ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	
		Case No. 2010-2260
Plaintiff-Appellant,	:	
		On Appeal from the Cuyahoga County Court of Appeals, Eighth Appellate District
v.	:	
JAMES D. HOOD,	:	
		Court of Appeals Case No. 93854
Defendant-Appellee.	:	

MERIT BRIEF OF APPELLANT JAMES D. HOOD

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STATEMENT OF THE CASE

Defendant-Appellant James Hood was indicted, along with Kareem Hill and William Sparks, in a multiple-count indictment alleging two counts of murder under R.C. 2903.02(A) and (B); ten counts of kidnapping under R.C. 2905.01; eleven counts of aggravated robbery under R.C. 2911.01; one count of aggravated burglary under R.C. 2911.11; and one count of having weapons while under disability under R.C. 2923.13. Mr. Hood was also charged with attendant firearm specifications as well as notice of prior conviction specifications and repeat violent offender specifications. Hood pleaded not guilty, and his case proceeded to a jury trial. He elected to waive a jury trial on the W.U.D. charge and the specifications related to prior convictions.

The court granted Mr. Hood's motion for acquittal under Crim. R. 29 for Counts 8 and 12 (kidnapping counts), and 19 and 23 (aggravated robbery counts). The jury acquitted Mr. Hood of the charge of murder under R.C. 2903.02(A) contained in Count 2, but returned a guilty verdict as to the murder charge contained in Count 1, in violation of R.C. 2903.02(B). The jury returned guilty verdicts as to all remaining counts in the indictment, including all firearm specifications. The trial court found Mr. Hood not guilty of having a weapon while under disability and not guilty of all the prior conviction and repeat violent offender specifications. The court ultimately sentenced Mr. Hood to an aggregate term of eighteen years to life in prison.

STATEMENT OF THE FACTS

In the early morning hours of January 26, 2009, the party Sharon Jackson was hosting for Denotra and Rodney Jones' birthday celebration was finally winding down. Plenty of alcohol had been consumed since the card-playing party began some twelve hours earlier. At around five in the morning, two of the women in attendance decided to leave the party. Due to the time of day and the relative safety of the neighborhood, Sharon Jackson's son Jerrell, agreed to walk the two women out to their cars. (T. 461-62; 469). As he walked them out, he told another guest, Brian Sanders, to lock the door behind him. (T. 463). But when Jerrell returned to the house, the back door was ajar. Jerrell entered the house, and found four masked, armed men standing in the hallway. (T. 463-64; 473). One of the robbers pulled out a gun that looked like a black Uzi, and pointed it at Jerrell while ordering him to lead them down to the basement. (T. 464-65). Jerrell ran down the stairs to the basement and yelled "Who's these niggers in there with these guns in my eyes?" (T. 464). The men followed him into the basement and ordered everyone to get down on the ground; one of the robbers pointed a gun at him and pulled the trigger but the gun jammed. (T. 466). At that point, Jerrell pushed the robber, and ran upstairs to call 911. (T. 467). Jerrell described the robbers as wearing masks and dark clothing and carrying guns. At trial, Jerrell could not identify any specific clothing worn by the robbers, only that they wore dark clothing. (T. 470, 477-79).

Like her son, Sharon Jackson testified that four armed robbers entered her basement in the early morning hours of January 26, 2009. Sharon had fallen asleep on the couch, but awoke when her son came running into the basement yelling about men with guns. (T. 484). According to Sharon, two of the robbers were tall, one was short, and one was medium-height. Sharon recalled that the first robber she saw was tall and armed with the black Uzi. He was lean and was wearing blue jeans, a red or maroon hooded sweatshirt, a black jacket with designs on it, and black tennis shoes. (T. 485-86). Sharon further testified that one of the other robbers was wearing a blue and/or purple coat, and another robber had on a dark, possibly black, coat. (Id.). She recalled that three of the robbers wore black masks and the fourth had on a blue and rust-colored mask. (T. 505). One of the robbers stood particularly close to Sharon during the robbery, and at one point Sharon told him that she recognized his eyes. Upon hearing this, the robber told her to look away and covered her head with a bed sheet. (T. 488-90).

Sharon Jackson testified that she heard and saw one of the robbers pull the trigger on his gun while it was pointed at her son. (T. 491). The gun jammed and her son ran out. (T. 491). One of the robbers went after her son, and then Sharon heard four gunshots, which she assumed were being fired at Jerrell. (T. 491-92). At this point, three of the robbers were still in the basement. (T. 492). Sharon testified that $175.00 in cash was taken from her during the robbery. (Id.).

Sharon identified Terrance Davis, or "T.D.", as one of the card players at the party that evening. (T. 493). She stated that T.D. had not played cards with them in a long time, but that he showed up that night. Sharon also remembered that T.D. left the party once and came back around 4:00 a.m., and that he left again about twenty minutes before the robbery. (T. 494-95). Sharon remembered that the robbery happened around 5:10 a.m., because she looked at her cell phone when the robbers first came into the basement. (T. 493-94).

Sharon Jackson gave descriptions of the robbers to police approximately one week after the incident. She described the first robber as being 5′ 10″, medium complexion, low hair, wearing a black jacket with something reddish underneath and black tennis shoes, and wielding a black Uzi with a clip hanging down. (T. 507-08). She described the second robber as about 5′ 5″ to 5′ 7″ tall wearing a darker bluish jacket and carrying a long chrome revolver. (T. 508). The third robber was wearing blue jeans and Timberland boots and was the one who told her not to look into his eyes. (Id.). She could not describe the fourth robber. (Id.). When shown photographs of two jackets at trial, Sharon identified the bluish purple jacket, but could not be sure if the black jacket depicted in State's Exhibit 125 was worn by one of the robbers. (T. 512-14). Sharon did not recall any of the robbers wearing a leather jacket--a jacket which the State identified at trial as belonging to Mr. Hood. (T. 513).

A guest at the party, Roxie Watkins, testified that when four men wearing gloves and masks and armed with guns burst into the basement, she ran into a back storage room to hide along with a few other party-goers. (T. 406-407, 425). Roxie saw one robber – the one holding the black Uzi with the black jacket and red hoodie underneath – jump up on the card table and wave the gun around. (T. 411). Another robber followed her into the back storage room, and the other two robbers stayed by the basement door. (T. 411-12). Roxie described the guns as black revolvers, but noticed that one had a clip hanging down like an Uzi. (Id.). The robbers took $300.00 in cash from her jacket. (T. 413; 419). Roxie then testified that she heard a floorboard squeak from above, and at that point, the robbers forced Brian Sandersup the stairs at gunpoint. (T. 413). She also heard two or three gunshots after the robbers had gone upstairs with Brian Sanders. (T. 431-33).

Later that morning, the police asked Roxie to come to a nearby McDonald's, along with some of the other card players. (T. 416-17). When she got there, she saw a green Jeep, and inside it, saw various cell phones and cash all over the floor of Jeep. (T. 417). A few hours later, Roxie was asked to identify a dead body. (T. 420). She looked at the body and identified him as one of the robbers. The deceased, Samuel Peet, was wearing a dark jacket with a red or maroon hoodie underneath, and still had a mask partially covering his face. At trial, Roxie testified that the dead man was the robber who jumped on the card table and waved the black Uzi around. (T. 431, 444-45). And

although she testified that there were four robbers, on cross examination Roxie admitted that in her original statements to police, she only said that she saw three men come into the basement and could only really describe two of them. (T. 455-57).

Brian Sanders testified that he was at Sharon Jackson's home on January 25, 2009 for the party. Sanders went to the party with his fiancée, Lavennea Reeves. (T. 727-30). He did not know anyone at the party, but recalled having a conversation with Rodney Jones. (T. 730). Sanders testified that he was sitting on the couch in the basement playing a video game when Jerrell walked the two older women out to their cars. (T. 732). About five or ten minutes later, Jerrell came running downstairs and Sanders saw two masked men behind him with guns. (T. 734). Sanders testified that one gun was a bigger gun, an automatic or semi-automatic, and that the other gun was a silver revolver. (T. 735).

Sanders ran to hide in the back storage room. (Id.). But two of the robbers then came into the back room, where Sanders was hiding, demanding money. (T. 738). Sanders gave the robber with the silver gun his money and cell phone. (T. 739). The robbers then ordered everyone to strip, and one of the robbers pulled Sanders' pants off him. (T. 740). That same robber then ordered Sanders, wearing nothing but socks and a t-shirt, to stand up. They yanked Sanders' necklace off his neck and forced him upstairs. (T. 742). As Sanders was going up the stairs, he realized it was dark and saw

an open door, which he ran through and shut behind him. Sanders hid in a bedroom until police arrived. (T. 743). While he was hiding, he heard two gunshots. (T. 745).

Lavennea Reeves testified that she was at Sharon Jackson's party with Brian Sanders. Reeves knew a few people at the party, including "T.D.," Terrance Davis. (T. 757-58). T.D. had actually borrowed $20.00 from Reeves that night. She testified that T.D. left the party once, returned later on, and then left just before the robbery occurred. (T. 772-73). When the robbers came downstairs, Reeves went with Sanders and others into the back room to hide. Reeves only saw two robbers. She described the robber with the Uzi as wearing a dark coat, dark saggy jeans with designs on the back pockets. (T. 761-62). She also said that he was aggressive and aggravated throughout the robbery. (T. 763-64). Reeves did not get a good look at the second robber, but heard him telling the one with the Uzi to hurry up. She did notice that the second robber had a long chrome gun. (T. 766). She testified that the robbers took her cell phone, which she later identified at McDonald's on the seat of the green Jeep. (T. 769). On cross-examination, Reeves admitted that she could not identify the jeans shown to her as being worn by the robbers. (T. 775).

Rodney Jones celebrated his twenty-first birthday at Sharon Jackson's that night, as did his mother, Denotra. (T. 671). Rodney knew "T.D.", and confirmed at trial that T.D. had come and gone a couple times throughout the night and that this was unusual behavior for him. Rodney also testified that T.D. had not played cards with them in a

long time. (T. 673-74). According to Rodney, T.D. and his cousin William Davis left the party together about thirty minutes before the robbery. (T. 701). When the robbers came in, Rodney ran to the back storage room for cover. He could not describe the two robbers that followed them into the back room, other than the fact that they both wore masks, dark clothing, and jeans. (T. 684). Rodney did see the guns, and described one as a chrome .357 or .38 long, and said the other gun was just a "big gun." (T. 684).

After the robbers left with Brian Sanders, Rodney waited a few minutes and then went upstairs, wearing only his underwear and one sock, and ran out onto the driveway and on into the backyard. (T. 687-88). While in the backyard, Rodney heard a commotion and when he turned to look, he bumped into one of the robbers, who he described as wearing a leather jacket and jeans. (T. 688). At that point, Rodney ran to the neighbor's yard and hid, and the robber ran towards the backyard fence. (T. 688-89).

Rodney also went to the McDonald's later that morning, and there he saw the green Jeep, and found his cell phone, others' phones, and money inside. (T. 690). Jones told police he did not have his cell phone when he received a call from an unknown person at 5:15 a.m. At trial, it came out that the call to Rodney's phone came from Kareem Hill's number. (T. 697-99). He was also asked to identify the dead body down the street, and immediately recognized the dead man, Samuel Peet, as the robber

who carried the Uzi, based in part on a distinctive faded jacket with a design. (T. 693-95, 703).

Denotra Jones testified that she also remembered T.D. being there and playing cards with them. (T. 705-09). But she recalled only three robbers coming into the basement. (T. 710). When they came into the basement, Denotra hid underneath the poker table, and consequently could only see the robbers from the waist down. (T. 713). She described the robbers as all wearing jeans and dark jackets. (Id.). She did recall that they were all wearing masks, and was able to describe one of the guns as long and silver. (T. 714). Denotra went with Rodney down to the McDonald's where he identified his cell phone, but she did not recover the $100.00 taken from her that night. When she viewed the body of Samuel Peet, Denotra noticed the sleeve of his jacket and described it as being the same as one of the robbers. (T. 723).

Patricia Robinson arrived at the party around 10:30 or 10:45 that evening. When she got there, Robinson recognized some of the other guests as people she had played cards with in the past, one being a guy they called "T-Dog." She recalled that T-Dog borrowed $20.00 from Lavennea that night. (T. 783-85). Robinson recalled T-Dog's eyes, and said that they were big and puffy. (T. 783). Robinson remembered that T-Dog left the party once, returned, and sat next to a guy named Sean at the card table. Shortly thereafter, T-Dog's phone rang and he left again, along with Will Davis. (T. 785-86, 789). About twenty minutes later, the party was robbed. (T. 786). When the

robbers came into the basement, Robinson tried to hide near the card table. When one of the robbers approached her, she offered her diamond ring because that was all she had, but he said "No, baby girl, you cool." (T. 791). Robinson thought that he was about 6′ 1″ or 6′ 2″, and described him as slim and wearing a dark-colored leather jacket. (T. 791-92). The robber that spoke to Robinson then went towards the back storage room and yelled for the robber back there to hurry up. (T. 799). Robinson testified that her cell phone was taken by the robbers, and that a couple hours after the robbery, she called her number and a young girl answered her phone. (T. 802). Robinson arranged to meet the girl at her school to retrieve her phone, and when she did, she gave the girl $5.00 for finding and returning it. (T. 804). The girl said she found Robinson's phone on Manor, which was one street over from Parkview, where Sharon Jackson lived. (Id.). Robinson also identified the body of Samuel Peet as the tall robber with the maroon sleeves who was aggressive during the robbery. (T. 808). But on cross, Robinson acknowledged that when shown photographs of jackets by police shortly after the incident, she could not identify any of them. (Id.). William Davis was also at the party, and part of a regular group who plays cards together. He testified that his cousin, Terrence "T.D." Davis, was not part of that group. (T. 811-12). T.D. did come to play cards that night, but after about two or three hours, he left. (T. 816). T.D. told William that he wanted William to take a set of car keys to "Boo-Boo" – Samuel Peet, the deceased. (Id.). William refused, so T.D. left on his own and came

back to the party about forty-five minutes later. (T. 820). T.D. and William then left the party together, sometime between 4:00 and 5:00 a.m., just before the robbery. (Id.). Shortly thereafter, William was arrested for DUI. (T. 822).

