[Cite as *State v. Blake*, 2012-Ohio-3124.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

BUTLER COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NO. CA2011-07-130
	:	O P I N I O N
- vs -		7/9/2012
	:	
ANTHONY DION BLAKE,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
Case No. CR 2011-01-0122

Michael T. Gmoser, Butler County Prosecuting Attorney, Donald R. Caster, Government Services Center, 315 High Street, 11th Floor, Hamilton, Ohio 45011, for plaintiff-appellee

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RINGLAND, J.

{¶ 1} Defendant-appellant, Anthony Dion Blake, appeals from his conviction in the Butler County Court of Common Pleas for murder with a firearm specification and having a weapon under disability. For the reasons outlined below, we affirm.

{¶ 2} On December 31, 2010, and into the early morning of January 1, 2011, a New Year's Eve party was held at the Edwards Brothers Hall, also known as Knights of Columbus Hall, or just simply "the K," in Middletown, Ohio. Blake, a member of the "Baltimore Street

Gangsters," also known as the "Baltimore Street Gang" (BSG), and a few other gang members attended this party. Blake was seen carrying a gun. At approximately 1:30 a.m., Blake exchanged some words with fellow guest, Terron "Skinny" Moton. Blake then shot Moton, causing him to collapse to the ground. Blake stood over Moton and shot him two more times.

{¶ 3} Lieutenant John Magill with the Middletown Police Department was the first to arrive at the scene. Once he entered the hall, he saw Moton on the floor and realized no life saving measures could be undertaken at that time. Accordingly, he began to secure the scene so the fire department could safely respond. Lieutenant Magill spoke with three females who were standing around Moton when he arrived. Magill did not get the names of these three women.

{¶ 4} Moton was transported to the Atrium Medical Center and pronounced dead. Dr. Kent Harshbarger performed an autopsy on January 2, 2011, at the Montgomery County Coroner's Office, which revealed that Moton was shot three times, once in the temple area near the right eye, once just above the right ear, and once in the upper back of the neck on the right side. Harshbarger explained that the shooter had been "six to eight inches up to two feet away" when the temple wound was inflicted. The other two occurred at a greater distance. The gun was about two feet from the victim when it was fired. All three wounds were considered lethal, and Harshbarger stated that the cause of death was gunshot wounds to the head and neck.

{¶ 5} During the investigation into Moton's murder, the police became aware that the BSG, including Blake, were involved in the shooting. Detective Rich Bush subpoenaed Blake's cellular telephone records and found a series of text messages texts from the night of the shooting and the days following the shooting which implicated Blake's involvement in the death of Moton.

{¶ 6} Blake was later arrested and indicted on one count of murder in violation of R.C. 2903.02(A) with a firearm specification under R.C. 2941.145, and one count of having weapons under disability in violation of R.C. 2923.13(A)(3). During discovery, Blake sought the disclosure of the names of certain witnesses that the state had filed a "certificate of non-disclosure" pursuant to Crim.R. 16(D). Blake requested a hearing pursuant to Crim.R. 16(F) for judicial review of the prosecuting attorney's certificate of nondisclosure. In accordance with *State v. Gillard,* 40 Ohio St.3d 226 (1988), the case was assigned to a different judge for purposes of this hearing. After the hearing, the court concluded that the state did not abuse its discretion in protecting the identities of the witnesses and ordered the identities, criminal histories, and statements be produced no later than the commencement of the trial.

{¶ 7} During a three-day jury trial, the state presented testimony from several officers from the Middletown Police Department. The jury also heard testimony from Bianca Calaoun and Makisha Conley, who identified Blake as the person who shot Moton. Brooke Kinkaid and La'Kesha Calaoun testified regarding Blake's actions after the shooting. A Cincinnati Bell Telephone representative testified concerning records of text messages from the same telephone number which Albert Givens, an acquaintance of Blake, and Detective Bush both identified as Blake's cellular telephone number.

{¶ 8} The jury found Blake guilty on both counts. The trial court sentenced Blake to an aggregate term of 23 years to life in prison. Blake filed a timely appeal raising four assignments of error.

{¶ 9} Assignment of Error No. 1:

{¶ 10} IT WAS ERROR FOR THE TRIAL COURT TO FAIL TO ORDER THE DISCLOSURE OF THE IDENTITY OF THE STATE'S WITNESSES AT THE RULE 16(F) HEARING, OR FAILING THAT, ORDER TESTIMONY BE TAKEN OR EVIDENCE PRODUCED TO SHOW THAT THERE WAS A DANGER TO THE WITNESSES OTHER

THAN BARE ALLEGATIONS, OR IN THE ATLERNATIVE PERMIT THE TAKING OF DEPOSITIONS IN THE MATTER OR CONDUCTING AN "IN CAMERA" INTERVIEW OF POTENTIAL WITNESSES NOT DISCLOSED.

