

ORIGINAL

NO. 2010-2260

IN THE SUPREME COURT OF OHIO

APPEAL FROM
THE COURT OF APPEALS FOR CUYAHOGA COUNTY, OHIO
NO. 93854

STATE OF OHIO,

Plaintiff-Appellee

-vs-

JAMES D. HOOD,

Defendant-Appellant

MERIT BRIEF OF APPELLEE

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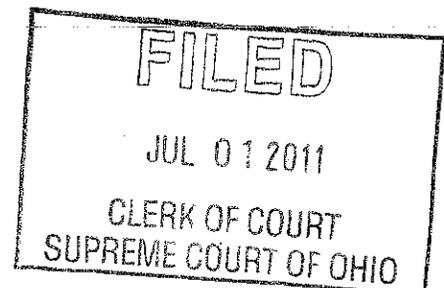
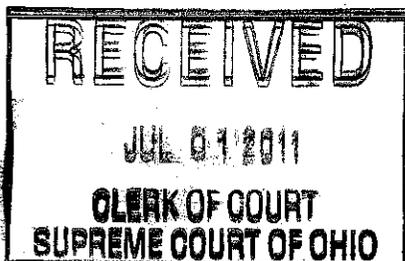


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STATEMENT OF THE CASE

In Cuyahoga County criminal case 520967 Defendant-Appellant James D. Hood and codefendants Kareem Hill and William Sparks were indicted with the following:

11 counts of Kidnapping in violation of R.C. § 2905.01(A)(2)—all of which carried one and three-year firearm specifications, a notice of prior conviction, and repeat violent offender specifications;

11 counts of Aggravated Robbery in violation of R.C. § 2911.01(A)(1)—all of which carried one and three-year firearm specifications, a notice of prior conviction, and repeat violent offender specifications;

1 count of Aggravated Burglary in violation R.C. § 2911.11(A)(2) with one and three-year firearm specifications, a notice of prior conviction, and a repeat violent offender specification; and,

1 count of Having Weapon While Under Disability under R.C. § 2923.13(A)(2).

Investigation revealed that the victim of a homicide, whose body was discovered in close proximity to the location of the home invasion, was actually a co-conspirator who was shot and killed during the defendants' commission of these felonies, to wit, Aggravated Robbery, Kidnapping and Aggravated Burglary. Therefore Hood and his codefendants were re-indicted in criminal case 523219 with the original charges plus additional counts for the death of their co-conspirator, Samuel Peet. The added charges were:

1 count of Murder in violation of R.C. § 2903.02(A) with one and three-year firearm specifications, a notice of prior conviction, and a repeat violent offender specification; and,

1 count of Murder in violation of R.C. § 2903.02(B) with one and three-year firearm specifications, a notice of prior conviction, and a repeat violent offender specification.

William Sparks, who was originally charged as a codefendant, was in the getaway vehicle when police made the initial arrests. (Tr. 953-961.) However the charges against Sparks were dismissed without prejudice after homicide detectives confirmed

that Sparks was not one of the participants in these crimes. Detectives learned that Terrance Davis, who had been a person of interest during the investigation, was the fourth co-conspirator. Thus Davis was indicted under the separate criminal case 527464 with identical charges, including the Murder offenses. In February of 2010 Davis pled guilty to 1 count of Involuntary Manslaughter with a three-year firearm specification, and 1 count of Aggravated Robbery which was amended to include all 11 victims.

Prior to Hood's trial, codefendant Kareem Hill entered a plea agreement to a reduced charge of Reckless Homicide and 1 count of Aggravated Robbery (which was amended to encompass all eleven victims.) As part of Hill's plea agreement, he was required to testify truthfully in Hood's trial.

Hood's case proceeded to trial by jury during which testimony was received from law enforcement officers, forensic personnel, Hood's codefendant Hill, as well as from the following victims: Roxie Watkins, Jarell Jackson, Sharon Jackson, Rodney Jones, Deontra Jones, Brian Sanders, Lavenna Reeves, Patricia Robinson, and Lavelle Neal. Ultimately the jury found Hood:

Guilty of 1 count of Murder during the commission of a felony in violation of R.C. § 2903.02(B), with one and three-year firearm specifications;

Guilty of 9 counts of Kidnapping, with one and three-year firearm specifications;

Guilty of 9 counts of Aggravated Robbery, with one and three-year firearm specifications; and,

Guilty of 1 count of Aggravated Burglary, with one and three-year firearm specifications.

(Tr. 1367-1378.) The court dismissed 2 counts of Kidnapping and 2 counts of Aggravated Robbery pursuant to Criminal Rule 29, as the victims identified in those

counts did not testify at Hood's trial. (Tr. 1226-1229.) The trial court also acquitted Hood with respect to the Weapon Under Disability charge, and with respect to all of the repeat violent offender specifications. Hood was sentenced to twenty-one years to life in prison.