Lavelle Neal arrived at the party at about 1:00 a.m. (T. 827-28). Lavelle knew both T.D. and William Davis. (T. 827). T.D. was not at the party when Lavelle first arrived, but he understood that T.D. had been there and had left already. (T. 828-29). Shortly thereafter, T.D. returned to the party, saw Lavelle, and left about an hour later, along with William Davis. (T. 829). Lavelle testified that T.D. and William Davis left approximately thirty minutes before the robbery. When the robbers came downstairs, Lavelle hid underneath the card table with Patricia Robinson and Denotra Jones. (T. 833). None of the robbers went through his pockets or took anything from him, and he heard one of the robbers tell Patricia she was "cool." (T. 834). No one ordered Lavelle to take his clothes off either. (Id.). Lavelle saw two guns, one that looked like a machine gun, and another that was long and silver. He saw the silver one in the driveway of the house next door later that morning. (T. 832). Lavelle also said that the robbers were all wearing masks and dark baggy clothing and jeans. (T. 831-32).

Lavelle testified that he had a cell phone and that he was presented with records from police that a person named "Hill" called his phone at 3:46 a.m. twice, but Lavelle denied receiving those calls. (T. 836-40). The records also indicated that he had

received a call from T.D. at 1:08 a.m., which he remembered, and a second call from T.D. at 3:45 a.m., which he denied receiving. (T. 840).

Lavelle Neal could not identify Mr. Hood. (T. 841).

On January 26, 2009, Officer Antonio Curtis of the Cleveland Police Department responded to three inter-related incidents in different parts of town. (T. 539). The first broadcast came in at 3:54 a.m. and described an incident in the area of E. 104th and Sophia in Cleveland, Ohio. Specifically, the broadcast stated that one male was pointing a gun at another male's face. (T. 540-43). While the broadcast was not directed to Curtis and his partner, they decided to respond to offer back-up assistance to the zone car headed for that run. (T. 539-40, 542). In route to that address, another broadcast was made regarding the robbery at Sharon Jackson's house on Parkview Avenue. It was broadcast that a sport utility vehicle was used in the commission of the robbery. (T. 553). On their way to the Sophia address, Curtis and his partner happened to pass by Parkview Avenue where Sharon Jackson lived. As Curtis and his partner passed by Parkview, they noticed a green, four-door Jeep Cherokee parked in the middle of the street with its lights on. (T. 543-44, 546). Given the odd parking location and the recent broadcast indicating a SUV was used in the robbery, Curtis and his partner did a U-turn and attempted to follow the Jeep Cherokee, which at that point had sped away. (T. 546-47). With sirens and lights activated, Curtis and his partner were able to follow the Jeep Cherokee long enough to get a partial license plate, which

they then broadcast over the radio. (T. 545-47). Curtis eventually lost sight of the green Jeep Cherokee but for about an hour continued to look for it. (T. 547-48). Then, another broadcast came over the radio directing Curtis and his partner to report to 11102 Parkview, where a robbery had recently occurred. (T. 552-53, 566). Thus, at that point, they gave up their search for the green Jeep Cherokee and reported to Parkview.

By the time Officer Curtis and his partner arrived at the Parkview location, there were already a number of zone cars there. (T. 554). Upon arriving, Curtis went down to the basement and interviewed the victims of the robbery; based on his interviews, Curtis understood to be looking for three black males dressed in dark clothing, and armed with guns. (T. 560-61).

After concluding the witness interviews at the Parkview address, Curtis heard yet another radio broadcast that some other officers had found the green Jeep and had pulled it over. (T. 563). The broadcast indicated that the Jeep Cherokee had been apprehended at a nearby McDonalds, and that three individuals (Kareem Hill, William Sparks, and James Hood) matching the descriptions given by the victims of the robbery were being arrested. (T. 551). Thus, from the Parkview address, Officer Curtis responded to the McDonalds on Buckeye and East 114th, where the vehicle he had previously chased had been apprehended at the drive-through window. (T. 571-72).

Upon arriving at the McDonald's, Curtis noticed that the first three letters of the license plate on the green Jeep Cherokee matched the plate he had identified earlier.

(T. 573). Upon looking inside the Jeep, Officer Curtis saw a number of cell phones, some cash, a black mask, some shoes, and a winter glove. (T. 575-76). Curtis had a list of phone numbers of the robbery victims' missing cell phones, so he began calling them and a couple of the phones in the Jeep rang. (T. 577). He collected the money and phones for evidence. (T. 579) After collecting evidence from the Jeep, Curtis received another call to respond to Parkview Avenue, for a dead body. (T. 586). The dead body, later identified as Samuel Peet, was a black male who matched the description of the clothing worn by one of the robbers, and still had a black mask partially covering his face. (T. 586-88).

Detective Kathleen Carlin testified that she received a 911 call at approximately 8:00 a.m. on January 26, 2009, reporting a male gunshot victim in the Parkview area. (T. 1123-25). She arrived on the scene with her partner Detective Henry Veverka. (T. 1126). Carlin assisted in processing the scene of the shooting, and was also involved in the arrests and ensuing investigations of Kareem Hill, William Sparks, Terrence Davis, and James Hood. Carlin found a couple of cell phones belonging to some of the robbery victims and $345.00 in cash in the pockets of Samuel Peet. (T. 1151-55, 1194). She also confiscated Kareem Hill's clothing, which included an off-white, orange, and brown hooded sweatshirt, Rocawear denim jeans, a dark-colored Pelle Pelle jacket and a pair of boots. (T. 1159-60).

When he was arrested, James Hood was wearing a pair of Parish denim jeans with studs on the back pockets, a black leather Rocawear jacket, and a pair of Timberland boots. (T. 1161). Testimony at trial demonstrated that William Sparks, another occupant of the green Jeep, who was also arrested in connection with the robbery, was wearing a nearly identical outfit. (T. 1003).

Carlin also requested that the prosecutor's office issue subpoenas for the cell phone records of James Hood, Kareem Hill, and Terrence Davis. (T. 1176). These records were obtained and analyzed by Detective Veverka. (T. 1178). Through the cell phone records, Detectives Carlin and Veverka linked Terrance Davis with the investigation of the suspects in the robbery. (T. 1189).

The case against Kareem Hill became better when DNA testing matched a latex glove recovered from the backyard of Sharon Jackson's home to Hill. (T. 1190). Until that point, Hill had given the detectives a number of false stories attempting to exculpate himself from the robbery and the death of Samuel Peet. But when the detectives informed Hill of the DNA match on the latex glove from the backyard—just before Hood was set to be tried—Hill changed his statement and implicated himself, Hood, and Terrence Davis in the robbery and struck a bargain in exchange for providing testimony against Hood. (T. 1191-93).

While Hill had not yet been sentenced when he testified against Mr. Hood, the State had proffered that his statements and testimony would never be used against

him in a criminal prosecution. Hill ultimately pleaded guilty to one count each of reckless homicide, aggravated burglary, aggravated robbery, and kidnapping and received an aggregate sentence of just three years in prison. (T. 975).

Hill was the State's star witness. He testified that he knew James Hood from around the neighborhood, but did not really know him that well. (T. 910). Hill and William Sparks were much closer, and hung out every weekend. (T. 913). Hill also knew Samuel Peet and Terrence Davis from the same neighborhood. (T. 910-11).

Hill testified that on January 25, 2009 at approximately 3:00 p.m., he ran into Mr. Hood, and that the two made plans to go to the Atmosphere Bar later that evening, despite the fact that both were underage. (T. 914-18) He testified that at the time, Hill was wearing a black Pelle Pelle jacket, an orange and brown Rocawear hooded sweatshirt, Rocawear jeans, and Columbia boots. (T. 919). Hill was also driving a green Jeep Cherokee, despite the fact that he did not have a driver's license. (T. 922).

Hill testified that he picked Mr. Hood up at Hood's mother's house around midnight on January 26, 2009. Hill claimed to remember exactly what Hood was wearing that night: a black Rocawear jacket, blue jeans with orange stitching, and brown Timberland boots. (T. 921-22). When Hill and Hood arrived at the Atmosphere Bar, they saw that Terrance "T.D." Davis and Samuel Peet were already there. (T. 924). At the bar, T.D. and Peet approached Hood and Hill about robbing a card game on Parkview. (T. 926). At about 1:30 a.m., T.D. left the bar to go back to the party, but he

returned to the bar approximately forty-five minutes later. (T. 929-30). Hill stated that Hood and Peet were using his cell phone to call T.D. throughout the early morning hours. (T. 931).

Hill claimed that when T.D. got back to the bar, after 2:00 a.m., he gave Hood, Hill and Peet the details of the party, and told them it was in the basement with about twelve to fourteen people. (T. 932). Hill testified that T.D. and Peet left in one car and Hill and Hood left for the party in Hill's Jeep Cherokee. (T. 933). Hill stated that before going to the card party, he and Hood went back to Hood's mother's house, where they picked up two guns, a black Uzi and a semi-automatic, as well as some latex gloves. (T. 934-35).

Hill testified that when he and Hood got to Parkview, Peet was already standing in the driveway next to Sharon Jackson's house, and told them that T.D. was inside scoping out the party. (T. 937). Peet had a long silver revolver. (T. 938). Hill stated that about five minutes later, T.D. came back outside and told them that the back door should be open. They agreed to park their cars one street over, and to meet in the backyard before going inside. (T. 939).

Hill testified that the four met in Jackson's backyard and proceeded into the house. He stated that he was carrying a .40 or .45 caliber gun, and T.D. had a black semi-automatic pistol. (T. 941, 943). Once they were inside the entrance hallway to Jackson's house, a guy came in from outside and startled them, so they forced him

down into the basement. (T. 943-44). According to Hill, during the robbery Hood hit someone over the head with his gun, and T.D. and Peet were generally robbing people and forcing them to strip. (T. 944, 947). Hill claimed that he just went through clothing that T.D. and Peet would toss over to him to check. (T. 945). Hill stated that he did not speak to anyone except for a woman who offered him her diamond ring, but he declined to take it. (T. 946). Hill further claimed that Peet and Hood got into an argument while they were all still in Jackson's basement, because Hood accused Peet of stealing some of the money from the card table and putting it in his pockets. (T. 948). Hill said that T.D. broke the argument up, and then they all left. Hill was the first one out of the house, and as he ran to the backyard he heard gunshots from inside the house but he had no idea who fired the shots. (T. 949-50). Hill testified that he jumped over a small metal fence and met Hood at his Jeep, and that T.D. took off in a different direction. (T. 951). Hill claimed he never saw Peet exit the house. (T. 950).

According to Hill, he took Hood back to his mother's house, where they dropped off their guns. (T. 952). Hill testified that they left the stolen money and a number of cell phones in the Jeep. (Id.). Hill then claimed that his buddy William Sparks called him and asked Hill to pick him up and take him to get some breakfast at McDonald's. (T. 953).

Hill testified that while they were driving, Hood used one of the stolen phones to call Hill's cell phone to see if the stolen phone worked. (T. 955). Hood then started

using Hill's phone to call T.D. again. (T. 956). When Hill picked Sparks up, Hill told Sparks to drive. (T. 957). According to Hill, they then drove to McDonalds, where they were eventually arrested while waiting in the drive-through line. (T. 959-61).

Kareem Hill admitted on the stand that he lied to the police multiple times about his whereabouts during the robbery. (T. 963-69). He claimed that at first he believed he could maintain his innocence and so did not tell police about his involvement, but when his lawyer told him about the DNA match to the latex glove, Hill decided to tell the truth and try to get a plea bargain. (T. 965-70).

On cross-examination, Hill admitted that he lied to police about the robbery and death of Samuel Peet on many occasions. (T. 997-98). Hill also admitted that Sparks was a good friend that he hung out with every weekend, whereas he hardly ever saw Hood. (T. 1001-02). Hill also admitted that Hood and Sparks were identically dressed on the night of the robbery and that the two men are roughly the same height. (T. 1003). Hill further acknowledged that he was only testifying because of the DNA evidence and because he wanted to get the best possible plea deal. (T. 1007-08). He admitted that even though he gave a confession to police, it was a "proffer," and that if things went badly at Hood's trial, the State could not use any of his statements against him. (T. 1010-11). Hill then changed the story he had provided on direct examination, and admitted that he was with Peet at 10:30 p.m. on January 25, 2009, because Peet

used Hill's cell phone at that time to call T.D. (T. 1016). This testimony directly contradicted his original trial testimony and the confession he gave to Detective Carlin; he originally told Carlin and testified on direct examination that he ran into T.D. and Peet at the bar after midnight, but on cross-examination, Hill testified that he actually saw Peet at E. 93rd Street at Stoughton, around 10:30 p.m. (T. 1016-19).

