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2015 IL App (3d) 130560-U

Order filed August 24, 2015

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IN THE  
APPELLATE COURT OF ILLINOIS  
THIRD DISTRICT

A.D., 2015

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of the 21th Judicial Circuit, Kankakee County, Illinois,
Plaintiff-Appellee,	)	
v.	)	Appeal No. 3-13-0560
LORENZO UPCHURCH,	)	Circuit No. 12-CF-658
Defendant-Appellant.	)	The Honorable Clark Erickson, Judge, Presiding.
	)	

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PRESIDING JUSTICE McDADE delivered the judgment of the court.  
Justices O'Brien and Wright concurred in the judgment.

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**ORDER**

- ¶ 1 *Held:* Where the admission of an audio recording improperly authenticated pursuant to the silent witness theory was not harmless, the decision of the trial court is reversed and the case is remanded.
- ¶ 2 The State charged defendant, Lorenzo Upchurch, by indictment with unlawful possession of a controlled substance with intent to deliver (Count I) (720 ILCS 570/401(a)(2)(A) (West 2014)) and unlawful possession of cannabis (Count II) (720 ILCS 550/4(c) (West 2014)). Following a jury trial, the circuit court of Kankakee County entered a judgment of conviction for

Count I and acquittal for Count II. Defendant was sentenced to 15 years' imprisonment. He appeals the conviction arguing the circuit court erred in admitting improperly submitted audio evidence during his trial. For the following reasons, we reverse and remand.

¶ 3

### FACTS

¶ 4

On December 26, 2012, police executed a search warrant at 438 North Cottage Avenue (the house) in Kankakee, IL. During the search, the police found approximately an ounce of crack cocaine and half an ounce of marijuana after a drug-sniffing dog made two alerts in the southwest bedroom of the house's basement. While there were seven occupants – six adults and one small child – inside the house, police stated they only saw defendant inside the basement bedroom where the controlled substances were found. Additionally, other evidence taken from the house – later introduced at trial – included two mailings found in a backpack retrieved from the same basement bedroom and addressed to defendant at the house. Defendant was arrested and charged with unlawful possession with the intent to deliver between 15 and 100 grams of cocaine and the unlawful possession of between 10 and 30 grams of cannabis.

¶ 5

### Motion *in limine*

¶ 6

Defendant filed a motion *in limine* on March 18, 2013, seeking to have the prosecution barred from introducing at trial his other crimes evidence including the fact that he was on parole at the time of his arrest. At the hearing, that motion was granted, after which defendant made an oral motion *in limine* seeking to exclude an audio recording the State had informed him it would be entering into evidence. The audio recording was of call from the jail phone. The portion of the audio recording the State sought to enter into evidence involved an inmate, who stated his name was "Renzo," telling an unknown woman that the police found the whole "lick" or "slab." The woman asked "Renzo" if it was all "28 grams" and he replied, "yes."

¶ 7 Defendant argued that he would be objecting to the State's introduction of the audio recording. He believed the State would not be able to lay a proper foundation for its admission; it was not relevant to the case; and it contained hearsay that he would not be able to challenge by cross-examination because the other party to the call was unidentified.

¶ 8 The State asserted that it would be able to lay a proper foundation through the testimony of Joe English, the officer who first listened to, downloaded, and submitted the download and a report on the audio recording. The State argued that the audio recording was relevant, and, as it included an admission by defendant, it was not hearsay. The State further noted that it would only be playing the designated portion of the audio recording because other parts were excludable as hearsay. The circuit court agreed and denied the oral motion, finding it was without merit at that time.

¶ 9 Trial

¶ 10 At trial, several officers testified to the occurrences surrounding the execution of the search warrant on the house and defendant's subsequent arrest. Officer Paul Berge testified that because a controlled narcotics buy was made there the search warrant had been issued for the house with no specific person named. After entering the house, Berge said he found one person asleep on a couch and another – later identified as Upchurch – coming out of the southwest basement bedroom.

¶ 11 Officer Jeff Martin testified that he and his narcotics dog searched the house after seven occupants were found and detained. The dog alerted at two different areas inside the southwest bedroom of the basement. Martin stated he then told Officer Michael Herscher about the alerts. Herscher testified that he searched the indicated areas.

¶ 12 In one area, Herscher stated he uncovered a sock with two clear, plastic bags inside of it. Both bags contained a white, rock-like substance. A field test indicated that the substance was cocaine. In the other area, Herscher said he discovered a martini shaker containing what looked like cannabis. His search of the rest of the bedroom yielded a backpack with two mailings for defendant addressed to the house, a cell phone, and a digital scale. Herscher conceded on cross-examination that he took all of those items into evidence except the sock that could have been tested for DNA and the martini shaker that could have been analyzed for fingerprints. Other officers who helped execute the search and testified also conceded during their cross-examination and review of the crime scene photos that there was other mail that had been open as well as clothing thrown about in the room that they did not take into evidence.

