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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. ANNETTE BORZAKIAN, Defendant and Appellant.	B229748 (Los Angeles County Super. Ct. No. BR048012)

APPEAL from a judgment of the Appellate Division of the Superior Court of Los Angeles County. Patti Jo McKay, Anita H. Dymant and Fumiko H. Wasserman, Judges. Reversed.

Annette Borzakian, in pro. per., for Defendant and Appellant.

Dapeer, Rosenblit & Litvak, William Litvak and Caroline K. Castillo for Plaintiff and Respondent.

Sheppard, Mullin, Richter & Hampton, Michael D. Stewart, Gregory P. Barbee and John M. Hynes; City of Santa Ana City Attorney's Office, Joseph Straka, Jose Sandoval and Melissa M. Crosthwaite, as Amici Curiae for Plaintiff and Respondent People of the State of California.

Wilson, Elser, Moskowitz, Edelman & Dicker and Robert Cooper, as Amicus Curiae for Defendant and Appellant Annette Borzakian.

Law Offices of Joseph W. Singleton and Joseph W. Singleton as Amicus Curiae for Defendant and Appellant Annette Borzakian (representing Michel Rabiean).

INTRODUCTION

In this appeal, Annette Borzakian challenges her conviction for failure to stop at a red light signal at an intersection equipped with an automated red light enforcement system. (Veh. Code, §§ 21453, subd. (a); 21455.5.) Because the trial court erred in admitting the evidence against Borzakian, we reverse.

FACTUAL AND PROCEDURAL SUMMARY

Annette Borzakian was cited for failing to stop at a red light at the intersection of Beverly Drive and Wilshire Boulevard in the City of Beverly Hills on June 3, 2009, in violation of Vehicle Code section 21453, subdivision (a).[1] Her citation (entitled "Traffic Notice to Appear[--]Automated Traffic Enforcement System") indicated the violation was not committed in the presence of the declarant identified on the citation (C. Williams), but rather was "based on photographic evidence." (See Veh. Code, § 21455.5.) [2]

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[1] Vehicle Code section 21453, subdivision (a), provides: "A driver facing a steady circular red signal alone shall stop at a marked limit line, but if none, before entering the crosswalk on the near side of the intersection or, if none, then before entering the intersection, and shall remain stopped until an indication to proceed is shown, except as provided in subdivision (b) [permitting a right turn (or left turn where turning from a one-way to a one-way street) after stop where no sign prohibits such a turn]."

[2] As relevant, Vehicle Code section 21455.5 provides:

"The limit line [or] the intersection . . . where a driver is required to stop, may be equipped with an automated enforcement system if the governmental agency utilizing the system meets all of the following requirements:

"(1) Identifies the system by signs that clearly indicate the system's presence and are visible to traffic approaching from all directions, or posts signs at all major entrances to the city, including, at a minimum, freeways, bridges, and state highway routes.

"(2) If it locates the system at an intersection, and ensures that the system meets the criteria specified in Section 21455.7 ["At an intersection at which there is an automated enforcement system in operation, the minimum yellow light change interval

shall be established in accordance with the Traffic Manual of the Department of Transportation," and "the minimum yellow light change intervals relating to designated approach speeds provided in the Traffic Manual of the Department of Transportation are mandatory minimum yellow light intervals]."

"(b) Prior to issuing citations under this section, a local jurisdiction utilizing an automated traffic enforcement system shall commence a program to issue only warning notices for 30 days. The local jurisdiction shall also make a public announcement of the automated traffic enforcement system at least 30 days prior to the commencement of the enforcement program.

"(c) Only a governmental agency, in cooperation with a law enforcement agency, may operate an automated enforcement system. As used in this subdivision, 'operate' includes all of the following activities:

"(1) Developing uniform guidelines for screening and issuing violations and for the processing and storage of confidential information, and establishing procedures to ensure compliance with those guidelines.

"(2) Performing administrative functions and day-to-day functions, including, but not limited to, all of the following:

"(A) Establishing guidelines for selection of location.

"(B) Ensuring that the equipment is regularly inspected.

"(C) Certifying that the equipment is properly installed and calibrated, and is operating properly.

"(D) Regularly inspecting and maintaining warning signs placed under paragraph (1) of subdivision (a).

"(E) Overseeing the establishment or change of signal phases and the timing thereof.

"(F) Maintaining controls necessary to assure that only those citations that have been reviewed and approved by law enforcement are delivered to violators.

"(d) The activities listed in subdivision (c) that relate to the operation of the system may be contracted out by the governmental agency, if it maintains overall control and supervision of the system. However, the activities listed in paragraph (1) of, and

Borzakian's trial on this infraction took place on January 21, 2010, before Commissioner Carol J. Hallowitz. The People's case was presented through the testimony of Officer Mike Butkus of the Beverly Hills Police Department and the automated enforcement evidence, comprised of three digital photographs with data box text, maintenance logs, a certificate of mailing and notice to appear. No prosecutor was present. Borzakian (representing herself) moved to exclude the People's evidence but was unsuccessful; she cross-examined Officer Butkus but did not testify on her own behalf.

Borzakian was found guilty of violating Vehicle Code section 21453, subdivision (a), and ordered to pay a fine in the amount of $435 and to attend a 12-hour traffic school.

On January 26, Borzakian filed a notice of appeal, indicating she wished to proceed with a record of the oral proceedings in the trial court in the form of a statement on appeal. On February 11, she timely filed her proposed statement on appeal, indicating she had objected to and requested the exclusion of the People's evidence for lack of foundation, hearsay and violation of *Melendez-Diaz v. Massachusetts* (2009) 129 S.Ct. 2527, and without this evidence there was insufficient evidence supporting the judgment.

