2021 IL App (1st) 181181-U

FIRST DISTRICT,
FIRST DIVISION
February 22, 2021

No. 1-18-1181

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. DAMIEN THOMAS, Defendant-Appellant.	)	Appeal from the Circuit Court of Cook County, Illinois. No. 13 CR 21976 Honorable Stanley J. Sacks, Judge Presiding

JUSTICE COGHLAN delivered the judgment of the court.
Presiding Justice Walker and Justice Hyman concurred in the judgment.

ORDER

¶ 1 *Held*: Following a jury trial, defendant was convicted of home invasion and armed robbery. On appeal, he argues that the trial court erred by admitting an incriminating text message that lacked a proper foundation and constituted inadmissible hearsay. We find that the trial court did not abuse its discretion in admitting the text message.

¶ 2 Following the July 11, 2013, armed robbery of the home of Janet Swies[1], defendant Damien Thomas and his codefendant Dorvell Gogins were charged with first-degree murder (720 ILCS 5/9-1(a)(1) (West 2012)), home invasion (720 ILCS 5/19-6(a)(3) (West 2012)), and

[1] Although she is also referred to as Janet "Sweis," at trial she spelled her last name as "Swies."

armed robbery (720 ILCS 5/19-6(a)(3) (West 2012)). (A third man was involved in the robbery but was not charged.) Defendant and Gogins proceeded to a joint but severed jury trial in January, 2018. The jury found defendant not guilty of first-degree murder, but guilty of home invasion and armed robbery. Defendant was sentenced to concurrent terms of 30 years of imprisonment on each offense.

¶ 3 On appeal, defendant asserts that the trial court committed reversible error by admitting an incriminating text message without a proper foundation, or, alternatively, that the text message was inadmissible hearsay. For the reasons set forth herein, we affirm.

¶ 4 BACKGROUND

¶ 5 In 2013, Janet Swies lived in a second-story apartment with her boyfriend Sam and her two daughters, aged one and three years old. Swies and Sam were friends with Jeremiah Brown, who came to visit their apartment "[a]lmost every day." Swies admitted that Sam would hold "a little bit" of marijuana for Brown in the house at times when Brown was not around, but she denied that Brown ever sold marijuana out of the house.

¶ 6 On July 11, 2013, around 2:30 p.m., Swies was home with her two daughters. Sam called her to let her know Brown was coming over. The rear door was already open, so Brown entered and went into the living room. Swies was in the kitchen on the phone with her sister-in-law. Sometime thereafter, three armed black males entered through the rear door, which was left open and was accessible through an outside stairwell. Swies identified defendant and Gogins as two of the three men who entered her house without authority.

¶ 7 Defendant put a gun to Swies' head, grabbed the cell phone out of her hand, and told her, "Don't move." Another pointed a gun at Brown and told him not to move either. Then Gogins

directed Swies to her bedroom. On the way to the bedroom, Swies saw her daughter's flip phone on the couch and tried to grab it to call 911, but defendant "took the phone from [her]."

¶ 8 In Swies' bedroom, Gogins ransacked the closets and drawers and flipped her bed, saying, "Where is the shit at? Where is the money at?" Swies could hear Brown outside, telling the other two robbers, "She has nothing to do with this. It's in the Lexus, everything is in the Lexus." (Brown drove a gold Lexus.) After Brown said this, Gogins left the bedroom, and all three robbers ran out of the house via the rear door, followed by Brown.

¶ 9 Swies looked out the window and saw one of the robbers fighting with Brown over the keys to the Lexus. After checking on her children, she ran outside to help Brown. Outside, she saw a green van pulling out of the alleyway "as fast as possible." She saw defendant and Gogins "pulling off in the van."[2]

¶ 10 Meanwhile, Brown was still fighting the third robber. Swies helped restrain the robber while Brown punched him. Then Brown retrieved his keys, got in his Lexus, and drove after the green van. The third robber fled on foot.

