best Evidence Rule, supra*, 26 Cal. Law Revision Com. Rep. at p. 388.)

Moreover, the courts of several other states have found that, even under the best evidence rule, duplicates of certified copies of official documents are admissible under rules similar to Federal Rule of Evidence rule 1003 and former section 1511. A Texas Court of Appeals held that the facsimile transmission of a certified copy of judgment was admissible in lieu of a certified copy as proof that a defendant violated probation. (*Eglund v. State, supra,* 946 S.W.2d at pp. 69-71 (*Eglund*).) The *Eglund* court stated that "[t]he only theory of inadmissibility rested upon a wooden application of [statutory rule] requiring the actual certified copy to be offered into evidence without regard to the indicia of authenticity present in the circumstances surrounding the faxed copy of the certified copy," and found the trial court did not abuse its discretion in admitting the duplicate of a certified copy. (*Id.* at p. 71; see also *Crowell v. State* (July 15, 1999) 1999 WL 497543 [nonpublished opinion of Texas Court of Appeals holding facsimile of certified copy of judgment admissible]; see also *Martinez v. State* (Sept. 17, 1998) 1998 WL 720467 [nonpublished opinion of Texas Court of Appeals held facsimile of out-of-state criminal record admissible].) Other state courts have come to similar conclusions. (*State v. Hagood* (Ala. 2000) 777 So.2d 214, 217 [Supreme Court of Alabama held facsimile copy of certified records of conviction admissible because defendant did not raise a genuine question of authenticity]; *Rudolph v. North Dakota Dep. of Transportation Director* (N.D. 1995) 539 N.W.2d 63, 66 [Supreme Court of North Dakota found copy of certified copy of breath test record may establish prima facie evidence of their contents]; *State v. Wall* (2000) 141 N.C.App. 529, 532-533, 539 S.E.2d 692 [North Carolina Court of Appeals found facsimile certified copy of a criminal record admissible to prove a prior conviction where defendant did not

contend exhibit was inaccurate or incomplete]; *Harwood v. State* (Ind. Ct.App. 1990) 555 N.E.2d 513, 516-517 [Indiana Court of Appeals held facsimile of certification admissible where no genuine issue of authenticity and not unfair]; *State v. Pisarkiewicz* (Oct. 18, 2000) 2000 WL 1533916 [nonpublished opinion of Ohio Court of Appeals found facsimile copies of certified copies of defendant's prior convictions properly admitted where no genuine issue as to authenticity].)

Similarly, at least two federal circuit courts have found duplicates of documentary evidence admissible under Federal Rule of Evidence rule 1003. In *United States v. Childs* (9th Cir. 1993) 5 F.3d 1328, the court found that uncertified copies of documents supposedly filed with the State of Arizona and the State of Minnesota were properly admitted under Federal Rule of Evidence rule 1003 because nothing in the record suggested that the copies had been altered. (*Id.* at p. 1335.) In *United States v. Rodriguez* (5th Cir. 1975) 524 F.2d 485, the court held that an unauthenticated xerox copy of a vehicle's certificate of title was properly admitted under Federal Rule of Evidence rule 1003 because the defendant made no allegation that the copy was inaccurate. (*Id.* at p. 487-488.) In *United States v. Hampton* (7th Cir. 2006) 464 F.3d 687, 689-690, the court found there was not sufficient dispute regarding the authenticity of a photocopy of a copy of sealed documents establishing the insured status of a bank to call for its exclusion.

The state of California is uniquely positioned, because there has been a legislative determination in California that has not been made in other states. The breadth and varied decisions and reasoning of cases in other states illustrate the concern of the California Legislature that the best evidence rule and its many exceptions had become too burdensome, complicated and inefficient. (*Best Evidence Rule, supra*, 26 Cal. Law Revision Com. Rep. at pp. 385-388.) The California Law Revision

Commission specifically concluded that "[t]he fraud rationale is undercut by the reality that even where the Best Evidence Rule applies it may often be ineffective in preventing fraud," because a litigant can manufacture an excuse satisfying one of the rule's exceptions and "new technologies. . . make it easier to fabricate a document that appears to be an original." (*Best Evidence Rule, supra*, 26 Cal.L.Revision Comm. Rep. at p. 379.) Additionally, in enacting the secondary evidence rule, the California Law Revision Commission found the "normal motivation of the parties to present the most convincing evidence in support of their cases" provides a safeguard against unreliable secondary evidence, in addition to the "mandatory exceptions set forth in [section 1521] subdivisions (a)(1) and (a)(2)." (*Id.* at p. 384; Cal. Law Rev. Comm. com. to § 1521.) There is no justification for favoring a more stringent and rigid application of the rules of evidence to a photocopy of a certified court document, by requiring original certification as the only means of admission, than is applied to other types of documents through the secondary evidence rule. (See *Kelly, supra*, 561 N.E.2d at p. 775 (dis. opn. of Givan, J.).) California's adoption of the secondary evidence rule in 1998 reflects this view. The purpose of the secondary evidence rule was to eliminate confusion, as well as inconsistent and uneven application of the former best evidence rule. (*Best Evidence Rule, supra*, 26 Cal. Law Revision Com. Rep. at p. 387, fn.50.) Thus, our law is different from the law in the states appellant relies upon.

Here, Exhibit 18 is an "original" as defined by section 255, and thus is admissible as a certified copy of an official record under section 1530. Alternatively, it is a duplicate under section 260, and is secondary evidence of a certified copy of an official record. As such, the secondary evidence rule permits Exhibit 18 to prove the contents of the certified copy of the first page of appellant's Alabama indictment. Thus, the copy of the certified copy of the document is admissible under section 1521, as there

was no genuine dispute of the material terms of the writing and admitting the copy was not unfair. Appellant made no substantive challenge to the authenticity, accuracy, or fairness to Exhibit 18, the trial court's admission of the evidence in this case embodied the legislature's desire to avoid the exclusion of relevant and reliable secondary evidence based on obsolete and rigid rules. Admission of Exhibit 18 comports with both the plain language and the spirit of the secondary evidence rule.

F. Federal Constitutional Right of Confrontation

Appellant claims that admission of Exhibit 18 under sections 1530 and 1521 violate his constitutional rights to confrontation and cross-examination. However, the "routine application of state evidentiary law does not implicate [a] defendant's constitutional rights." (*People v. Hovarter*, *supra*, 44 Cal.4th at p. 1013; *People v. Brown* (2003) 31 Cal.4th 518, 545.)

In any event, the United States Supreme Court specifically identified a clerk's certificate authenticating a copy of an official record as a class of evidence that does not violate the Confrontation Clause because a clerk's authority in that regard is narrowly circumscribed. (*Melendez-Diaz* (2009) __ U.S. __ [129 S.Ct. 2527, 2538-2539, 174 L.Ed.2d 314].) The Court found that "[a] clerk could by affidavit authenticate or provide a copy of an otherwise admissible record," but — unlike crime lab analysts — could not create or interpret a record for the sole purpose of providing evidence against a defendant. (*Id.* at p. 2539.)