Hill also made several additional statements that radically altered the timing of the robbery and Peet's death. (T. 1022-28, 1033). When confronted with phone records showing that James Hood's cell phone was calling Hill's phone at 2:42 a.m., Hill could not provide an explanation—according to his story, Hill and Hood were riding around in together in Hill's car at that time. (T. 1046-47).

Given the unreliability of Mr. Hill's testimony, to substantiate its case against Mr. Hood, the State introduced various cell phone records and documents through Detective Henry Veverka. Over objection by defense counsel, the trial court allowed the State to introduce multiple documents analyzing the cellular phone activity and movements of Mr. Hood, Kareem Hill, and Terrence Davis. (T. 1210, 1212-13, 1237). These documents were not identified by a particular cellular carrier, and there is no indication that they were records kept in the ordinary course of business.

Detective Veverka had no formal training relating to cellular phone services or records. (T. 1178, 1207, 1209) At Mr. Hood's trial, Detective Veverka simply stated that he had learned how to interpret cell phone records on the job from other detectives. (T.

1209, 1221). Detective Veverka stated that he had subpoenaed various records related to the cell phone activity of Mr. Hood, Kareem Hill, and Terrence Davis. (T. 1207, 1242). The documents were not authenticated, and were not presented by a qualified expert in mobile phone tracking or a qualified records custodian. Detective Veverka was unable to explain the meaning of the records, although he asserted that they established that Mr. Hood was present with Mr. Hill and Terrence "T.D." Davis at crucial times during period of the robbery.

> Q. As relates to location, based upon information that is provided to you in the cell phone records, are you able to make a determination, based upon the records, where a call may have been placed?
>
> A. We also subpoena cell tower site records which is the – each cell phone company has towers across the nation and you can subpoena those records and when someone makes a phone call, it pings off a tower within a mile and-a-half, two-mile radius. That gives you a location, an idea where the phone call was made from and where it ended. So if you're driving on [sic] the car talking, it's bouncing off each tower as you're talking.
>
> . . . .
>
> Q. Based upon the information you received as it relates to the cell phone records for Defendant Hood, Defendant Kareem Hill, and Terrence Davis, TD, does it appear, from the information you obtained from the cell phone company, that these three people were in the vicinity of the home invasion during that time?
>
> A. Yes, ma'am.
>
> MR. SHAUGHNESSY: Objection.

(T. 1209-16). Detective Ververka could not confirm the authenticity of the records based upon which he made this conclusion, and as demonstrated when he was cross-examined, he could not even explain the basis for his conclusion. The state failed to provide a witness who could authoritatively testify as to the content of the records and how they were produced, yet relied heavily on those records to convict Mr. Hood. (See, *e.g.*, Tr. 1351-52, 1354-55).

ARGUMENT IN SUPPORT OF PROPOSITION OF LAW

PROPOSITION OF LAW

Cell phone records are not admissible as business records without proper authentication. The admission of unauthenticated cell phone records under the business records exception violates the Confrontation Clause of the Sixth Amendment to the United States Constitution.

To substantiate its case against Mr. Hood, the State introduced various unauthenticated cell phone call and tower records through Detective Henry Veverka of the Cleveland Police Department. Over objection by defense counsel, the trial court allowed the State to introduce multiple documents analyzing the cellular phone activity of Mr. Hood, Kareem Hill, and Terrence Davis. (T. 1210, 1212-13, 1237). These documents were neither identified by or attached to a particular cellular carrier, nor authenticated in any manner consistent with Ohio Rules of Evidence or statutory law. (T. 975, 1242; State's Trial Exhibits 162, 163, 182, and 187 attached hereto at A-4, A-6, A-13, A-14); also, see Ohio Evid. R. 803(6); R.C. 2317.40. Moreover, these exhibits contained Detective Veverka's handwritten notes explaining the meaning of parts of the records, which alone may have compromised any authenticity or reliability. (T. 1242; State's Trial Exhibits 162, 163, 182, and 187 attached hereto at A-4, A-6, A-13, A-14)

Detective Veverka was known around the Cleveland Police Department as the resident cell phone expert despite his lack of any formal training. (T. 1178, 1207, 1209).

At Mr. Hood's trial, Detective Veverka acknowledged his lack of training and simply stated that he had learned how to interpret cell phone records on the job from other detectives. (T. 1209, 1221) For the purpose of Mr. Hood's trial, Detective Veverka stated that he subpoenaed various records related to the cell phone activity of Mr. Hood, Kareem Hill, and Terrence Davis, although defense counsel noted that no subpoena had been produced. (T. 1207, 1242).

The state subpoenaed those records specifically to prove Mr. Hood's involvement in the robbery. But the records were hearsay, were not authenticated or identified, and most importantly, in spite of the Constitution's clear mandate that a criminal defendant must be allowed to confront the witnesses against him or her, the records were not presented by a qualified expert in mobile phone tracking or even by a qualified records custodian. The jury heard only from Detective Veverka, the self-trained phone expert, who failed to even bring the master list of tower records and was completely unable to complete the tower information related to the three phone numbers, rendering his testimony wholly unreliable. (T. 977-79, 1213, 1215).

Instead of presenting the in-court testimony of a qualified expert in mobile phone roaming and tracking, the State essentially presented forensic testimony by a third party who had no formal training, no role in the preparation or keeping of the records, and who could not be effectively cross-examined. The State used that critical forensic evidence to establish Mr. Hood's presence with the other suspected robbers

during relevant times, and to establish his role in planning and executing the robbery that led to the death of Samuel Peet. This Court should not condone this practice of offering testimony in a criminal case by a stand-in witness who has neither the necessary knowledge nor requisite qualification to discuss the analysis performed. This practice runs afoul of the plain language of the Confrontation Clause and cannot be reconciled with the recent guidance provided by *Crawford v. Washington* (2004), 541 U.S. 36, and *Melendez-Diaz v. Massachusetts* (2009), 557 U.S. ___, 129 S.Ct. 2527.

The Sixth Amendment of the United States Constitution guarantees a defendant the right "to be confronted with the witnesses against him," and Section 10, Article I, of the Ohio Constitution allows defendants to "meet the witnesses face to face." When the State introduces testimonial evidence in a criminal prosecution, the defendant must be afforded the opportunity to confront the person who made the statement or created the document at issue. And, whether that in-court witness offered by the prosecution is a supervisor, a police officer, or a lay person hailed from the courthouse lobby, is of no consequence in this analysis. In *Melendez-Diaz,* the Court explained that the Confrontation Clause guarantees an opportunity to test the "honesty, proficiency, and methodology" of the actual author of a forensic report that the prosecution seeks to introduce into evidence. *Melendez-Diaz,* 129 S.Ct. at 2538.

In this case, the State offered mobile phone and tower records, over defense counsel's objection. (T. 977-79, 1210-15, 1242) The trial court permitted the State to

examine its star witness, Kareem Hill, on those records prior to those records being properly authenticated. (T. 977-79; State Trial Exhibits 162 and 163, attached hereto at A-4, A-6) And the records were authenticated, yet were nonetheless provided to the jury over objection for their consideration in deliberations. Detective Veverka testified that he subpoenaed the records, but he did not prepare those records or even bring all of the necessary records with him to trial. (T. 1221) Further, he admitted multiple times that he was no expert in mobile phone tracking. (T. 1209, 1221)

Under *Melendez-Diaz,* Mr. Hood had the right to confront the person who prepared the records and to cross-examine that person as to the accuracy of the records, the detail of the records, how the records were compiled, and on the interpretation and analysis of the records. As demonstrated by the following passages, cross-examination was futile and proves that in this situation Detective Veverka was no different than the surrogate witness at issue in *Melendez-Diaz*:

> Q. So there's different cell phone towers all over here, and I won't waste the time because I know you don't have the answer without your book, but for example, 440, 378, there's numbers up and down this form that you wouldn't be able to tell us the answer, right?
>
> A. That's correct.
>
> * * *
>
> Q. It would be fair to say, though, while you are the cell phone expert of your team, you don't have any expertise in cell phones or these towers, do you?
>
> A. None at all.

Q. In fact, there's different towers that have different powers, correct?

A. I don't know.

Q. As you and I have discussed in the past, some towers you'll see like a delineation of A, B or C, 1, 2 or 3, because some go in one direction and some only from one direction, right?

A. Yes, sir.

Q. If you actually go to the cell phone company, they can do a graph or pie chart and kind of show you the range where you'll get a strong signal, correct?

A. Yes, sir. They have experts.

Q. They have experts that could come in and they could take one of these cell tower things and they could give us a map of the city and they could shade in pretty colors like you did and they could show us where you could go with each tower and where you'd be in the city, right?

A. I'm sure they could, yes, sir.

(T. 1220-22) There can be no dispute that in this case, the cell phone records of Mr. Hood, Kareem Hill, and Terrence Davis were prepared by the respective cell phone companies (information that was never revealed during trial) for the purpose of being used as evidence in a criminal prosecution. *Crawford,* 541 U.S. at 64, 68.Detective Veverka did not prepare the records, he had no idea as to the contents of some of those records, and was unable to testify as to the location of several cell phone towers, yet his limited testimony and the erroneously admitted exhibits led the jury to believe that Mr. Hood and Mr. Hill were in the same vicinity before, during, and after the robbery.

Based on the trial court's evidentiary ruling, the defense had no choice but to attempt to cross-examine Veverka regarding his analysis of the records, but the detective admitted he was not an expert and simply could not answer many questions.

Surrogate forensic testimony does not meet the Confrontation Clause's requirement that "reliability be assessed . . . by testing in the crucible of cross-examination." *Crawford*, 541 U.S. at 61. Thus, this Court must overturn Mr. Hood's conviction and declare the practice utilized by the State at trial unconstitutional.

Furthermore, had the State followed the clear mandate of Evidence Rule 803(6) and Evidence Rule 901 when it sought to introduce the various cell phone and tower records as "business records," Mr. Hood might not have a Confrontation Clause claim. See *Melendez-Diaz*, 129 S.Ct. at 2538. Evidence Rule 901 articulates the bare minimum for establishing "authenticity or identification as a condition precedent to admissibility," by requiring evidence sufficient to support that the document is what the proponent says it is. And Evidence Rule 803(6) required the State to provide "[t]he testimony of the custodian or other qualified witness" in order to authenticate those records. But the State failed to produce such a witness and thus created the confrontation problem demonstrated herein. Detective Veverka was not an expert or qualified to testify as to how the tower records are kept, nor was he an expert on how to analyze and interpret those records. His inability to answer many of defense counsel's questions during cross-examination demonstrates the need for a defendant to

have appropriate access to the person who had knowledge of how the records are kept and who could testify competently on the details and significance of the records. Without that testimony, the evidence was insufficient to establish that the records identified in State's Exhibits 162, 163, 182, and 187 were what the State purported them to be. Thus, it cannot be determined at this point whether those exhibits qualified as "business records," and the admission of those records violated Mr. Hood's confrontation rights under the Sixth Amendment.

CONCLUSION

Assuming the disputed records are what the State purports them to be, Mr. Hood's confrontation rights may not have been violated. *Melendez-Diaz,* 129 S.Ct. at 2538. But because the State failed to provide anything to establish that the records were even genuine, let alone reliable, Mr. Hood's rights under the Sixth Amendment were disregarded, necessitating a new trial. The use of a testimonial stand-in by the government, which is precisely how Detective Veverka was employed in Mr. Hood's trial, violates the Confrontation Clause and is not sanctioned by United States Supreme Court precedent.

Thus, for the foregoing reasons, Mr. Hood asks this Court to reverse the judgment of the court of appeals, and to remand his case for a new trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing **Merit Brief of Appellant James D. Hood** has been sent by regular U.S. mail, postage prepaid to Kristen Sobieski, Assistant Prosecuting Attorney, Cuyahoga County Prosecutor's Office, Justice Center, 8th Floor, 1200 Ontario Street, Cleveland, Ohio 44113, this 16th day of May, 2011.

MELISSA M. PRENDERGAST #0075482
Assistant State Public Defender

#343575

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	
	:	Case No. 2010-0659
Plaintiff-Appellee,	:	
	:	On Appeal from the Cuyahoga
v.	:	County Court of Appeals
	:	Eighth Appellate District
JAMES D. HOOD, :		
	:	C.A. Case No. 93854
Defendant-Appellant.	:	

APPENDIX TO

MERIT BRIEF OF APPELLANT JAMES D. HOOD

IN THE SUPREME COURT OF OHIO

10-2260

State of Ohio,	:	Case No.
Plaintiff-Appellee,	:	On Appeal from the Cuyahoga County Court of Appeals, Eighth Appellate District Case No. 93854
v.	:	
James D. Hood,	:	
Defendant-Appellant.	:	

NOTICE OF APPEAL OF JAMES D. HOOD

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FILED
DEC 27 2010
CLERK OF COURT
SUPREME COURT OF OHIO

IN THE SUPREME COURT OF OHIO

State of Ohio,	:	Case No.
Plaintiff-Appellee,	:	On Appeal from the Cuyahoga County Court of Appeals, Eighth Appellate District Case No. 93854
v.	:	
James D. Hood,	:	
Defendant-Appellant.	:	

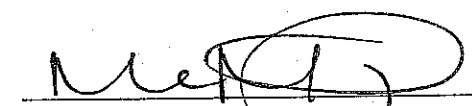
NOTICE OF APPEAL OF JAMES D. HOOD

James D. Hood hereby gives his notice of appeal to the Supreme Court of Ohio from the judgment of the Cuyahoga County Court of Appeals, Eighth Appellate District, entered in Court of Appeals Case No. 93854, on November 10, 2010.