Hood sought review in the Eighth District Court of Appeals where he assigned four errors including the trial court's admission of cellular telephone records allegedly "without being properly authenticated in violation of the Confrontation Clause." However, the appellate court affirmed the jury verdicts finding the admission of the records did not contribute to Hood's convictions:

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.

State v. Hood, Cuyahoga App. No. 93854, 2010-Ohio-5477, ¶ 29-30.

On March 2, 2011 this Honorable Court extended jurisdiction over the following proposition of law as submitted by Hood:

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.

On June 21, 2011 the State moved for dismissal of this appeal as improvidently allowed for the reason that, in light of the appellate court's determination that the admission of the records was harmless, this Court's adoption of Hood's proposition will not provide him with effectual relief.

The State's merit brief of appellee follows.

STATEMENT OF THE FACTS

Introduction.

In the late evening hours of January 25, 2009 a group of friends gathered in the basement of Sharon Jackson's home located on Parkview Avenue, in the City of Cleveland, Cuyahoga County, Ohio to play cards and celebrate the birthdays of mother and son, Denotra and Rodney Jones. (Tr. 482, 671.) By the early morning hours of January 26, 2009 the home had been burglarized, the party-goers kidnapped, forced to strip, and robbed at gunpoint—and one of the perpetrators, Samuel Peet, was found dead in the front yard of a home just down the street. Hood and codefendant Kareem Hill were arrested a short time later in Hill's green Jeep. Also recovered from inside the Jeep were cellular telephones belonging to the victims, cash, and the DNA of both Hood and Peet. (Tr. 327, 1190.)

Trial testimony.

One of the men playing cards that night was Terrance Davis, who is also known as "T.D." (Tr. 674.)¹ According to victim Rodney Jones, although Davis had played cards with the group on previous occasions, Davis's presence was unusual as he had not joined them for more than a year. *Id.* Jones also found Davis's behavior unusual because Davis came and left the party several times throughout the evening. *Id.* Jones described the robbers as wearing dark coats, having their faces covered, and carrying guns. (Tr. 683-684.) The robbers forced him to strip, leaving him in just his underwear and one sock. (Tr. 687.)

Terrance Davis's first cousin, William Davis, testified that Terrance Davis drove a white convertible. (Tr. 511.) He also testified that on the night in question Terrance was with Samuel Peet (who is also known as "Boo Boo"), the murder victim. (Tr. 506-508.)

Homeowner-victim Sharon Jackson testified that she had fallen asleep on the couch in her basement and woke up to her son, Jerrell, yelling and being followed into the basement by four men who were wearing masks and carrying guns. (Tr. 482-486.) Sharon Jackson described the guns as being two .9mm handguns, one Uzi, and one with a long chrome barrel. (Tr. 487-488.) The robbers made the victims strip and then rifled through the clothes and took money. (Tr. 486, 492-496.) Sharon Jackson was afraid that she would be killed. (Tr. 497.) One of men told her to stop looking at him and he covered her head with a sheet. (Tr. 489, 495-496.) One of them ordered her son to get on the floor, and when Jerrell didn't move fast enough, the robber pulled the trigger. The gun clicked but did not go off. (Tr. 491.) Sharon's son ran upstairs and the four

¹ Co-conspirator Davis pled guilty in criminal case number 527464 to Involuntary Manslaughter and Aggravated Robbery.

men ran out, too—when Sharon heard gunshots, she thought her son had been hit. (Tr. 491-492.) She testified that Davis had been at the party and then left, and then the robbery occurred. (Tr. 494-495.) Sharon also identified the body of murder victim (Peet) as one of the masked robbers that had been in her basement. (Tr. 511-512.)

Jerrell Jackson testified that, at one point in the night, he walked a few of his mother's friends to their car and brushed off the snow. (Tr. 461-463.) When he returned home, there were four men in the hallway wearing masks and carrying guns. (Tr. 463-464.) Jerrell yelled out a warning and ran into the basement where everyone scattered as the four men came down behind him. (Tr. 464-465.) Jerrell saw at least two guns, including an Uzi. (Tr. 465, 470.) At one point, a robber pointed a gun at him and pulled the trigger, but the gun just clicked. That's when Jerrell pushed past the robber, ran upstairs and called 9-1-1. (Tr. 467-468.)

Roxie Watkins described the events in a similar fashion. (Tr. 401-440.) Watkins described the robbers' dark clothing and black guns—one being a revolver and one being an Uzi. (Tr. 407-412.) After police responded and located the suspects, Watkins was asked to go to the McDonald's to attempt to identify property that was found inside the green Jeep. Two cell phones were identified as belonging to victims. (Tr. 416-420, 690-691.)