Appellant acknowledges the Supreme Court's holding, but nonetheless asserts that a clerk's certificate is no longer excepted when it is photocopied. This assertion does not comport with the Supreme Court's reasoning that a clerk's certification does not violate the confrontation clause because a clerk cannot create or interpret a record in order to provide evidence against a defendant. A copy of a clerk's certification also cannot

operate to create or interpret a record to provide evidence against a defendant; it merely attests to the accuracy of a copy of an official document already in existence. By asserting that a copy of a document by its nature becomes testimonial hearsay in violation of the Confrontation Clause, appellant challenges the entire basis and operation of the secondary evidence rule. Such a conclusion is not supported by the Supreme Court's rule in *Melendez-Diaz*, or in any other decision. Thus, appellant's federal constitutional rights were not implicated by the admission of evidence in this case.

CONCLUSION

For the foregoing reasons, respondent respectfully requests that the judgment be affirmed.

Dated: October 25, 2010

Respectfully submitted,

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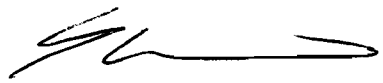

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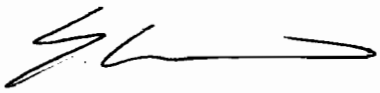
CERTIFICATE OF COMPLIANCE

I certify that the attached RESPONDENT'S ANSWER BRIEF ON THE MERITS uses a 13 point Times New Roman font and contains 9, 070 words.

Dated: October 25, 2010

EDMUND G. BROWN JR.
Attorney General of California



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ATTACHMENT A

(California Rules of Court Rule 8.1115.)

Not Reported in S.W.2d, 1999 WL 497543 (Tex.App.-Hous. (14 Dist.))
(Cite as: 1999 WL 497543 (Tex.App.-Hous. (14 Dist.)))

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Only the Westlaw citation is currently available.

NOTICE: NOT DESIGNATED FOR PUBLICATION. UNDER TX R RAP RULE 47.7, UNPUBLISHED OPINIONS HAVE NO PRECEDENTIAL VALUE BUT MAY BE CITED WITH THE NOTATION "(not designated for publication)."

Court of Appeals of Texas, Houston (14th Dist.).
Terrence Keith CROWELL, Appellant,
v.
The STATE of Texas, Appellee.
No. 14-97-00432-CR.

July 15, 1999.

On Appeal from the 361st District Court Brazos County, Texas Trial Court Cause No. 24,757-361.

Panel consists of Justices Yates, Fowler and Frost.

OPINION

FOWLER, Justice.

***1** Appellant was charged by indictment with the felony offense of aggravated assault with a deadly weapon, enhanced by a previous felony conviction from Arkansas. A jury found appellant guilty and made an affirmative finding as to the use of a deadly weapon. The jury assessed punishment at twenty years confinement in the Texas Department of Criminal Justice-Institutional Division. On appeal, appellant raises two points of error alleging the following: (1) the evidence is legally insufficient to sustain his conviction; and (2) the trial court erred in allowing the Arkansas conviction into evidence. We affirm.

Factual Background

On August 13, 1996, appellant entered a grocery store in Bryan, Texas. The manager of the store, Jimmy Junek observed appellant place a single pack of cigarettes in his shopping cart. After placing the cigarettes in the shopping cart, appellant began to walk around the store. Junek saw appellant awhile later and noticed there were no cigarettes in the cart. When appellant entered the check-out lane, Junek approached him and asked where the cigarettes were. Appellant told Junek he put them down somewhere in the store. Junek asked appellant to show him where he put them.

Appellant and Junek began walking through the store looking for the cigarettes. When the pair reached the aisle adjacent to the bread racks, appellant, according to a State's witness, attacked Junek without warning and punched him in the face. Because of the blow, Junek crashed into the bread racks. Appellant, on the other hand, testified Junek struck him first and that he was merely acting in self-defense.

After the first blow, Junek recovered and took a few steps toward appellant. According to the first assistant store manager, Jeanette Stone, appellant then punched Junek in the stomach, doubling him over and causing him to lose his breath. While Junek was doubled over, appellant kicked him in the head. The force of the kick caused Junek to stand straight up. At that point, Junek, who was apparently unconscious, fell back onto the floor. Stone and John Lievsay, a food broker, watched appellant kick Junek in the head as he lay unconscious on the floor. Appellant was allegedly yelling as he kicked Junek, "I'm not going to let no white man take me out. I'm going to take him out before he takes me out." Another store employee, Deana Arnold tried to persuade appellant to wait for the police to arrive. Appellant threatened to knock her out and he left. Junek was transported to the hospital where he was treated for his injuries, including a fractured skull and bruising of the brain. The police subsequently arrested appellant that evening when he

was found hiding in the bathtub of a friend's apartment.

First Point of Error-Legal Challenge to the Sufficiency of the Evidence

In his first point of error, appellant alleges the trial court erred in denying his motion for instructed verdict because the State failed to prove beyond a reasonable doubt that (1) appellant caused serious bodily injury by using his hands and feet; and (2) appellant's hands and feet, in the manner of their use or intended use, were capable of causing death or serious bodily injury. At the end of the State's case-in chief, appellant moved for an instructed verdict. The trial court denied the oral motion and appellant then proceeded to present defensive evidence to the jury. The State urges this court to overrule appellant's first point of error on the ground of waiver. We decline.

***2** Before June of 1990, several cases held that an appellant who put on defensive evidence after the trial court denied a defense motion for instructed verdict at the close of the State's case-in-chief waived any right to challenge the trial court's ruling. *See, e.g., Hafdahl v. State,* 805 S.W.2d 396, 400 (Tex.Crim.App.1990); *Kuykendall v. State,* 609 S.W.2d 791, 794 (Tex.Crim.App.1980); *Anguiano v. State,* 774 S.W.2d 344, 346 (Tex.App.-Houston [14th] 1989, pet. ref'd). In 1990, however, the Texas Court of Criminal Appeals specifically disavowed its previous position and held that a challenge to a trial court's ruling on a motion for instructed verdict is actually a challenge to the legal sufficiency of the evidence to support the conviction. *See Madden v. State,* 799 S.W.2d 683, 686 n. 3 (Tex.Crim.App.1990). Accordingly, we will review appellant's contention as a challenge to the legal sufficiency of the evidence.

In reviewing a legal sufficiency claim, we must view the evidence in the light most favorable to the verdict and determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *See Whitaker v. State,* 977 S.W.2d 595, 598 (Tex.Crim.App.1998) (citing *Jackson v. Virginia,* 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); *Mason v. State,* 905 S.W.2d 570, 574 (Tex.Crim.App.1995)). The jury is the exclusive judge of the credibility of the witnesses and the weight to be given their testimony. *See Whitaker,* 977 S.W.2d at 598 (citing *Barnes v. State,* 876 S.W.2d 316, 321 (Tex.Crim.App.1994) (en banc)). Likewise, reconciliation of conflicts in the evidence is within the exclusive province of the jury. *See Whitaker,* 977 S.W.2d at 598 (citing *Losada v. State,* 721 S.W.2d 305, 309 (Tex.Crim.App.1986)).