¶ 11 Around 2:50 p.m., Mirna Morales Sanchez and her fiancé Luis Ortiz were walking "in the alley of Walgreens by 63rd and Kedzie." Sanchez heard footsteps behind her. Turning, she saw a black man with a gun running toward her, and a gold Lexus driving up behind him. Ortiz also looked back and saw a man running, although he did not see whether the man was holding anything and did not initially notice a car. Both Sanchez and Ortiz identified the running man as Gogins.

[2] Defendant, Gogins, and a third man had, in fact, been stopped by police for a traffic violation while driving in a green minivan at 12:27 p.m. earlier that day (documented by a computer generated contact card).

¶ 12 When the Lexus was about 20 feet away from Gogins, he turned and started shooting, firing three shots at the Lexus. The Lexus kept coming and "ran [Gogins] over." Both Sanchez and Ortiz ran for cover. From her vantage point in the drive-thru lane of the Walgreens pharmacy, Sanchez saw the Lexus drive out of the alley and come to a stop. The driver exited, gasped for air, looked around, and fell. Sanchez saw that he had been shot in his side and called 911.

¶ 13 After police arrived on the scene, Sanchez heard screaming from the alley where the shooting occurred. She went to the alley and saw Gogins screaming "on the ground with broken feet," and a gun lying 5 to 10 feet away. She pointed Gogins out to police as the man she saw firing at the Lexus and directed them to the gun she had seen him holding.

¶ 14 Janice Diming, a Walgreens employee, also saw Gogins in the alley with "his feet *** hanging off his ankles." She provided him with bottles of water. Officer Keith Fuelling arrived on the scene and observed Gogins "pouring [the water] over his head and on his arms" and making a "washing motion, like rubbing his hands and arms." He saw a silver handgun five feet away from Gogins, and he also saw two cell phones which were later processed by evidence technicians. One of the phones, a T-Mobile phone, was on the ground and had a smashed screen; the other phone, a black flip phone, was in the alley near Gogins.

¶ 15 Meanwhile, back at her apartment, Swies borrowed a neighbor's phone to call Sam and 911. After Sam got there, but before police arrived, a neighbor informed Swies that her friend had been killed. Swies and Sam ran to the corner of 63rd and Kedzie. She saw Brown lying in the street, covered by a white sheet. An autopsy of Brown later revealed that he died of a gunshot wound to the torso.

¶ 16 As noted, a black flip phone was found in the alley near Gogins. The last outgoing text message on that phone was, "Gotta stain boi, get up."[3] Assistant State's Attorney Marilyn Salas-Wail testified that she was present during the examination of the cell phone, which revealed the text message, but she did not know who the phone belonged to or who the text was sent to. The jury was shown a screenshot of the text message. Officer Robert Spiegel, a member of an intelligence unit within the Chicago police department, explained that "stain" was street slang for a robbery. He first learned the term in 2011 from an informant. Since then, he had heard the term 30 to 40 more times and "[i]t's always meant a robbery."

¶ 17 The jury returned verdicts finding defendant guilty of the offenses of home invasion and armed robbery. He was sentenced to concurrent terms of imprisonment of 30 years on each offense.

¶ 18 ANALYSIS

¶ 19 Defendant asserts that the trial court committed reversible error by admitting the "Gotta stain boi, get up" text because the State failed to lay a proper foundation for its admission, or, alternatively, that the text was inadmissible hearsay. We consider these points in turn.

¶ 20 Foundation for the Text Message

¶ 21 Defendant argues that the State failed to lay a proper foundation for the admission of the text message. Specifically, he claims that "nothing about the circumstances under which the flip phone *** was found suggests that the phone belonged to Gogins, other than it happened to be found in an alley where he had briefly been present."

[3] The text appears in the record as both "got a stain boi, get up" and "gotta stain boi, get up." We refer to it as "gotta stain boi, get up" to be consistent with the parties.

¶ 22 The admissibility of evidence lies within the sound discretion of the trial court. *People v. Pikes*, 2013 IL 115171, ¶ 12. We will not reverse its ruling absent an abuse of discretion, which occurs only when the trial court's ruling is arbitrary or fanciful, or no reasonable person would take the trial court's view. *Id.*; *People v. Donoho*, 204 Ill. 2d 159, 182 (2003). "Reasonable minds can disagree about whether certain evidence is admissible without requiring a reversal of a trial court's evidentiary ruling under the abuse of discretion standard." *People v. Watkins*, 2015 IL App (3d) 120882, ¶ 35 (citing *Donoho*, 204 Ill. 2d at 186).

