COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

18-P-1556

COMMONWEALTH

vs.

EVAN HOLTMAN.

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

Following a jury trial, the defendant was convicted of one count of violating an abuse prevention order. G. L. c. 209A, § 7. On appeal, he argues the judge erred by (1) admitting statements made by the recipient of recorded jail telephone calls; (2) accepting the testimony of a correction officer to authenticate and admit the recorded calls; and (3) improperly admitting unauthenticated photographs and testimony regarding the calls. We affirm.

Discussion. 1. Recipient's statements. The defendant asserts that statements made by the recipient of telephone calls he placed are inadmissible hearsay and should have been excluded. We disagree.

It is well settled that statements made by a defendant are admissible against the defendant at trial. See Commonwealth v.

DiMonte, 427 Mass. 233, 243 (1998) (party's admission is excluded from hearsay rule). It follows then that the statements made by others in the course of a conversation with the defendant, which provide context to the defendant's admissible statements, are also admissible. See Commonwealth v. Mejia, 88 Mass. App. Ct. 227, 238 (2015).

Here, the Commonwealth alleged that the defendant violated the no contact clause of an abuse prevention order by engaging the recipient of his telephone calls, a female believed to go by the name Stacey DuPont, to make prohibited third-party contact on his behalf.[1] As such, any statements DuPont made in the course of these telephone calls which gave context to the defendant's statements are admissible. Mejia, 88 Mass. App. Ct. at 238. For example, in one of the telephone calls, the defendant is heard saying, "What does that mean," "That's weird," "No. She didn't," and "Or her grandmother seen it." These statements can only be understood in the context of the recipient's statements that "I wrote, 'Your father is on the

[1] The defendant also argues that the statements were inadmissible because the Commonwealth did not authenticate the female voice on the calls as belonging to "Stacey DuPont." Whether the female's voice was truly that of DuPont is irrelevant. The defendant's voice was properly identified on the calls. The evidence shows that the defendant directed someone to contact his daughter and that somebody in fact followed his instructions. The identity of this intermediary has no bearing on the defendant's guilt.

phone. He really wants to know you, see if you're okay. Please answer me' [indiscernible] and she erased it" and "I only wrote that one thing after you kept begging me to fuckin' find out and I [indiscernible]. She erased it." Similarly, the defendant's protest "That's why I only wanted you to say, 'Happy birthday' to her and 'Are you okay?'" is made clear in the context of the recipient's prior claim that "I wrote, 'Are you okay question mark' and that was fine. She left it. She left the picture up there, so when I asked her -- I said, 'Your father won't call. He wants to know if you're okay.' I said, 'Can you please answer me?' and she cut that right off." Accordingly, we see no error in the admission of any of these statements. See id.

Furthermore, several of the other challenged statements were properly admitted as the defendant's nonhearsay adoptive admissions. See Commonwealth v. Babbitt, 430 Mass. 700, 705 (2000) ("exception applies to any statement made in the presence of the defendant to which the defendant's response -- whether by oral declaration, by gesture, or by revealing silence -- objectively denotes the defendant's acceptance of the statement"). These included, for example, the statements in which the defendant responded, "Yeah" and "Exactly" to DuPont saying, "Yeah. Well, we're not talking to her. Just looking at

pictures of your daughter" and "Which, I mean, public knowledge. It's not like I'm fuckin' hacking into her account."[2]

Finally, even assuming the remaining statements -- challenged either broadly or specifically -- were impermissible hearsay, we discern no prejudice. There is strong evidence of the defendant's guilt. He is heard on the recording referring to having asked the person on the other end of the call to contact his daughter and ask, among other things, "Are you okay?" There is overwhelming evidence, both in the admissible telephone call portions and in testimony by another witness, that "Stacey DuPont" contacted the defendant's daughter via Facebook. On this record, there is little doubt, therefore, that the defendant violated the abuse prevention order.[3] See Commonwealth v. Zagranski, 408 Mass. 278, 284 (1990) ("the

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[2] The defendant also challenges a statement by the recipient that "she'll respond to other people, but she's not responding to what I put, so I'm not going to waste my time anymore." Once again, the statement is admissible, this time as a statement of the recipient's intent to cease contact (an intention which the defendant convinces the recipient to abandon). See Goldman, petitioner, 331 Mass. 647, 651 (1954) ("Moreover, the state of mind or intent of a person, whenever material, may be shown by his declarations out of court").