Deontra Jones similarly testified about the robbers bursting into the basement demanding money and forcing people to take off their clothes. (Tr. 705-711.) She described the guns as "big" and said one was long and silver. (Tr. 714.) She was afraid for her life. (Tr. 725.) She, too, went to the McDonald's where she saw cash and her son's cell phone in the suspects' vehicle. (Tr. 717-718.) Deontra Jones also testified that

Davis was playing cards with them and then left—and then the robbery occurred. (Tr. 718-720.) She identified the body of Samuel Peet as one of the robbers. (Tr. 722-725.)

Brian Sanders testified that the robbers wore masks, dark clothing, and carried guns. (Tr. 727-735.) He described one gun as a bigger automatic or semi-automatic and another as being silver. (Tr. 735.) The robbers took his cell phone, necklace and money. (Tr. 738-740, 742.) One of the men grabbed Sanders' pants and pulled them off so that he was left wearing only a t-shirt and socks. (Tr. 740-742.) Sanders escaped to the upstairs where he hid in a bedroom until police arrived. (Tr. 740-743.)

Lavennea Reeves (fiancée of Brian Sanders) testified that Davis was playing cards at the party but left—and then the robbery occurred. (Tr. 755-759, 765.) She described the robbers as wearing masks and dark clothing—and the aggressive one carried an Uzi. (Tr. 761-762.) She also saw a long chrome gun. (Tr. 763.) The robbers took her cell phone and money and made her fear for her life. (Tr. 765-767.)

Lavelle Neal testified that Davis was in and out of the card party and after he finally left, the robbery occurred. (Tr. 826-830.) Neal described the robbers as wearing masks and dark clothes and carrying guns. (Tr. 831-833.) He described one gun as being silver and another being “like a machine gun.” (Tr. 831.)

Patricia Robinson testified that the robbers wore masks, dark colored clothing and carried guns (Tr. 777-791.) In the course of the robbery, she offered one of the men her diamond ring but he did not take it. (Tr. 791.)

Co-defendant Kareem Hill testified as a State's witness. Hill knew co-conspirators Hood, Davis, and Peet from the neighborhood where he was raised. (Tr. 906-912.) On the afternoon of January 25, 2009 he was driving his green Jeep Cherokee when he encountered Hood. (Tr. 914-918.) The two men planned to go to the

Atmosphere bar that night. (Tr. 918.) Hill identified the clothing he was wearing: a black Pelle Pelle jacket (State's Exhibit 134) Rockawear blue jeans (State's Exhibit 178) and an orange and tan hoodie (State's Exhibit 177). (Tr. 611.) Hill also identified the jacket (State's Exhibit 136) and jeans (State's Exhibit 179) that Hood wore. (Tr. 614-615.)

That night, Hill and Hood met Peet and Davis at the bar. (Tr. 924-925.) The four discussed robbing a card game on Parkview Avenue. (Tr. 925-928.) Davis left the bar to go to the card party. Someone inside the party was working with Davis. (Tr. 927.) Hill had a cell phone and he allowed Hood and Peet to use it. (Tr. 930-931.) Sometime later, Davis returned to the bar and told Hill, Hood and Peet that the party was in the basement with 12-14 unarmed people. (Tr. 932.)

Upon leaving the bar, Davis and Peet left in Davis's white/beige vehicle. (Tr. 933-934.) Hill and Hood left in Hill's green Jeep and went to Hood's house on Sophia Avenue to pick up guns. (Tr. 934-936.) Hood went into the house and returned to Hill's vehicle with a semi-automatic pistol, an Uzi, and latex gloves. (Tr. 934-936, 992.) Hill and Hood next drove to Parkview Avenue, where they saw Peet standing in a driveway and they let Peet get into the backseat of Hill's Jeep. (Tr. 936-937.)

Once Davis told Hill, Hood and Peet that it was time, Hood and Peet exited Hill's Jeep while Hill drove to the next street over to park behind the target house. (Tr. 939-942.) Hill cut through the back yards to meet Hood, Peet, and Davis. All four men had weapons, wore hats or masks and Hill, Hood and Davis wore latex gloves. *Id.*

Hill testified that he carried a black .40 or .45 caliber handgun (Tr. 939-940); that Peet carried a long silver revolver (Tr. 992-993); that Davis carried a black semi-automatic pistol (Tr. 943, 992); and that Hood carried the Uzi (Tr. 934-936, 992, 1033).

Hill explained the details of the robbery including how one woman offered him her jewelry, but he declined. (Tr. 945-946.) Hill testified that they took cell phones and money and that Hood struck one victim over the head with his gun. (Tr. 943-949.) Hill also testified about the argument between Hood and Peet over the money: Hood accused Peet of stealing money off of the table—but Peet denied doing so. (Tr. 948.) Davis broke up Hood and Peet's verbal altercation by telling them it was time to go. Id.