In her proposed statement, Borzakian submitted the following summary of Officer Butkus's initial testimony with respect to all trials scheduled that day (as bullet points): Officer Butkus "testified that he was employed by the Beverly Hills Police Department[; h]e had been so employed for 25 years[; h]e had 5 years experience in photo enforcement[; h]e had undertaken 40 hours of training in photo enforcement[; h]e reviewed the photos [and] videos and determined whether a citation should issue[; h]e testified [to] Vehicle Code section requirements, including each element that was necessary for the People to prove their case[; r]egarding the requirement that the

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subparagraphs (A), (D), (E), and (F) of paragraph (2) of, subdivision (c) may not be contracted out to the manufacturer or supplier of the automated enforcement system. . . . ."

equipment be calibrated and maintained regularly, he stated that the Beverly Hills Police Department contracts with a [c]ompany called Red[]flex Systems[and t]hat they are in charge of maintaining and servicing the equipment used for photo enforcement[; h]e testified briefly regarding the triggering mechanism which causes the camera to take pictures and video[; and h]e took questions from the audience seated in court." Borzakian also set out her argument of her motion in limine, objecting to the People's exhibit on foundation and hearsay grounds as well as violation of her right of confrontation under *Melendez-Diaz v. Massachusetts* (2009) 129 S.Ct. 2527, as well as her cross-examination of Officer Butkus in question-and-answer format.

Borzakian said the officer did not testify to qualifications to lay a foundation for the exhibits he wished to enter, citing evidence including the following testimony: A company by the name of Redflex Traffic Systems prepared the job maintenance sheet which contained the description of maintenance and the party responsible for maintaining and calibrating the equipment which caused the photographs and video to be recorded; Officer Butkus was not employed by Redflex nor was he its custodian of records; he did not perform the maintenance or calibration of the machines himself; he was not present when the calibration was performed; he did not inspect the photo enforcement unit in this case; he was not present when the inspection was supposed to have taken place; it was not part of his job duties to inspect or to calibrate the photo enforcement unit; he did not take the photos or video in the case and was not present when they were taken; he had no independent knowledge that the information on the maintenance log was true and accurate; he was only reading what was written; his testimony was based "not on [his] observation but on this sheet of paper."

Borzakian argued Officer Butkus was not qualified to authenticate the People's evidence. "Underlying all this [evidence] are the maintenance logs," but Officer Butkus was not able to lay a foundation as he was not the individual who made or kept the records. "Without the maintenance log there is no evidence that the camera and video

were working properly." "The officer himself stated that the logs were a necessary element of the People's case in chief showing that the equipment was regularly inspected, correctly installed and calibrated, and operating properly," but failed to lay the necessary foundation for this evidence with the Redflex custodian of records or the person who calibrated and inspected the machines, and it should have been excluded. "Furthermore, the Court placed the burden on the Defendant," by telling her that "instead of complaining that the custodian of records was not present in court, she should have subpoenaed the witness herself."

On February 22, the trial court filed its "Order Concerning Appellant's Proposed Statement on Appeal." According to the "[s]ummary of [t]estimony" in the trial court's (proposed and ultimately certified) settled statement (CR-144), "Officer Mike Butkus of the Beverly Hills Police Department was sworn and testified.[3] His initial testimony was in the form of a presentation to all of the motorists in court that morning for red light camera ticket trials. He testified about his background, training, and experience, what the City had to do before being allowed to operate the red light camera ticket system, how the system works and how it is maintained. Everyone, including [Borzakian], was given a packet containing two or more photographs of their alleged violation, maintenance logs for before and after their citation was issued and other documents relating to their citation. Officer Butkus testified about the data boxes imprinted on the photographs and the letters and numbers contained in them. He explained what the letters and numbers mean, how they are generated and how they relate to the citation. During his testimony he used blown-up photographs for purposes of demonstration and urged everyone, including [Borzakian], to follow his testimony on their own photographs so they could see how this testimony related to their own citation.

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3 There was no court reporter, court recorder or other official recording of the proceedings.

"Once Officer Butkus completed his initial testimony, motorists were called up individually for the balance of their trial. When [Borzakian] came forward she indicated that she understood the charge in her citation and that she was ready for the balance of her trial. However, she did want to make an oral Motion in Limine to exclude the People's evidence. The Court allowed [Borzakian] to make the motion [on the grounds of lack of foundation and hearsay, citing *Melendez-Diaz v. Massachusetts* (2009) 129 S.Ct. 2527 in support of her position] and subsequently denied it.

"With respect to [Borzakian's] citation, Officer Butkus testified that her alleged violation occurred at approximately 7:08 p.m. on Wednesday, June 03, 2009, as [Borzakian] travelled northbound on Beverly Drive in the number two lane at Wilshire Boulevard in the City of Beverly Hills. Officer Butkus further testified that he reviewed the technicians' logs and that the cameras were working properly on the date and at the time of [Borzakian's] alleged violation. Officer Butkus stated that he also reviewed the video and the photographs taken by the cameras installed at the particular intersection and concluded that the light had been **yellow for 3.15 seconds** before it turned red which is legally sufficient when the speed limit is 25 miles per hour as it is at this intersection. The officer also testified that the light had been **red for .28 seconds** when [Borzakian traversed the limit line at a **speed of 29 miles per hour**. He also testified that the photograph of the driver appeared to be a photograph of [Borzakian]. He then played the video of the alleged violation two times: first in real time and then again in slow motion. [Borzakian] confirmed that she did see the video both times. The photographs and documents that supported Officer Butkus'[s] testimony were marked as People's #1 for identification and offered into evidence.