¶ 13 Forensic chemist Brian Trost testified that he tested the white substance in the plastic bags and the purported cannabis from the martini shaker. He confirmed that they were crack cocaine and cannabis, respectively. The largest piece of crack weighed 27.2 grams and the cannabis weighed 14.2 grams.

¶ 14 Officer Joe English also testified about his part in the execution of the search warrant. The State then questioned him about the continuing investigation of defendant while defendant was detained at the Jerome Combs Detention Center (the Center). English stated his police unit had assigned him to monitor inmate calls made from the Center using the department's standard monitoring system, Securest Platform Monitoring System (the system). He had been trained on how to use the system two years earlier by the deputy chief of corrections.

¶ 15 English described how the system worked for the inmate placing the call and how it worked with respect to monitoring the inmate's calls. He stated that prior to the commencement of a call the inmate is informed that the call is subject to monitoring and recording. The system

then asks for the inmate's account information and his name, which is also recorded. Once that information is provided, the call is initiated.

¶ 16 English testified that he was able to monitor inmate calls from various places including his office at the police station. He noted that while live calls can be monitored, the system also records every inmate call made. He can access those recorded calls in the system on the basis of a specific date and time, a specific number called, an inmate's account number, and/or an inmate's name. The system also identifies from where in the center the call is being placed.

¶ 17 In this case, English said he queried the system using defendant's last name and the date range defendant was detained at the Center. He then listened to all of the recorded calls that came up. He stated that he was able to identify defendant as the inmate placing the audio recording in question because the inmate identified himself as "Renzo" and English had previously heard defendant speak. English also noted that the call was made from the "Max C" section of the Center where defendant was housed at the time. He reported that when he worked at the Center five years earlier, the policy for this housing area was to allow only one inmate out at a time to make a phone call lasting no longer than one hour.

¶ 18 English further testified that while listening to the audio recording, he heard information relevant to the investigation. He stated he then downloaded the entire call on a CD as he did not know how to do any manipulation of the audio recording and he completed a written report summarizing the contents of the call.

¶ 19 After this testimony and over objections from defendant, the court allowed the State to publish the portion of the audio recording it had stated was not hearsay at the motion *in limine* hearing to the jury. English was questioned about the term "slab" in the recording. He stated that "slab" was one of several slang terms for crack cocaine. On cross-examination, English was

asked whether he conducted any follow-up investigation regarding the number that had been called to ascertain the identity of the other party. Although he stated he had, no evidence from that follow-up was provided in any report or included in any of the investigation documents.

¶ 20 Lieutenant Christopher Kidwell also testified that the term "slab" was slang for 28 grams of crack cocaine. Kidwell opined that people in possession of such would have bought it to sell in small divided quantities.

¶ 21 After both the State and defendant completed their respective admissions of exhibits, they rested. Defendant then moved for a directed verdict, which was denied. Both parties presented closing arguments. The State specifically reviewed the substance of the audio recording; matched details of the call with the other evidence presented in the case; and stated that defendant admitted in the audio recording the police got the whole "slab."

¶ 22 During deliberation, the jury asked to hear the audio recording again. The jurors were brought back into the courtroom and the audio recording was played twice. The jury later found defendant guilty of unlawful possession of cocaine with intent to distribute. It found him not guilty of unlawful possession of the cannabis.

¶ 23 Defendant filed a *pro se* post-trial motion, claiming, *inter alia*, ineffective assistance of counsel. After a *Krankel*<sup>1</sup> hearing, the circuit court found no basis for the claim. Defense counsel also filed a post-trial motion, alleging, *inter alia*, that the audio recording was improperly admitted. That motion was denied.

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<sup>1</sup> Under *People v. Krankel*, 102 Ill.2d 181, 189 (1984), a defendant's post-trial *pro se* claims of ineffective assistance of counsel require a circuit court to conduct an examination of the adequacy of the factual basis underlying a defendant's claim.

¶ 24 Defendant was sentenced to 15 years' imprisonment. His motion to reconsider was denied. He timely appealed.

¶ 25 ANALYSIS

¶ 26 Defendant argues here on appeal that the circuit court erred in allowing the audio recording to be submitted into evidence because the State failed to lay a proper foundation for its admission pursuant to the silent witness theory. He asserts that this erroneous admission of the audio recording was not harmless as the State placed great emphasis on it during trial, the jury evidenced reliance on it during deliberation, and he was acquitted on the charge related to the cannabis found in the same room as the crack cocaine, which was the only controlled substance mentioned on the audio recording.

