

ORIGINAL

In the
Supreme Court of Ohio

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

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INTRODUCTION

Although frequently overlapping, the Sixth Amendment's Confrontation Clause and evidentiary rules on the admission of hearsay are not coextensive. The Confrontation Clause applies to testimonial statements, and it requires only that a defendant have an opportunity to cross-examine witnesses against him. It is silent as to minimum standards for admitting evidence at trial. By contrast, the Ohio Rules of Evidence apply to testimonial *and* non-testimonial statements alike and govern the proper authentication and admission of evidence.

Cellular phone records are nontestimonial and therefore do not trigger a defendant's confrontation rights; instead, the Rules of Evidence govern their admissibility. Cell phone records are nontestimonial because they record "regularly conducted business activity" and are "created for the administration of an entity's affairs and *not* for the purpose of establishing or proving some fact at trial." *Melendez-Diaz v. Massachusetts* (2009), 129 S. Ct. 2527, 2538, 2539-40 (emphasis added); see also *Bullcoming v. New Mexico* (U.S. 2011), No. 09-10876, slip op. at 2 (Sotomayor, J., concurring). Phone companies keep these records to facilitate their day-to-day operations and cellular phone network management by, among other things, tracking subscribers' phone usage and billing.

Appellant James D. Hood argues that the admission of cell phone records at his trial violated his confrontation rights. At trial, Hood raised only an evidentiary challenge to these records, and properly so: Any question as to the admissibility of the records turns on an evidentiary issue of authentication, *not* the Confrontation Clause. But Hood now improperly conflates Confrontation Clause rights with the requirements of the Rules of Evidence, and he urges this Court to make the same mistake.

When analyzed separately—as a confrontation challenge and an evidentiary challenge—Hood's argument cannot succeed. The Confrontation Clause does not apply to cell phone

records because they are nontestimonial. And even if the Court assumes, for the sake of argument, that the trial court violated the Rules of Evidence by admitting the cell phone records, any such error was harmless.

Accordingly, the Court should affirm the Eighth District's decision and uphold Hood's convictions.

STATEMENT OF AMICUS INTEREST

The Ohio Attorney General acts as Ohio's chief law officer. R.C. 109.02. Accordingly, he has an interest in ensuring the proper interpretation and enforcement of Ohio's criminal procedures, as well as the proper application and protection of defendants' constitutional rights. In the wake of *Crawford v. Washington*, (2004), 541 U.S. 36, and *Melendez-Diaz*, 129 S. Ct. 2527, courts have been faced with numerous questions about both the proper application of the Sixth Amendment and the relationship between the Confrontation Clause and evidentiary rules. The Attorney General has a strong interest in ensuring that these questions are answered clearly and correctly.

STATEMENT OF THE CASE AND FACTS

Appellant James Hood, along with Samuel Peet, Terrance Davis, and Kareem Hill, planned and participated in a robbery and kidnapping the night of January 25 and morning of January 26, 2009. (Tr. 926-59.) Peet was killed, and his body was found that morning. (Tr. 586-89.) Hill confessed to police, implicating all four men in the crime. (Tr. 970-76, Ex. 180).

Hood was indicted on counts of murder, kidnapping, aggravated robbery, aggravated burglary, and having a weapon under disability. (Tr. 30-44).

At trial, the prosecution introduced records it had subpoenaed from cellular phone companies. (Tr. 1175-78, 1186-87, 1207-16.) Three witnesses testified about the records. Hill testified about certain calls that were either placed or received from his phone. (Tr. 977-90.)

Detective Kathleen Carlin testified about how the cell phone records were obtained. (Tr. 1175-87.) And Detective Henry Veverka testified about his general experience with reviewing and interpreting cell phone records, as well as the conclusions he personally reached after reviewing these records. (Tr. 1206-25.)

Hood's counsel objected to the prosecution's use of the phone records, arguing that they had not been properly authenticated according to the Rules of Evidence. (Tr. 977-82, 1237-39, 1241-42.) He did not object on the basis of the Confrontation Clause or the Sixth Amendment. (*Id.*) Nor did he object that Detective Veverka lacked the qualifications necessary to testify about the conclusions he reached after reviewing the cell phone records. (See Tr. 1207-25.)