This case raises a substantial constitutional question, involves a felony, and is of public or great general interest.

Respectfully submitted,

OFFICE OF THE OHIO PUBLIC DEFENDER



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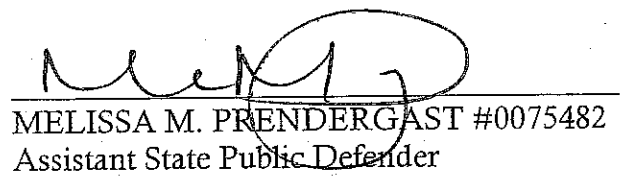
Certificate of Service

I hereby certify that a copy of the foregoing **Notice of Appeal of James D. Hood** was forwarded by regular U.S. Mail to Pinkey S. Carr, Assistant Prosecuting Attorney addressed to her office at The Justice Center, 8th Floor, 1200 Ontario Street, Cleveland, Ohio 44113, this 27th day of December, 2010.



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#333890

TERRANCE DAVIS
308-6254

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KAREEM HILL
LAVELLE NEAL
WOOTEN (GIRLFRIEND)
WILLIAM DAVIS

A – 4

STATE'S EXHIBIT
1267

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58	Cleveland1	1/26/2009	2:26:56	383	434	MT	(216) 308-6254	(216) 308-6254	(216) 883-1386	257
59	Cleveland1	1/26/2009	3:10:25	140	434	MT	(216) 308-6254	(216) 308-6254	(216) 341-5237	95
60	Cleveland1	1/26/2009	3:44:32	347	622	MO	(216) 308-6254	(216) 253-1191	(216) 308-6254	34
61	Cleveland1	1/26/2009	3:44:35	347	0	MO	(216) 308-6254	(630) 619-2094	(216) 308-6254	4
62	Cleveland1	1/26/2009	3:45:15	347	0	MO	(216) 308-6254	322-7913	(216) 308-6254	9
63	Cleveland1	1/26/2009	3:45:17	347	0	MO	(216) 308-6254	(630) 619-2979	(216) 308-6254	7
64	Cleveland1	1/26/2009	3:58:30	478	0	MM	(216) 308-6254	308-6254	(216) 372-7888	128
65	Cleveland1	1/26/2009	4:18:24	347	372	MO	(216) 308-6254	#737	(216) 308-6254	39

HILL: 386-1413

HILL

Details	Switch	Date	Time	Dir	MDN	Called #	CPN	Szr	Success Fail
1	Cleveland 1	1/26/2009	6:57:57	MM	(216) 386-1413	386-1413	(216) 952-5820	37	Success
2	Cleveland 1	1/26/2009	6:55:28	MF	(216) 386-1413	386-1413	(216) 952-5820	44	Success
3	Cleveland 1	1/26/2009	5:48:51	MO	(216) 386-1413	(630) 619-2195	(216) 386-1413	4	Success
4	Cleveland 1	1/26/2009	5:48:48	MO	(216) 386-1413	(216) 308-6254	(216) 386-1413	13	Fail
5	Cleveland 1	1/26/2009	5:30:59	MO	(216) 386-1413	(630) 619-3015	(216) 386-1413	4	Success
6	Cleveland 1	1/26/2009	5:30:56	MO	(216) 386-1413	(216) 308-6254	(216) 386-1413	10	Fail
7	Cleveland 1	1/26/2009	5:29:32	MO	(216) 386-1413	(630) 619-2251	(216) 386-1413	4	Success
8	Cleveland 1	1/26/2009	5:29:30	MO	(216) 386-1413	(216) 952-5820	(216) 386-1413	46	Success
9	Cleveland 1	1/26/2009	5:25:08	MO	(216) 386-1413	(630) 619-2045	(216) 386-1413	4	Success
10	Cleveland 1	1/26/2009	5:25:05	MO	(216) 386-1413	(216) 308-2866	(216) 386-1413	38	Success
11	Cleveland 1	1/26/2009	5:23:00	MO	(216) 386-1413	(630) 619-2903	(216) 386-1413	4	Success
12	Cleveland 1	1/26/2009	5:22:58	MO	(216) 386-1413	(216) 308-2866	(216) 386-1413	50	Success
13	Cleveland 1	1/26/2009	5:22:49	MO	(216) 386-1413	(630) 619-3190	(216) 386-1413	2	Success
14	Cleveland 1	1/26/2009	5:21:58	MO	(216) 386-1413	(630) 619-3134	(216) 386-1413	4	Success
15	Cleveland 1	1/26/2009	5:21:55	MM	(216) 386-1413	(216) 308-2866	(216) 386-1413	56	Success
16	Cleveland 1	1/26/2009	5:15:21	MM	(216) 386-1413	(216) 538-4762	(216) 386-1413	4	Success
17	Cleveland 1	1/26/2009	5:14:58	MM	(216) 386-1413	(216) 538-4762	(216) 386-1413	23	Success

0750 HOMICIDE

[redacted]

0515 HOME INVASION

HOOD: 970-6108

T.D.: 308-6254

LAVELLE NEAL 322-7913

Rodney Jones 538-4762

6 OUT TO TD
1/26 0420-0548

8 IN TO TD
1/25-1/26 2153-0226

STATE'S EXHIBIT

163

Details	Switch	Date	Time	Dir	MDN	Called #	CPN	Szr	Success Fail
18	Cleveland 1	1/26/2009	5:13:50	MF	(216) 386-1413	386-1413	(216) 538-4762	92	Success
19	Cleveland 1	1/26/2009	4:56:34	MO	(216) 386-1413	(630) 619-2014	(216) 386-1413	4	Success
20	Cleveland 1	1/26/2009	4:56:32	MO	(216) 386-1413	*673227909	(216) 386-1413	847	Success
21	Cleveland 1	1/26/2009	4:37:47	MO	(216) 386-1413	(630) 619-2231	(216) 386-1413	5	Success
22	Cleveland 1	1/26/2009	4:37:45	MM	(216) 386-1413	(216) 952-5820	(216) 386-1413	35	Success
23	Cleveland 1	1/26/2009	4:30:28	MO	(216) 386-1413	(630) 619-3165	(216) 386-1413	4	Success
24	Cleveland 1	1/26/2009	4:30:25	MO	(216) 386-1413	(216) 308-6254	(216) 386-1413	10	Fail
25	Cleveland 1	1/26/2009	4:21:21	MO	(216) 386-1413	(630) 619-3158	(216) 386-1413	5	Success
26	Cleveland 1	1/26/2009	4:21:19	MO	(216) 386-1413	(216) 308-6254	(216) 386-1413	12	Fail
27	Cleveland 1	1/26/2009	4:20:43	MO	(216) 386-1413	(630) 619-3124	(216) 386-1413	4	Success
28	Cleveland 1	1/26/2009	4:20:41	MO	(216) 386-1413	(216) 308-6254	(216) 386-1413	9	Fail
29	Cleveland 1	1/26/2009	4:20:27	MO	(216) 386-1413	(630) 619-3116	(216) 386-1413	4	Success
30	Cleveland 1	1/26/2009	4:20:25	MO	(216) 386-1413	(216) 308-6254	(216) 386-1413	10	Fail
31	Cleveland 1	1/26/2009	3:47:52	MO	(216) 386-1413	(630) 619-2234	(216) 386-1413	4	Success
32	Cleveland 1	1/26/2009	3:47:49	MO	(216) 386-1413	322-7913	(216) 386-1413	25	Success
33	Cleveland 1	1/26/2009	3:47:11	MO	(216) 386-1413	(630) 619-3047	(216) 386-1413	4	Success
34	Cleveland 1	1/26/2009	3:47:08	MO	(216) 386-1413	253-1191	(216) 386-1413	35	Success

Details	Switch	Date	Time	Dir	MDN	Called #	CPN	Szr	Success Fail
35	Cleveland 1	1/26/2009	3:46:51	MO	(216) 386-1413	(630) 619-3040	(216) 386-1413	5	Success
36	Cleveland 1	1/26/2009	3:46:49	MO	(216) 386-1413	322-7913	(216) 386-1413	11	Success
37	Cleveland 1	1/26/2009	3:46:31	MO	(216) 386-1413	(630) 619-2176	(216) 386-1413	4	Success
38	Cleveland 1	1/26/2009	3:46:28	MO	(216) 386-1413	322-7913	(216) 386-1413	12	Success
39	Cleveland 1	1/26/2009	3:46:14	MO	(216) 386-1413	(630) 619-3016	(216) 386-1413	10	Success
40	Cleveland 1	1/26/2009	3:45:40	MO	(216) 386-1413	(630) 619-2991	(216) 386-1413	5	Success
41	Cleveland 1	1/26/2009	3:45:38	MO	(216) 386-1413	322-7913	(216) 386-1413	46	Success
42	Cleveland 1	1/26/2009	3:42:52	MO	(216) 386-1413	(630) 619-2026	(216) 386-1413	4	Success
43	Cleveland 1	1/26/2009	3:42:49	MO	(216) 386-1413	253-1191	(216) 386-1413	35	Success
44	Cleveland 1	1/26/2009	3:42:11	MO	(216) 386-1413	(630) 619-3158	(216) 386-1413	5	Success
45	Cleveland 1	1/26/2009	3:42:09	MO	(216) 386-1413	253-1191	(216) 386-1413	35	Success
46	Cleveland 1	1/26/2009	3:32:24	MO	(216) 386-1413	(630) 619-2162	(216) 386-1413	4	Success
47	Cleveland 1	1/26/2009	3:32:21	MO	(216) 386-1413	*673557862	(216) 386-1413	49	Success
48	Cleveland 1	1/26/2009	3:32:08	MO	(216) 386-1413	(630) 619-2137	(216) 386-1413	4	Success
49	Cleveland 1	1/26/2009	3:31:15	MO	(216) 386-1413	(630) 619-3006	(216) 386-1413	4	Success
50	Cleveland 1	1/26/2009	3:31:12	MO	(216) 386-1413	*673557862	(216) 386-1413	60	Success
51	Cleveland 1	1/26/2009	2:43:51	MT	(216) 386-1413	(216) 386-1413	(216) 246-1233	51	Success

Details	Switch	Date	Time	Dir	MDN	Called #	CPN	Szr	Success Fail
52	Cleveland 1	1/26/2009	2:42:41	MO	(216) 386-1413	(630) 619-2912	(216) 386-1413	4	Success
53	Cleveland 1	1/26/2009	2:42:38	MM	(216) 386-1413	970-6108	(216) 386-1413	35	Success
54	Cleveland 1	1/26/2009	2:42:25	MO	(216) 386-1413	(630) 619-3192	(216) 386-1413	0	Success
55	Cleveland 1	1/26/2009	2:41:45	MO	(216) 386-1413	(630) 619-2180	(216) 386-1413	4	Success
56	Cleveland 1	1/26/2009	2:41:43	MM	(216) 386-1413	970-6108	(216) 386-1413	42	Success
57	Cleveland 1	1/26/2009	2:41:35	MO	(216) 386-1413	721-4432	(216) 386-1413	1	Success
58	Cleveland 1	1/26/2009	2:26:15	MM	(216) 386-1413	386-1413	(216) 308-6254	56	Success
59	Cleveland 1	1/26/2009	2:22:41	MM	(216) 386-1413	386-1413	(216) 308-6254	144	Success
60	Cleveland 1	1/26/2009	2:11:33	MM	(216) 386-1413	386-1413	(216) 308-6254	173	Success
61	Cleveland 1	1/26/2009	2:10:48	MM	(216) 386-1413	386-1413	(216) 308-6254	38	Success
62	Cleveland 1	1/26/2009	1:55:20	MT	(216) 386-1413	(216) 386-1413	(216) 271-0953	35	Success
63	Cleveland 1	1/26/2009	1:53:19	MO	(216) 386-1413	(630) 619-2051	(216) 386-1413	4	Success
64	Cleveland 1	1/26/2009	1:53:16	MO	(216) 386-1413	441-5647	(216) 386-1413	103	Success
65	Cleveland 1	1/26/2009	1:52:25	MO	(216) 386-1413	(630) 619-3125	(216) 386-1413	4	Success
66	Cleveland 1	1/26/2009	1:52:22	MO	(216) 386-1413	-411	(216) 386-1413	45	Success
67	Cleveland 1	1/25/2009	23:59:40	MT	(216) 386-1413	(216) 386-1413	(216) 791-3523	34	Success
68	Cleveland 1	1/25/2009	23:45:41	MF	(216) 386-1413	(216) 386-1413	(216) 791-3523	31	Success