¶ 23 To authenticate documentary evidence, the proponent must demonstrate that the document is what the proponent claims it to be. Ill. R. Evid. 901(a) (eff. Jan 1, 2011). "Documentary evidence, such as a text message, can be authenticated through direct or circumstantial evidence." *Watkins*, 2015 IL App (3d) 120882, ¶ 37. Circumstantial evidence includes "appearance, contents, substance, and distinctive characteristics, which are to be taken into consideration with the surrounding circumstances." *Id.* In determining whether documentary evidence is admissible, the trial court serves a "limited screening function," assessing whether the evidence of authentication, viewed in the light most favorable to the proponent, would allow a reasonable jury to find the document is more likely than not authentic. *Id.* ¶ 36. A finding of authentication does not preclude the opponent from contesting the genuineness of a document; ultimately, it is up to the jury to determine its authorship. *People v. Downin*, 357 Ill. App. 3d 193, 202-03 (2005).

¶ 24 Prior to trial, the State filed a motion *in limine* to admit the text message against Gogins as a statement by a party opponent, and against defendant as a statement of a coconspirator. In granting the State's motion with respect to Gogins, the trial court considered the sequence of events in the case: the text was sent at 11:09 a.m. on the date of the robbery, which occurred less

than four hours later at around 2:30 p.m. Gogins was arrested in connection with a robbery at approximately 2:52 p.m., and the phone was recovered near his person with an outgoing text message referencing a robbery. Based on that timeline and the circumstances of the phone's recovery, the court found that a reasonable juror could conclude the phone belonged to Gogins. The court explained that Gogins "sort of predict[ed] at 11:09 there's going to be a stain" and the content of the text was "something that a person would know, arguably, only if he's involved with the incident himself."

¶ 25 We do not find the trial court's ruling to be an abuse of discretion. Gogins was found in the alley nearby the location where the cell phone was found. There is nothing in the record to suggest that anyone else was in the alley or had abandoned a cell phone in the alley. Moreover, Gogins' connection to the phone in the alley was more than mere proximity. The timeline of events, as outlined by the trial court, circumstantially linked Gogins to the phone. The text arguably predicts the occurrence of a robbery. Within four hours of the text, Gogins was involved in a robbery and arrested.

¶ 26 Relying on *Watkins*, 2015 IL App (3d) 120882, defendant argues that the admission of the text is reversible error. We disagree. In *Watkins*, police executed a search warrant of the home of Gwen Evans. Evans was not present, but six others were, including her nephew Charles Watkins. No drugs or drug paraphernalia were found on Watkins' person. However, in a common area of the house, police found drugs in a drawer, as well as a cell phone with incoming drug-related texts that referenced "Gwen" and "Charles."

¶ 27 Under these facts, the *Watkins* court held that the trial court abused its discretion in admitting the text messages against Watkins because "[t]he only evidence presented by the State to authenticate the text messages was the fact that the cell phone was found in the same house as

defendant, albeit in a drawer in a common area, and the fact that some of the messages referred to, or were directed at, a person named 'Charles.' " *Id.* ¶ 38. Because the text messages went to the "very heart of the main charge," their admission constituted reversible error. *Id.* ¶ 39.

¶ 28 Defendant's reliance on *Watkins* is misplaced. In *Watkins,* the phone was found in a common area where Evans and all of the other six occupants had access to it. Here, the police did not find any suspects in the alley other than Gogins, who had an incentive to rid himself of incriminating evidence and was, in fact, scrubbing himself clean at the time of his arrest. In addition, although it is entirely plausible that an occupant of a home might place their phone in a drawer, it is significantly less likely that anyone other than Gogins would have left a cellphone in the same alley where Gogins was arrested and the phone was recovered.

