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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. MARCUS LOUIS WILBORN, Appellant.	2 CA-CR 2009-0070 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PINAL COUNTY

Cause No. CR200800568

Honorable Janna L. Vanderpool, Judge

AFFIRMED

Terry Goddard, Arizona Attorney General
By Kent E. Cattani and Laura P. Chiasson
Tucson
Attorneys for Appellee

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E S P I N O S A, Presiding Judge.

¶1 After a jury trial, appellant Marcus Wilborn was convicted of promoting prison contraband by possessing a cellular telephone. Finding Wilborn had two prior felony convictions, the trial court sentenced him to an enhanced, partially mitigated prison term of 4.5 years, to be served consecutively to the terms he was serving on previous convictions. On appeal, Wilborn argues the court erred in allowing publication to the jury of a text message that had been found on the telephone, in denying his motion to sever his trial from that of his codefendant, and in denying his motion for mistrial. Finding no error, we affirm.

Factual Background and Procedural History

¶2 "We view the evidence in the light most favorable to sustaining the convictions." *State v. Sarullo*, 219 Ariz. 431, ¶ 2, 199 P.3d 686, 688 (App. 2008). In October 2007, a corrections officer at the state prison in Florence received a call informing him that Wilborn and his cellmate Douglas Skinner were in possession of a cellular telephone. The officer and one of his partners immediately went to Wilborn's cell, where they observed him sitting at a table; Skinner was sitting on the lower bunk, which was partially covered by a hanging towel. As one officer placed Wilborn in handcuffs, the other officer moved the towel and saw that Skinner was holding a cellular telephone and pushing buttons. After removing both inmates from the cell, the officers searched it and found a cellular telephone charger hidden in the mattress assigned to Wilborn. The charger fit the telephone Skinner had been holding.

¶3 Investigator Joseph Mariscal took possession of the telephone, obtained from the service provider the security code to unlock it, and examined the activity recorded on the telephone. Mariscal testified officers had obtained a court order to get information from the service provider about the contract and ownership of the telephone but were provided only the numbers for calls placed on or received by the telephone.

¶4 One of the messages on the telephone was a text message received earlier that morning, which was later published to the jury over Wilborn's objection. It contained the number from which the message had been sent, and stated, "Gudmrng baby let in you knw tht I m thnkg about u and miss u. Luv very much." At the bottom of the message appeared the name of the sender, Reneta Wilborn, and the time the message was sent and received.[1]

¶5 Both Wilborn and Skinner were charged with "knowingly making, obtaining or possessing prison contraband" for their possession of the cellular telephone phone. At the conclusion of the trial, the jury found each defendant guilty as charged. Wilborn was sentenced as outlined above and filed a timely notice of appeal. This court has jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033.

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[1]The exact text of the message is somewhat unclear. The record does not contain a copy of the actual message, which was read into the record and appears in Wilborn's motion to suppress with some inconsistencies. However, the trial court found "the name that is written [was] an electronic signature" that was immediately underneath and separated from the text.

Discussion

¶6 Wilborn first argues the trial court committed reversible error by allowing publication of the text message to the jury. "The trial court's ruling on admissibility of evidence will not be disturbed on appeal absent a clear abuse of discretion." *State v. Emery*, 141 Ariz. 549, 551, 688 P.2d 175, 177 (1984). Wilborn appears to contend that the text message was hearsay, not subject to a hearsay exception, and admitted without proper foundation. The trial court did not abuse its discretion by admitting this evidence.

¶7 Rule 801(c), Ariz. R. Evid., defines hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." A statement is defined as "(1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion." Ariz. R. Evid. 801(a). Hearsay is inadmissible unless an exception applies. Ariz. R. Evid. 802. However, statements not introduced to prove the truth of the matter asserted are not hearsay and are generally admissible. *State v. Rivera*, 139 Ariz. 409, 413-14, 678 P.2d 1373, 1377-78 (1984).

¶8 Wilborn concedes that the text message was not admitted to prove that the sender actually was in love with the recipient, but he takes issue with the portion that was admitted to show the identity of the sender. Upon his objection at trial, the court classified the bottom portion of the message, including the name Reneta Wilborn and the date and time of the sending, as "an electronic signature . . . separate from the rest of the text of the

message" and as "validation of the identity of the person sending it and of the time and date that it's sent, and those are generated as part of business practices within the cell phone company." The court found that portion of the message had "equivalent circumstantial guarantees of trustworthiness" to be admitted as an exception to the rule against admission of hearsay under Rule 803(24), Ariz. R. Evid.