"[Borzakian] objected to the introduction of People's #1 into evidence on the same grounds she had argued with respect to her Motion in Limine. She asked to take Officer Butkus on voir dire and was allowed to do so. [T]here was no official recording of the proceedings, so the Court can[]not explain how [Borzakian] purports to be reproducing a

verbatim account of what was said. Without an explanation for this from [Borzakian], the Court suspects [she] either surreptitiously recorded the proceedings in violation of California Rule of Court 1.150(d) or that she is simply making things up and using quotation marks to make the statements appear authentic.[4] Once again, the Court rejected [Borzakian's] arguments, found there was sufficient foundation laid by the testimony of Officer Butkus to admit the evidence, and that the *Melendez-Diaz* case was distinguishable and inapplicable to the case at bar. People's [Exhibit] #1 was then admitted into evidence over [Borzakian's] objection." As "Additional Points," the court noted, "The court did explain to [Borzakian] that the testimony of employees of Redflex is not required in order to authenticate and lay the foundation for the admissibility of the People's exhibits. The People have never been required to have Redflex employees such as the custodian of records or the field service technicians present in court in order for the People's exhibits to be admissible. Officer Butkus is perfectly capable of authenticating the documents and laying the necessary foundation for their admissibility and in the Court's opinion had done both in this matter. It was explained to [Borzakian] that she could have filed a discovery motion or issued her own subpoenas, as many motorists do, had she cared to do so."

On March 2, Borzakian filed her objection to the court's order and requested a hearing before a court reporter, asserting "a factual dispute about material aspect[s] of the trial proceeding." Citing *People v. Jenkins* (1976) 55 Cal.App.3d Supp. 55, she said the court's proposed statement was a prohibited "conclusionary statement" and did not comply with the duty to set forth the evidence "'fairly and truly.'" In particular, she said,

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4 "The judge may permit inconspicuous personal recording devices to be used by persons in a courtroom to make sound recordings as personal notes of the proceedings. A person proposing to use a recording device must obtain advance permission from the judge. The recordings must not be used for any purpose other than as personal notes." (Cal. Rules of Court, rule 1.150(d).)

"the dialogue of the voir dire [of Officer Butkus] is an essential part of the trial record," but the "Proposed Statement makes no mention of the testimony of Officer Butkus admitting that he did not work for Redflex, that he is not employed by them, that he was not the custodian of records for them, that he did not inspect the photo enforcement unit in this case, that he was not there when the inspection was purportedly done, that it was not a part of his job duty to inspect or calibrate the unit, that he did not prepare the logs that he sought to admit, that he did not make the entries in the maintenance log, that the person who made the entries did not work at the Beverly Hills Police Department, that [Officer Butkus] did not calibrate[] the machines, that he does not know the qualifications of the person who inspected the machine, that he was not present when the photos were taken, that he did not take the photos, etc." Borzakian said she had taken "great care to create this record during trial" as her motion in limine was "read from written form prepared before trial" so she was able to provide a record of it and she "recorded . . . Officer Butkus's responses contemporaneously in her notes, which contained each question[] she asked in Court."

Further, she said, the Court's proposed statement did not include the specifics of the People's evidence which she had sought to exclude, a "necessary element of the [a]ppeal." "The officer sought to admit photographs, maintenance logs prepared by an Australian company and [v]ideo taken by the video maintained by the Australian company.[5] These are critical facts that are omitted from the Court's Proposed Statement. There is not one mention of the fact that the officer testified that the cameras and the video recorder were maintained by an Australian company and not the Beverly Hills Police Department. There is no mention of the fact that the officer admitted to not being the custodian of records for the Australian company who prepared the maintenance

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5 The record on appeal does not contain any video evidence. In her opening brief, Borzakian says the online video was not preserved for appeal.

logs. This is the basis for [my] appeal. Without these facts, the record before the Appellate Court will be inaccurate and prejudicial to [me]."

On March 3, the trial court filed its response, overruling Borzakian's objection, denying her request for a hearing before a court reporter, and certified the court's previously submitted statement on form CR-144 and dated February 22, 2010, as a complete and accurate summary of trial court proceedings in the matter.

The Appellate Division of the Los Angeles Superior Court affirmed the trial court's decision.

Borzakian then filed a petition to transfer the case to this court "to secure uniformity of opinion or to settle an important question of law," citing the decision in *People v. Khaled* (2010) 186 Cal.App.4th Supp. 1 in which the Appellate Division of the Orange County Superior Court reversed a conviction in a "photo enforcement" citation trial "on the exact same facts."

On January 5, 2011, we granted Borzakian's petition.[6]

DISCUSSION

Infractions and Settled Statements.

When issued by a law enforcement agency "based on an alleged violation of [Vehicle Code s]ection 21453 . . . recorded by an automated enforcement system pursuant to Section 21455.5," a written notice to appear constitutes a complaint to which the defendant may enter a plea. (Veh. Code, § 40518, subd. (a).) "The issuance of citations based upon automated traffic enforcement systems is thus governed by the procedural requirements of Vehicle Code section 21455.5." (*People v. Park* (2010) 187 Cal.App.4th Supp. 9, 11.)

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6 We note that a similar appeal of a red light camera violation in which the Appellate Division of the Los Angeles County Superior Court affirmed the motorist's conviction (*People v. Goldsmith* (2011) 193 Cal.App.4th Supp. 1) is currently pending before Division Three in *People v. Goldsmith*, B231678.

Special procedures apply to the trial of infractions under the Vehicle Code. (Veh. Code, § 40901 et seq.; 5 Witkin, California Criminal Law (3d ed. 2000) Criminal Trial, § 561, p. 803.) Still, "Except as provided, the statute does not 'permit the submission of evidence other than in accordance with the law.' . . . (Veh. Code, § 40901[, subd.] (e).)" (*Id*. at p. 804.)