Hill stated that he was the first one back up the basement stairs and outside—and that is when he heard gunshots from inside the house. (Tr. 949-950.) Hill never fired his weapon and he never saw Peet leave the house. Id. Hill and Hood fled in Hill's Jeep, while Davis took off in a different direction. (Tr. 950-952.) Hill and Hood returned to Hood's house on Sophia where Hood brought his two guns back inside. Id. Still in the Jeep, Hill and Hood picked up Hill's friend (William Sparks) and went to McDonald's where they were stopped by police and all three were arrested. (Tr. 953-961.)

Hill initially lied to police and denied any involvement. (Tr. 961-969, 997-998.) When a latex glove recovered from the scene tested positive for his DNA, Hill made a proffer to the prosecutor's office and agreed to testify truthfully against Hood. (Tr. 969-974, 993-995.)² Hill does not know who shot Peet. (Tr. 974.)

Cleveland Police Fourth District Officer Antonio Curtis testified that on the date in question there was a radio broadcast at approximately 3:54AM regarding a male pointing a gun at another male in the area of East 104th Street and Sophia Avenue. (Tr. 531-540.) When Officer Curtis approached that area, he observed a green four-door Jeep Cherokee with its headlights illuminated parked in the middle of the street, which was

² Hill's proffer (the written statement he provided to police) was read into the record at trial. (Tr. 1075-1086.)

unusual. (Tr. 541-544.) At approximately 4:00AM the Jeep headed towards East 116th Street and Officer Curtis was only able to obtain the partial plate “EOF”. (Tr. 544-549.) Within an hour, Curtis and his partner received an assignment to respond to Parkview Avenue for a burglary and multiple-victim robbery. (Tr. 550-566.) A possible suspect vehicle was described as a sport utility truck. *Id.* Oral statements regarding the events and suspect descriptions were taken from the victims. *Id.* Officer Curtis found a silver revolver in the driveway next door to the scene of the home invasion. (Tr. 568-571.)

Officer Curtis and his partner next responded to the McDonald’s to determine whether a dark sports utility truck was connected to the crime on Parkview. (Tr. 571-572.) Curtis recognized the vehicle as the same green sports utility vehicle that he had pursued earlier—complete license plate being “EOF 7079.” (Tr. 574.) Curtis looked inside the vehicle and observed cash and cell phones on the floor. (Tr. 572-574.) Officer Curtis also observed a mask on the passenger seat, as depicted in State’s Exhibit 121. (Tr. 576.) Since Curtis had a list of the phone numbers for the victims’ missing cell phones, he tried calling the numbers from his own phone—and the cell phones inside the Jeep began to ring. (Tr. 577-579.) At the time of his arrest, Hood had \$411.25 in cash on his person. (Tr. 593-594.)

Officer Curtis testified that after arresting the occupants of the Jeep [Hood, Hill and Sparks (Tr. 600)], he returned to the district to write his report. (Tr. 585.) While there he received another assignment to go back to Parkview Avenue where a dead body had been discovered. (Tr. 585-586.) At that scene, Curtis observed a deceased male in a front yard. The male wore a jacket and mask—fitting the descriptions provided by the robbery victims. (Tr. 587-589.) Three of those victims (Patricia Robinson, Roxie

Watkins and Denotra Jones) were summoned to the scene where they positively identified the body as one of the robbers. (Tr. 590-592.)

Cleveland Police Homicide Detective Kathleen Carlin was called to the scene. She observed a path of blood droplets from the area of the home invasion to the location where Peet's body was found. (Tr. 1151.) Detective Carlin testified that cell phones belonging to victims Brian Sanders and John Ragland were found on Peet's body along with \$345 in cash. (Tr. 1152-1155.)

Ballistics evidence confirmed that the shooting took place in the hallway that connects the basement stairs to the side door inside Sharon Jackson's home. (Tr. 845-862, 1137-1138.) The Coroner's office determined that Samuel Peet had been shot twice from close proximity. (Tr. 311-333.) His death was ruled a homicide. (Tr. 367-390.)

LAW AND ARGUMENT

DEFENDANT-APPELLANT'S 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.

Renewed motion to dismiss.

The State respectfully requests this appeal be dismissed as improvidently granted. Even if this Court were to adopt Hood's proposition of law, Hood would not gain any effectual relief. The appellate court found that the admission of the cellular telephone records at Hood's trial did not contribute to his convictions. As such, the promulgation of Hood's proposition of law would be rendered entirely advisory.

Hood has not appealed the Eighth District's decision to apply "harmless beyond a reasonable doubt" analysis to his claim. Nor has Hood appealed the Eighth District's

ultimate conclusion that the admission of the cell phone records at his trial was harmless. Hood has only appealed the matter of whether the use of allegedly unauthenticated business records violates the Confrontation Clause. Since the admission of the cell phone records (even if it was in violation of the Confrontation Clause) was harmless beyond a reasonable doubt, the mootness doctrine precludes this Court's consideration of the issue. Accordingly, the State renews its motion to dismiss this appeal.