¶ 29 Defendant also argues that the lack of phone records constitutes an insufficient foundation to admit the phone under *Watkins*. But, as discussed, documentary evidence can be admitted through direct *or* circumstantial evidence. The lack of phone records is not fatal to the State's case where, as here**,** considerable circumstantial evidence linked Gogins to the phone. The trial court properly performed its limited screening function and let the jurors determine for themselves whether the State's evidence showed the phone belonged to Gogins. Moreover, defendant's counsel vigorously argued to the jury that the State failed to prove Gogins' ownership of the phone for multiple reasons, including the lack of phone records.

¶ 30 Finally, defendant claims that the admission of the text was improper because of the "lack of any evidence of who authored the text." However, like any other documentary evidence, the State only needed to establish a "rational basis upon which the fact finder may conclude that the document [in this case, the text message] did in fact belong to or was authored by the party alleged." *Watkins*, 2015 IL App (3d) 120882, ¶ 36. Based on the State's evidence, a reasonable

juror could infer that it was more likely than not that the phone belonged to Gogins and that he authored the text. See *Downin*, 357 Ill. App. 3d at 203 ("The ultimate issue of authorship is for the trier of fact to determine."). Thus, we do not consider the trial court's finding of authentication to be an abuse of discretion.

¶ 31 Admissibility of the Text Message as a Statement of a Coconspirator

¶ 32 Defendant also argues that the text message is inadmissible hearsay. The State counters that it was properly admitted against defendant as a statement of a coconspirator.

¶ 33 Hearsay, defined as an out-of-court statement offered for the truth of the matter asserted, is generally inadmissible unless it falls within an exception to the hearsay rule. *People v. Yancy*, 368 Ill. App. 3d 381, 385 (2005). However, " 'any declaration by one coconspirator is admissible against all coconspirators where the declaration was made during the pendency of and in furtherance of the conspiracy.' " *People v. Jaimes*, 2019 IL App (1st) 142736, ¶ 63 (quoting *People v. Kliner*, 185 Ill. 2d 81, 141 (1998)); see Ill. R. Evid. 801(d)(2)(E) (eff. Jan. 1, 2011). Such a statement is not hearsay at all. Ill. R. Evid. 801(d)(2)(E) (eff. Jan. 1, 2011). A statement made in furtherance of a conspiracy "[has] the effect of advising, encouraging, aiding or abetting its perpetration." *Kliner*, 185 Ill. 2d at 141. To properly admit a coconspirator's statement, the State must make a *prima facie* showing of a conspiracy, independent of the coconspirator's statement. *People v. Caraga*, 2018 IL App (1st) 170123, ¶ 39.

¶ 34 Defendant does not allege that the State failed to make a *prima facie* showing of a conspiracy. Rather, he argues that the evidence did not establish that the text was sent by a fellow conspirator in the home invasion and robbery, or that he was the intended recipient of the text. However, as previously discussed, there was a reasonable basis to conclude that the phone belonged to codefendant Gogins and, therefore, that he sent the last outgoing text message.

Moreover, it is irrelevant whether defendant or another party was the intended recipient. See *People v. Denson*, 2013 IL App (2d) 110652, ¶ 20 ("the fact that the statement is made to a noncoconspirator does not, alone, make the statement inadmissible under the coconspirator exception"); see also *Jaimes*, 2019 IL App (1st) 142736, ¶ 64 (noting that "a coconspirator does not have to even make the statement to another coconspirator for the statement to be admissible").

¶ 35 The text message was also in furtherance of the conspiracy; it was sent prior to the robbery, and, as the trial court observed, it appeared to be "recruiting someone" to "get up" for the robbery. Thus, it could reasonably be read as aiding or abetting the perpetration of the robbery. See *Kliner*, 185 Ill. 2d at 141. Under these facts and circumstances, the trial court's admission of the text as a coconspirator statement was not "arbitrary, fanciful, or unreasonable."

¶ 36 CONCLUSION

¶ 37 For the foregoing reasons, we find that the record does not establish that the trial court abused its discretion in admitting the incriminating text message because there was a sufficient foundation for its admission, and it was properly admitted as a coconspirator's statement. We therefore affirm defendant's conviction and sentence.

¶ 38 Affirmed.