A jury convicted Hood of one count of murder, nine counts of kidnapping, nine counts of aggravated robbery, and one count of aggravated burglary, as well as two firearm specifications. *State v. Hood* (8th Dist.), No. 93854, 2010-Ohio-5477, ¶ 22.

Hood appealed to the Eighth District Court of Appeals, arguing, among other things, 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.” *Id.* at ¶ 25. The appeals court held that the admission of the records was, at most, harmless error. *Id.* at ¶ 30. The court overruled Hood's remaining assignments of error, and affirmed his conviction. *Id.* at ¶ 47.

Hood appeals the Eighth District's decision, alleging a violation of the Confrontation Clause.

ARGUMENT

Amicus Curiae Attorney General's Proposition of Law:

The Ohio Rules of Evidence regarding hearsay and Sixth Amendment confrontation rights are not coextensive. Business records that are created for the administration of an entity's affairs, and not for the purpose of establishing or proving some fact at trial, must be properly authenticated, according to the Ohio Rules of Evidence, but are not testimonial and therefore do not trigger the Confrontation Clause.

Hood improperly conflates the constitutional protections of the Confrontation Clause with the procedural requirements of the Rules of Evidence. See Merit Brief of Appellant James D. Hood ("Hood Br.") at 28 ("[H]ad 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."). Instead, the Court should evaluate his objection to the cell phone records separately under Sixth Amendment doctrine and the Ohio Rules of Evidence. Hood's claim fails under either framework.

Hood alleges that his confrontation rights were violated by the trial court's admission of the cell phone records, and by Detective Veverka's testimony about those records.¹ Neither action amounts to a confrontation problem. First, cell phone records are nontestimonial and therefore not subject to the Confrontation Clause. Second, Hood was provided with, and took advantage of, ample opportunity to cross-examine Detective Veverka about the conclusions he drew from analyzing those records.

¹ Hood's trial counsel objected to the cell phone records only on authenticity grounds. (See Tr. 978-82, 1237-39). Because he did not object on Sixth Amendment grounds, Hood waived his Confrontation Clause argument. See *Melendez-Diaz*, 129 S. Ct. at 2534 n.3 ("The right to confrontation may, of course, be waived, including by failure to object to the offending evidence."); *State v. Tibbetts*, 92 Ohio St. 3d 146, 161, 2001-Ohio-132 (explaining that a party waives an argument if he "fail[s] to object at trial on [that] specific ground"). However, because waiver was not argued in the intermediate court of appeals, the constitutional argument will be addressed on its merits.

Any argument that admitting the cell phone records (and Detective Veverka's testimony about them) violated the Ohio Rules of Evidence also fails; and even if the trial court erred by admitting the evidence, any such error was harmless.

A. Although occasionally overlapping, confrontation rights and hearsay rules are not coextensive.

The Sixth Amendment's confrontation right and the authentication rules for admitting hearsay under the Rules of Evidence are not coextensive. See *State v. Edwards*, 107 Ohio St. 3d 169, 2005-Ohio-6180, ¶ 18. These requirements serve separate and independent purposes.

The Sixth Amendment guarantees a defendant "the right . . . to be confronted with the witnesses against him." U.S. Const., amend. 6. The purpose of this guarantee is to ensure that the reliability of evidence is "assessed in a particular manner: by testing in the crucible of cross-examination." *Crawford*, 541 U.S. at 61. However, this constitutional right applies only to *testimonial* evidence; it does not extend to non-testimonial evidence. *Id.* at 68; see also *Bullcoming*, slip op. at 2 n.1 (Sotomayor, J., concurring) ("[T]he purpose of the Confrontation Clause is to determine whether statements are testimonial and therefore require confrontation."). In the context of nontestimonial evidence, States have "flexibility in their development of hearsay law." *Crawford*, 541 U.S. at 61.

By comparison, the Ohio Rules of Evidence "are designed primarily to police reliability," *Bullcoming*, slip op. at 2 n.1 (Sotomayor, J., concurring), and they govern the introduction of testimonial and nontestimonial evidence alike. Rule 803 identifies several exceptions to the general prohibition against hearsay evidence, including an exception for records of regularly conducted business activity. Evid. R. 803(6). When a party seeks to introduce business records under this exception, he must comply with the evidentiary rules for identifying and authenticating the documents. See Evid. R. 901. The purpose of these authentication

requirements is to establish that documents are true and accurate, and that they qualify for the business records exception. See *State v. Vrona* (9th Dist. 1988), 47 Ohio App. 3d 145, 148 (citing 1 Weissenberger's Ohio Evidence (1985) 75-76, § 803.79).

