IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

LANE MICHAEL STANLEY,
Appellant.

No. 2 CA-CR 2015-0109
Filed July 20, 2016

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Crim. P. 31.24.

Appeal from the Superior Court in Pima County
No. CR20134227002
The Honorable Scott Rash, Judge

AFFIRMED

COUNSEL

Mark Brnovich, Arizona Attorney General
Joseph T. Maziarz, Section Chief Counsel, Phoenix
By Amy Pignatella Cain, Assistant Attorney General, Tucson
Counsel for Appellee

Steven R. Sonenberg, Pima County Public Defender
By Erin K. Sutherland, Assistant Public Defender, Tucson
Counsel for Appellant

MEMORANDUM DECISION

Presiding Judge Howard authored the decision of the Court, in which Judge Espinosa and Judge Staring concurred.

H O W A R D, Presiding Judge:

¶1 Following a jury trial, Lane Stanley was convicted of conspiracy to possess marijuana for sale and possession of marijuana for sale. On appeal, he argues the trial court erred by admitting text messages sent between his codefendants Janet and Dee Anderson, as well as information contained on certain recovered cell phones, because the state did not properly authenticate that evidence. He additionally argues the text messages constituted inadmissible hearsay because they were not made in furtherance of a conspiracy and contends their admission violated his Confrontation Clause rights. Because we find no error, we affirm.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to upholding the verdicts. *State v. Damper*, 223 Ariz. 572, n.1, 225 P.3d 1148, 1150 n.1 (App. 2010). In September 2013, Janet sold approximately forty pounds of marijuana to undercover Tucson police officers. Officers had seen Stanley with Janet at her home the day of the sale. Shortly before the sale took place, Stanley drove to the prearranged meeting place for the sale and tried to convince one of the officers to complete the sale[1] at Janet's residence, rather than in the parking lot of a convenience store. After Stanley left, Janet and another male arrived with the marijuana in the trunk of Janet's car to complete the sale.

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[1]The exact nature of the sale was not explicitly discussed during their conversation.

¶3 Stanley was charged and convicted as noted above. The trial court sentenced him to concurrent, mitigated, twelve-year prison terms. We have jurisdiction over his appeal pursuant to A.R.S. §§ 12-120.21(A)(1) and 13-4033(A)(1).

Authentication

¶4 Stanley first argues the trial court erred by admitting text messages between Janet and Dee because they lacked proper foundation and authentication establishing the two women as the authors of the messages. Stanley additionally argues the phone call logs and contact lists from Dee's and Stanley's cell phones, information used to authenticate the authorship of the text messages, were also not properly authenticated.

¶5 Prior to trial, Stanley objected on the grounds that, inter alia, the state could not lay proper foundation as to the ownership of Dee's and Janet's cell phones or authorship of the text messages. The trial court withheld ruling on the issue until the relevant testimony was heard. Stanley additionally stated he was "not objecting" to the use of his own phone as evidence. During trial, an officer testified as to how he determined the ownership of each phone, but before he began reading the text messages retrieved from Janet's phone, Stanley objected again on foundation grounds. He agreed "[the officer] can tell what phone it came from, but I haven't heard any foundation about whether that person actually sent those texts."

¶6 The only preserved issue Stanley now raises is whether the state properly authenticated the text messages as being authored by Janet and Dee. *See State v. Henderson*, 210 Ariz. 561, ¶ 18, 115 P.3d 601, 607 (2005). He has forfeited review of any issue related to ownership of Dee's or Stanley's phone except for fundamental, prejudicial error. *See id.* ¶¶ 19-20; *see also State v. Lopez*, 217 Ariz. 433, ¶ 4, 175 P.3d 682, 683 (App. 2008) ("an objection on one ground does not preserve the issue on another ground"). However, under either standard of review, Stanley must first establish error occurred. *See State v. Hardwick*, 183 Ariz. 649, 653, 905 P.2d 1384, 1388 (App. 1995) (court reviews for harmless error after establishing trial court erred); *see also State v. Avila*, 217 Ariz. 97, ¶ 9, 170 P.3d 706, 708

(App. 2007) (under fundamental error review, defendant must establish error occurred). We review the court's ruling on the issue of authentication for an abuse of discretion. *State v. Haight-Gyuro*, 218 Ariz. 356, ¶ 7, 186 P.3d 33, 35 (App. 2008).