Moreover, "In contrast to felony appeals, in which a verbatim reporter's transcript of most of the oral proceedings is part of the normal record on appeal (see [rule] 8.320(b) [of the California Rules of Court (all further rule references are to the California Rules of Court)]) and the settled statement is rarely necessary, appeals in misdemeanor and infraction cases are routinely heard on statements on appeal." (Appeals & Writs in Criminal Cases (Cont.Ed.Bar 3d ed. 2008) Procedural Aspects of Appellate Representation, § 3.17, pp. 125-126.)

"A proposed statement prepared by the appellant must contain: (1) A condensed narrative of the oral proceedings that the appellant believes necessary for the appeal and a summary of the trial court's holding and a summary of the sentence imposed on the defendant. Subject to the court's approval, the appellant may present some or all of the evidence by question and answer; and (2) A statement of the points the appellant is raising on appeal. The appeal is then limited to those points unless the appellate division determines that the record permits the full consideration of another point. (A) The statement must specify the intended grounds of appeal by clearly stating each point to be raised but need not identify each particular ruling or matter to be challenged. (B) *The statement must include as much of the evidence or proceeding as necessary to support the stated grounds.* Any evidence or portion of a proceeding not included will be presumed to support the judgment or order appealed from. (C) If one of the grounds of appeal is insufficiency of the evidence, the statement must specify how it is insufficient." (Rule 8.916(c), italics added.)

Within 10 days after the appellant files a proposed statement, the respondent may file and serve proposed amendments. (Rule 8.916(d)(1).) Whether the respondent files a proposed amendment or not, the trial judge must "make any corrections or modifications . . . necessary to ensure that it is an accurate summary of the trial court proceedings." (Rule 8.916(d)(4). Then, if the trial court makes corrections or modifications any party may file and served proposed modifications or objections to the statement. (Rule 8.916(e).) Within five days after the time for filing proposed modifications or objections has expired, the "the judge must review any proposed modifications or objections to the statement filed by the parties, make any corrections or modifications to the statement necessary to ensure that it is an accurate summary of the trial court proceedings, and certify the statement." (Rule 8.916(f); and see generally, Appeals & Writs in Criminal Cases, *supra*, Procedural Aspects of Appellate Representation, §§ 3.17-3.18, pp. 125-129.)

"The trial judge *must* settle the statement. [The judge] must correct, alter, or rewrite the statement, if this proves to be necessary to make the settled statement set forth the evidence and proceedings 'fairly and truly' . . . ." (See *People v. Jenkins* (1976) 55 Cal.App.3d Supp. 55, 64, original italics, citation omitted [discussing prior rule 871].) To assist in carrying out this responsibility "to prepare an accurate statement of the evidence[,] the trial court may rely on the appellant's proposed statement, the respondent's proposed amendments, and [the court's] own notes or memory of the evidence." (*Id*. at pp. 64-65.) A proper settled statement should contain a "narrative summary of the testimony of each witness who testified for the People and for the defendant whose testimony is relevant to the issues raised in the grounds on appeal. *A conclusionary statement of what the evidence showed as to a disputed issue or the sufficiency of the evidence to establish guilt does not comply with the responsibility of the trial judge . . . . It is of no value to this court to include the trial court's conclusions as to*

the merits of the appellant's grounds of appeal. Such conclusions tend to cast doubt on the impartiality of the trier of fact." (*Id.* at p. 65, italics added.)

As summarized above, we note the efforts Borzakian made to include a detailed summary of the evidence at her trial in the record on appeal, as well as the limitations imposed by the statement as certified. Borzakian specified her grounds for appeal, and recounted Officer Butkus's testimony, including the questions she asked of him and the answers she recorded in response, as specifically contemplated under rule 8.916. When the trial court's proposed statement excluded Borzakian's detailed recitation of the evidence, she filed her objection and requested a hearing, but the trial court settled the proposed statement without modification. (Compare *People v. Khaled, supra,* 186 Cal.App.4th Supp. 1; *People v. Goldsmith* (2011) 193 Cal.App.4th Supp. 1.) "No presumption of prejudice arises from the absence of materials from the appellate record." (*People v. v. Samayoa* (1997) 15 Cal.4th 795, 820; *People v. Cummings* (1993) 4 Cal.4th 1233, 1333.)

Nevertheless, an "appellant in a criminal case has a due process right to a transcript that is adequate to preserve the right to appeal," but the "appellate record is inadequate only if the complained-of deficiency is prejudicial to the defendant's ability to prosecute his or her appeal (*People v. Young* (2005) 34 Cal.4th 1149, 1170, 24 Cal.Rptr.3d 112; *People v. Alvarez* (1996) 14 Cal.4th 155, 196, [f]n[.] 8, 58 Cal.Rptr.2d 385; *People v. Jordan* (2006) 146 Cal.App.4th 232, 246, 53 Cal.Rptr.3d 18) and the burden is on the defendant to show that the record is inadequate to permit 'meaningful appellate review.'" (Appeals and Writs in Criminal Cases, *supra,* Procedural Aspects of Appellate Representation, § 3.10, p. 114, further citations omitted.) In the infraction context, where the settled statement is deficient, a matter is properly remanded to the trial court for preparation of a settled statement in compliance with the California Rules of Court. (*People v. Jenkins, supra,* 55 Cal.App.3d Supp. at p. 66 [settled statement in one of two cases found to be deficient because statement (1) was silent as to testimony of two

witnesses; (2) failed to contain specification of appellant's grounds for appeal; and (3) contained "totally inappropriate" "argument and conclusions concerning the merits of the grounds on appeal" so matter remanded for preparation of proper settled statement].)