As cellular telephone records constitute business records they are non-testimonial. The admission of non-testimonial statements does not implicate the Confrontation Clause.

Business records are admissible in criminal trials as an exception to the hearsay rule because they are non-testimonial in nature. Non-testimonial statements (whether properly authenticated or not) do not implicate the Confrontation Clause. Therefore, Hood's proposition "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" must fail.

First, a statement is defined as an assertion made by a declarant. Evid. R. 801(A). A statement becomes testimonial when it is "made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." *Crawford v. Washington* (2004), 541 U.S. 32, 51-52, 124 S.Ct. 1354, 158 L.Ed.2d 177 1. At a minimum a statement is testimonial when it is made "at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations." *Id.* 541 U.S. at 68.

Business records are non-testimonial. *Id.* 541 U.S. at 56, *Melendez-Diaz v. Massachusetts* (2009), 129 S.Ct. 2527, 2538-2540, 174 L.Ed.2d 314. The Confrontation

Clause is not implicated by non-testimonial statements—it only applies to testimonial statements. *State v. Siler*, 116 Ohio St.3d 39, 876 N.E.2d 534, 2007-Ohio-5637, ¶ 21, citing *Crawford v. Washington*, supra. With regard to the use of non-testimonial statements the United States Supreme Court specified:

Where nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law *** as would an approach that exempted such statements from Confrontation Clause scrutiny altogether. Where testimonial evidence is at issue, however, the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination.

Crawford v. Washington, supra, 541 U.S. at 51-52. Thus where a statement is non-testimonial in nature, instead of being held to Confrontation Clause standards, it is merely subject to the admissibility and authentication requirements of state evidentiary rules.

Under Ohio's Evidence Rule 803, business records are admissible evidence. The rule provides:

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

(6) 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 *Melendez-Diaz* the United States Supreme Court noted that business records "are generally admissible absent confrontation not because they qualify under an exception to the hearsay rules, but because having been created for the administration of an

entity's affairs and not for the purpose of establishing or proving some fact at trial—they are not testimonial.” *Melendez-Diaz v. Massachusetts*, supra, 129 S.Ct. at 2539-2540.

Cell phone records are, by definition, non-testimonial business records. They are created and maintained by a cellular telephone company for the administration of the company's affairs—not for the purpose of establishing or proving some fact in a criminal trial. Since call activity records and cell phone tower records are kept in the course of the cellular telephone companies' regularly conducted business, their records are non-testimonial business records and can be admitted under Evid.R. 803(6).

For example, earlier this year the United States Tenth Circuit Court of Appeals considered the nature of cell phone records and found “Because we conclude that neither the cell phone records nor their authenticating documents were testimonial, no Confrontation Clause violation occurred.” *United States v. Yeley-Davis* (10th Cir. 2011), 632 F.3d 673, 679. Similarly the Eleventh Circuit has held “the documents at issue in this case, cell phone records and cell tower locations, are business records * * * and thus, satisfy an exception to the hearsay rule.” *U.S. v. Green* (11th Cir. 2010), 396 Fed. Appx. 573, 575. The *Green* court went on to state:

We conclude that Green's cell phone records and cell tower location information qualified as business records under Fed.R.Evid. 803(6) which, by their nature, are non-testimonial for purposes of the Sixth Amendment. Further, because the records were generated for the administration of Metro PCS's business, and not for the purpose of proving a fact at a criminal trial, they were non-testimonial, and the district court did not violate Green's constitutional right by admitting them into evidence.

Id. (citations omitted.) An Indiana appellate court has likewise found cell phone records “are not testimonial in nature, and they fall under the business records exception to the hearsay rule. Therefore, their admission does not violate the Confrontation Clause.” *Smith v. State* (Ind. Ct. App. 2005), 839 N.E.2d 780, 784 at FN4.

When an entity's regularly conducted activity involves producing evidence for use at trial then that business's records may become testimonial (and therefore inadmissible under the business records exception to the hearsay rule.) *Melendez-Diaz v. Massachusetts*, supra, 129 S.Ct. at 2538. However, cellular telephone records are in no way analogous to the kinds of forensic reports and analyses that have been found to constitute testimonial statements. Unlike laboratory certificates that produce the results of drug testing (*Melendez-Diaz v. Massachusetts* (2009), 129 S.Ct. 2527, 174 L.Ed.2d 314), and unlike laboratory reports that indicate the analysis of a drunk driving suspect's blood (*Bullcoming v. New Mexico* (June 23, 2011), Slip Op. No. 09-10876, ___ U.S. ___), cellular telephone records simply do not call for any form of expert forensic testing, examination, or analysis.