¶7 Proper authentication requires the proponent to "produce evidence sufficient to support a finding that the item is what the proponent claims it is." Ariz. R. Evid. 901(a). A court "does not determine whether the evidence is authentic, but only whether evidence exists from which the jury could reasonably conclude that it is authentic." *Damper*, 223 Ariz. 572, ¶ 18, 225 P.3d at 1152, *quoting State v. Lavers*, 168 Ariz. 376, 386, 814 P.2d 333, 343 (1991). Our courts have adopted "a flexible approach," which allows the court "to consider the unique facts and circumstances in each case—and the purpose for which the evidence is being offered—in deciding whether the evidence has been properly authenticated." *Haight-Gyuro*, 218 Ariz. 356, ¶ 14, 186 P.3d at 37.

¶8 Additionally, direct evidence authenticating the piece of evidence is not necessary; a party may rely upon circumstantial and corroborating evidence, as well as the piece of evidence itself, to establish its authenticity. *See Lavers,* 168 Ariz. at 388, 814 P.2d at 345; *see also Rodriguez v. State*, 273 P.3d 845, 849 (Nev. 2012) ("use of corroborating evidence" to establish authorship of text messages "is critical to satisfying the authentication requirements for admissibility"). In the similar context of photographs, this court has stated: "[E]ven if direct testimony as to foundation matters is absent, . . . the contents of a photograph itself, together with such other circumstantial or indirect evidence as bears upon the issue, may serve to explain and authenticate a photograph sufficiently to justify its admission into evidence." *Haight–Gyuro,* 218 Ariz. 356, ¶ 19, 186 P.3d at 38, *quoting United States v. Stearns,* 550 F.2d 1167, 1171 (9th Cir. 1977); *see also Commonwealth v. Koch*, 39 A.3d 996, 1003 (Penn. 2011) ("Circumstantial evidence may suffice where the circumstances support a finding that the writing is genuine.").

¶9 As relevant to this appeal, the state sought to introduce three text messages sent between Janet and Dee on September 21 that referred to Stanley. The state's purpose was to show that Stanley was involved with Janet and Dee in the conspiracy to sell

marijuana to the undercover officers. One of the messages, sent from Janet to Dee, reads "Lane is in route. I asked him to come so someone got my back." The two other messages were sent from Dee to Janet. The first reads "So where is he? Or is there a bunch coming. If this is a scam please don't take up anymore of [Stanley's] time." The second states "you need to pay [Stanley] some money for this since you called him."

¶10 Tucson Police Officer Quezada, working in an undercover capacity, had purchased methamphetamine from Janet in March and early September 2013, and purchased ammunition from her in mid-September. He testified the phone number he had used repeatedly to contact Janet matched one of the recovered cell phones, and the records from that phone contained text messages he and Janet had exchanged. That phone also contained a saved contact for Quezada's phone number stored under his nickname. Janet's phone also had a saved contact under the name "Ma Mi Crazee" for a phone number that matched the phone attributed to Dee, her mother, and also had a contact saved for "Lane" which matched the phone number for Stanley's recovered phone. The records downloaded from Janet's phone contained numerous text messages exchanged between Janet and Dee describing the drug deal that Janet was negotiating with Quezada and the three text messages about Stanley. The numerous text messages exchanged between Dee and Janet were consistent, both in timing and content, with Quezada's testimony of the planning and negotiation of the drug deal.