Appellant first claims the evidence is legally insufficient to prove he caused serious bodily injury by use of his hands and feet. Specifically, appellant argues the State's expert, Dr. Rudy Briner, testified that Junek's "serious bodily injury" was caused by the blow Junek received when he struck his head on the floor. Thus, appellant contends the evidence does not show appellant caused the injury; rather, the injury was caused *by the floor* when appellant fell and struck his head. We find appellant's argument disingenuous.

A person is criminally responsible for his conduct if the result would not have occurred but for his conduct. *See* TEX. PEN.CODE ANN. § 6.04(a) (Vernon 1994). Moreover, a person is criminally responsible for his conduct if that conduct, regardless of a concurrent cause, caused the harm, or if his conduct, together with another cause, caused the harm. *Id.* The only exception is if a concurrent cause is clearly sufficient to produce the harm and the conduct of the alleged perpetrator is clearly insufficient. *Id.* Accordingly, proof of causation is sufficient if the evidence establishes that "but for" the defendant's conduct, the alleged result would not have occurred. *See Barcenes v. State,* 940 S.W.2d 739, 745 (Tex.App.-San Antonio 1997, no pet.); *Lowe v. State,* 676 S.W.2d 658, 661 (Tex.App.-Houston [1st Dist.] 1984, pet. ref'd). *See also* TEX. PEN.CODE ANN. § 6.04(a) (Vernon

1994).

*3 In this case, the evidence showed appellant struck Junek with his fists and kicked Junek with his feet. But for appellant striking Junek with his hands and feet, Junek would not have fallen backward and struck his head on the floor. In other words, had appellant not struck Junek, he would not have suffered the serious bodily injuries testified to by Dr. Briner. The evidence clearly established that appellant intended to knock appellant to the floor. For appellant to claim that it was the floor, not him, that caused Junek's injuries is untenable.

Appellant also complains of the jury's affirmative finding on the deadly weapon issue. The indictment alleged appellant:

"intentionally, knowingly and recklessly cause[d] serious bodily injury to JIMMY JUNEK by striking JIMMY JUNEK with his fists and by kicking him and ... during the commission of the above described felony, ... use[d] and exhibit[ed] a deadly weapon, to-wit: his hands and feet, that in the manner of their use and intended use, were capable of causing death and serious bodily injury...."

The Texas Penal Code defines a deadly weapon as anything that in the manner of its use or intended use is capable of causing death or serious bodily injury. *See* TEX. PEN.CODE ANN. § 1.07(a)(17)(B) (Vernon 1994). While hands and feet are not deadly weapons *per se,* they can become deadly weapons if, in the manner of use, they are capable of causing death or serious bodily injury. *See Powell v. State,* 939 S.W.2d 713, 717 (Tex.App.-(Tex.App.-El Paso 1997, no pet.) (holding that evidence supported finding feet used as deadly weapons when used to kick victim in head); *Clark v. State,* 886 S.W.2d 844, 845 (Tex.App.-Eastland 1994, no pet.) (holding that evidence supported finding feet used as deadly weapons where defendant struck and kicked two-year old child in manner capable of causing death). An object is subject to an affirmative finding of a deadly weapon only when it is actually used in such a way as to cause death or serious bodily injury. *See Powell,* 939 S.W.2d at 717. In other words, an object is a deadly weapon under section 1.07(a)(17)(B) when it is actually used in a manner which causes, or has the potential to cause, death or serious bodily injury. *See id.* (citing *Hill v. State,* 913 S.W.2d 581, 591 (Tex.Crim.App.1996). Consequently, in this case, the State was required to prove beyond a reasonable doubt that appellant's hands and feet, in the manner of their use, were capable of causing death or serious bodily injury to Junek.

The testimony established that appellant struck Junek with his hands and kicked him with his feet. Dr. Briner testified Junek suffered serious bodily injuries and described the injuries to the jury. According to Dr. Briner, Junek suffered a scalp laceration, a skull fracture, and bruising of the brain. As a result of these injuries, Junek suffered a spinal fluid leak, diminished mental capacity, memory loss, and possible permanent hearing loss.

*4 There was also evidence that as appellant assaulted Junek he shouted: "I'm not going to let no old white man take me out. I'm going to take him out before he takes me out." The jury was entitled to consider this evidence, along with Dr. Briner's testimony, in making their determination on the deadly weapon issue. *See Hatchett v. State,* 930 S.W.2d 844, 848 (Tex.App.-Houston [14th] 1996, pet. ref'd) (holding that in making determination as to use of deadly weapon, jury may consider words spoken by defendant). Considering all of the evidence before the jury, and viewing it in the light most favorable to the verdict, we hold the evidence was sufficient to support the jury's affirmative finding that appellant used a deadly weapon. We overrule appellant's first point of error.

Second Point of Error-Admission of Previous Conviction

In point of error two, appellant claims the trial court erred in admitting into evidence, during the punishment phase, a previous conviction from the

State of Arkansas. Appellant argues the conviction was inadmissible for two reasons: (1) the conviction was void because it contains no showing that appellant was admonished as to his right to a jury trial and waived such right; and (2) the copy of the Arkansas judgment offered by the State was not properly authenticated because the State only offered a facsimile transmission of a certified copy of the judgment and it did not contain an Arkansas seal. We find no merit to appellant's arguments.

An attack on an out of state conviction is a collateral attack. *See Acosta v. State,* 650 S.W.2d 827, 828 (Tex.Crim.App.1983). When a collateral attack is made upon a prior, out of state conviction, the burden is on the appellant to show the conviction is void by showing the procedure used to obtain the conviction was improper. *See id.* at 829. In this case, rather than proving the conviction was void because he did not waive his right to a jury trial, appellant admitted he waived his right to a jury trial. During the punishment phase of the trial, the prosecutor asked appellant about his Arkansas convictions. In response, appellant admitted that in 1991 he had been convicted of two counts of burglary and one count of theft. He also stated that at the time of those convictions, he was represented by an attorney, waived a jury trial, and in fact, signed a document specifically waiving his right to a jury trial. Accordingly, we find no merit to appellant's first argument.

We also find no merit to appellant's second argument. The State introduced a facsimile transmission ("fax") of a certified copy of appellant's Arkansas conviction. Appellant contends the trial court should not have admitted the document because it had no seal, and therefore, was not properly authenticated. In *Englund v. State,* 946 S.W.2d 64, 71 (Tex.Crim.App.1997), the court held that a facsimile transmission of a certified copy of a judgment is admissible. In reaching its decision, the court focused on the goals and purposes of article X of the Texas Rules of Evidence, also commonly referred to as "best evidence" rules. *See id.* at 67. It is clear, based on the court's review of the rules in article X, common law, and various commentators' musings on the admissibility of duplicates, that the court found the goals and purposes of article X were to ensure the introduction of authentic documents, rather than fraudulent ones. *See id.* at 71. The court refused to apply woodenly article X and stated that to do so, without regard to the indicia of authenticity present in the circumstances surrounding the document in question, would be contrary to the goals and purposes of article X. *See id.*

***5** In this case, appellant specifically testified as to the existence of his Arkansas conviction. What more than appellant's own admission could create a greater indicia of authenticity? Appellant attempts to distinguish his case from *Englund* by arguing that in *Englund,* unlike here, the faxed copies exhibited evidence of a seal. Based on the court's reasoning in *Englund,* we find this distinction irrelevant.