The manner in which cell phone records are copied and provided to the State in response to a subpoena is entirely dissimilar to the manner in which forensic laboratory test results are generated. Unlike the administration and interpretation of laboratory testing, the review of cell phone records does not require professional judgment calls on the part of a trained analyst.³ Nor do cell phone records involve potentially disputable scientific methods or procedures, or the use of theoretically unreliable testing instruments or devices. See, *Melendez-Diaz v. Massachusetts*, supra, 129 S.Ct. at 2538-2539. Rather, cell phone companies merely release of a copy of the business records that

³ Cleveland Police Homicide Detective Henry Veverka, through whom the cell phone records in this case were admitted, is not an expert in cell phone record interpretation. Rather, he has learned on the job how to read the information contained in cell phone and cell tower records. (Tr. 1206-1225.)

they already maintain for their own purposes. Accordingly cell phone records are non-testimonial and do not implicate a defendant's rights under the Confrontation Clause.⁴

Authentication of cell phone records as business records under Ohio's Rules of Evidence.

As this Court has previously recognized, a defendant's constitutional right to confrontation is separate from the procedural matter of proper evidentiary authentication. *State v. Edwards*, 107 Ohio St.3d 169, 837 N.E.2d 752, 2005-Ohio-6180, ¶ 18. In this case, the defense's objection to the admission of the business records at Hood's trial was based on the fact that the records were allegedly improperly authenticated—the objection was not that the admission of the records violated Hood's constitutional right to confrontation. (Tr. 977-982, 1121, 1242.)

With regard to authentication, Ohio Evidence Rule 901(A) states: "The requirement of authentication * * * 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." Further, Evidence Rule 901(B)(1) provides that records may be authenticated via the testimony of witness with knowledge that a record is what it is claimed to be.

Evidence establishing authenticity need only be sufficient to afford a rational basis for a jury to decide that the evidence is what its proponent claims it to be, and "conclusive evidence as to authenticity and identification need not be presented to justify allowing evidence to reach the jury." *State v. Steele*, Butler App. No. CA2003-11-276, 2005-Ohio-943, ¶ 115, citing *State ex rel. Montgomery v. Villa* (1995), 101 Ohio

⁴ Akin to cellular telephone records, 9-1-1 dispatch logs are another example of a non-testimonial business record. *State v. Jaime*, Cuyahoga App. No. 94401, 2010-Ohio-5783.

App.3d 478, 484-85, 655 N.E.2d 1342, and *State v. Easter* (1991), 75 Ohio App.3d 22, 25, 598 N.E.2d 845.

Once a trial court makes a determination with regard to authenticity, that decision should only be reversed upon a demonstration of an abuse of discretion. *State v. Easter*, supra, 75 Ohio App.3d at 26, citing *United States v. Whitworth* (C.A.9, 1988), 856 F.2d 1268, 1283 and *United States v. Spetz* (C.A.9, 1983), 721 F.2d 1457, 1476; see also *State v. Hancock*, 108 Ohio St.3d 57, 840 N.E.2d 1032, 2006-Ohio-160, ¶ 129-130, *State v. Tibbetts* (2001), 92 Ohio St.3d 146, 160, 749 N.E.2d 226. Trial courts enjoy broad discretion in deciding the admissibility of evidence. That discretion is only tempered by the rules of procedure and evidence. *Rigby v. Lake County* (1991), 58 Ohio St.3d 269, 271, 569 N.E.2d 1056, *State v. Finnerty* (1989), 45 Ohio St.3d 104, 107, 543 N.E.2d 1233. An “abuse of discretion” connotes more than an error of law—it implies that the court acted unreasonably, arbitrarily or unconscionably. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140.

In Hood’s case, codefendant Hill testified regarding the cell phone records and described his and his co-conspirators use of their phones to maintain contact with each other on the date of the crime. (Tr. 983-990, 1100-1103.) Homicide Detectives Kathleen Carlin and Henry Veverka testified as to how the cell phone records were acquired (Tr. 1176-1178) and what they revealed (Tr. 1209-1216; 1222-1223). However no representatives from the cellular telephone companies testified.

The trial court’s decision to allow the cell phone records was not unreasonable, arbitrary or unconscionable (Tr. 980-981, 1121, 1242) therefore it did not constitute an abuse of discretion. Further, the admission of the cell phone records without testimony from a records custodian (if erroneous) was harmless. As to harmless error, Criminal

Rule 52(A) dictates “Any error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded.”

Upon review the appellate court concluded that Hood failed to prove that his substantive rights were affected by his inability to cross-examine the custodian of records for the cell phone companies at issue in his trial. *State v. Hood*, Cuyahoga App. No. 93854, 2010-Ohio-5477, ¶ 29. (In fact no proffer was made by the defense to indicate what Hood might have established regarding the accuracy, detail, compilation process or analysis of the cell phone records had he been afforded an opportunity to cross-examine the records custodians.)⁵ Thus the appellate court properly concluded “we cannot find that the admission of the cell phone records contributed to [Hood’s] conviction.” *Id.* at ¶ 30.