Here, however, notwithstanding the deficiencies of the settled statement, we find Borzakian's conviction must be reversed.

In *People v. Khaled* (2010) 186 Cal.App.4th Supp. 1, another automated red light enforcement case, the prosecution sought to establish the defendant's violation of Vehicle Code 21453, subdivision (a), with a police officer's declaration presented to support the introduction of photographs (with added date, time and other information) purportedly showing Khaled driving through an intersection against a red light. The documentation included the signature of an employee of Reflex Traffic Systems. Like Borzakian, Khaled objected the evidence was inadmissible hearsay and violated his confrontation rights. The Appellate Division of the Orange County Superior Court reversed the defendant's conviction.

First, the *Khaled* court noted, the officer could not establish the time in question, the method of retrieval of the photographs, or that any of the photographs or videotape were a "'reasonable representation of that which it is [sic] alleged to portray.'" (*Khaled, supra,* 186 Cal.App.4th Supp. at p. 5, citing *People v. Gonzalez* (2006) 38 Cal.4th 932, 952.) Further, the *Khaled* court rejected arguments that the photographic evidence was properly admissible under Evidence Code sections 1280 (official records exception) and 1271 (business records exception). Evidence Code section 1280 was inapplicable as the writing was not prepared by and within the scope of duty of a public employee, and furthermore, the record was "totally silent as to whether the trial court took judicial notice of anything" nor did it show "'sufficient independent evidence . . . that the record or report was prepared in such a manner as to assure its trustworthiness.'" (*Khaled, supra,* 186 Cal.App.4th Supp. at p. 7, quoting *Bhatt v. State Dept. of Health Services* (2005) 133 Cal.App.4th 923, 929, additional internal quotations omitted.) Finally, the Khaled court

concluded the exhibits did not fall under the business records exception of Evidence Code section 1271.[7]

"In order to establish the proper foundation for the admission of a business record, an appropriate witness must be called to lay that foundation (*Bhatt, supra,* 133 Cal.App.4th 923, 929). The underlying purpose of [Evidence Code] section 1271 is to eliminate the necessity of calling all witnesses who were involved in a transaction or event. (*People v. Crosslin* (1967) 251 Cal.App.2d 968 [60 Cal. Rptr. 309].) Generally, the witness who attempts to lay the foundation is a custodian, but any witness with the requisite firsthand knowledge of the business's recordkeeping procedures may qualify. The proponent of the admission of the documents has the burden of establishing the requirements for admission and the trustworthiness of the information. (*People v. Beeler* [(1995)] 9 Cal.4th [953,] 978.) And the document cannot be prepared in contemplation of litigation. (*Palmer v. Hoffman* (1943) 318 U.S. 109 [87 L. Ed. 645, 63 S. Ct. 477]; *Gee v. Timineri* (1967) 248 Cal.App.2d 139 [56 Cal. Rptr. 211].)" (*Khaled, supra,* 186 Cal.App.4th Supp. at p. 8.)

The *Khaled* court found the police officer "did not qualify as the appropriate witness and did not have the necessary knowledge of underlying workings, maintenance, or recordkeeping of Redflex Traffic System. The foundation for the introduction of the

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[7] "Evidence of a writing made as a record of an act, condition, or event is not made inadmissible by the hearsay rule when offered to prove the act, condition, or event if:

"(a) The writing was made in the regular course of a business;

"(b) The writing was made at or near the time of the act, condition, or event;

"(c) The custodian or other qualified witness testifies to its identity and the mode of its preparation; and

"(d) The sources of information and method and time of preparation were such as to indicate its trustworthiness."

photographs and the underlying workings of the Redflex Traffic System was outside the personal knowledge of Officer Berg. If the evidence fails to establish each foundational fact, neither the official records nor the business records hearsay exception is available. (*People v. Matthews* (1991) 229 Cal.App.[3d] 930, 940 [280 Cal.Rptr. 134].)[ ] Accordingly, without such foundation, the admission of exhibits Nos. 1 and 3 was erroneous and thus the trial court abused its discretion in admitting these exhibits. Without these documents, there is a total lack of evidence to support the Vehicle Code violation in question." (*Khaled, supra*, 186 Cal.App.4th Supp. at p. 8, footnote omitted.)

Then, in *People v. Goldsmith* (2011) 193 Cal.App.4th Supp. 1, the Appellate Division of the Los Angeles Superior Court disagreed with *Khaled*. (*Id.* at p. 4.) "[I]t is our view that photographs taken by an [automated traffic enforcement system] may be admissible even if the testifying officer was not a percipient witness to the violation and was not personally responsible for setting up the camera. We conclude the accuracy of the photographs is subject to a rebuttable presumption pursuant to Evidence Code sections 1552, subdivision (a), and 1553. Moreover, apart from such a presumption, the photographs may be authenticated by a law enforcement officer who has knowledge about the methods used by the [automated traffic enforcement system] to transmit the photographs to the officer's law enforcement agency. Finally, the data and images on the photographs did not constitute hearsay because they did not amount to a 'statement' from a human declarant." (*People v. Goldsmith, supra,* 193 Cal.App.4th Supp. at p. 4, fn. omitted.) As previously noted, *Goldsmith* was subsequently transferred to Division Three for hearing and decision and remains pending.[8]

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8 *People v. Goldsmith* presented a far more detailed record of extensive testimony from a police officer from the City of Inglewood, including how that public entity operates and how involved that particular officer was with the automated traffic enforcement system in operation there.

The Photo Enforcement Evidence.