The purpose of the authentication rules is to ensure documents are accurate. The documents introduced by the State alleged appellant was convicted of a particular offense, on a particular day, in a particular Arkansas county. As the court recognized in *Englund,* any investigation by appellant's counsel, including a search of the particular county's records, would have enabled counsel to determine the true facts of appellant's Arkansas conviction. Appellant's judgment of conviction was a public record whose existence and content were readily discoverable so that appellant could have raised a question about fraud or the accuracy of the fax of the certified copy. Accordingly, we find the trial court did not err in admitting the fax transmission offered by the State. We overrule point of error two. We affirm the trial court's judgment.

Tex.App.-Hous. (14 Dist.),1999.
Crowell v. State
Not Reported in S.W.2d, 1999 WL 497543 (Tex.App.-Hous. (14 Dist.))

END OF DOCUMENT

ATTACHMENT B

(California Rules of Court Rule 8.1115.)

Not Reported in S.W.2d, 1998 WL 720467 (Tex.App.-Hous. (1 Dist.))
(Cite as: 1998 WL 720467 (Tex.App.-Hous. (1 Dist.)))

Court of Appeals of Texas, Houston (1st Dist.).
Martha Elva MARTINEZ, Appellant
v.
The State of Texas, Appellee
No. 01-96-01151-CR.

Sept. 17, 1998.

On Appeal from the 184th District Court Harris County, Texas Trial Court Cause No. 719679.

OPINION

SCHNEIDER, Chief Justice.

***1** A jury found appellant, Martha Elva Martinez, guilty of delivery of marihuana weighing more than 50 pounds and less than 2000 pounds, and the trial court assessed punishment at 16 years confinement. On appeal, appellant contends that (1) a faxed copy of an out-of-state criminal record was erroneously admitted during the punishment phase and (2) the prosecutor made improper remarks during her closing argument of the guilt/innocence phase. We reverse and remand for a new punishment hearing.

FACTS

On April 3, 1996, an informant told Sergeant Oscar Garcia, an undercover narcotics investigator, that he knew a woman who wanted to sell marihuana. Garcia told the informant to set up a meeting with the woman so he could purchase 100 pounds of marihuana. The following day, Garcia rented a motel room, where he and Officer Paul Zavala, a narcotics investigator with the Houston Police Department, waited. Appellant, Blanca Perez, and the informant arrived at the room at 3:00 in the afternoon. Garcia invited them in and asked them if they were ready to "do the deal." Appellant responded affirmatively. Garcia also asked if he had to negotiate with someone else, and appellant told Garcia that he was to deal directly with her.

Garcia showed the women $45,000 in cash. Appellant asked Garcia how he wanted to conduct the transaction, and Garcia told her he wanted to go to her house and weigh the marihuana before he made the purchase. Appellant told Garcia to follow them to Perez's house, which was next door to appellant's house.

Garcia followed the two women to Perez's house. The two women led Garcia to a bedroom in the house and showed him that the marihuana was in some trash bags. When Garcia asked for a scale, appellant told Perez to go get one. Perez returned with the scale, and Garcia weighed the marihuana. Appellant wrote down the weight of the marihuana "bricks."

After Garcia weighed the marihuana, Garcia told appellant he was going outside to get the money. In actuality, Garcia went outside to give the bust signal. The surveillance team went into the house and arrested appellant and Perez. The marihuana that was seized from Perez's house weighed approximately 96.4 pounds.

IMPROPER ARGUMENT

In point of error two, appellant contends the prosecutor made improper remarks during her closing argument of the guilt/innocence phase of the trial. Appellant's complaint is based on the following remarks:

[Prosecutor]: And where is Blanca Perez? Mr. Mar-

tinez [defense counsel] specifically asked where is Blanca Perez. I will tell you, Blanca Perez took her lumps and she is in the penitentiary.

[Defense Counsel]: I object, Your Honor, that's evidence outside-

The Court: Sustained.

[Defense Counsel]: Ask the jury to-ask the Court to instruct the jury to disregard the last statement.

...

[Prosecutor]: Judge, he opened the door, misled the jury that she's walking out there on the streets, he completely opened the door to her whereabouts.

***2** [The Court]: Sustained.... The jury is instructed to disregard the last comment of the prosecutor and not consider if for any purpose whatsoever.

[Defense Counsel]: At this time, Your Honor, I respectfully move for a mistrial.

[The Court]: Denied.

The State argues the prosecutor's remarks were invited by the following remarks made by defense counsel:

Why isn't Blanca here? Now if I wanted to have Blanca here, then she would be. It's not an easy thing to get a person accused of a crime, and I could have called Blanca or maybe not, but I'm not here to prove a case or even disprove the case, I'm here to show you she has to prove the case, and that's all I have to prove. And Blanca is not here, and there is no explanation for that. And I submit sometimes it is not easy to do that. But she is not here and she is a witness. And I may not want Blanca here, but that's not my job to get her or not, it's not my job, and I don't have the burden of proof.

The proper areas of jury argument are: (1) summation of the evidence; (2) reasonable deduction from the evidence; (3) answers to the argument of opposing counsel; and (4) pleas for law enforcement. *Stanley v. State,* 887 S.W.2d 885, 895 (Tex.Crim.App.1994); *Simpson v. State,* 886 S.W.2d 449, 453 (Tex.App.-Houston [1st Dist.] 1994, pet. ref'd). To determine the propriety of a prosecutor's argument, we consider the entire argument rather than just isolated statements. *Mosley v. State,* 686 S.W.2d 180, 183 (Tex.Crim.App.1983); *Simpson,* 886 S.W.2d at 453. Reversible error results from improper prosecutorial argument only when the argument is "extreme, manifestly improper, injects new and harmful facts into [the] case or violates a mandatory statutory provision and is thus so inflammatory that its prejudicial effect cannot reasonably be cured by judicial instruction to disregard argument." *Hernandez v. State,* 819 S.W.2d 806, 820 (Tex.Crim.App.1991).