The admission of the cellular telephone records at Hood’s trial was harmless.

At trial the State introduced Hood and his co-conspirators’ cellular telephone records through the testimony of codefendant Hill and Cleveland Police Homicide Detectives Carlin and Veverka. (Tr. 983-990, 1100-1103, 1176-1178, 1207-1216.) Counsel for the defendant objected to the State’s use of the cell phone records on the grounds of improper authentication. (Tr. 977-982, 1121, 1242.) The prosecution argued that the records were admissible under the rules of evidence as business records. (Tr. 980, 1121.) Ultimately the trial court allowed the records to be admitted as evidence. (Tr. 980-981; 1121, 1242.) Upon appeal, the appellate court determined that the trial

⁵ When noting his ongoing objection to the authentication of the cell phone records counsel stated “when you get lemons, you try to make lemonade.” (Tr. 1121.)

court' admission of the cell phone records was harmless. *State v. Hood*, Cuyahoga App. No. 93854, 2010-Ohio-5477, ¶ 29-30.

Improper authentication of records has been reviewed on appeal for harmlessness. *State v. Moton* (Mar. 18, 1993), Cuyahoga App. No. 62097, 1993 WL 76904, *5, *State v. Jordan* (June 1, 1989), Cuyahoga App. No. 55450, 1989 WL 59258, *7-8. Accordingly, the Eighth District's determination of harmlessness in Hood's case is legally sound. At trial the State presented substantial credible evidence of Hood's guilt which included: the victims' descriptions of the perpetrators clothing (which matched the items Hood wore at the time of his arrest); Hood, Davis, Peet and Hill met beforehand and planned to commit the robbery together; Hood supplied weapons and latex gloves for himself and codefendant Hill; Hood was armed at the time of the robbery; a latex glove with Hill's DNA was recovered from the scene; Hood and co-conspirator Peet argued in the course of the robbery; after the robbery Peet's dead body was discovered just down the street from the home invasion; Peet died of two gunshot wounds; on Peet's body was found a sum of cash and cellular telephones that belonged to two of the robbery victims; Hood was arrested a short time later with Hill in Hill's Jeep; the DNA of both Hood and Peet were recovered from Hill's Jeep; cash and cell phones belonging to the robbery victims were also found inside the Jeep; and Hood had \$411.25 on his person at the time of his arrest. Based on the evidence the admission of the cellular telephone records at Hood's trial, if erroneous, was an entirely harmless error on the part of the trial court.

The Confrontation Clause.

As Hood has couched his proposition of law in terms of a Confrontation Clause violation, the State submits the following: "The central concern of the Confrontation

Clause is to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact.” *Maryland v. Craig* (1990), 497 U.S. 836, 845, 110 S.Ct. 3157. Confrontation and cross-examination are a means of assuring accuracy and are designed to weed out fraudulent and incompetent evidence.

More recently the United States Supreme Court noted “To be sure, the Clause’s ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination.” *Crawford v. Washington*, supra, 541 U.S. at 61.

An infringement on the constitutional right to confrontation can be harmless beyond a reasonable doubt.

Assuming for the sake of argument that this Court finds that the admission of the cell phone records triggered Hood’s right to confrontation, Hood is not entitled to relief as the admission of the records was found harmless beyond a reasonable doubt by the appellate court.

Certain trial errors, even if they are of constitutional proportions, can be found harmless in light of the circumstances of a given case. *Chapman v. California* (1967), 386 U.S. 18, 22, 87 S.Ct. 824. However, “before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt.” *Id.* 386 U.S. at 24.

In *Delaware v. Van Arsdall* (1986), 475 U.S. 673, 106 S.Ct. 1431 the United States Supreme Court noted that violations of the Confrontation Clause do not fall “within the limited category of constitutional errors that are deemed prejudicial in every case.” *Id.*

475 U.S. at 682. Instead where Confrontation Clause violations are found, reviewing courts should apply a harmless beyond a reasonable doubt analysis. *Melendez-Diaz v. Massachusetts*, supra, 129 S.Ct. at 2542, FN14, *Coy v. Iowa* (1988), 487 U.S. 1012, 1020-1022, 108 S.Ct. 2798, *Schneble v. Florida* (1972), 405 U.S. 427, 430, 92 S.Ct. 1056.