¶ 27 The State counters that the circuit court did not err because under the Illinois Rules of Evidence it laid a proper foundation for the admission of the audio recording. It further argues that in light of the overwhelming evidence of defendant's guilt the admission of the audio recording is at most harmless error. Defendant was the only person seen in the basement bedroom of the house where the controlled substances were found. Mail addressed him at the house was also found in a backpack retrieved from the same basement bedroom. Additionally, there was no other evidence indicating that the seized controlled substances belonged to anyone else.

¶ 28 Evidence is admitted at the sound discretion of the circuit court and its decision will not be disturbed absent a showing of an abuse of discretion. *People v. Taylor*, 2011 IL 11067, ¶ 26. "An abuse of discretion will be found only where the trial court's ruling is arbitrary, fanciful, unreasonable, or where no reasonable person would take the view adopted by the trial court." *People v. Caffey*, 205 Ill. 2d 52, 89 (2001) (citing *People v. Illgen*, 145 Ill. 2d 353, 364 (1991)).

If abuse is found and the issue has been preserved for appeal, then we conduct a harmless error analysis. *People v. McLaurin*, 235 Ill. 2d 478, 495 (2009). It becomes the State's burden to prove defendant was not prejudiced by the error and that the remaining properly admitted evidence is sufficient to support defendant's conviction. *Id.*

¶ 29 We determine first whether an error occurred by addressing defendant's contention that the audio recording was improperly admitted. Under the Illinois Rule of Evidence 901(a), the authentication of evidence for its admission is “satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.” Ill. R. Evid. 901(a) (eff. Jan. 1, 2011). Authentication of a recording typically occurs in one of two ways. A participant or witness to the actual live conversation – while it was taking place – identifies the voices and testifies that the tape accurately portrays the conversation. *People v. Dennis*, 2011 IL App (5th) 090346, ¶ 22. Where, as here, there is no witness with personal knowledge of what the recording captured, Illinois case law holds that such evidence is admissible if the proponent presents "evidence as to [the] (1) capability of the device for recording; (2) competency of the operator; (3) proper operation of the device; (4) preservation of the recording with no changes, additions, or deletions; and (5) identification of the speakers." *People v. Smith*, 321 Ill. App. 3d 669, 675 (2001); see also *People v. Vaden*, 336 Ill. App. 3d 893, 899 (2003). This is known as the silent witness theory. *Dennis*, 2011 IL App (5th) 090346, ¶ 23.

¶ 30 We find the court's application of the silent witness theory in *People v. Sangster*, 2014 IL App (1st) 113457, instructive as it, unlike the other cited cases, considers the theory's applicability to a recording system incorporated into the general functions of a correctional facility. *c.f. Vaden*, 336 Ill. App. 3d at 898-99 (involved a recording set up by officers in their confidential informant's car); *c.f. Smith*, 321 Ill. App. 3d at 672 (involved a videotape dropped

off at the police station by a random individual); *c.f. Dennis*, 2011 IL App (5th) 090346, ¶ 26 (involved video surveillance equipment at a liquor store).

¶ 31 In *Sangster*, the defendant argued, as does defendant here, that the State failed to lay a proper foundation for the admission of a recorded jail phone call. *Id.* ¶ 49. The court, however, found that a proper foundation had been laid. *Id.* ¶ 52. The correctional officer who had listened to and downloaded the audio recording testified that the jail telephone system in that case required a personal identification number and voice recognition identification before a call could be initiated. *Id.* ¶ 50. Thus, the ability of the defendant to make the phone call and the jail telephone system's recording of the call provided sufficient proof the jail telephone system was working properly. *Id.* The court noted that the correctional officer also testified to her competency in operating the phone system by stating she was trained by the actual supplier of the phone system. *Id.* Additionally, the court found that the fact a call was placed and recorded using the jail telephone system showed that there was proper operation of the recording device. *Id.* With respect to the fourth element of the silent witness theory, the court noted that the defendant had made no colorable claim at trial or on appeal that the recording was not authentic or accurate. *Id.* ¶ 51. Thus the State needed only to establish a probability that it was accurate. *Id.* The court held that "[a]ny deficiencies would go to the weight, rather than the admissibility, of the evidence." *Id.* Finally, the court found that the caller's voice which triggered the call, his discussion of the facts specific to the case, and his attempt to contact other witnesses was sufficient evidence of identification of defendant as the caller. *Id.* ¶ 52.