Notably, notwithstanding the detail included in Borzakian's proposed statement with respect to Officer Butkus's testimony in this regard, the trial court's "summary of testimony" does not include a single mention of Redflex, its relationship with the City of Beverly Hills or its involvement in the operation of the automated traffic enforcement system and its role in the generation of evidence supporting red light violations. (Further, the trial court did not identify any factual inaccuracies in Borzakian's proposed statement, and to the contrary, accused her of "surreptitiously" recording the proceedings without first requesting the court's permission.) All the trial court had to say regarding Redflex was its "[a]dditional [p]oints" that: "The Court did explain to [Borzakian] that the testimony of employees of Redflex is not required in order to authenticate and lay the foundation for the admissibility of the People's exhibits. The People have never been required to have Redflex employees such as the custodian of records or the field service technicians present in court in order for the People's exhibits to be admissible. Officer Butkus is perfectly capable of authenticating the documents and laying the necessary foundation for their admissibility and in the Court's opinion had done both in this matter. It was explained to [Borzakian] that *she* could have filed a discovery motion or issued her own subpoenas, as many motorists do, had she cared to do so." (Italics added.)

In this case, however, the record on appeal does include People's Exhibit No. 1—comprised of documents clearly identified as Redflex documents, prepared by a Redflex employee, but presented through the testimony of Officer Butkus. The exhibit includes three photographs--with information typed in a box across the top of each photograph. On all three photographs, the location is identified as "N/B Beverly and Wilshire, Beverly Hills, CA;" "Date: Wednesday 03 June 2009;" "Frame: 50;" "Speed Limit: 25 MPH;" "Lane: 2;" and "Vehicle Speed: 29 MPH." In the first photograph ("A Scene Image"), it appears the car in lane 2 has not yet entered the crosswalk at the intersection; the type on the photo reads "RED 0.28[;] Elapsed Time: 0.00[;] Amber: 3.15[.]" In the

second photograph ("B Scene Image"), the car in lane 2 has passed the crosswalk; the type reads: "RED 1.04[;] Elapsed Time: 0.75[;] Amber: 3.15[.]" The third photograph ("Face Image"), apparently taken from a different camera positioned on the opposite side of the street, shows the car in lane 2 crossing the crosswalk and includes the notations "RED: .94[;] Elapsed Time: 0.65[.]"

In addition, People's Exhibit 1 includes a document entitled "Maintenance Job Statistics – Details" bearing a logo and the name "Redflex Traffic Systems, Inc." followed by a two-page form (with no company or entity identified) entitled "Monthly Preventative Maintenance (PM) Inspection."[9] The "Maintenance Job Statistics – Details" page states "ROUTINE" work orders were completed on May 27, 2009 and June 23, 2009, with the same information reported for both dates: "Routine proactive maintenance for this approach. All physical, hardware, and software systems operational per RTS specifications and Routine Maintenance Program. Performed following Checks, Physical Check (Verified structure, glass cleaned, area free of debris, foundation seals, equipment clean, enclosures secure) Communication Check (Router, modem, and communication link in working order) Secure Continuity (All loop grounding is secure and within specification) Voltage Levels (All incoming voltage levels are within specification and foreign voltage does not exist) System Check (Next Images, defrag hard-drives, SDCM comms, video and phasing fully operational) Valid Certification. Tech. Fernando Tafoya." However, the words "Physical Check," "Communication Check," "Voltage Levels," "System Check," and "Valid Certification. Tech." are underlined by hand on the earlier entry but not on the later one. In addition, the first entry identifies the start time as "1:15:00 PM" and the end time as "1:45:00 PM" for "total hours worked: 0.50," and the start and end times are underlined by hand for the

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[9] The two-page document does not bear the same "Redflex" logo or heading but includes references to "RTS specifications" and "RTS cabinets," suggesting they are also documents prepared by Redflex Traffic Systems.

first entry but not the second. Under the heading "Issues Explained," the first entry is described as "Certificate of Inspection and Operation: May 2009," and the second is "Certificate of Inspection and Operation: June 2009." Both bear entries bear the same apparent signature next to the words "WORK ORDER ASSIGNED TO: FTAFOYA."

With respect to the two-page "Monthly Preventative Maintenance (PM) Inspection" checklist, numerous tasks are listed under headings for the "Face Camera," "Main Camera," "RTS Cabinet" and "Associated Equipment," all with the sidebar "Physical Inspection." Similar headings for "Face Camera," "Main Camera," and "Associated Equipment," accompany a second sidebar for "Configuration/Operational Inspection." Although the tasks are listed in a checklist format with open boxes next to each task, there are no marks in any of the boxes. However, there are handwritten asterisks noted on both pages: one on the first page, under the "Physical Inspection" "RTS Cabinet" heading, beside the words: "Ensure all electrical connections are tight and free from corrosion, *repair as required*." (Italics added.) On the second page, under the "Configuration/Operational Inspection" "Main Camera" heading, there are two asterisks next to the following tasks: "Defrag and error check face computer (if applicable), annotate any errors that cannot be resolved," "Ensure current date/time settings for the camera being checked are accurate, pay particular attention to time zone," and "Ensure that camera being checked has a valid certificate that is not due to expire within the next 60 days, reissue certificate as necessary, annotate records if updates are made."

Photographs and videotapes are considered "writings" under Evidence Code section 250. (*Rojas v. Superior Court* (2004) 33 Cal.4th 407, 416; *Jones v. City of Los Angeles* (1993) 20 Cal.App.4th 436, 440.) A writing must be authenticated before it may be received in evidence. (Evid. Code, § 1401, subd. (a).) Authentication of a writing means "the introduction of evidence sufficient to sustain a finding that it is the writing

that the proponent of the evidence claims it is or . . . the establishment of such facts by any other means provided by law." (Evid. Code, § 1400.)