Details	Switch	Date	Time	Dir	MDN	Called #	CPN	Szr	Success Fail
69	Cleveland 1	1/25/2009	23:34:21	MM	(216) 386-1413	(216) 386-1413	(216) 952-5820	40	Success
70	Cleveland 1	1/25/2009	23:30:10	MO	(216) 386-1413	704-8261	(216) 386-1413	9	Success
71	Cleveland 1	1/25/2009	23:28:58	MO	(216) 386-1413	704-8261	(216) 386-1413	35	Success
72	Cleveland 1	1/25/2009	23:28:03	MO	(216) 386-1413	704-8261	(216) 386-1413	40	Success
73	Cleveland 1	1/25/2009	23:27:14	MO	(216) 386-1413	704-8261	(216) 386-1413	37	Success
74	Cleveland 1	1/25/2009	23:26:58	MO	(216) 386-1413	(630) 619-3173	(216) 386-1413	2	Success
75	Cleveland 1	1/25/2009	23:26:11	MM	(216) 386-1413	*673721223	(216) 386-1413	49	Success
76	Cleveland 1	1/25/2009	23:16:30	MF	(216) 386-1413	(216) 386-1413	(216) 799-7723	37	Success
77	Cleveland 1	1/25/2009	22:58:10	MM	(216) 386-1413	(216) 386-1413	(216) 372-1223	77	Success
78	Cleveland 1	1/25/2009	22:57:13	MM	(216) 386-1413	386-1413	(216) 308-2866	43	Success
79	Cleveland 1	1/25/2009	22:56:51	MO	(216) 386-1413	(630) 619-2252	(216) 386-1413	0	Success
80	Cleveland 1	1/25/2009	22:56:28	MM	(216) 386-1413	970-6108	(216) 386-1413	23	Success
81	Cleveland 1	1/25/2009	22:55:56	MO	(216) 386-1413	707-9695	(216) 386-1413	24	Success
82	Cleveland 1	1/25/2009	22:52:25	MO	(216) 386-1413	372-1223	(216) 386-1413	36	Success
83	Cleveland 1	1/25/2009	22:51:15	MF	(216) 386-1413	(216) 386-1413	(216) 324-8988	38	Success
84	Cleveland 1	1/25/2009	22:33:48	MM	(216) 386-1413	386-1413	(216) 308-6254	49	Success
85	Cleveland 1	1/25/2009	22:31:18	MO	(216) 386-1413	355-7862	(216) 386-1413	34	Success

Details	Switch	Date	Time	Dir	MDN	Called #	CPN	Szr	Success Fail
86	Cleveland 1	1/25/2009	22:25:19	MM	(216) 386-1413	386-1413	(216) 308-6254	55	Success
87	Cleveland 1	1/25/2009	22:16:37	MM	(216) 386-1413	(216) 386-1413	(216) 618-5442	51	Success
88	Cleveland 1	1/25/2009	22:15:28	MM	(216) 386-1413	(216) 386-1413	(216) 308-6254	24	Success
89	Cleveland 1	1/25/2009	22:12:50	MO	(216) 386-1413	(216) 219-0332	(216) 386-1413	21	Success
90	Cleveland 1	1/25/2009	22:08:57	MO	(216) 386-1413	355-7862	(216) 386-1413	67	Success
91	Cleveland 1	1/25/2009	22:07:40	MM	(216) 386-1413	(216) 704-8261	(216) 386-1413	36	Success
92	Cleveland 1	1/25/2009	22:06:41	MO	(216) 386-1413	533-9365	(216) 386-1413	6	Success
93	Cleveland 1	1/25/2009	22:05:29	MM	(216) 386-1413	(216) 704-8261	(216) 386-1413	57	Success
94	Cleveland 1	1/25/2009	22:03:21	MM	(216) 386-1413	(216) 308-6254	(216) 386-1413	24	Success
95	Cleveland 1	1/25/2009	21:53:48	MM	(216) 386-1413	386-1413	(216) 308-6254	49	Success
96	Cleveland 1	1/25/2009	21:39:28	MF	(216) 386-1413	(216) 386-1413	(216) 752-9116	43	Success
97	Cleveland 1	1/25/2009	21:36:43	MT	(216) 386-1413	(216) 386-1413	(216) 324-8988	30	Success
98	Cleveland 1	1/25/2009	21:24:11	MM	(216) 386-1413	618-5824	(216) 386-1413	15	Success
99	Cleveland 1	1/25/2009	21:22:42	MF	(216) 386-1413	(216) 386-1413	(216) 324-8988	23	Success
100	Cleveland 1	1/25/2009	21:16:03	MM	(216) 386-1413	618-5824	(216) 386-1413	42	Success
101	Cleveland 1	1/25/2009	21:13:22	MO	(216) 386-1413	(630) 619-3187	(216) 386-1413	1	Success
102	Cleveland 1	1/25/2009	21:11:34	MO	(216) 386-1413	240-6830	(216) 386-1413	109	Success

Details	Switch	Date	Time	Dir	MDN	Called #	CPN	Szr	Success Fail
103	Cleveland 1	1/25/2009	21:11:20	MF	(216) 386-1413	(216) 386-1413	(216) 324-8988	27	Success
104	Cleveland 1	1/25/2009	20:59:38	MF	(216) 386-1413	(216) 386-1413	(216) 324-8988	47	Success
105	Cleveland 1	1/25/2009	20:46:31	MO	(216) 386-1413	791-3523	(216) 386-1413	6	Success
106	Cleveland 1	1/25/2009	20:16:58	MT	(216) 386-1413	(216) 386-1413	(216) 682-5029	246	Success
107	Cleveland 1	1/25/2009	19:58:19	MT	(216) 386-1413	(216) 386-1413	(216) 324-8988	25	Success
108	Cleveland 1	1/25/2009	19:53:05	MT	(216) 386-1413	(216) 386-1413	(216) 324-8988	54	Success
109	Cleveland 1	1/25/2009	19:32:02	MO	(216) 386-1413	324-8988	(216) 386-1413	75	Success

HOOD'S CELL : 970- 6108

HOOD ?

Details	Switch	Date	Time	Dir	MDN	Called #	CPN	Szr	Success Fail
1	Cleveland1	1/26/2009	6:24:29	MT	(216) 970-6108	(216) 970-6108	(216) 527-7279	27	Success
2	Cleveland1	1/26/2009	2:52:14	MM	(216) 970-6108	(216) 970-6108	(216) 386-0938	24	Success
3	Cleveland1	1/26/2009	2:42:38	MM	(216) 970-6108	970-6108	(216) 386-1413	35	Success
4	Cleveland1	1/26/2009	2:41:44	MO	(216) 970-6108	324-0645	(216) 970-6108	3	Fail
5	Cleveland1	1/26/2009	2:41:43	MM	(216) 970-6108	970-6108	(216) 386-1413	42	Success
6	Cleveland1	1/26/2009	2:33:49	MT	(216) 970-6108	(216) 970-6108	(216) 991-2815	28	Success
7	Cleveland1	1/26/2009	2:18:46	MT	(216) 970-6108	(216) 970-6108	(216) 991-2815	31	Success
8	Cleveland1	1/25/2009	23:24:34	MF	(216) 970-6108	970-6108	(216) 372-1223	42	Success
9	Cleveland1	1/25/2009	22:59:07	MT	(216) 970-6108	(216) 970-6108	(216) 707-9695	17	Success
10	Cleveland1	1/25/2009	22:56:37	MF	(216) 970-6108	(216) 970-6108	(216) 544-9494	29	Success
11	Cleveland1	1/25/2009	22:56:28	MM	(216) 970-6108	970-6108	(216) 386-1413	23	Success
12	Cleveland1	1/25/2009	22:52:09	MT	(216) 970-6108	(216) 970-6108	(216) 682-5257	18	Success
13	Cleveland1	1/25/2009	22:47:10	MO	(216) 970-6108	(215) 307-1414	(216) 970-6108	44	Success
14	Cleveland1	1/25/2009	22:44:03	MO	(216) 970-6108	386-0938	(216) 970-6108	34	Success
15	Cleveland1	1/25/2009	22:43:07	MO	(216) 970-6108	386-0938	(216) 970-6108	41	Success
16	Cleveland1	1/25/2009	22:14:50	MO	(216) 970-6108	(215) 307-1414	(216) 970-6108	2	Success

0515 HOME INVASION

KAREEM HILL: 3861413

[redacted]

T. D. (?) : 308- 6254

STATE'S EXHIBIT

18A - 13

HOOP 970-6108
TOWER

SWITCH	Call Date	Call Time	Orig C/G	Term C/G	DIR	MDN	Called #	CPN	SZR
Cleveland1	1/26/2009	6:24:29	190	383	MT	(216) 970-6108	(216) 970-6108	(216) 527-7279	27
Cleveland1	1/26/2009	2:52:14	347	0	MM	(216) 970-6108	(216) 970-6108	(216) 386-0938	24
Cleveland1	1/26/2009	2:42:38	383	0	MM	(216) 970-6108	970-6108	(216) 386-1413	35
Cleveland1	1/26/2009	2:41:44	383	622	MO	(216) 970-6108	324-0645	(216) 970-6108	3
Cleveland1	1/26/2009	2:41:43	383	0	MM	(216) 970-6108	970-6108	(216) 386-1413	42
Cleveland1	1/26/2009	2:33:49	140	347	MT	(216) 970-6108	(216) 970-6108	(216) 991-2815	28
Cleveland1	1/26/2009	2:18:46	140	347	MT	(216) 970-6108	(216) 970-6108	(216) 991-2815	31
Cleveland1	1/25/2009	23:24:34	0	68	MF	(216) 970-6108	970-6108	(216) 372-1223	42
Cleveland1	1/25/2009	22:59:07	140	347	MT	(216) 970-6108	(216) 970-6108	(216) 707-9695	17
Cleveland1	1/25/2009	22:56:37	0	68	MF	(216) 970-6108	(216) 970-6108	(216) 544-9494	29
Cleveland1	1/25/2009	22:56:28	347	0	MM	(216) 970-6108	970-6108	(216) 386-1413	23
Cleveland1	1/25/2009	22:52:09	190	347	MT	(216) 970-6108	(216) 970-6108	(216) 682-5257	18
Cleveland1	1/25/2009	22:47:10	347	197	MO	(216) 970-6108	(215) 307-1414	(216) 970-6108	44
Cleveland1	1/25/2009	22:44:03	347	68	MO	(216) 970-6108	386-0938	(216) 970-6108	34
Cleveland1	1/25/2009	22:43:07	347	68	MO	(216) 970-6108	386-0938	(216) 970-6108	41
Cleveland1	1/25/2009	22:14:50	407	0	MO	(216) 970-6108	(215) 307-1414	(216) 970-6108	2

10515 CARNEGIE

383 = 10515 CARNEGIE
347 = 3161 E.81
622 =
140 = W. AUDI CT

HILL

STATE'S EXHIBIT
189

AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

CONSTITUTION OF THE STATE OF OHIO

ARTICLE I: BILL OF RIGHTS

§ 10 [Trial of accused persons and their rights; depositions by state and comment on failure to testify in criminal cases.]

Except in cases of impeachment, cases arising in the army and navy, or in the militia when in actual service in time of war or public danger, and cases involving offenses for which the penalty provided is less than imprisonment in the penitentiary, no person shall be held to answer for a capital, or otherwise infamous, crime, unless on presentment or indictment of a grand jury; and the number of persons necessary to constitute such grand jury and the number thereof necessary to concur in finding such indictment shall be determined by law. In any trial, in any court, the party accused shall be allowed to appear and defend in person and with counsel; to demand the nature and cause of the accusation against him, and to have a copy thereof; to meet the witnesses face to face, and to have compulsory process to procure the attendance of witnesses in his behalf, and a speedy public trial by an impartial jury of the county in which the offense is alleged to have been committed; but provision may be made by law for the taking of the deposition by the accused or by the state, to be used for or against the accused, of any witness whose attendance can not be had at the trial, always securing to the accused means and the opportunity to be present in person and with counsel at the taking of such deposition, and to examine the witness face to face as fully and in the same manner as if in court. No person shall be compelled, in any criminal case, to be a witness against himself; but his failure to testify may be considered by the court and jury and may be made the subject of comment by counsel. No person shall be twice put in jeopardy for the same offense. (As amended September 3, 1912.)

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TITLE 23. COURTS -- COMMON PLEAS
CHAPTER 2317. EVIDENCE
BUSINESS RECORDS

Go to the Ohio Code Archive Directory

ORC Ann. 2317.40 (2011)

§ 2317.40. Records as evidence

As used in this section "business" includes every kind of business, profession, occupation, calling, or operation of institutions, whether carried on for profit or not.

A record of an act, condition, or event, in so far as relevant, is competent evidence if the custodian or the person who made such record or under whose supervision such record was made testifies to its identity and the mode of its preparation, and if it was made in the regular course of business, at or near the time of the act, condition, or event, and if, in the opinion of the court, the sources of information, method, and time of preparation were such as to justify its admission.

This section shall be so interpreted and construed as to effectuate its general purpose to make the law of this state uniform with those states which enact similar legislation.

HISTORY:

GC §§ 12102-22-12102-24; 118 v 662, §§ 1, 2; Bureau of Code Revision, 10-1-53; 127 v 847. Eff 9-16-57.

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TITLE 29. CRIMES -- PROCEDURE
CHAPTER 2903. HOMICIDE AND ASSAULT
HOMICIDE

Go to the Ohio Code Archive Directory

ORC Ann. 2903.02 (2011)

§ 2903.02. Murder

(A) No person shall purposely cause the death of another or the unlawful termination of another's pregnancy.

(B) No person shall cause the death of another as a proximate result of the offender's committing or attempting to commit an offense of violence that is a felony of the first or second degree and that is not a violation of *section 2903.03* or *2903.04 of the Revised Code.*

(C) Division (B) of this section does not apply to an offense that becomes a felony of the first or second degree only if the offender previously has been convicted of that offense or another specified offense.