The United States Supreme Court did not firmly distinguish the Confrontation Clause from hearsay rules until 2004. Before 2004, a witness's out-of-court statement did not violate a defendant's confrontation rights if the statement bore certain indicia of reliability, such as falling "within a firmly rooted hearsay exception." *Ohio v. Roberts* (1980) 448 U.S. 56, 66; see G. Michael Fenner, *Today's Confrontation Clause (After Crawford and Melendez-Diaz)*, 43 Creighton L. Rev. 35, 37 (2009) ("For years, Confrontation Clause jurisprudence more or less tracked the hearsay rule."). In *Crawford*, the Court changed course, explaining that the Confrontation Clause "commands, not that evidence be reliable"—as *Roberts* held—"but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination." 541 U.S. at 61. In other words, the Sixth Amendment is not satisfied simply because evidence qualifies under a hearsay exception. Conversely, some hearsay evidence does not even "implicate[] the Sixth Amendment's core concerns." *Id.* at 51. The Court thus overruled *Roberts* and "dissolved the partnership between the Confrontation Clause and the hearsay rule." Fenner, 43 Creighton L. Rev. at 38.

Hearsay rules continue to apply to both testimonial and nontestimonial statements against a criminal defendant. But "the introduction of nontestimonial statements"—such as business records, see *Melendez-Diaz*, 129 S. Ct. at 2539—"raises no constitutional concerns." David Alan Sklansky, *Hearsay's Last Hurrah*, 2009 Sup. Ct. Rev. 1, 5. Accordingly, business records and other nontestimonial hearsay statements "are generally admissible absent confrontation." *Melendez-Diaz*, 129 S. Ct. at 2539. But as the *Melendez-Diaz* Court took care to explain, that is

not because the rules of evidence allow for the admission of these records. Instead, it is because the records are generally not testimonial to begin with—they “hav[e] been created for the administration of an entity’s affairs and not for the purpose of establishing or proving some fact at trial.” *Id.* at 2539-40; see *Crawford*, 541 U.S. at 56 (“[M]ost of the hearsay exceptions covered statements that by their nature were not testimonial—for example business records. . . .”). Business records are testimonial, however, if a business’s “regularly conducted . . . activity” involves “*produc[ing] . . . evidence for use at trial.*” *Melendez-Diaz*, 129 S. Ct. at 2538.

The U.S. Supreme Court has thus firmly established that, in light of their distinct purposes, “the hearsay rule and the right of confrontation . . . [are] separate and distinct rights and grounds for objection.” John C. O’Brien, *Criminal Evidence: The Hearsay Within Confrontation*, 29 St. Louis U. Pub. L. Rev. 501, 503 (2010).

B. Neither the admission of the cell phone records nor Detective Veverka’s testimony about the records violated Hood’s confrontation rights.

- 1. Cell phone records maintained in the normal course of business are not testimonial evidence subject to the Confrontation Clause because they are not created for the purpose of establishing or proving some fact at trial.**

Cell phone records are not subject to Sixth Amendment confrontation requirements. The Confrontation Clause applies only to “testimonial” evidence, *Crawford*, 541 U.S. at 68, and cell phone records are generally nontestimonial. Accordingly, absent evidence that particular cell phone records were “prepared specifically for use at . . . trial,” *Melendez-Diaz*, 129 S. Ct. at 2540, the admission of cell phone records—regardless of whether it violates any evidentiary rules—does *not* violate the Sixth Amendment.

As a general rule, cell phone records are nontestimonial under *Crawford* and its progeny because they are business records that were “created for the administration of an entity’s affairs

and not for the purpose of establishing or proving some fact at trial.” *Id.* at 2539-40. These records are nothing more than collections of data about calls placed and received on a phone company’s network. (See Tr. 1207-10). Phone companies maintain these records as part of their ordinary business operations and rely on them to facilitate operations. The information enables companies to manage subscriber accounts and billing, among other things.