¶ 32 In the case at hand, we find that English's testimony and the record fail to meet the standard set in *Sangster* for authenticating an audio recording from a recording system incorporated into the general functions of a correctional facility under the silent witness theory.

As to the operation of the recording system, English provided no insight. He testified that in order for an inmate to make a call he must provide his account information and state his name. He did not testify about how the call results in a recording or how the integrity of the system is maintained. Indeed, there is no indication that he even possessed this knowledge. Though a call was made and recorded, the added voice recognition component involved in the jail telephone system in *Sangster* was what ensured that jail telephone recording system was enabled and working. It is uncertain whether the system in this case, which did not have that feature, could not be activated with any random sound. Thus whether it was properly working is also uncertain.

¶ 33           Next, English's competency as an operator is not proven. He testified that he had been trained several years earlier on how to use the system, but he did not state whether he was taught to use the entire system or only the monitoring and downloading functions. Moreover, that training was conducted by another employee of the police department and not the actual developers or providers of the system. There is no discussion of his interim use of the system, if any, prior to being designated inmate call monitor by his unit or when or why he was given that assignment. Additionally, there is uncertainty as to whether there was proper operation of the system. Though the caller was able to place the call through the process described by English, that fact discloses nothing about the proper operation of the system and provides no assurances that it was functioning properly at the time the challenged call and recording were made.

¶ 34           Moreover, the defendant raised a viable claim at trial and here on appeal that the audio recording had not been properly preserved. During closing arguments and again here on appeal he insists that though English stated emphatically that he was not familiar with CD altering, English never actually affirmed that the CD had not been altered at any point after he

downloaded it or that what was being presented to the jury was the true and accurate copy he downloaded.

¶ 35 Finally, contrary to the State's argument, English did not properly identify defendant as the caller. "Testimony as to a telephone conversation \*\*\* is inadmissible in the absence of a claim by the witness that he or she knows the other person or can identify the person's voice or other corroborative circumstances from which the caller can be identified as the person [talking]." *Caffey*, 205 Ill. 2d at 94-95. English first testified on the day the audio recording was published to the jury that he could be sure that the caller was defendant because of his prior work experience at the Center. However, on cross examination, he stated it had been five years since he last worked at the Center. He was not sure if the Center's policy of allowing only one inmate in "Max C" – the area where defendant was housed and where the system showed the call originated – out at a time to place calls still remained in effect. English then stated on the next day of the trial that once he heard the voice of the caller he recognized it as defendant's voice because he had heard defendant speak before. However, he does not discuss when, how many times, or under what circumstances he previously heard defendant speak.

¶ 36 Thus based on the evidence presented and English's testimony we find that the circuit court abused its discretion in admitting the audio recording into evidence as the requirements of the silent witness theory were not met.

¶ 37 Having found error, we next undertake a harmless error analysis. "When deciding whether error is harmless, a reviewing court may (1) focus on the error to determine whether it might have contributed to the conviction; (2) examine the other properly admitted evidence to determine whether it overwhelmingly supports the conviction; or (3) determine whether the

improperly admitted evidence is merely cumulative or duplicates properly admitted evidence." *In re Rolandis G.*, 232 Ill. 2d 13, 43 (2008).

¶ 38 The record shows the State and the jury significantly relied on the improperly authenticated audio recording. The latter part of the first day of defendant's trial and for the duration of the State's case presentation on the second day, State's witnesses were questioned and testified only about what was discussed on the audio recording. Additionally, the State used the audio recording as one of its chief points of fact in its closing argument. Moreover, during deliberation the jury requested to listen to the audio recording again and in fact listened to it twice.

¶ 39 The only other evidence proffered by the State includes an officer's statement that defendant was the only person out of six other adult occupants of the house he happened to see coming out of the basement bedroom at the time the search warrant was executed and two letters addressed to defendant at the house that were discovered in a backpack found in the same basement bedroom. On cross-examination, several of the officers' testimonies showed that they failed to consider other possible evidence from that basement bedroom. They did not take into evidence the martini shaker that contained the cannabis for fingerprinting, the sock that the crack cocaine was found in for DNA testing, or the other open mail in the room. They also neglected to, at the least, note to whom the other open mail was addressed. Furthermore, it is significant that defendant was acquitted on the charge related to the cannabis found in the same room as the crack cocaine, which again was the only controlled substance mentioned on the audio recording. Clearly use of the improperly-admitted audio recording was not harmless error.

¶ 40

## CONCLUSION

¶ 41 The judgment of the circuit court of Kankakee County is reversed and remanded for proceedings in accord with this order.

¶ 42 Reversed and remanded.