¶11 Stanley's cell phone was recovered in his motel room. It contained saved contacts for Janet—which matched the phone number Quezada contacted her with and the recovered phone attributed to her—and Dee, which matched the phone number listed in Janet's phone under "Ma Mi Crazee" and the recovered phone attributed to her. Quezada was also able to match Stanley's name to the phone number associated with his phone on social media. The records from Stanley's phone showed numerous phone calls between Stanley and Janet on September 21.

¶12 Dee's cell phone contained a saved contact under Stanley's name for a phone number matching the phone recovered

from his motel room. Her phone did not have a saved contact associated with Janet's number, but the records from the phone showed several phone calls and "hundreds" of text messages primarily sent to and received from the same number associated with Janet's phone. The text messages retrieved from Dee's phone were sent to and received from primarily Janet's phone number prior to and after September 21, but her phone did not contain any text message records from September 21. The records also showed one phone call from Dee to Stanley on the evening of September 21.

¶13 Under the "unique facts and circumstances" of this case, the state presented sufficient circumstantial and corroborating evidence for the jury to conclude that Janet and Dee authored the relevant text messages and that Stanley and Dee owned the cell phones attributed to them by the state. *Haight-Gyuro*, 218 Ariz. 356, ¶ 14, 186 P.3d at 37; *see also* Ariz. R. Evid. 901(a). The trial court did not abuse its discretion in finding the state properly authenticated the messages. *See Haight-Gyuro*, 218 Ariz. 356, ¶ 7, 186 P.3d at 35.

¶14 Stanley contends, however, "[t]here was no testimony as to when or where the phones were actually recovered, who was in possession of which phone, or whether other individuals had access to those phones," thus drawing into question the ownership of the phones. He is correct the testimony was unclear as to whether Janet's and Dee's phones were seized in the search of Janet's trailer or whether they were in Janet's and Dee's possession when they were arrested. However, the content of the phones themselves, along with Quezada's corroboration of Janet's phone number and the content of text messages saved on her phone, were sufficient to allow the jury to conclude that Janet and Dee authored the text messages at issue. *See Lavers,* 168 Ariz. at 388, 814 P.2d at 345; *see also Haight–Gyuro,* 218 Ariz. 356, ¶ 19, 186 P.3d at 38. Although, as Stanley points out, several other people were at Janet's trailer on September 21, no evidence suggests that those people were also using these same phones. *See Damper*, 223 Ariz. 572, ¶ 19, 225 P.3d at 1153.

¶15 Stanley relies on two out-of-state cases to support his position: *Rodriguez*, 273 P.3d 845, decided by the Nevada Supreme Court, and *Koch*, 39 A.3d 996, from the Superior Court of

Pennsylvania. In *Rodriguez*, the defendant and his codefendant attacked the victim in her home and took her cell phone. 273 P.3d at 846-47. Following the attack, both men used the phone and several text messages were sent to the victim's boyfriend. *Id.* at 847, 849-50. The phone was later recovered from the codefendant's cousin, who told police the codefendant had given it to him. *Id.* at 847. The state offered the text messages to show that Rodriquez was one of the men who assaulted the victim. *Id.* at 849. But it was only able to provide corroborating evidence that Rodriguez did, in fact, "participat[e] in composing" two of the twelve messages sent to the victim's boyfriend after the attack, based on a surveillance video showing Rodriguez operating the victim's phone at the time those two messages were sent. *Id.* at 850. The state did not present any evidence showing Rodriguez "authored or participated in authoring" the other ten messages. *Id.* Those messages therefore were deemed not properly authenticated. *Id.*

¶16 At issue in *Koch* was whether the defendant had authored drug-related text messages sent from her cell phone. 39 A.3d at 1002. The text messages themselves were sorted through and transcribed by a detective who conceded at trial that another person had written at least some of the text messages found on the phone, that the author of the incriminating text messages "could not be ascertained," and that some of the text messages referred to the defendant in the third-person "and thus, were clearly not written by her." *Id.* at 1003, 1005. Consequently, the state had not presented sufficient evidence to authenticate that the defendant had authored the incriminating text messages. *Id.* at 1005.