(D) Whoever violates this section is guilty of murder, and shall be punished as provided in *section 2929.02 of the Revised Code.*

HISTORY:

134 v H 511 (Eff 1-1-74); 146 v S 239 (Eff 9-6-96); 147 v H 5. Eff 6-30-98.

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TITLE 29. CRIMES -- PROCEDURE
CHAPTER 2905. KIDNAPPING AND EXTORTION
KIDNAPPING AND RELATED OFFENSES

Go to the Ohio Code Archive Directory

ORC Ann. 2905.01 (2011)

§ 2905.01. Kidnapping

(A) No person, by force, threat, or deception, or, in the case of a victim under the age of thirteen or mentally incompetent, by any means, shall remove another from the place where the other person is found or restrain the liberty of the other person, for any of the following purposes:

(1) To hold for ransom, or as a shield or hostage;

(2) To facilitate the commission of any felony or flight thereafter;

(3) To terrorize, or to inflict serious physical harm on the victim or another;

(4) To engage in sexual activity, as defined in *section 2907.01 of the Revised Code*, with the victim against the victim's will;

(5) To hinder, impede, or obstruct a function of government, or to force any action or concession on the part of governmental authority;

(6) To hold in a condition of involuntary servitude.

(B) No person, by force, threat, or deception, or, in the case of a victim under the age of thirteen or mentally incompetent, by any means, shall knowingly do any of the following, under circumstances that create a substantial risk of serious physical harm to the victim or, in the case of a minor victim, under circumstances that either create a substantial risk of serious physical harm to the victim or cause physical harm to the victim:

(1) Remove another from the place where the other person is found;

(2) Restrain another of the other person's liberty.

(C) (1) Whoever violates this section is guilty of kidnapping. Except as otherwise provided in this division or division (C)(2) or (3) of this section, kidnapping is a felony of the first degree. Except as otherwise provided in this division or division (C)(2) or (3) of this section, if an offender who violates division (A)(1) to (5), (B)(1), or (B)(2) of this section releases the victim in a safe place unharmed, kidnapping is a felony of the second degree.

(2) If the offender in any case also is convicted of or pleads guilty to a specification as described in *section 2941.1422 [2941.14.22] of the Revised Code* that was included in the indictment, count in the indictment, or information charging the offense, the court shall order the offender to make restitution as provided in division (B)(8) of *section 2929.18 of the Revised Code* and, except as otherwise provided in division (C)(3) of this section, shall sentence the offender to a mandatory prison term as provided in division (D)(7) of *section 2929.14 of the Revised Code.*

(3) If the victim of the offense is less than thirteen years of age and if the offender also is convicted of or pleads guilty to a sexual motivation specification that was included in the indictment, count in the indictment, or information charging the offense, kidnapping is a felony of the first degree, and, notwithstanding the definite sentence provided for a felony of the first degree in *section 2929.14 of the Revised Code*, the offender shall be sentenced pursuant to *section 2971.03 of the Revised Code* as follows:

(a) Except as otherwise provided in division (C)(3)(b) of this section, the offender shall be sentenced pursuant to that section to an indefinite prison term consisting of a minimum term of fifteen years and a maximum term of life imprisonment.

(b) If the offender releases the victim in a safe place unharmed, the offender shall be sentenced pursuant to that section to an indefinite term consisting of a minimum term of ten years and a maximum term of life imprisonment.

(D) As used in this section:

(1) "Involuntary servitude" has the same meaning as in *section 2905.31 of the Revised Code.*

(2) "Sexual motivation specification" has the same meaning as in *section 2971.01 of the Revised Code.*

HISTORY:

134 v H 511 (Eff 1-1-74); 139 v S 199 (Eff 1-5-83); 146 v S 2. Eff 7-1-96; 152 v S 10, § 1, eff. 1-1-08; 152 v H 280, § 1, eff. 4-7-09; 153 v S 235, § 1, eff. 3-24-11.

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TITLE 29. CRIMES -- PROCEDURE
CHAPTER 2911. ROBBERY, BURGLARY, TRESPASS AND SAFECRACKING
ROBBERY

Go to the Ohio Code Archive Directory

ORC Ann. 2911.01 (2011)

§ 2911.01. Aggravated robbery

(A) No person, in attempting or committing a theft offense, as defined in *section 2913.01 of the Revised Code*, or in fleeing immediately after the attempt or offense, shall do any of the following:

(1) Have a deadly weapon on or about the offender's person or under the offender's control and either display the weapon, brandish it, indicate that the offender possesses it, or use it;

(2) Have a dangerous ordnance on or about the offender's person or under the offender's control;

(3) Inflict, or attempt to inflict, serious physical harm on another.

(B) No person, without privilege to do so, shall knowingly remove or attempt to remove a deadly weapon from the person of a law enforcement officer, or shall knowingly deprive or attempt to deprive a law enforcement officer of a deadly weapon, when both of the following apply:

(1) The law enforcement officer, at the time of the removal, attempted removal, deprivation, or attempted deprivation, is acting within the course and scope of the officer's duties;

(2) The offender knows or has reasonable cause to know that the law enforcement officer is a law enforcement officer.

(C) Whoever violates this section is guilty of aggravated robbery, a felony of the first degree.

(D) As used in this section:

(1) "Deadly weapon" and "dangerous ordnance" have the same meanings as in *section 2923.11 of the Revised Code.*

(2) "Law enforcement officer" has the same meaning as in *section 2901.01 of the Revised Code* and also includes employees of the department of rehabilitation and correction who are authorized to carry weapons within the course and scope of their duties.

HISTORY:

134 v H 511 (Eff 1-1-74); 139 v S 199 (Eff 1-5-83); 140 v S 210 (Eff 7-1-83); 146 v S 2 (Eff 7-1-96); 147 v H 151. Eff 9-16-97.

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TITLE 29. CRIMES -- PROCEDURE
CHAPTER 2911. ROBBERY, BURGLARY, TRESPASS AND SAFECRACKING
BURGLARY

Go to the Ohio Code Archive Directory

ORC Ann. 2911.11 (2011)

§ 2911.11. Aggravated burglary

(A) No person, by force, stealth, or deception, shall trespass in an occupied structure or in a separately secured or separately occupied portion of an occupied structure, when another person other than an accomplice of the offender is present, with purpose to commit in the structure or in the separately secured or separately occupied portion of the structure any criminal offense, if any of the following apply:

(1) The offender inflicts, or attempts or threatens to inflict physical harm on another;

(2) The offender has a deadly weapon or dangerous ordnance on or about the offender's person or under the offender's control.

(B) Whoever violates this section is guilty of aggravated burglary, a felony of the first degree.

(C) As used in this section:

(1) "Occupied structure" has the same meaning as in *section 2909.01 of the Revised Code.*

(2) "Deadly weapon" and "dangerous ordnance" have the same meanings as in *section 2923.11 of the Revised Code.*

HISTORY:

134 v H 511 (Eff 1-1-74); 139 v S 199 (Eff 1-5-83); 140 v S 210 (Eff 7-1-83); 146 v S 2 (Eff 7-1-96); 146 v S 269. Eff 7-1-96.

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TITLE 29. CRIMES -- PROCEDURE
CHAPTER 2923. CONSPIRACY, ATTEMPT, AND COMPLICITY; WEAPONS CONTROL; CORRUPT ACTIVITY
MISCELLANEOUS

Go to the Ohio Code Archive Directory

ORC Ann. 2923.13 (2011)

§ 2923.13. Having weapons while under disability

(A) Unless relieved from disability as provided in *section 2923.14 of the Revised Code*, no person shall knowingly acquire, have, carry, or use any firearm or dangerous ordnance, if any of the following apply:

(1) The person is a fugitive from justice.

(2) The person is under indictment for or has been convicted of any felony offense of violence or has been adjudicated a delinquent child for the commission of an offense that, if committed by an adult, would have been a felony offense of violence.

(3) The person is under indictment for or has been convicted of any offense involving the illegal possession, use, sale, administration, distribution, or trafficking in any drug of abuse or has been adjudicated a delinquent child for the commission of an offense that, if committed by an adult, would have been an offense involving the illegal possession, use, sale, administration, distribution, or trafficking in any drug of abuse.

(4) The person is drug dependent, in danger of drug dependence, or a chronic alcoholic.

(5) The person is under adjudication of mental incompetence, has been adjudicated as a mental defective, has been committed to a mental institution, has been found by a court to be a mentally ill person subject to hospitalization by court order, or is an involuntary patient other than one who is a patient only for purposes of observation. As used in this division, "mentally ill person subject to hospitalization by court order" and "patient" have the same meanings as in *section 5122.01 of the Revised Code.*

(B) Whoever violates this section is guilty of having weapons while under disability, a felony of the third degree.

HISTORY:

134 v H 511 (Eff 1-1-74); 146 v S 2. Eff 7-1-96; 150 v H 12, § 1, eff. 4-8-04.

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Ohio Rules Of Criminal Procedure

Ohio Crim. R. 29 (2011)

Review Court Orders which may amend this Rule.

Rule 29. Motion for Acquittal

(A) Motion for judgment of acquittal.

The court on motion of a defendant or on its own motion, after the evidence on either side is closed, shall order the entry of a judgment of acquittal of one or more offenses charged in the indictment, information, or complaint, if the evidence is insufficient to sustain a conviction of such offense or offenses. The court may not reserve ruling on a motion for judgment of acquittal made at the close of the state's case.

(B) Reservation of decision on motion.

If a motion for a judgment of acquittal is made at the close of all the evidence, the court may reserve decision on the motion, submit the case to the jury and decide the motion either before the jury returns a verdict, or after it returns a verdict of guilty, or after it is discharged without having returned a verdict.

(C) Motion after verdict or discharge of jury.

If a jury returns a verdict of guilty or is discharged without having returned a verdict, a motion for judgment of acquittal may be made or renewed within fourteen days after the jury is discharged or within such further time as the court may fix during the fourteen day period. If a verdict of guilty is returned, the court may on such motion set aside the verdict and enter judgment of acquittal. If no verdict is returned, the court may enter judgment of acquittal. It shall not be a prerequisite to the making of such motion that a similar motion has been made prior to the submission of the case to the jury.

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Ohio Rules Of Evidence
Article VIII Hearsay

Ohio Evid. R. 803 (2011)

Review Court Orders which may amend this Rule.

Rule 803. Hearsay Exceptions; Availability of Declarant Immaterial

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(1) Present sense impression.

A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter unless circumstances indicate lack of trustworthiness.

(2) Excited utterance.

A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

(3) Then existing, mental, emotional, or physical condition.

A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

(4) Statements for purposes of medical diagnosis or treatment.

Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

(5) Recorded recollection.

A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable him to testify fully and accurately, shown by the testimony of the witness to have been made or adopted when the matter was fresh in his memory and to

reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

(6) Records of regularly conducted activity.

A memorandum, report, record, or data compilation, in any form, of acts, events, or conditions, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness or as provided by Rule 901(B)(10), unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

(7) Absence of entry in record kept in accordance with the provisions of paragraph (6).

Evidence that a matter is not included in the memoranda, reports, records, or data compilations, in any form, kept in accordance with the provisions of paragraph (6), to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a memorandum, report, record, or data compilation was regularly made and preserved, unless the sources of information or other circumstances indicate lack of trustworthiness.

(8) Public records and reports.

Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (a) the activities of the office or agency, or (b) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel, unless offered by defendant, unless the sources of information or other circumstances indicate lack of trustworthiness.

(9) Records of vital statistics.

Records or data compilations, in any form, of births, fetal deaths, deaths, or marriages, if the report thereof was made to a public office pursuant to requirement of law.

(10) Absence of public record or entry.

To prove the absence of a record, report, statement, or data compilation, in any form, or the nonoccurrence or nonexistence of a matter of which a record, report, statement, or data compilation, in any form, was regularly made and preserved by a public office or agency, evidence in the form of a certification in accordance with Rule 901(B)(10) or testimony, that diligent search failed to disclose the record, report, statement, or data compilation, or entry.

(11) Records of religious organizations.

Statements of births, marriages, divorces, deaths, legitimacy, ancestry, relationship by blood or marriage, or other similar facts of personal or family history, contained in a regularly kept record of a religious organization.

(12) Marriage, baptismal, and similar certificates.

Statements of fact contained in a certificate that the maker performed a marriage or other ceremony or administered a sacrament, made by a clergyman, public official, or other person author-

ized by the rules or practices of a religious organization or by law to perform the act certified, and purporting to have been issued at the time of the act or within a reasonable time thereafter.

(13) Family Records.

Statements of fact concerning personal or family history contained in family Bibles, genealogies, charts, engravings on rings, inscriptions on family portraits, engravings on urns, crypts, or tombstones, or the like.

(14) Records of documents affecting an interest in property.

The record of a document purporting to establish or affect an interest in property, as proof of the content of the original recorded document and its execution and delivery by each person by whom it purports to have been executed, if the record is a record of a public office and an applicable statute authorizes the recording of documents of that kind in that office.

(15) Statements in documents affecting an interest in property.

A statement contained in a document purporting to establish or affect an interest in property if the matter stated was relevant to the purpose of the document, unless dealings with the property since the document was made have been inconsistent with the truth of the statement or the purport of the document.

(16) Statements in ancient documents.

Statements in a document in existence twenty years or more the authenticity of which is established.

(17) Market reports, commercial publications.

Market quotations, tabulations, lists, directories, or other published compilations, generally used and relied upon by the public or by persons in particular occupations.