The issue before us is whether the State's reply to defense counsel's argument (*i.e.,* that Blanca Perez's absence at trial could not be explained) went beyond the scope of defense counsel's invitation. The invited argument rule allows prosecutorial argument outside the record in response to a defense argument that goes outside the record. *Bush v. State,* 773 S.W.2d 297, 301 (Tex.Crim.App.1989). However, a prosecutor may not stray beyond the scope of the invitation. *Id.*

In *Thornton v. State,* a case very similar to the instant case, the defense counsel rhetorically asked during closing argument (1) where two witnesses were; (2) why they were not present to testify; and (3) why the State did not call the witnesses to testify. 542 S.W.2d 181, 182 (Tex.Crim.App.1976). In response, the prosecutor argued the two witnesses were in the penitentiary serving a seven-year sentence for the same offense. *Id.* The Court found that the defense counsel's argument was not an impermissible venture outside the record, and, hence, the State was not entitled to stray outside the record. *Id.* at 183. The Court stated there was no evidence in the record that the two witnesses were in the penitentiary serving a seven-year sentence. *Id.* The Court pointed out that generally, such information cannot be admitted because upon a trial of one charged

with a crime, it is impermissible to show that another jointly or severally indicted for the same offense has been convicted or acquitted. *Id.* The Court held the unsworn testimony of the prosecutor injected new facts into the case that were harmful and prejudicial to the appellant. *Id.* Finally, the Court stated that the prosecutor could have replied that the witnesses were equally available for the defense as they were for the State. *Id.*

***3** Similarly, in this case, defense counsel's statement that Perez's absence could not be explained was not outside the record. Hence, the prosecutor was not entitled to go outside the record. There is no evidence in the record that Perez went to the penitentiary.[FN1] By replying that Perez "took her lumps" and was in the penitentiary, the prosecutor injected new facts that were harmful and prejudicial to appellant. The prosecutor simply could have replied that Perez was equally available as a witness for the defense as she was for the State.

> FN1. There is only evidence that Perez was arrested and charged with the same offense for which appellant was charged.

However, unlike *Thornton,* the trial court in this case sustained appellant's counsel's objection to the prosecutor's remark and instructed the jury to disregard the improper argument. Generally, there is a presumption that a jury will an obey an instruction to disregard prejudicial evidence or improper argument. *Gardner v. State,* 730 S.W.2d 675, 696 (Tex.1987) ("In essence, this Court puts its faith in the jury's ability, upon instruction, to consciously recognize the potential for prejudice, and then consciously to discount the prejudice, if any, in its deliberations."). An instruction to disregard improper argument cures harm, provided the prosecutor does not revisit the argument after the jury receives the instruction. *Rushing v. State,* 962 S.W.2d 100, 102 (Tex.App.-Houston [1st Dist.] 1997, pet. ref'd). In this case, the prosecutor referred to Perez's presence in the penitentiary only once and did not revisit the subject after an instruction to disregard. Thus, the instruction to disregard cured any harm.

In any case, the record indicates that any error did not affect a substantial right of the appellant and, thus, a reversal is not required. *See* TEX. R. APP. P. 44.2(b). Officer Garcia identified appellant as the woman who personally negotiated the delivery of 100 pounds of marijuana. Garcia testified that appellant led him from the initial meeting location to Perez's home, where the marijuana was located, and that appellant kept written notes of the weight of various bundles of marijuana as Garcia weighed them.

Officer Zavala, who witnessed the initial negotiations, also identified appellant as the woman who negotiated the drug transaction with Garcia. Officer John Garza identified appellant as one of the women whom he followed from the site of the initial negotiations to the site of the actual transaction and arrest.

Further, defense counsel's strategy throughout cross-examination and closing argument was to imply that Perez was the real perpetrator of the drug deal and appellant was merely a bystander. The prosecutor's argument that Perez had already been convicted and sentenced could just as easily be taken as support for this theory. In light of this and the overwhelming, properly admitted evidence of appellant's guilt, we find that the improper jury argument did not have a substantial or injurious influence on the jury's decision. Accordingly, the trial court did not err in overruling appellant's motion for mistrial.

***4** We overrule point of error two.

OUT-OF STATE CRIMINAL RECORD

In point of error one, appellant contends the facsimile transmission of an out-of-state order of probation was inadmissible during the punishment phase because it was hearsay and had not been authenticated. We agree.

The State's fingerprint expert was able to identify only one of appellant's ten fingerprints from the

facsimile of appellant's out-of-state criminal record. During the punishment phase, appellant objected to the admission of this criminal record under rules 802 and 803 of the Rules of Evidence. On appeal, appellant, although acknowledging that public records and reports are exceptions to these hearsay rules, specifically argues that the source of, and the circumstances surrounding, the criminal record indicate a lack of trustworthiness.[FN2]

> FN2. Rule 803(8) provides that records or reports of "public offices or agencies setting forth (A) the activities of the office or agency; (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding in criminal matters observed by police officers and other law enforcement personnel; or (C) ... as against the state, factual findings resulting from an investigation made pursuant to authority granted by law; *unless the sources of information or other circumstances indicate lack of trustworthiness.* " TEX. R. EVID. 803(8) (emphasis added). The State contends appellant has not preserved her hearsay argument for appellate review because in making her objection at trial, appellant did not specify that the facsimile was untrustworthy due to its poor quality; instead, appellant merely objected to the facsimile as hearsay. Identifying challenged evidence as hearsay generally should be regarded as a sufficiently specific objection. *See Cofield v. State,* 891 S.W.2d 952, 954 (Tex.Crim.App.1994). A general objection will not waive error if the complaint is obvious to the trial court and the State and if it is apparent from the context of the record. *Long v. State,* 800 S.W.2d 545, 548 (Tex.Crim.App.1990). It is apparent from the context of this record that appellant was objecting to a public record, a hearsay exception, on the ground that it was unreliable. Accordingly, the State's waiver argument has no merit.

According to appellant, the facsimile was untrustworthy because (1) it was not a final judgment but an order of probation, and (2) the State's fingerprint expert testified that facsimiles are not good fingerprint identification sources. Appellant does not indicate why an order of probation is less trustworthy than a final judgment and does not cite any authority for such a proposition. In addition, the State's fingerprint expert testified that although facsimiles are normally not of good quality, the one the expert reviewed in this case was of unusually good quality. According to the expert, there were enough characteristics in the right index fingerprint on the facsimile such that the expert was able to make a comparison.

Appellant also argues that the facsimile was inadmissible because it was not properly authenticated. Specifically, appellant contends that the State did not demonstrate due diligence under rule 1005 of the Rules of Evidence [FN3] in obtaining a properly authenticated certified copy of the probation order so as to be able to use "other evidence" such as the faxed copy of that order. Appellant also argues that the facsimile copy of the order of probation is not admissible because questions can be raised as to the authenticity of the original or because circumstances exist that indicate it would be unfair to admit the facsimile copy in lieu of the original. *See* TEX. R. EVID. 1003.

> FN3. Rule 1005 provides: "The contents of an official record or of a document authorized to be recorded or filed and actually recorded or filed, including data compilations in any form, if otherwise admissible, may be proved by copy, certified as correct in accordance with Rule 902 or testified to be correct by a witness who has compared it with the original. If a copy which complies with the foregoing cannot be obtained by the exercise of reasonable diligence, then other evidence of the contents may be given. TEX. R. EVID. 1005.