¶17 Here, Stanley's identity was not at issue, differentiating this case from *Rodriguez*. And unlike both *Rodriguez* and *Koch*, the state, as discussed above, did provide circumstantial and corroborating evidence supporting its contentions that Janet and Dee authored the relevant text messages and that Stanley and Dee owned their respective phones. Stanley's reliance on *Rodriguez* and *Koch* is therefore misplaced. Because the state properly authenticated both authorship of the text messages and ownership of Dee's and Stanley's phones, Stanley cannot show the trial court

erred by admitting this evidence. *See Hardwick*, 183 Ariz. at 653, 905 P.2d at 1388; *see also Avila*, 217 Ariz. 97, ¶ 9, 170 P.3d at 708.

¶18 Stanley additionally contends the state failed to lay proper foundation that the messages were evidence of his involvement in the marijuana sale because Quezada did not testify as to the exact times on September 21 the text messages were sent. He did not object on these grounds below, and therefore has forfeited review except for fundamental, prejudicial error. *See Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d at 607. Again, however, he cannot establish the trial court erred. Quezada testified the text messages about Stanley were sent on September 21 and occurred in the midst of Janet and Dee's larger text message conversation regarding the marijuana deal with Quezada. This is proper circumstantial evidence to support the state's contention that the messages were related to the drug deal with Quezada. *See Lavers*, 168 Ariz. at 388, 814 P.2d at 345.

Hearsay

¶19 Stanley next argues Janet's and Dee's text messages constituted inadmissible hearsay because they were not made "in furtherance of the conspiracy." Ariz. R. Evid. 801(d)(2)(E). We review a trial court's admission of a coconspirator's statement for an abuse of discretion. *State v. Dunlap*, 187 Ariz. 441, 458, 930 P.2d 518, 535 (App. 1996).[2]

[2]The state contends that Stanley has forfeited this issue for review because his hearsay objection below was based on the text messages being offered to prove the truth of the matter asserted, and not furtherance-of-the-conspiracy grounds. "An objection is sufficiently made if it provides the judge with an opportunity to provide a remedy." *State v. Fulminante*, 193 Ariz. 485, ¶ 64, 975 P.2d 75, 93 (1999). After Stanley's initial objection, the state argued the text messages fell within a hearsay exception because they furthered the conspiracy, and the trial court's ruling was also based on the statements being made in furtherance of a conspiracy. Stanley thus objected that the text messages were hearsay, and the court ruled the

¶20 Rule 801(d)(2)(E) provides that a statement is not hearsay if it is offered against a party and was made by that party's coconspirator during and in furtherance of the conspiracy. "A coconspirator's statements are admissible 'when it has been shown that a conspiracy exists and the defendant and the declarant are parties to the conspiracy.'" *Dunlap*, 187 Ariz. at 458, 930 P.2d at 535, *quoting State v. White*, 168 Ariz. 500, 506, 815 P.2d 869, 875 (1991). When determining whether statements were made in furtherance of a conspiracy, "courts focus on the intent of the coconspirator in advancing the goals of the conspiracy, not on whether the statement has the actual effect of advancing those goals." *Id.* A court need only find a reasonable basis for concluding the statement furthered the conspiracy. *Id.*

¶21 The text messages at issue here advanced the objectives of the conspiracy in several ways. All the messages kept both Janet and Dee "abreast of the activities of the conspiracy." *See United States v. Larson*, 460 F.3d 1200, 1212 (9th Cir. 2006). Janet's message indicating she had asked Stanley to come help furthered the conspiracy by alerting Stanley to the situation, by seeking back-up for the planned sale, and by assuring Dee that back up was available; whether she was asking Stanley for his assistance solely for the preparation of the sale or his assistance during the sale is immaterial because either furthered the conspiracy to possess marijuana for sale. Dee's message stating, "If this is a scam please don't take up anymore of [Stanley's] time" necessarily furthered the conspiracy by seeking to establish the proposed sale was not, in fact, a "scam." And Dee's message telling Janet she needed to pay Stanley was clearly sent with the intent of advancing the goals of the conspiracy by ensuring a coconspirator was paid for his involvement. These statements thus furthered the "common objectives of the conspiracy," *see id.* at 1211, and the trial court did not abuse its discretion in finding they were non-hearsay, *Dunlap*, 187 Ariz. at 458, 930 P.2d at 535; Ariz. R. Evid. 801(d)(2)(E).