For decades this Court has applied harmless beyond a reasonable doubt analysis to Confrontation Clause violations. *State v. Madrigal* (2000), 87 Ohio St.3d 378, 388, 721 N.E. 52, *State v. Moritz* (1980), 63 Ohio St.2d 150, 155-156, 407 N.E.2d 1268, *State v. Pierce* (1980), 64 Ohio St.2d 281, 290, 414 N.E.2d 1038. In fact, every appellate district in the State of Ohio has applied harmless beyond a reasonable doubt analysis to claimed Confrontation Clause violations. Some examples are: *State v. Hart*, Hamilton App. No. C-060686, 2007-Ohio-5740, ¶ 37-40 (1st District) *In re: J.S.*, Montgomery App. No. 22063, 2007-Ohio-4551, ¶ 46, (2nd District); *State v. McNeal*, Allen App. No. 1-01-158, 2002-Ohio-2981, ¶ 50 (3rd District); *State v. Reinhart*, Ross App. No. 07CA2983, 2008-Ohio-5570, ¶ 32 (4th District); *State v. McBride*, Stark App. No. 2008-CA-00076, 2008-Ohio-5888, ¶ 26 (5th District); *State v. Price* (March 29, 1996), Lucas App. No. L-95-071, unreported at *9 (6th District); *State v. Peeples*, Mahoning App. No. 07 MA 212, 2009-Ohio-1198, ¶ 56 (7th District); *State v. Carter*, Cuyahoga App. No. 84036, 2004-Ohio-6861, ¶ 38-40 (8th District); *State v. Hill*, 160 Ohio App.3d 324, 827 N.E.2d 351, ¶ 31-41 (8th District); *State v. Jenkins*, Cuyahoga App. No. 87606, 2006-Ohio-6421, ¶ 27-28, (8th District); *State v. Swaby*, Summit App. No. 24528, 2009-Ohio-3690, ¶ 7 (9th District); *State v. Jennings*, Franklin App. Nos. 09AP-70, 09AP-75, 2009-Ohio-6840, (10th District); *State v. Jenkins*, Lake App. No. 2003-L-173, 2005-Ohio-3092, ¶ 37-38, (11th District); and *State v. Wynn*, Butler App. No. CA2009-04-120, 2009-Ohio-6744, ¶ 17 (12th District).

Specifically with regard to allegedly unauthenticated records, the Eighth District has previously affirmed convictions (even in light of erroneously admitted evidence) when it has found the errors to be harmless beyond a reasonable doubt. *State v. Jordan* (June 1, 1989), Cuyahoga App. No. 55450, 1989 WL 59258, *7-8; *State v. Moton* (Mar. 18, 1993), Cuyahoga App. No. 62097, 1993 WL 76904, *5.

In Hood's appeal the appellate court specified:

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.

State v. Hood, Cuyahoga App. No. 93854, 2010-Ohio-5477, ¶ 29-30. The Eighth District has already found that the cell phone records admitted at Hood's trial did not contribute in any measurable degree to his convictions. Thus, even if this Court finds that the admission of the cell phone records implicated Hood's right to confrontation, Hood's convictions cannot be overturned unless this Court also finds that the Eighth District erred in its application of the harmless error analysis.

In sum, “Not every admission of inadmissible hearsay or other evidence can be considered to be reversible error unavoidable through limiting instructions; instances occur in almost every trial where inadmissible evidence creeps in, usually inadvertently. ‘A defendant is entitled to a fair trial but not a perfect one.’” *Bruton v. U.S.* (1968), 391 U.S. 123, 135, 88 S.Ct. 1620, quoting *Lutwak v. United States* (1953), 344 U.S. 604, 619, 73 S.Ct. 481. In this case, the appellate court properly determined that Hood received a fair trial. The cell phone records that were admitted as business records were non-testimonial in nature and therefore never implicated Hood’s rights under the Confrontation Clause. If any error occurred it was not of constitutional proportions and was harmless. But even if constitutional error occurred, Hood has failed to prove that the Eighth District Court of Appeals erred in ruling the admission of the cellular telephone records to be harmless beyond a reasonable doubt.

CONCLUSION

This case should be dismissed as improvidently granted for the reason that, even if this Court were to adopt Defendant-Appellant James D. Hood’s proposition of law, no relief would be afforded to him. Whether the cellular telephone records used at his trial were authenticated or unauthenticated in accordance with the Ohio Rules of Evidence, or testimonial versus non-testimonial for purposes of the Confrontation Clause, the appellate court found that their admission into evidence did not contribute to Hood’s convictions. Since Hood has not challenged or even attempted to overcome the appellate court’s decision in this regard, this Court’s adoption of his proposition of law would be wholly advisory.

Considered on its merits, Hood’s proposition of law fails. Cellular telephone records are business records and, as such, are admissible because they are non-

testimonial in nature. Even if non-testimonial business records are not properly authenticated, their admission into evidence can be found harmless on appeal. Further, because they are non-testimonial, business records do not implicate the rights that are afforded to an accused under the Sixth Amendment's Confrontation Clause. Finally, even on the occasion of a Confrontation Clause violation, an appellate court may find such error to be harmless beyond a reasonable doubt. In the instant case, the appellate court found the admission of the records harmless beyond a reasonable doubt. Thus, Hood's proposition of law falls short and should not be promulgated by this Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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