Accordingly, the handful of courts to address whether cell phone records are testimonial under *Crawford* have held that they are not. See *United States v. Yeley-Davis* (10th Cir. 2011), 632 F.3d 673, 679 (concluding that cell phone records were business records and were not testimonial); *United States v. Green* (11th Cir. 2010), 396 Fed. Appx. 573, 575 (unpublished) (“[C]ell phone records and cell tower locations, are business records within the meaning of Fed. R. Evid. 803(6), and thus, satisfy an exception to the hearsay rule” and “by their nature, are non-testimonial for purposes of the Sixth Amendment.”); *Smith v. State* (Ind. Ct. App. 2005), 839 N.E.2d 780, 784 n. 4 (“[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.”). Unless there is evidence that particular records were “prepared specifically for use at . . . trial,” *Melendez-Diaz*, 129 S. Ct. at 2540, cell phone records do not trigger confrontation rights.

Here, Hood’s flimsy argument that the cell phone records in this case were prepared “specifically for use at . . . trial” is unsupported by the record. In his brief, Hood inaccurately claims “[t]here can be no dispute that in this case, the cell phone records . . . were prepared . . . for the purpose of being used as evidence in a criminal prosecution.” Hood Br. 27. But Hood’s assertion speaks not to the reason the records were initially kept, but instead to the fact that the *copies* of the records produced at trial were created for trial. The fact that a business produces

copies of existing records in response to a subpoena (and that these copies are used at trial) does not mean that the underlying records were “created . . . for the purpose of establishing or proving some fact at trial.” See *Melendez-Diaz*, 129 S. Ct. at 2538-39 (distinguishing between authenticating copies of a record and creating a new record for use at trial).

As a general matter, cell phone records are nontestimonial business records that fall outside the ambit of the Confrontation Clause. And although it is conceivable that cell phone records could be produced specifically for use at trial (and not in the ordinary course of business) and thus trigger a defendant’s confrontation rights, that was not the case here.

2. Hood exercised his right to confront the witness who testified about these cell phone records.

Hood also suggests that his confrontation rights were violated by Detective Veverka’s testimony about the cell phone records. According to Hood, “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.” Hood Br. 24. But Hood’s attempts to portray this as a case of “[s]urrogate forensic testimony,” *id.*—which might implicate *Melendez-Diaz*—fall flat. Cell phone records are not forensic evidence. And whatever evidentiary objections Hood may have,² Detective Veverka’s testimony did not violate the Confrontation Clause because he testified only about his own opinions and Hood cross-examined him at trial.

² To the extent Hood implies that the trial court violated the Rules of Evidence by permitting Detective Veverka to testify about the records, that challenge has been waived. Hood did not object to Detective Veverka’s qualifications as a witness at trial. See *State v. Drummond*, 111 Ohio St. 3d 14, 2006-Ohio-5084, ¶ 73 (“The failure to object to [a witness’s] testimony waives all but plain error.”). Nor would there be any merit to such a claim: Detective Veverka spoke only to his own personal knowledge, Evid. R. 602, and testified about his own opinions as permitted under Evid. R. 701. (See Tr. 1206-25.) The prosecution never sought to qualify Detective Veverka as an expert witness, nor did the trial court recognize him as such.

First, contrary to Hood's misguided suggestion, Detective Veverka did not present "[s]urrogate forensic testimony." Hood Br. 28. Cell phone records are ordinary business records, and no one has suggested that they are the product of forensic analysis. Further, Detective Veverka did not testify about *someone else's* analysis of the cell phone records; he testified only about his *own* conclusions based upon his personal examination of the records. (Tr. 1206-25.)

Second, Hood exercised his right to confront Detective Veverka. Hood's trial counsel cross-examined the witness at length about his opinions, the basis for his opinions, his training, knowledge, experience, and his overall expertise in interpreting cell phone records. (Tr. 1216-22, 1223-25.) Hood now objects that Detective Veverka was unable to answer satisfactorily certain questions on cross-examination. Far from showing a confrontation problem, this confirms that Hood tested Detective Veverka in the "crucible of cross-examination," see *Crawford*, 541 U.S. at 61, and was able to raise questions about his "honesty, proficiency, and methodology." *Melendez-Diaz*, 129 S. Ct. at 2538.