"No photograph or film has any value in the absence of a proper foundation. It is necessary to know when it was taken *and that it is accurate and truly represents what it purports to show*. It becomes probative only upon the assumption that it is relevant and accurate. This foundation is usually provided by the testimony of a person who was present at the time the picture was taken, *or who is otherwise qualified to state that the representation is accurate*." (*People v. Bowley* (1963) 59 Cal.2d 855, 862, italics added.)

Here, the People sought to prove a violation of Vehicle Code section 21453 with evidence obtained through the use of an automated enforcement system. In Vehicle Code section 21455.5, the Legislature specified that an intersection where a driver is required to stop "may be equipped with an automated enforcement system *if the governmental agency utilizing the system meets all of the following requirements*: (1) Identifies the system by signs that clearly indicate the system's presence and are visible to traffic approaching from all directions, or posts signs at all major entrances to the city . . . . [and] (2) [*E*]*nsures that the system meets the criteria specified in Section 21455.7*." (Italics added.) In Vehicle Code section 21455.7, the Legislature mandated that, "[a]t an intersection at which there is an automated enforcement system in operation, the minimum yellow light change interval *shall be established in accordance with the Traffic Manual of the Department of Transportation*. (b) For purposes of subdivision (a), the minimum yellow light change intervals relating to designated approach speeds provided in the Traffic Manual of the Department of Transportation are *mandatory minimum yellow light intervals*." (Italics added.)

According to the record in this case, Officer Butkus "concluded that the light had been **yellow for 3.15 seconds** before it turned red which is legally sufficient when the speed limit is 25 miles per hour as it is at this intersection" (and then red for .28 seconds before Borzakian entered the intersection) based on his review of the photographs and

video from Redflex. (Original emphasis.) Even assuming a 3.15 second interval meets the mandatory minimum yellow light interval as mandated by the Legislature, according to Officer Butkus's testimony then, he relied upon text typed across the top of two photos, stating "Amber: 3.15." Accordingly, where the evidence was being presented to show the duration of the yellow traffic signal met the minimum interval mandated by the Legislature—measured to the hundredth of a second--the record does not support the conclusion Officer Butkus was "otherwise qualified to state that the representation [wa]s accurate." (*People v. Bowley*, *supra*, 59 Cal.2d at p. 862.)

Further, subdivision (c) of Vehicle Code section 21455.5 provides that "Only a governmental agency, in cooperation with a law enforcement agency, may operate an automated enforcement system. As used in this subdivision, 'operate' includes all of the following activities: . . . [¶] Performing administrative functions and day-to-day functions, including, but not limited to, all of the following: . . . (A) Establishing guidelines for selection of location. (B) *Ensuring that the equipment is regularly inspected.* (C) *Certifying that the equipment is properly installed and calibrated, and is operating properly*. (D) Regularly inspecting and maintaining warning signs placed under paragraph (1) of subdivision (a). (E) Overseeing the establishment or change of signal phases and the timing thereof. (F) Maintaining controls necessary to assure that only those citations that have been reviewed and approved by law enforcement are delivered to violators." (Italics added.)

Pursuant to subdivision (d), "The activities listed in subdivision (c) that relate to the operation of the system *may be contracted out by the governmental agency, if it maintains overall control and supervision of the system*. However, the activities listed in paragraph (1) of, and subparagraphs (A), (D), (E), and (F) of paragraph (2) of, subdivision (c) may not be contracted out to the manufacturer or supplier of the automated enforcement system." (Italics added.)

According to the record, the City of Beverly Hills "contracted out" responsibility for regularly inspecting the automated red light enforcement system and certifying the equipment is properly installed and calibrated and operating properly. Consequently, in addition to the photographic evidence, the People relied on the maintenance log of Redflex employee Tafoya. As the Appellate Division of the Los Angeles Superior Court observed in this case, "The record does not indicate whether the logs consisted of entries created by a computer-generated testing or a field technician." (Opn. at p. 4.) Indeed, there were handwritten notations on the maintenance logs.

We disagree that the presumptions set forth in Evidence Code section 1552 and 1553 suffice to carry the People's burden. Subdivision (a) of Evidence Code section 1552 provides: "A printed representation of computer information or a computer program is presumed to be an accurate representation of the computer information or computer program that it purports to represent. This presumption is a presumption affecting the burden of producing evidence. If a party to an action introduces evidence that a printed representation of computer information or computer program is inaccurate or unreliable, the party introducing the printed representation into evidence has the burden of proving, by a preponderance of evidence, that the printed representation is an accurate representation of the existence and content of the computer information or computer program that it purports to represent."

Evidence Code section 1553 provides: "A printed representation of images stored on a video or digital medium is presumed to be an accurate representation of the images it purports to represent. This presumption is a presumption affecting the burden of producing evidence. If a party to an action introduces evidence that a printed representation of images stored on a video or digital medium is inaccurate or unreliable, the party introducing the printed representation into evidence has the burden of proving, by a preponderance of evidence, that the printed representation is an accurate representation of the existence and content of the images that it purports to represent."

As explained in *People v. Hawkins* (2002) 98 Cal.App.4th 1428, 1449, Evidence Code section 1552, "operates to establish only that a computer's print function has worked properly. *The presumption does not operate to establish the accuracy or reliability of the printed information*. On that threshold issue, upon objection the *proponent* of the evidence *must offer foundational evidence that the computer was operating properly*." (Italics added; see *People v. Nazary* (2010) 191 Cal.App.4th 727, 754 [test of admissibility of machine-generated receipts from automated gas station island pumps is whether "machine was operating properly at the time of the reading"]; and see *Stockinger v. Feather River Community College* (2003) 111 Cal.App.4th 1014, 1028 ["authentication of a writing is independent of the question of whether the content of the writing is inadmissible as hearsay"].)