The issue of whether a facsimile of a certified copy

is admissible in lieu of the certified copy that is the source document for the facsimile was addressed by the Court of Criminal Appeals in *Englund v. State,* 946 S.W.2d 64 (Tex.Crim.App.1997). In *Englund,* the Cameron County Clerk's office sent a certified copy of a judgment to the Brazoria County District Attorney's office via a facsimile telecopier. *Id.* at 65. The facsimile of the judgment was preceded by a facsimile transmittal memorandum. *Id.* The top of each page of the facsimile included a machine notation showing the date, time, source telephone number, and source of transmittal. *Id.* The bottom of each page included a reproduction of the county clerk's seal, attestation, and signature. *Id.* The Court stated that "[t]he potential for fraud was minimized because the source of the facsimile transmission was the same source of the certified copy-the Cameron County Clerk's office." *Id.* at 71. The Court held that the Rules of Evidence were "flexible enough to have allowed for an interpretation leading to the conclusion that the facsimile was admissible under Rules 1005 and 1003." *Id.* However, the Court cautioned that a copy of a public record obtained by a facsimile transmission will not always be admissible. *Id.* n .13. That is, if a party raises an objection, the trial court must exercise its discretion under rule 1003 in determining whether a question is raised as to the authenticity of the original or whether in the circumstances it would be unfair to admit the duplicate in lieu of the original. *Id.*

***5** The facts of this case are clearly distinguishable from those in *Englund.* Unlike the facsimile in *Englund,* the facsimile of the order of probation was not transmitted from the same source as the original. Although the order of probation was issued in the State of Alabama, the Harris County District Attorney's office obtained it from the Cameron-Willacy Counties Community Supervision and Corrections Department. In addition, the facsimile of the order of probation did not bear a reproduction of a clerk's seal and did not have an attestation that the order of probation was a certified copy. Because it does not appear that the source document was certified, "other evidence of the contents" of that document such as the facsimile of that document may not be admitted without proof that a certified copy could not be obtained by the exercise of reasonable diligence. The record does not indicate that the State demonstrated that it exercised reasonable diligence in obtaining a certified copy of the probation order.

We conclude the trial court erred in admitting the facsimile of the order of probation during the punishment phase. Consequently, we must determine if the error was harmful.

During the punishment phase, the State only presented the fingerprint expert and the facsimile of the uncertified order of probation, which was accompanied by a sheet of appellant's purported fingerprints. Appellant did not present any evidence. Presumably, the State was relying on this evidence to show appellant had a prior conviction. In essence, the unauthenticated order of probation was the sole evidence that the trial judge, the trier of fact, had before her in assessing appellant's punishment. Our examination of the record leads us to conclude that the error affected a substantial right of appellant. *See* TEX. R. APP. P. 44.2(b). A substantial right is affected when the error had a substantial and injurious effect or influence on the trier of fact's decision. *See King v. State,* 953 S.W.2d 266, 271 (Tex.Crim.App.1997) (citing *Kotteakos v. U.S.,* 328 U.S. 750, 776, 66 S.Ct. 1239, 1253, 90 L.Ed. 1557 (1946)). In light of the fact that no other evidence of appellant's prior conviction was properly admitted, we find the complained of document in this case had a substantial or injurious influence.

We sustain point of error one.

We reverse and remand for a new punishment hearing.

Justices HEDGES and NUCHIA also participating.

Tex.App.-Hous. (1 Dist.),1998.
Martinez v. State

Not Reported in S.W.2d, 1998 WL 720467 (Tex.App.-Hous. (1 Dist.))
(Cite as: 1998 WL 720467 (Tex.App.-Hous. (1 Dist.)))

Not Reported in S.W.2d, 1998 WL 720467
(Tex.App.-Hous. (1 Dist.))

END OF DOCUMENT

ATTACHMENT C

(California Rules of Court Rule 8.1115.)

Not Reported in N.E.2d, 2000 WL 1533916 (Ohio App. 9 Dist.), 2000 -Ohio- 6609
(Cite as: 2000 WL 1533916 (Ohio App. 9 Dist.))

Court of Appeals of Ohio, Ninth District, Medina County.
STATE of Ohio, Appellee,
v.
Stephen PISARKIEWICZ, Appellant.
No. C.A. 2996-M.

Oct. 18, 2000.

Appeal from Judgment Entered in the Court of Common Pleas, County of Medina, Ohio, Case No. 99 CR 0117.

John P. Hildebrand, Attorney at Law, Fairview Park, OH, for appellant.

Dean Holman, Prosecuting Attorney, Joseph F. Salzgeber, and Scott G. Salisbury, Assistant Prosecuting Attorneys, Medina, OH, for appellee.

DECISION AND JOURNAL ENTRY

BATCHELDER.

***1** Appellant, Stephen Pisarkiewicz, appeals his conviction in the Medina County Court of Common Pleas. We affirm.

I.

On March 31, 1999, the Medina County Grand Jury indicted Mr. Pisarkiewicz on one count of operating a vehicle while under the influence of drugs or alcohol, having previously been convicted of three violations of R.C. 4511.19(A) or (B) within six years prior to the current offense, in violation of R.C. 4511.19(A)(1) and 4511.99(A)(4)(a). A jury trial was held, commencing on June 9, 1999. Mr. Pisarkiewicz was represented by counsel and testified at trial. After the close of the State's case-in-chief and at the close of all evidence, Mr. Pisarkiewicz made a motion for acquittal, pursuant to Crim.R. 29. The trial court denied these motions. In a verdict journalized on June 17, 1999, the jury found Mr. Pisarkiewicz guilty of the charge contained in the indictment, making a special finding that Mr. Pisarkiewicz was convicted of three prior offenses regarding operating a motor vehicle while under the influence of alcohol within the previous six years. He was sentenced accordingly. This appeal followed.

II.

Mr. Pisarkiewicz asserts six assignments of error. We discuss each in due course, consolidating the second and sixth assignments of error and the third, fourth, and fifth assignments of error to facilitate review.

A.

First Assignment of Error

THE TRIAL COURT ERRED BECAUSE IT ALLOWED FACSIMILE COPIES OF ALLEGED CERTIFIED COPIES OF APPELLANT'S PRIOR CONVICTIONS INTO EVIDENCE, AND ALSO DID NOT REQUIRE FURTHER EVIDENCE SUFFICIENT TO IDENTIFY APPELLANT.

Mr. Pisarkiewicz avers that the trial court erred in admitting into evidence facsimile copies of certified copies of municipal court and other state documents. He questions the authenticity of these documents, arguing that it was prejudicial to allow duplicate copies of certified copies when R.C. 2945.75(B) specifies certified copies. We disagree.

" 'The trial court has broad discretion in the admission * * * of evidence and unless it has clearly abused its discretion and the defendant has been materially prejudiced thereby, [an appellate] court should be slow to interfere.' " (First alteration original.) *State v. Maurer* (1984), 15 Ohio St.3d 239, 265, quoting *State v. Hymore* (1967), 9 Ohio St.2d 122, 128. An abuse of discretion is more than an error of judgment, but instead demonstrates "perversity of will, passion, prejudice, partiality, or moral delinquency." *Pons v. Ohio State Med. Bd.* (1993), 66 Ohio St.3d 619, 621. When applying the abuse of discretion standard, an appellate court may not substitute its judgment for that of the trial court. *Id.*

When a prior conviction raises the degree of the current offense from a misdemeanor to a felony, as is the situation in the case at bar, the prior conviction is an essential element of the crime and must be proven beyond a reasonable doubt. See *State v. Day* (1994), 99 Ohio App.3d 514, 517. R.C. 2945.75(B) provides:

***2** [w]henever in any case it is necessary to prove a prior conviction, a certified copy of the entry of judgment in such prior conviction together with evidence sufficient to identify the defendant named in the entry as the offender in the case at bar, is sufficient to prove such prior conviction.