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text messages were non-hearsay. Stanley sufficiently preserved the issue for review. *Id.*

Confrontation Clause

¶22 Stanley lastly argues the admission of the text messages violated his right to confront witnesses against him because the messages were testimonial. *See Crawford v. Washington*, 514 U.S. 36, 68 (2004). We review a trial court's ruling on a Confrontation Clause issue de novo.[3] *State v. Bronson*, 204 Ariz. 321, ¶ 14, 63 P.3d 1058, 1061 (App. 2003).

¶23 In *Bourjaily v. United States*, 483 U.S. 171, 183-84 (1987), the Supreme Court concluded that statements of a coconspirator, made in furtherance of the conspiracy, did not implicate the Confrontation Clause. *See State v. Tucker*, 231 Ariz. 125, ¶ 49, 290 P.3d 1248, 1267 (App. 2012) ("there is no requirement that a coconspirator's statement satisfy the Confrontation Clause to be admissible"), *citing Bourjaily*, 483 U.S. at 183-84. Stanley appears to argue this is no longer good law in light of *Crawford*.

¶24 In *Crawford*, the Supreme Court pointed out that "statements in furtherance of a conspiracy" are not "by their nature . . . testimonial." 541 U.S. at 56. The Court went on to cite *Bourjaily* approvingly as an example of a case where statements made in furtherance of a conspiracy were non-testimonial and thus properly admitted. *Id.* at 58. In *Davis v. Washington*, 547 U.S. 813, 825 (2006), the Court proclaimed that the coconspirator's statements made in *Bourjaily* would not have posed a Confrontation Clause problem because they were "clearly nontestimonial." And, in 2008, the Court again endorsed the continued validity of *Bourjaily*, noting that the admission of the coconspirator's statements in that case was correct

[3] The state argues that Stanley did not object at trial on grounds the text messages violated his Confrontation Clause rights, thus forfeiting review of the issue on appeal for all but fundamental, prejudicial error. However, Stanley objected on grounds that the messages presented a "[C]onfrontation [C]lause problem" because neither Janet nor Dee were witnesses in the case and he therefore could not cross-examine them on the meaning or purpose of the text messages. This objection sufficiently preserved the issue for appeal.

under both pre- and post-*Crawford* case law. *Giles v. California*, 554 U.S. 353, 374 n.6 (2008).

¶25 The Supreme Court has not explicitly overruled its conclusion in *Bourjaily* that the admission of a coconspirator's statement does not present a Confrontation Clause issue. Conversely, in three recent cases the Court has cited that rule favorably. Accordingly, despite Stanley's insistence that the statements in *Crawford, Giles*, and *Tucker* are dicta, and his implied argument that *Bourjaily* is not controlling, we find that *Bourjaily* remains good law and controls the outcome here. *See Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989) ("If a precedent of [the Court] has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, [courts] should follow the case which directly controls, leaving to [the Court] the prerogative of overruling its own decisions."); *see also Thurston Motor Lines, Inc. v. Jordan K. Rand, Ltd*., 460 U.S. 533, 535 (1983) (only the Court "may overrule one of its precedents."). The admission of Janet's and Dee's text messages did not violate Stanley's Confrontation Clause rights. *See Bourjaily*, 483 U.S. at 183-84.

Disposition

¶26 For the foregoing reasons, we affirm Stanley's convictions and sentences.