Detective Veverka testified about his own opinions and Hood's counsel effectively cross-examined him. (See Tr. 1121, 1238.) (trial counsel observed that he made "lemonade out of lemons" on cross-examination). Even if the cross-examination of Detective Veverka had been ineffective, that would not amount to a Sixth Amendment violation. See *United States v. Owens* (1988), 484 U.S. 554, 559-60.

C. Even assuming that the admission of these cell phone records at trial violated the Rules of Evidence, Hood is not entitled to relief because any such error was harmless.

For all the reasons above, Hood's objections amount not to a Sixth Amendment claim, but rather to an argument that the trial court violated the Rules of Evidence by admitting the cell phone records in this case. But this evidentiary claim must fail because, as the State's brief

explains, Hood cannot overcome the broad deference afforded to trial courts' evidentiary determinations. In any event, Hood is not entitled to relief for the reasons the Eighth District correctly articulated: Even if the trial court erred by admitting the cell phone records, that error was harmless.

According to Hood, the cell phone records were inadmissible because they were not properly authenticated. See, e.g., Hood Br. 23. Evidentiary determinations, such as whether a document is properly authenticated, are within a trial court's broad discretion, and are affirmed absent an abuse of discretion. *Rigby v. Lake County* (1991), 58 Ohio St. 3d 269, 271. An abuse of discretion requires more than a mere error; instead, it is an error indicating that "the court's attitude is unreasonable, arbitrary or unconscionable." *Blakemore v. Blakemore* (1983), 5 Ohio St. 3d 217, 219. Thus, to merit reversal, the admission of the cell phone records would have to "be so palpably and grossly violative of fact and logic that it evidences not the exercise of will but perversity of will, not the exercise of judgment but defiance thereof, not the exercise of reason but rather of passion or bias." *State v. Jenkins* (1984), 15 Ohio St. 3d 164, 222 (internal quotation omitted).

There is no need to engage in abuse of discretion analysis here, however, because the errors alleged are harmless. Defendants are entitled to "a trial free from prejudicial error, not necessarily one free of all error." *State v. Brown* (1992), 65 Ohio St. 3d 483, 485. Errors are deemed harmless if they do not "affect substantial rights." Crim. R. 52(A). Accordingly, a non-constitutional error, such as admitting an improperly authenticated document, "is harmless if there is substantial other evidence to support the guilty verdict." *State v. Webb* (1994), 70 Ohio St. 3d 325, 335. Further, if an alleged error is not constitutional, the defendant bears the burden

“to show that he ‘was or may have been prejudiced thereby.’” *State v. Davis* (8th Dist. 1975), 44 Ohio App. 2d 335, 348 (cited in *Webb*, 70 Ohio St. 3d at 335).

As discussed more fully in the State’s brief, the cell phone records here were not the only evidence supporting Hood’s conviction. Among other things, the evidence showed that Hood’s DNA was found in the vehicle used in the robbery. (Tr. 623-36). Eight of the eleven robbery and kidnapping victims testified about the robbers’ identity, including their clothing and general appearances. (See generally Tr. 1331). Kareem Hill, one of Hood’s co-conspirators, testified at great length about Hood’s involvement in the robbery. (Tr. 906-1120). Thus, even setting aside the disputed cell phone records, other substantial record evidence supported the guilty verdict.

Further, the cell phone records were cumulative of other evidence introduced at trial and therefore harmless. See *State v. Fears*, 86 Ohio St. 3d 329, 339, 1999-Ohio-111 (holding a witness’s testimony was cumulative, and its admission was harmless error because it did not contribute to the verdict). Kareem Hill testified about phone calls Hood placed on the night of the robbery and kidnapping (Tr. 930-32, 955-56), thereby echoing the information contained in the challenged cell phone records.

For these reasons, even if the trial court had abused its discretion by admitting the cell phone records, any such error was harmless.

CONCLUSION

For the foregoing reasons, this Court should affirm the decision of the Eighth District Court of Appeals and affirm James Hood's convictions.

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CERTIFICATE OF SERVICE

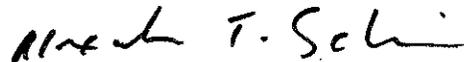
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