However, this court has previously stated that " R.C. 2945.75 sanctions merely one means of proving a prior conviction but not the only [means]." *State v. Frambach* (1992), 81 Ohio App.3d 834, 843.

Evid.R. 902 provides for the self-authentication of documents and states in relevant part:

Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following:

* * *

(4) Certified copies of public records.

A copy of an official record or report * * * certified as correct by the custodian or other person authorized to make the certification, by certificate complying with paragraph (1), (2), or (3) of this rule or complying with any law of a jurisdiction, state or federal, or rule prescribed by the Supreme Court of Ohio.

Further, Evid.R. 1003 governs the admissibility of duplicates and states:
A duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original.

In present case, Mr. Pisarkiewicz argues that because R.C. 2745.75(B) specifies certified copies and Exhibit 7 contained facsimile copies of certified copies of municipal court and other state documents, the trial court erred in admitting these documents into evidence. However, the trial court specifically found that there was no genuine issue as to the authenticity of the facsimile copies of the certified municipal court and other public documents, and Mr. Pisarkiewicz does not aver that the information contained in the documents is inaccurate or altered from the original. Hence, we cannot say that the trial court abused its discretion in admitting these documents into evidence. See, generally, *Akron v. Martin* (Jan. 10, 1996), Summit App. No. 17286, unreported, at 3-4 (finding that a facsimile copy of a municipal court record complied with the requirements of Evid.R. 902).

In the alternative, he complains that the prosecution did not provide further evidence sufficient to identify Mr. Pisarkiewicz as the individual named in the judgment entries of his prior convictions, as is required by R.C. 2945.75(B). Although Mr. Pisarkiewicz objected to the admission of the uncertified LEADS printouts in Exhibit 6 and the authenticity of Exhibit 7, he did not raise this issue before the trial court, and therefore, it is not properly before this court. Mr. Pisarkiewicz's first assignment of error is overruled.

B.

Second Assignment of Error

THE TRIAL COURT ERRED BECAUSE IT DID NOT GRANT APPELLANT'S MOTION FOR VERDICT OF DISMISSAL PURSUANT TO CRIMINAL RULE 29.

Sixth Assignment of Error

*3 THE VERDICT RENDERED BY THE TRIER OF FACT WAS AGAINST THE MANIFEST WEIGHT AND SUFFICIENCY OF THE EVIDENCE SINCE THE PROSECUTION DID NOT PRODUCE SUFFICIENT EVIDENCE TO PROVE APPELLANT'S GUILT BEYOND A REASONABLE DOUBT.

Mr. Pisarkiewicz contends that his conviction for operating a vehicle while under the influence of alcohol was based on insufficient evidence and against the manifest weight of the evidence. He further argues that the trial court erred in denying his Crim.R. 29 motion for acquittal. We disagree.

Crim.R. 29(A) provides that a trial court "shall order the entry of a judgment of acquittal * * * if the evidence is insufficient to sustain a conviction of such offense or offenses." A trial court may not grant an acquittal by authority of Crim.R. 29(A) if the record demonstrates that reasonable minds can reach different conclusions as to whether each material element of a crime has been proven beyond a reasonable doubt. *State v. Wolfe* (1988), 51 Ohio App.3d 215, 216. In making this determination, all evidence must be construed in a light most favorable to the prosecution. *Id.*

"While the test for sufficiency requires a determination of whether the state has met its burden of production at trial, a manifest weight challenge questions whether the state has met its burden of persuasion." *State v. Gulley* (Mar. 15, 2000), Summit App. No. 19600, unreported, at 3, citing *State v. Thompkins* (1997), 78 Ohio St.3d 380, 390 (Cook, J., concurring). When a defendant asserts that his conviction is against the manifest weight of the evidence,

an appellate court must review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of witnesses and determine whether, in resolving conflicts in the evidence, the trier of fact clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered.

State v. Otten (1986), 33 Ohio App.3d 339, 340. This discretionary power should be invoked only in extraordinary circumstances when the evidence presented weighs heavily in favor of the defendant. *Id.*
Because sufficiency is required to take a case to the jury, a finding that a conviction is supported by the weight of the evidence must necessarily include a finding of sufficiency. Thus, a determination that [a] conviction is supported by the weight of the evidence will also be dispositive of the issue of sufficiency.

(Emphasis omitted.) *State v. Roberts* (Sept. 17, 1997), Lorain App. No. 96CA006462, unreported, at 4.

Mr. Pisarkiewicz was convicted of operating a vehicle while under the influence of alcohol, in violation of R.C. 4511.19(A), which states is relevant part that "[n]o person shall operate any vehicle * * * within this state, if * * * [t]he person is under the influence of alcohol[.]" Further, "[i]f, within six years of the offense, the offender has been convicted or pleaded guilty to three or more violations of division (A) or (B) of [R.C.] 4511.19[or] a municipal ordinance relating to operating a vehicle while under the influence of alcohol * * * the offender is guilty of a felony of the fourth degree." R.C. 4511.99(A)(4)(a).

*4 In the present case, Sergeant Derek Bauman of

the Montville Township Police Department testified that on March 21, 1999 at approximately 2:00 a.m., he observed Mr. Pisarkiewicz's vehicle make an unusually wide turn from the exit ramp of Interstate 71 onto eastbound State Route 18 in Medina County, Ohio. Sgt. Bauman, who had been stopped at the red light on eastbound Rte. 18, activated the video camera in his police cruiser and followed Mr. Pisarkiewicz's vehicle. This video was played for the jury and admitted into evidence. He testified that the vehicle was weaving in a serpentine fashion and was not maintaining its lane. Sgt. Bauman stated that after he activated his lights, Mr. Pisarkiewicz turned on his emergency flashers and continued to drive approximately one-third of a mile before pulling into the parking lot of the Kilted Yak. Sgt. Bauman noted that this was an unusually long distance under the circumstances. When he approached the vehicle, Sgt. Bauman noticed that Mr. Pisarkiewicz had bloodshot, glassy eyes, and that there was a strong odor of alcoholic beverages, emanating from his person. Sgt. Bauman stated that Mr. Pisarkiewicz had difficulty explaining where he lived and stuttered when he spoke. When Sgt. Bauman asked Mr. Pisarkiewicz how much he had to drink, he answered that he had "[l]ike one beer." However, later that evening, he admitted to having two glasses of champagne and a beer. At trial, Mr. Pisarkiewicz testified that he had two glasses of champagne and one and two-thirds beers. Sgt. Bauman asked Mr. Pisarkiewicz for his identification, and he presented a Florida driver's license and an Ohio identification card. Upon transmitting the identification information to the dispatcher, Sgt. Bauman learned that Mr. Pisarkiewicz had a felony warrant for his arrest. Thereafter, Officer Scott Marcum of the Montville Township Police Department arrived. Officer Marcum testified that he smelled an obvious odor of alcoholic beverages on Mr. Pisarkiewicz and that Mr. Pisarkiewicz had red, glassy eyes and slow speech. Subsequently, Mr. Pisarkiewicz refused to perform a sobriety test and later refused to take a breathalyzer test. Sgt. Bauman stated that Mr. Pisarkiewicz was unfit to drive.