In this case, Borzakian objected, but the only evidence presented to show the Redflex automated traffic enforcement system was working properly (and inspected regularly and properly calibrated) was the maintenance log prepared by a Redflex employee. In the People's view, the "data text" on the photographs and the maintenance log were admissible under Evidence Code section 1271 (the business records exception to the hearsay rule). According to the People, all of the documents presented at trial, including the photographs, video and maintenance logs "were prepared in the ordinary course of business of the *BHPD*," and Officer Butkus was qualified to authenticate the evidence as business records. (Italics added.) We disagree. Again, the City of Beverly Hills elected to contract out certain aspects of its operation of an automated enforcement system to Redflex.[10] Further, Evidence Code section 1271 "'requires a witness to testify

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[10] In its amicus brief, Redflex says *it* "is *in the business of* manufacturing red light camera systems and *assisting cities in collecting and processing evidence of violations*. Redflex collects photographic video evidence in the ordinary course of business for each and every vehicle that triggers one of its systems. Thus, because collecting such evidence **is** Redflex's business and Redflex collects the evidence for every vehicle that triggers its system, Redflex plainly collected the evidence of [Borzakian's] violation in the ordinary course of business." (Italics added; additional emphasis in original.) (See *Khaled, supra,*

as to the identity of the record *and its mode of preparation in every instance*.'" (*Bhatt v. State Dept. of Health Services, supra,* 133 Cal.App.4th at p. 929, quoting *People v. Dunlap* (1993) 18 Cal.App.4th 1468, 1477; *People v. George* (1994) 30 Cal.App.4th 262, 274 [same], italics added.) There is nothing in this record to support the conclusion that Officer Butkus described the mode of preparation of the maintenance logs in any respect or that the sources of information and method and time of preparation were such as to indicate trustworthiness. Without the proper testimony, the maintenance logs (and therefore the photographs with text typed across the top) were not properly admitted. (*People v. Matthews, supra,* 229 Cal.App.3d at p. 940; *People v. Crabtree* (2009) 169 Cal.App.4th 1293, 1312.) Without these documents, as in *Khaled*, there is a "total lack of evidence to support the Vehicle Code violation in question."[11] (*Khaled, supra,* 186 Cal.App.4th Supp. at p. 8.)

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186 Cal.App.4th Supp. at p. 8 ["the document cannot be prepared in contemplation of litigation"].)

[11] In light of our resolution of the issues surrounding the admissibility of the Redflex evidence, we need not reach Borzakian's arguments relating to her constitutional right of confrontation. We note, however, the Redflex evidence necessarily has a "'primary purpose'" of "'establish[ing] or prov[ing] past events potentially relevant to later criminal prosecution.'" (*Bullcoming v. New Mexico* (2011) 131 S.Ct. 2705, 2714, 2717, fn. 6, citation omitted ["A document created solely for an 'evidentiary purpose,' . . ., made in aid of a police investigation, ranks as testimonial."] "Suppose a police report recorded an objective fact – Bullcoming's counsel posited the address above the front door of a house or the read-out of a radar gun. [Citation.] Could an officer other than the one who saw the number on the house or gun present the information in court -- so long as that officer was equipped to testify about any technology the observing officer deployed and the police department's standard operating procedures? As our precedent makes plain, the answer is emphatically 'No.'" (*Id.* at pp. 2714-2715, citation omitted.) "The Clause does not tolerate dispensing with confrontation simply because the court believes that questioning one witness about another's testimonial statements provides a fair enough opportunity for cross-examination. . . . When the State elected to introduce Caylor's certification, Caylor became a witness Bullcoming had the right to confront." (*Id.* at p. 2716.) Further, it bears mention that the "'Confrontation Clause imposes a burden on the prosecution to present its witnesses, not on the defendant to bring those adverse witnesses into court.'" (*Bullcoming, supra,* 131 S.Ct. at p. 2719, citation omitted.)

DISPOSITION

The judgment is reversed. The requests for judicial notice of documents never presented to the trial court are denied.

WOODS, Acting P. J.

We concur:

ZELON, J. **JACKSON, J.**

Filed 2/10/12

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. ANNETTE BORZAKIAN, Defendant and Appellant.	B229748 (Los Angeles County Super. Ct. No. BR048012) **ORDER CERTIFYING OPINION FOR PUBLICATION; NO CHANGE IN JUDGMENT**

*THE COURT:

The opinion in the above-entitled matter filed on January 23, 2012, and modified on January 26, 2012, was not certified for publication in the Official Reports. For good cause it now appears that the opinion should be published in the Official Reports and it is so ordered.

The foregoing does not change the judgment.

Filed 1/26/12

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. ANNETTE BORZAKIAN, Defendant and Appellant.	B229748 (Los Angeles County Super. Ct. No. BR048012) **ORDER MODIFYING OPINION** **NO CHANGE IN JUDGMENT**

THE COURT:

It is ordered that the opinion filed herein on January 23, 2012, and not certified for publication, be modified as follows:

1. On the title page, designation of the trial judges was erroneously listed as:

"Patti Jo McKay, Anita H. Dymant and Fumiko H. Wasserman, Judges."

It should read:

"Fumiko H. Wasserman, Anita H. Dymant and Sanjay Kumar, Judges."

The foregoing does not change the judgment.

WOODS, Acting P. J. **ZELON, J.** **JACKSON, J.**