(18) Learned Treatises.

To the extent called to the attention of an expert witness upon cross-examination or relied upon by the expert witness in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice. If admitted, the statements may be read into evidence but may not be received as exhibits.

(19) Reputation concerning personal or family history.

Reputation among members of the declarant's family by blood, adoption, or marriage or among the declarant's associates, or in the community, concerning a person's birth, adoption, marriage, divorce, death, legitimacy, relationship by blood, adoption or marriage, ancestry, or other similar fact of the declarant's personal or family history.

(20) Reputation concerning boundaries or general history.

Reputation in a community, arising before the controversy, as to boundaries of or customs affecting lands in the community, and reputation as to events of general history important to the community or state or nation in which located.

(21) Reputation as to character.

Reputation of a person's character among the person's associates or in the community.

(22) Judgment of previous conviction.

Evidence of a final judgment, entered after a trial or upon a plea of guilty (but not upon a plea of no contest or the equivalent plea from another jurisdiction), adjudging a person guilty of a crime punishable by death or imprisonment in excess of one year, to prove any fact essential to sustain the judgment, but not including, when offered by the Government in a criminal prosecution for purposes other than impeachment, judgments against persons other than the accused. The pendency of an appeal may be shown but does not affect admissibility.

(23) Judgment as to personal, family, or general history, or boundaries.

Judgments as proof of matters of personal, family or general history, or boundaries, essential to the judgment, if the same would be provable by evidence of reputation.

HISTORY: Effective: July 1, 1980; amended effective July 1, 2006; July 1, 2007.

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Ohio Rules Of Evidence
Article IX Authentication And Identification

Ohio Evid. R. 901 (2011)

Review Court Orders which may amend this Rule.

Rule 901. Requirement of Authentication or Identification

(A) General provision.

The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

(B) Illustrations.

By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule:

(1) Testimony of witness with knowledge. Testimony that a matter is what it is claimed to be.

(2) Nonexpert opinion on handwriting. Nonexpert opinion as to the genuineness of handwriting, based upon familiarity not acquired for purposes of the litigation.

(3) Comparison by trier or expert witness. Comparison by the trier of fact or by expert witness with specimens which have been authenticated.

(4) Distinctive characteristics and the like. Appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances.

(5) Voice identification. Identification of a voice, whether heard firsthand or through mechanical or electronic transmission or recording, by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker.

(6) Telephone conversation. Telephone conversations, by evidence that a call was made to the number assigned at the time by the telephone company to a particular person or business, if (a) in the case of a person, circumstances, including self-identification, show the person answering to be the one called, or (b) in the case of a business, the call was made to a place of business and the conversation related to business reasonably transacted over the telephone.

(7) Public records or reports. Evidence that a writing authorized by law to be recorded or filed and in fact recorded or filed in a public office, or a purported public record, report, statement, or data compilation, in any form, is from the public office where items of this nature are kept.

(8) Ancient documents or data compilation. Evidence that a document or data compilation, in any form, (a) is in such condition as to create no suspicion concerning its authenticity, (b) was in a place where it, if authentic, would likely be, and (c) has been in existence twenty years or more at the time it is offered.

(9) Process or system. Evidence describing a process or system used to produce a result and showing that the process or system produces an accurate result.

(10) Any method of authentication or identification provided by statute enacted by the General Assembly not in conflict with a rule of the Supreme Court of Ohio or by other rules prescribed by the Supreme Court.

NOV 10 2010

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93854

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

JAMES D. HOOD

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-523219-C

BEFORE: Celebrezze, J., Kilbane, P.J., and Sweeney, J.

RELEASED AND JOURNALIZED: November 10, 2010

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FILED AND JOURNALIZED
PER APP.R. 22(C)

NOV 10 2010

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FRANK D. CELEBREZZE, JR., J.:

Defendant-appellant, James Hood, appeals his convictions. Based on our review of the record and the apposite case law, we affirm.

Factual History

Appellant's co-defendant, Kareem Hill, testified that he and appellant began hanging out at 3:00 p.m. on January 25, 2009. The two made arrangements to meet later that evening and go to Atmosphere, a bar in Cleveland. Hill picked up appellant and the two arrived at Atmosphere at approximately 12:30 a.m. on January 26, 2009. The two had arranged to meet two acquaintances at the bar, Samuel Peet and Terrence Davis.

While at the bar, Davis, Peet, Hill, and appellant concocted a plan to rob a card party that was occurring that evening on Parkview Avenue. According to Hill, Davis had attended the party earlier in the evening and formulated a plan to rob those who were still in attendance. Hill specifically testified that Davis knew the layout of the Parkview house and believed committing the robbery would be easy.

Hill testified that Davis left the bar, but returned later with additional information. Davis told the other three men that the card party was in the basement of the Parkview residence, and 12 to 14 unarmed individuals would be in attendance. When Davis left Atmosphere a second time, he took Peet with

him, but first told Hill and appellant to remain at the bar until it closed and then to travel over to the Parkview address.

Hill and appellant left the bar and went to appellant's house. According to Hill, appellant went inside his residence and returned with two guns — a black .40 or .45 caliber firearm and an Uzi. The two then drove toward the Parkview address and saw Peet standing in a driveway. According to Hill, Davis was inside the card party at this time.

Davis later came out of the Parkview address. He told Hill to park the vehicle and meet the other three men outside the house. According to Hill, he was carrying the .40 or .45 caliber firearm, appellant was carrying the Uzi, Peet was armed with a silver revolver, and Davis had a black semiautomatic pistol. Hill also testified that he was wearing a black Pelle Pelle coat, a Rocawear hooded sweatshirt, Rocawear jeans, and Columbia boots. Appellant was wearing a black Rocawear coat, blue jeans, and brown Timberland boots. Peet was wearing a black and red jacket, blue jeans, and tennis shoes.

Hill testified that as they were preparing to barge into the basement, a man in a red shirt walked inside the home. The four men shoved the man, later identified as Jerrell Jackson, into the basement and began the robbery.

Several victims of the robbery testified including Roxie Watkins, Jerrell Jackson, Sharon Jackson, Rodney Jones, Denotra Jones, Brian Sanders,

Lavennea Reeves, Patricia Robinson, and Lavelle Neal (collectively referred to as "the victims"). Although the testimony of these victims differed slightly, their versions of the event were essentially the same. They all testified that Sharon Jackson lives at the Parkview address with her husband and children, one of whom is Jerrell Jackson. Sharon had agreed to host a card party in her basement on the evening of January 25, 2009 to celebrate Rodney and Denotra Jones's birthdays. They testified that Davis had attended the card party, but left and returned multiple times throughout the evening.

The victims testified that at approximately 5:00 a.m., Jerrell left the house to walk two older women to their cars. According to Jerrell, as he left the house, he told someone to lock the door. When he returned, he was surprised to find the door ajar. As he entered the house, Jerrell saw four men with masks and guns standing in the entryway. Jerrell testified that he immediately ran downstairs yelling about men with guns being in the house. The victims testified that the robbers followed Jerrell into the basement. There was differing testimony, however, with regard to how many men were actually robbing the card party. Some victims testified that there were four men, some testified to three, and some testified to two.

The victims testified that once the robbers entered the basement, they ordered everyone to get on the ground and to give the robbers all of their money.

Several of the victims ran into a smaller room adjacent to the room where they had been playing cards. Those victims, who included Roxie Watkins, Rodney Jones, Brian Sanders, and Lavennea Reeves, testified that two robbers came into the adjacent room and told everyone to strip. One of the victims, Brian Sanders, was not undressing fast enough, so one of the robbers approached him and pulled his pants off. The two robbers that were in the smaller room forced Sanders to his feet and ordered him out of that room.

The victims who remained in the main room — Jerrell Jackson, Sharon Jackson, Denotra Jones, Patricia Robinson, and Lavelle Neal — all testified to a similar chain of events. These victims testified that they were ordered to get on the ground and turn over any money they had. Several of these victims also testified that one of the robbers pointed his gun at Jerrell and pulled the trigger; the gun made a clicking noise but did not discharge.

The victims also testified that one of the victims who did not testify at trial, John "Sean" Ragland, was hiding under a table. One robber, who the victims testified was wearing a jacket that was noticeably different from the rest, began hitting Ragland over the head with his gun. According to the victims, this robber, later identified as Peet, was carrying the Uzi.

After collecting money and cell phones, the robbers forced Sanders to accompany them upstairs. The victims testified that they then heard gunshots.

Rodney Jones, who was only wearing underwear and one sock by this point, left the basement. As he left the Parkview residence, he ran into a man wearing a leather jacket who was running away from the scene. Rodney testified that he hid in the yard of a neighboring home until the police arrived.

Sanders testified that once he reached the top of the basement stairs, he ran inside the main residence and shut the door behind him. Sanders, who was only wearing a shirt and socks, then hid inside one of the home's bedrooms until the police arrived.

The remaining victims testified that they stayed in the basement until the police arrived. The victims provided statements to the police and then went their separate ways.

Officer Antonio Curtis with the Cleveland Police Department testified that just after 4:00 a.m. on January 26, 2009, another zone car received a call that a male was putting a gun in another male's face. Officer Curtis and his partner responded to assist that zone car. As they approached, Officer Curtis noticed a green four-door Jeep Cherokee in the middle of the street with its lights on. The car began going eastbound on Parkview Avenue, and the officers had to make a U-turn in order to follow it. After attempting to follow the Jeep, the officers were only able to obtain a partial license plate number of EOF. During the same shift, Officer Curtis responded to a call that a home on Parkview had been

robbed. As he was approaching the Parkview residence, Officer Curtis found a .22 caliber silver revolver lying in the driveway. Officer Curtis took the victims' statements. He later received a phone call that the green Jeep had been pulled over in a nearby McDonald's parking lot.

Hill testified that once they left the Parkview residence, he and appellant proceeded to his vehicle, Davis ran in a different direction, and he did not see Peet. Hill and appellant drove to appellant's home so they could dispose of their weapons. While appellant was inside, Hill received a phone call from William Sparks, who asked Hill to pick him up and take him to McDonald's. Appellant returned, and the two proceeded to go pick up Sparks. Hill testified that when they arrived at Sparks's home, he was shaken up by the night's events so he let Sparks drive his vehicle. After being followed by a police cruiser, the men pulled into the McDonald's drive-thru lane. While waiting in the drive-thru lane, the parking lot was swarmed with police cars. Hill, appellant, and Sparks were ordered out of the vehicle and placed under arrest.

The police officers found money and cell phones inside the vehicle. The officers contacted Roxie Watkins, Rodney and Denotra Jones, Brian Sanders, and Lavennea Reeves and asked them to come to the parking lot and identify their property. Several of the cell phones in Hill's car were identified as those stolen from the victims.

Officers later received a call that a dead body was found on Parkview Avenue near the residence that had been robbed. After responding to the scene, officers found a man, later identified as Samuel Peet, wearing black tennis shoes, blue jeans, and a maroon jacket. The man also had a mask covering part of his face. Several of the robbery victims were called to the scene and identified Peet's clothing as that worn by one of the robbers. An autopsy revealed that Peet died of two gunshot wounds and his death was ruled a homicide.

Procedural History

On February 11, 2009, in case number CR-520967, appellant was indicted in a 24-count indictment on 11 counts of kidnapping, 12 counts of aggravated robbery, and one count of having a weapon while under disability. After various motions and discovery requests were filed, this indictment was dismissed on April 23, 2009.

Appellant was reindicted in a 26-count indictment in case number CR-523219 on two counts of murder, 11 counts of kidnapping, 11 counts of aggravated robbery, one count of aggravated burglary, and one count of having a weapon while under disability. With the exception of the count for having a weapon while under disability, all charges carried one- and three-year firearm specifications, notice of a prior conviction, and repeat violent offender specifications.

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This matter proceeded to a jury trial on July 27, 2009. At the close of the state's case-in-chief, appellant's counsel made a Crim.R. 29 motion for acquittal. Based on this motion, the trial court dismissed two counts of kidnapping and two counts of aggravated robbery. These were the counts that related to John Ragland and Cortez Kirby, two alleged victims who did not testify at trial. The jury found appellant guilty of one count of murder,[1] nine counts of kidnapping,[2] nine counts of aggravated robbery,[3] and one count of aggravated burglary.[4] The court found appellant not guilty of having a weapon while under disability. Appellant was also found guilty of the one- and three-year firearm specifications, but not guilty of the repeat violent offender specifications.

The court sentenced appellant to 15 years to life for murder, to run consecutively to three years imposed for the firearm specification. Appellant was also sentenced to three years each for all remaining counts. These three-year terms were to run concurrently to each other, but consecutively to the sentence imposed for murder, for an aggregate sentence of 21 years to life in prison.

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[1]R.C. 2903.02(B), an unclassified felony.

[2]R.C. 2905.01(A)(2), first-degree felonies.

[3]R.C. 2911.01(A)(1), first-degree felonies.

[4]R.C. 2911.11(A)(2), a first-degree felony.

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This appeal followed wherein appellant argues that the trial court improperly admitted cell phone records that were not properly authenticated, the trial court failed to bring him to trial within his allotted speedy-trial time, his conviction is against the manifest weight of the evidence, and he was prejudiced by an improper prosecutorial comment made during the state's closing argument.