The defense called Craig Ogland, Mr. Pisarkiewicz's employer, to testify. Mr. Ogland testified that Mr. Pisarkiewicz had come to a dinner party at his house on March 20, 1999, and had consumed approximately two glasses of champagne and two beers between approximately 7:30 p.m. and 12:30 a.m. Mr. Ogland admitted that he did not know who had exactly what to drink, but testified that he did not think that Mr. Pisarkiewicz was drunk when he left the party to drive another individual home. However, it was unclear whether Mr. Pisarkiewicz was able to account for some of the time between when he left Mr. Ogland's house, drove another individual home, and was stopped by the police.

At trial, Mr. Pisarkiewicz testified that he took a wide turn onto Rte. 18 because he had the green light and there was no other traffic.[FN1] At trial, he generally denied all of Sgt. Bauman's and Officer Marcum's observations, such as denying that he smelled of alcohol and that he stammered. He explained that he did not do the performance sobriety test or the breathalyzer test because his attorney for one of his previous DUI's had advised against it.

> FN1. There are two eastbound lanes on Rte. 18.

***5** Lastly, municipal court and other state documents were admitted into evidence, showing that on October 19, 1993, Mr. Pisarkiewicz was convicted of a violation of a municipal ordinance relating to operating a vehicle while under the influence of alcohol, and that on January 12, 1996 and August 8, 1996, Mr. Pisarkiewicz pleaded guilty to violations of R.C. 4511.19. Furthermore, Mr. Pisarkiewicz admitted at trial that he had three prior convictions for operating a vehicle while under the influence of alcohol within six years prior to the March 21, 1999 offense. After a thorough review of the record, we find that the jury did not clearly lose its way and act against the manifest weight of the evidence in convicting Mr. Pisarkiewicz of operating a vehicle while under the influence of alcohol and in finding that he had previously been convicted of or pleaded

guilty to three or more violations of R.C. 4511.19 or a municipal ordinance relating to operating a vehicle while under the influence of alcohol within six years prior to the current offense. Consequently, we conclude that Mr. Pisarkiewicz's assertion that the State did not produce sufficient evidence to support his conviction, therefore, is also without merit. See *Roberts, supra,* at 4. Mr. Pisarkiewicz's second and sixth assignments of error are overruled.

C.

Third Assignment of Error

THE TRIAL COURT ERRED BECAUSE THE VERDICT WAS AGAINST THE MANIFEST WEIGHT AND SUFFICIENCY OF THE EVIDENCE WHERE THE STOP OF APPELLANT WAS WARRANTLESS, UNCONSTITUTIONAL, AND NOT BASED ON PROBABLE CAUSE.

Fourth Assignment of Error

THE TRIAL COURT ERRED BECAUSE THE VERDICT WAS AGAINST THE MANIFEST WEIGHT AND SUFFICIENCY OF THE EVIDENCE WHERE IT WAS NOT PROVEN THAT THERE WAS PROBABLE CAUSE TO ARREST APPELLANT FOR DRIVING UNDER THE INFLUENCE.

Fifth Assignment of Error

THE TRIAL COURT ERRED BECAUSE STATEMENTS AND EVIDENCE WERE OBTAINED FROM APPELLANT IN VIOLATION OF THE FIFTH AND SIXTH AMENDMENTS.

In his third assignment of error, Mr. Pisarkiewicz contends that the police lacked reasonable suspicion to stop him, and therefore, all evidence obtained as a result of the illegal stop was inadmissible. Similarly, in his fourth assignment of error, Mr. Pisarkiewicz avers that the arresting officer did not have probable cause to arrest him for driving while under the influence of alcohol or drugs, and thus, all evidence obtained as a result of the illegal arrest was inadmissible. Lastly, Mr. Pisarkiewicz argues that his statements to police were inadmissible because the police did not advise him of his rights, as required by *Miranda v. Arizona* (1966), 384 U.S. 436, 16 L.Ed.2d 694, and therefore, his constitutional right to counsel, as guaranteed by the Fifth and Sixth Amendments to the United States Constitution, was violated.[FN2] Prior to trial, Mr. Pisarkiewicz failed to file a motion to suppress any of the statements or evidence. Thus, the threshold question is whether Mr. Pisarkiewicz waived these challenges. We find that he did.

FN2. Mr. Pisarkiewicz was read his Miranda rights after being placed under arrest and seated in the police cruiser.

***6** It is well-settled that " 'an appellate court will not consider any error which counsel for a party complaining of the trial court's judgment could have called but did not call to the trial court's attention at a time when such error could have been avoided or corrected by the trial court.' * * * Such errors are waived." *State v. Campbell* (1994), 69 Ohio St.3d 38, 40, quoting *State v. Childs* (1968), 14 Ohio St.2d 56, paragraph three of the syllabus. By failing to file a pretrial motion to suppress illegally obtained evidence prior to trial, a defendant waives any error to its admission at trial. See Crim.R. 12(B)(3); see, also, *Campbell,* 69 Ohio St.3d at 44; *State v. Sibert* (1994), 98 Ohio App.3d 412, 429. Here, Mr. Pisarkiewicz failed to file a motion to suppress the evidence and statements allegedly illegally obtained by the police, and therefore, waived any objection he might have had to the introduction of this evidence at trial. We further conclude that the error complained of does not rise to the level of plain error. Crim.R. 52(B). Mr. Pisarkiewicz's third, fourth, and fifth assignments of error are overruled.

III.

Mr. Pisarkiewicz's six assignments of error are overruled. The judgment of the Medina County Court of Common Pleas is affirmed.

Judgment affirmed.

The Court finds that there were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Medina, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E).

Costs taxed to Appellant.

Exceptions.

BAIRD and SLABY, JJ., concur.

Ohio App. 9 Dist.,2000.
State v. Pisarkiewicz
Not Reported in N.E.2d, 2000 WL 1533916 (Ohio App. 9 Dist.), 2000 -Ohio- 6609

END OF DOCUMENT

DECLARATION OF SERVICE BY U.S. MAIL & ELECTRONIC SERVICE

Case Name: **PEOPLE v. DANNY LEE SKILES** No.: **S180567**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On **October 26, 2010**, I served the attached **RESPONDENT'S ANSWER BRIEF ON THE MERITS** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 110 West A Street, Suite 1100, P.O. Box 85266, San Diego, CA 92186-5266, addressed as follows:

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For delivery to:
Honorable Daniel Mc Nearney, Judge

and furthermore declare I electronically served a copy of the above document from the Office of the Attorney General's electronic notification address of ADIEService@doj.ca.gov on **October 26, 2010** to Appellate Defender's, Inc.'s electronic notification address, eservice-criminal@adi-sandiego.com

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on **October 26, 2010**, at San Diego, California.

Jena Ray
Declarant

Signature

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