[3] We also reject the defendant's arguments that the phone calls should be excluded because probative value was outweighed by their prejudice. "Determinations of the relevance, probative value, and prejudice of such evidence are left to the sound discretion of the judge, whose decision to admit such evidence will be upheld absent clear error." Commonwealth v. Bryant, 482 Mass. 731, 735 (2019), quoting Commonwealth v. Dung Van Tran, 463 Mass. 8, 14-15 (2012). There is no clear error.

evidence of the defendant's guilt was so overwhelming that the error did not prejudice his case").

2. Calls as business records. The defendant next argues the telephone calls were improperly authenticated and thus their admission results in a substantial risk of a miscarriage of justice. We are not persuaded. "To properly authenticate evidence, the proponent of the evidence must make a showing 'sufficient to support a finding that the item is what the proponent claims it is.'" Commonwealth v. Mack, 482 Mass. 311, 318 (2019), quoting Commonwealth v. Woollam, 478 Mass. 493, 498 (2017). Here, a correction officer identified the defendant's voice on the calls based on the officer's familiarity with the defendant. See Chartrand v. Registrar of Motor Vehicles, 345 Mass. 321, 325 (1963) (where witness was able to testify to contents of telephone conversation he overheard, as well as to authenticate voice heard on other end of line, telephone conversation was properly authenticated even without testimony of caller or of recipient of call). Further, the correction officer testified to the prison's practice of recording prison calls and the process of compiling the collection of telephone calls admitted into evidence. See Commonwealth v. Mahoney, 400 Mass. 524, 529-530 (1987) (videotape was properly authenticated through testimony of arresting officer about procedure used in videotaping process). Contrary to the defendant's G. L. c. 233,

§ 78, business record challenge, the testimony of the correction officer, familiar with the prison's policy and practice regarding jailhouse telephone calls, properly authenticated the telephone records and sufficiently supported a finding that these recordings were of telephone conversations between the defendant and another person. Cf. Commonwealth v. Duddie Ford, Inc., 28 Mass. App. Ct. 426, 435 (1990) (where, taken as whole, there was sufficient evidence to authenticate bank records, documents were admissible despite requirements of G. L. c. 233, § 78, not having been rigidly met), vacated in part on other grounds, 409 Mass. 387 (1991).

3. Inclusion of photographs and accompanying statements. The defendant next challenges, for the first time on appeal, the admission of photographs posted to his daughter's Facebook account and the testimony regarding what they depicted as having been improperly authenticated. We disagree.

"[P]roof of authenticity usually takes the form of testimony of a qualified witness either (1) that the thing is what its proponent represents it to be, or (2) that circumstances exist which imply that the thing is what its proponent represents it to be." Commonwealth v. Nardi, 452 Mass. 379, 396 (2008), quoting Commonwealth v. LaCorte, 373 Mass. 700, 704 (1977). The defendant's ex-wife's testimony identifying the content of the photographs as depictions of her

ex-husband and her daughter provided proper authentication for their admission. See Howe v. Boston, 311 Mass. 278, 281 (1942) ("A photograph is admissible . . . if verified by proof that it is a true representation of the subject . . .").

The defendant nevertheless challenges the admission of these photographs, asserting that the Commonwealth presented insufficient evidence that the photographs posted to an account bearing the name "Stacey DuPont" were actually posted by Stacey DuPont. See Commonwealth v. Williams, 456 Mass. 857, 868-869 (2010) (messages posted via social media from an account bearing the name and photo of defendant's brother were not properly authenticated as actually being sent by defendant's brother). Where the circumstantial evidence strongly links these post to Stacey Dupont, we are not persuaded. See Commonwealth v. Purdy, 459 Mass. 442, 447-448 (2011) (evidence may be authenticated by circumstantial evidence).

The evidence established that the defendant placed calls to an individual on his calling list that he identified as "Stacey Dupont." He is heard speaking to a female voice in that call. The defendant directs her to post photographs of him on his daughter's account, and photographs of him with his daughter are then posted to his daughter's Facebook page from an account also bearing the name "Stacey DuPont." This evidence provided "adequate 'confirming circumstances.'" Purdy, 459 Mass. at 450.

Furthermore, in a subsequently recorded telephone conversation between the defendant and the individual he had identified as Stacey DuPont on his call list, the two acknowledge that she posted the photographs. There is no error. Id. at 451.[4]

Judgment affirmed.

By the Court (Rubin, Maldonado & Shin, JJ.[5]),

Joseph F. Stanton

Clerk

Entered: August 10, 2020.

[4] Because we discerned no error in the admissibility of the bulk of the telephone calls and the photographs, and found no prejudice flowing from any improperly admitted hearsay, we also reject the defendant's contention that the effect of the cumulative errors deprived the defendant of a fair trial. See Commonwealth v. Roy, 464 Mass. 818, 836 (2013).

[5] The panelists are listed in order of seniority.