Law and Analysis

Authentication of Business Records and Confrontation Clause

In his first assignment of error, appellant argues that "[t]he trial court erred by allowing cell phone records to be admitted into evidence without being properly authenticated in violation of the Confrontation Clause." The standard of review when determining the admissibility of evidence is abuse of discretion. *State v. Heinish* (1990), 50 Ohio St.3d 231, 553 N.E.2d 1026; *State v. Sibert* (1994), 98 Ohio App.3d 412, 648 N.E.2d 861. To constitute an abuse of discretion, the ruling must be unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 450 N.E.2d 1140.

"It is axiomatic that any evidentiary material must be properly authenticated; that is, identified as what it purports to be." *State v. Braxton*, Cuyahoga App. No. 91881, 2009-Ohio-2724, ¶31, citing Evid.R. 901(A). Hearsay is inadmissible subject to certain exceptions. Evid.R. 802. These exceptions are

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set forth in Evid.R. 803 and 804. Evid.R. 803(6) excludes "[a] memorandum, report, record, or data compilation, in any form, of acts, events, or conditions, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness or as provided by Rule 901(B)(10), unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness."

In this case, the trial court admitted cell phone records despite the fact that no custodian of records or any other representative of the cell phone companies was called to testify that the records were what the state claimed. Assuming arguendo that these records were inadmissible and violative of appellant's right to confront the witnesses against him, any error on the part of the trial court in this regard was harmless. Crim.R. 52(A); *State v. Moton* (Mar. 18, 1993), Cuyahoga App. No. 62097. Any error will be deemed harmless if it did not affect the accused's "substantial rights." Otherwise stated, the accused has a constitutional guarantee to a trial free from prejudicial error, not necessarily one free of all error. Before constitutional error can be considered harmless, we must be able to "declare a belief that it was harmless beyond a reasonable

doubt." *Chapman v. California* (1967), 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705. Where there is no reasonable possibility that the unlawful testimony contributed to a conviction, the error is harmless and therefore will not be grounds for reversal. *State v. Lytle* (1976), 48 Ohio St.2d 391, 358 N.E.2d 623, paragraph three of the syllabus, vacated on other grounds in (1978), 438 U.S. 910, 98 S.Ct. 3135, 57 L.Ed.2d 1154.

Appellant relies on *In re D.K.*, 185 Ohio App.3d 355, 2009-Ohio-6347, 924 N.E.2d 370, to support his proposition that the cell phone records were inadmissible. In *D.K.*, a high school principal testified that he reviewed the defendant's disciplinary records and found that he was suspended in junior high for behavior similar to that for which he was being accused. Id. at ¶16. The court found this evidence to be inadmissible due to the defendant's inability to cross-examine the preparer of his disciplinary records and the principal's lack of personal knowledge of the defendant's disciplinary history. Id. at ¶23-24. The court in *D.K.* went on to note, however, that "[b]ecause such inadmissible evidence was the only evidence admitted to prove the necessary element of habitual disobedience, there was insufficient evidence presented to establish an offense under R.C. 2151.022(A), as charged." Id. at ¶26. In this case, the cell phone records were not the only evidence used to establish the necessary

elements of the crimes charged. As such, this case is clearly distinguishable from *D.K.*

Appellant has failed to demonstrate, and the record fails to show, that appellant's substantial rights were affected by his inability to cross-examine the custodian of records for the various cell phone companies at issue. See *Moton*, supra. In fact, appellant's counsel rigorously cross-examined Detective Veverka, the detective who introduced the cell phone records. Through this cross-examination, appellant's counsel was able to point out various loopholes in Detective Veverka's analysis of these cell phone records and what they purported to prove. In fact, appellant's counsel proved that, at the time when Hill testified that he and appellant were driving around together, appellant's cell phone was inexplicably placing phone calls to Hill's cell phone.

Unfortunately for appellant, this rigorous cross-examination had little effect in light of the considerable evidence against him. Considering Hill's devastating testimony against appellant, we cannot find that the admission of the cell phone records contributed to appellant's conviction. See *State v. Swaby*, Summit App. No. 24528, 2009-Ohio-3690 (finding an error in admitting evidence violative of the Confrontation Clause to be harmless in light of the evidence against the defendant). For these reasons, appellant's first assignment of error is overruled.

Speedy Trial

In his second assignment of error, appellant argues that his conviction cannot stand because the trial court violated his statutory right to a speedy trial. When determining whether an offender's right to a speedy trial has been violated, an appellate court must simply calculate the days chargeable to the state and determine if the offender was tried within the time constraints set forth in R.C. 2945.71. *State v. Andrews*, Cuyahoga App. No. 92695, 2010-Ohio-3499, ¶43. A person charged with a felony must be brought to trial within 270 days of his arrest. R.C. 2945.71(C)(2). Each day that the offender is held in jail in lieu of bond is to be counted as three days. R.C. 2945.71(E). Because appellant remained in jail during the pendency of his proceedings, the three-for-one count provision applies, and the trial court was required to bring him to trial within 90 days.[5]

Appellant was arrested on January 26, 2009, and thus his speedy trial time began to run on January 27. *State v. Steiner* (1991), 71 Ohio App.3d 249,

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[5]Although appellant's trial counsel did not make a motion to dismiss based on a speedy trial violation, appellant himself notified the court that he thought his speedy trial time had elapsed. The trial judge mentioned that appellant was on probation at the time of his arrest and relied on this information in holding that the three-for-one count provision did not apply to appellant. After carefully reviewing the record in this case, we are left with no evidence that shows that appellant was held in jail in lieu of bond on additional charges or his probation violation. As such, we must apply the triple-count provision to this case. *State v. McDonald*, 153 Ohio App.3d 679, 2003-Ohio-4342, 795 N.E.2d 701, ¶35.

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250-251, 593 N.E.2d 368 (date of arrest not included when determining whether there is a speedy trial violation). His speedy trial time ran from January 27 until February 24, 2009, when appellant filed his motion for discovery, which constitutes a tolling event. At this point, 28 days were chargeable to the state.

Appellant's speedy trial time was tolled until March 18, 2009 when the state responded to appellant's discovery requests. The time was tolled again, however, on April 8, 2009 when appellant requested a continuance of a pretrial. This added another 21 days chargeable to the state, for a total of 49 days. The time remained tolled until April 17, 2009, when appellant was reindicted in CR-523219. Time then continued to run until April 28, 2009, when appellant's counsel filed a new motion for discovery. By this point, another 11 days had elapsed, for a total of 60 days.

Before the state responded to appellant's renewed discovery request, appellant filed a motion to suppress on May 5, 2009, which tolled his speedy trial time for a reasonable period. *State v. Hogan* (Oct. 9, 1997), Cuyahoga App. No. 71337. In this case, the trial court did not rule on appellant's motion before trial began on July 27, 2009. Our calculations show that a total of 83 days elapsed between when appellant's motion to suppress was filed and when trial began. While there is no set rule to determine what constitutes a "reasonable time" in

order to rule on a motion to suppress, 83 days seems unreasonable in a factually simplistic case such as this one.

We need not determine what constitutes a "reasonable time" to rule on the motion to suppress in this case because other events occurred that tolled appellant's speedy trial time. On June 16, 2009, yet another pretrial was continued at appellant's request. This pretrial was rescheduled for June 29, 2009.[6] Even assuming that the speedy trial time ran from June 29, 2009 until the trial began on July 27, only another 29 days had elapsed, for a maximum total of 89 days. Since the trial court brought appellant to trial within the time constraints of R.C. 2945.71, appellant's second assignment of error is overruled.

Manifest Weight of the Evidence

Appellant next argues that his conviction was against the manifest weight of the evidence. When reviewing a manifest weight claim, "[t]he [appellate] court, reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of victims and determines whether in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered." *State v. Martin* (1983), 20 Ohio App.3d 172, 175, 485 N.E.2d 717.

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[6]The trial court's docket reveals that the June 29 pretrial was not held because appellant's trial counsel was unavailable, but it also noted that the trial date remained scheduled for July 27, 2009.

Appellant argues that Hill's testimony was unreliable and self-serving and should not have been relied upon by the jury. In attempting to discredit Hill's testimony, appellant relies on the fact that Hill identified appellant as the man carrying the Uzi when all of the victims identified Peet, the man in the red jacket, as the individual carrying that weapon. Hill was vigorously cross-examined on this issue. Hill adamantly testified that appellant was the man he saw carrying the Uzi, but admitted that it was dark and appellant and Peet could have exchanged guns prior to entering the Parkview house.[7]

Hill was extensively cross-examined on the fact that he provided inconsistent statements to the police and did not admit his involvement in the robbery until his DNA was identified on a latex glove discovered at the scene. He was also rigorously cross-examined on all loopholes in his testimony and anything he said that could be considered inconsistent with the victims' testimony. The jury heard ample evidence that called Hill's credibility into question. Despite this evidence, the jury chose to believe Hill and find appellant guilty of murder, kidnapping, aggravated robbery, and aggravated burglary.

Because Hill's version of events was strikingly similar to the events as described by the victims, and appellant was found in the vehicle with items that

[7]Even if Hill were wrong about which gun appellant was carrying when the robbery occurred, such a mistake is immaterial to whether appellant could be found guilty of the crimes charged.

had been stolen during the robbery, we cannot find that the jury lost its way in finding appellant guilty. Appellant's third assignment of error is overruled.

Improper Prosecutorial Statements

In his fourth and final assignment of error, appellant argues that he was prejudiced by an improper comment made by the state during its closing argument. We must first determine if the prosecutor's statements were improper. *State v. Flowers*, Cuyahoga App. No. 91864, 2009-Ohio-4876, ¶31. If the comments were improper, we must determine whether they prejudicially affected appellant's substantial rights. Id.

During his closing argument, appellant's counsel heavily discussed the cell phone records and how they did not align with the version of events provided by Hill. Appellant's position was that it was Sparks, not appellant, who robbed the Parkview address with Hill, Davis, and Peet. He argued that Hill testified untruthfully to protect Sparks, with whom Hill had been friends for several years.

In her closing argument, the prosecutor made the following statements:

"Hood, DNA on the door, back door, DNA on the cigar tip in the front. What separates him from * * * Sparks? You know, Sparks, Hill's good buddy, the one that he spends 20 hours a week with or whatever, why isn't his DNA in that car?

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"His name is in the report. They tested it. You find in there where anything comes back to Sparks. Anything. Nada. Nothing. You're not going to get away from it. He's responsible. He's involved. If you think for one second that we just went on the word of Hill as it relates to Sparks, the stuff had to be corroborated."

Appellant argues that these comments were improper, and thus he is entitled to a new trial. Assuming arguendo that these statements were improper, appellant has pointed to no evidence to show that they were violative of his substantial rights. The record does not support the conclusion that, without these statements, appellant would have been acquitted. In addition, the trial court instructed the jury that opening and closing arguments do not constitute evidence and are not to be relied on in rendering a decision. As such, appellant's fourth and final assignment of error is overruled.

Conclusion

A careful review of the record in this case reveals that 1) any error in admitting the cell phone records without the testimony of the custodian of records was harmless at best, 2) appellant's right to a speedy trial was not violated, 3) appellant's conviction was not against the manifest weight of the evidence, and 4) appellant failed to show that he was prejudiced by the allegedly improper statements made by the prosecution during closing argument.

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Appellant's assignments of error are overruled.

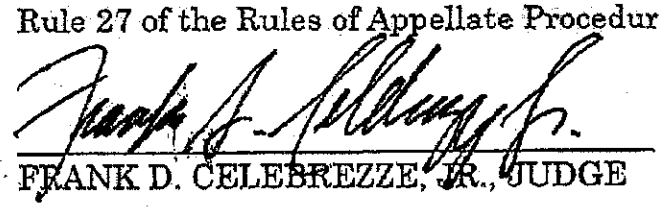
Judgment affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.



FRANK D. CELEBREZZE, JR., JUDGE

JAMES J. SWEENEY, J., CONCURS;
MARY EILEEN KILBANE, P.J., DISSENTS (WITH SEPARATE OPINION)

MARY EILEEN KILBANE, P.J., DISSENTING:

I respectfully dissent. I would hold that the trial court's admission of unauthenticated cell phone records violated Evid.R. 803(6) and is not harmless error. The record demonstrates that neither the custodian of the cell phone records nor any other qualified individual testified as required by Evid.R. 803(6). Thus, the trial court should have excluded the officer's testimony as well as the

records themselves. See, e.g., *State v. Jordan* (June 1, 1989), 8th Dist. No. 55450. While *Jordan* held that the admission of certain unauthenticated business records and subsequent police testimony about those records was harmless error in light of the defendant's incriminating pretrial statements that potentially rendered the admission of the records moot, here, unlike *Jordan*, there is no evidence that Hood made any incriminating pretrial statements. I would therefore hold that Hood's constitutional right to confrontation was violated when he could not cross-examine a records custodian, a person that could adequately explain the cell phone's significance to his possible whereabouts, instead of Detective Veverka, about the nature of the records.

While under oath, Detective Veverka repeatedly admitted that he did not prepare the phone records, that he was not qualified to testify about how they were prepared, and that he had little knowledge of the specifics behind the records, including being able to tell Hood's location at given points on the night of the alleged crimes.

Thus, regardless of whether Hood was able to cross-examine the detective, Hood still was not able to cross-examine someone who regularly kept the records in the course of business or someone who could authenticate them under Evid.R. 803(6). The records themselves provided a timeline that proved crucial to Hood's whereabouts and to his ultimate conviction. I would hold that the failure to

properly authenticate the records and produce the records custodian violated Hood's right to confrontation.