¶9 We agree with the state, however, that identifying information generated by the cellular telephone software or the telephone service provider is not a "statement" under the hearsay rule because it was neither made by "a person" nor intended as an assertion.[2] Ariz. R. Evid. 801(a); *see also Tatum v. Commonwealth*, 440 S.E.2d 133, 135 (Va. Ct. App. 1994) (caller-identification display based on computer-generated information rather than repetition of prior recorded human input or observation not hearsay). Thus, that portion of the text message was not hearsay at all. *See United States v. Khorozian*, 333 F.3d 498, 506 (3d Cir. 2003) (header information automatically generated by facsimile machine not hearsay because "'a statement is something uttered by "a person," so nothing "said" by a machine . . . is hearsay.'") (*quoting* 4 Mueller & Kirkpatrick, *Federal Evidence* § 380 (2d ed. 1994); *see also*

[2]After the state and Wilborn's counsel argued this issue below, the trial court observed that the name, date, and time were separate from the text message, and it made an express finding that they were generated by the cellular telephone and constituted an "electronic signature" or an "electronic transmission stamp." Although Wilborn objected, he did not proffer any contrary evidence or refute this finding at trial, nor has he done so on appeal. *Cf. State v. Lucier*, 887 A.2d 129, 131 (N.H. 2005) (caller-identification in such widespread use that reliability of technology is matter of common knowledge and capable of verification beyond reasonable controversy).

State v. McCoy, 187 Ariz. 223, 226, 928 P.2d 647, 650 (App. 1996) ("notes, letters, photographs, and a 'roll call,' all with gang logos and insignia" not hearsay . . . because "not offered to prove the truth of any of the words contained therein").

¶10 Further, even if the identifying information were deemed hearsay, the trial court was well within its discretion in ruling the information had "equivalent circumstantial guarantees of trustworthiness" to make it admissible pursuant to Rule 803(24). The telephone was found in Wilborn's prison cell, its charger was discovered concealed in Wilborn's mattress, and the text message was in the telephone's memory, rather than being obtained from a third party such as the cellular service provider. The court noted that, "because of the actual nature of it coming through the cell phone process with . . . an electronic transmission stamp . . . , there [was] no question as to the guarantees of trustworthiness." The message was relevant to show that Wilborn had either actual or constructive possession of the telephone. *Cf. McCoy*, 187 Ariz. at 226, 928 P.2d at 650 (objects in gang member's possession bearing gang insignia "evidence of the knowledge and participation of the possessor").

¶11 Wilborn also contends "the State failed to provide any foundation for the admission of this evidence," thus denying his constitutional right to confront and cross-examine witnesses under the Sixth Amendment to the United States Constitution and

Crawford v. Washington, 541 U.S. 36, 51 (2004).[3] For a proper evidentiary foundation to exist, there must be sufficient evidence to support a finding that the offered evidence is what its proponent claims it to be. Ariz. R. Evid. 901(a); *see State v. Lavers*, 168 Ariz. 376, 386, 814 P.2d 333, 343 (1991). For physical items offered in evidence, foundation must be "established by either chain of custody or identification testimony." *State v. Ashelman*, 137 Ariz. 460, 465, 671 P.2d 901, 906 (1983).

¶12 Here, investigator Mariscal identified the cellular telephone, which was introduced as an exhibit, as the same one he had seen when he was called to Wilborn's unit, and he identified the text message at issue here as the one he had viewed at the time. At trial, the text message was displayed on the screen of the cellular telephone and shown to each juror individually to give each "an opportunity to see it . . . exactly as it appear[ed] on the screen." Investigator Mariscal's identification of the telephone and the message provided sufficient foundation to support the admission of both, and we find no abuse of the court's discretion in admitting the exhibit. *See State v. George*, 206 Ariz. 436, ¶¶ 29-31, 79 P.3d 1050, 1060 (App. 2003) (circumstances of location of letter correctional officer found between pages of book defendant had checked out from prison library, combined with its contents, provided reasonable basis for its admission into evidence).

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[3]Although Wilborn did not cite the Sixth Amendment or *Crawford* in his arguments below, the state has not contended the issue is waived, and we believe Wilborn's general objection and foundation arguments below sufficiently raised and preserved the issue for appeal.

¶13 Further, the right to confront witnesses is inapplicable to the portion of the text message at issue in this case. The evidence is an electronic display of the sender's name and the time and date of receipt, automatically generated by an electronic device, rather than a testimonial statement made by a person. *See Crawford*, 541 U.S. at 51. This information is not a "statement" within the legal meaning of the word, and "[n]on-testimonial statements are not subject to a confrontation challenge." *State v. Fischer*, 219 Ariz. 408, 418, 199 P.3d 663, 673 (App. 2008).

¶14 Next, Wilborn contends the trial court erred in denying his motion to sever his trial from that of his codefendant. We will not disturb the trial court's ruling on a motion to sever absent an abuse of discretion. *See State v. Van Winkle*, 186 Ariz. 336, 339, 922 P.2d 301, 304 (1996). Wilborn points out Skinner's counsel told the jury in opening and closing statements that "the evidence . . . [would] not convince [them] that Douglas Skinner was the owner of the cell phone" and "[i]t's our position . . . that the phone belonged to Wilborn." He argues the "trial court's continued failure to recognize the prejudice to which [he] was subjected and its failure to correct the inherent prejudice constitutes reversible error." But Wilborn does not explain how he was prejudiced, nor does he demonstrate any undue prejudice against which the trial court was unable to protect.

¶15 We agree with the state that Wilborn's failure to develop this argument constitutes abandonment and waiver of the issue. *See State v. Carver*, 160 Ariz. 167, 175, 771 P.2d 1382, 1390 (1989). And we note, in any event, "the mere presence of hostility

between co-defendants, or the desire of each co-defendant to avoid conviction by placing the blame on the other does not require severance." *State v. Cruz*, 137 Ariz. 541, 544, 672 P.2d 470, 473 (1983). Rather,

> a defendant seeking severance based on antagonistic defenses must demonstrate that his or her defense is so antagonistic to the co-defendant[']s that the defenses are mutually exclusive. Moreover, defenses are mutually exclusive within the meaning of this rule if the jury, in order to believe the core of the evidence offered on behalf of one defendant, must disbelieve the core of the evidence offered on behalf of the co-defendant.

Id. at 545, 672 P.2d at 474.

¶16 Here, the evidence of the cellular telephone, including the text message on the screen, was properly admitted against both defendants. Thus, that evidence could have been presented against Wilborn even in a separate trial. *See State v. Runningeagle*, 176 Ariz. 59, 68, 859 P.2d 169, 178 (1993) (no prejudice when evidence to which defendant objected would have been admissible at severed trial). Because Wilborn has not argued any other way in which his codefendant's defense was antagonistic to his own, nor any reason the jury must have "disbelieve[d] the core of the evidence" offered on behalf of either defendant in order to believe the other, we see no error in the trial court's refusal to sever the trials.

¶17 Finally, Wilborn argues the trial court abused its discretion in denying his motion for mistrial. *See State v. Slover*, 220 Ariz. 239, ¶ 19, 204 P.3d 1088, 1094 (App. 2009). But he fails to develop this argument and does not specify the motion to which he is referring. This constitutes an abandonment and waiver of the issue. *See Carver*, 160 Ariz.

at 175, 771 P.2d at 1390. To the extent he is referring to his statement, "I think it's grounds for a severance and possibly a mistrial," made during his motion for severance based on Skinner's position that the text message was admissible, it does not appear that he made a formal motion for mistrial. Because, as stated above, the text message was admissible, this argument is without merit.

Conclusion

¶18 For the foregoing reasons, Wilborn's conviction and sentence is affirmed.

PHILIP G. ESPINOSA, Presiding Judge

CONCURRING:

JOSEPH W. HOWARD, Chief Judge

ANN A. SCOTT TIMMER, Judge*

*The Honorable Ann A. Scott Timmer, Chief Judge of Division One of the Arizona Court of Appeals, is authorized to participate in this appeal pursuant to A.R.S. § 12-120(F) (2003).