{¶ 11} In his first assignment of error, Blake argues the trial court abused its discretion and violated his due process rights by not compelling the state to disclose the names of five witnesses. Blake also argues that the court could have perpetuated the witnesses' testimony through depositions or *in camera* interviews.

{¶ 12} Blake briefly suggests that the court's denial of his motion to disclose the witnesses' names violated his due process rights. However, a criminal defendant is not constitutionally entitled to discovery in a criminal case. *State v. Craft,* 149 Ohio App.3d 176, 2002-Ohio-4481, ¶ 11 (12th Dist.), citing *Weatherford v. Bursey*, 429 U.S. 545, 559, 97 S.Ct. 837 (1977). In fact, the due process clause of the Fourteenth Amendment to the United States Constitution does not require the prosecution in a state criminal case to reveal before trial the names of all witnesses who will testify unfavorably to the defense. *State v. Bradley*, 4th Dist. No. 1583, 1987 WL 1703, * 11, (Sept. 22, 1987), citing *Weatherford* at 549. In the present case, the identities of these witnesses were not absolutely withheld from the defense; all four witnesses testified at trial and were subject to cross-examination by Blake. *See State v. Daniels*, 92 Ohio App.3d 473, 480 (1st Dist.1993). Furthermore, Blake failed to show any prejudice to his ability to defend himself resulting from the trial court's refusal to release the names and addresses of these witnesses prior to trial. Accordingly, we find Blake's due process rights were not violated.

{¶ 13} Blake also argues for the first time in his reply brief that by failing to disclose the witnesses' names, his right to confront witnesses against him, as guaranteed by the United States and Ohio Constitutions, was violated. However, an appellant may not use a reply brief to raise new issues or assignments of error. *Baker v. Meijer Stores Ltd.*

Partnership, 12th Dist. No. CA2008-11-136, 2009-Ohio-4681, ¶ 17. Accordingly, this issue is not properly before the court, and we will not consider it.

{¶ 14} The granting or overruling of discovery motions in a criminal case rests within the sound discretion of the court. *Craft* at ¶ 10. Abuse of discretion is more than an error of law or judgment; it implies that the trial court's decision was unreasonable, arbitrary or unconscionable. *Id.,* citing *State v. Adams*, 62 Ohio St.2d 151, 157 (1980).

{¶ 15} Crim.R. 16 governs discovery in criminal cases. Although a witness list is required by Crim.R. 16(I), Crim.R. 16(D) permits a prosecuting attorney to decline to disclose to the defendant the names of witnesses as long as the prosecutor certifies nondisclosure is for one of the five reasons enumerated in this section. One such reason is because "[t]he prosecuting attorney has reasonable, articulable grounds to believe that disclosure will compromise the safety of a witness, victim, or third party, or subject them to intimidation or coercion." Crim.R. 16(D)(1). In support of nondisclosure, the state's reasonable, articulable grounds "may include, but are not limited to, the nature of the case, the specific course of conduct of one or more parties, threats or prior instances of witness tampering or intimidation, whether or not those instances resulted in criminal charges, whether the defendant is pro se, and any other relevant information." Crim.R. 16(D)(5).

{¶ 16} The trial court, upon motion by the defendant, must review the prosecuting attorney's decision of nondisclosure for abuse of discretion. Crim.R. 16(F). If, after the hearing, the trial court finds no abuse of discretion, then a copy of any discoverable material that was not disclosed before trial must be provided to the defendant no later than the start of trial. Crim.R. 16(F)(5). However, if there is a finding of abuse of discretion, then the trial court may order disclosure, grant a continuance, or order any other appropriate relief. Crim.R. 16(F)(1).

{¶ 17} At the Crim.R. 16(F) hearing, the prosecutor provided the following details

regarding the four witnesses:[1]

> With regard to Witness One, this individual was present for the shooting that took place. They are familiar with the defendant and his associates.
>
> The defendant is alleged to be a member of the Baltimore Street Gang which is a violent street gang in the City of Middletown whose members have participated in shootings, drug activities, [and] felonious assault. The State has concern that the revealing of that witness would subject that witness to undue coercion or threats by the defendant or his associates.
>
> With regard to Witness Two, that witness was actually directly threatened by the defendant. The State has information that the defendant both communicated with this witness by telephone and made a personal appearance at this witness' residence and threatened the witness if they cooperated that he would do bad things to him. I think his words were something to the effect of, you and your friends will be dead if you cooperate.
>
> With regard to Witness Three, Your Honor, the third witness, also a witness to the event. That witness is also known and familiar to the defendant and his group of friends. Same street gang. They are also readily available to the gang because they reside in the area where the gang operates * * *[.]
>
> * * *
>
> Which is Baltimore Street in the City of Middletown. They are in the area, they live in the vicinity. So the State believes that revealing those witnesses could potentially subject them to repercussions from the other members of the group.
>
> And finally, Your Honor, the fourth witness is actually one of the members of the group. The individual has alleged, I guess I could use the word "overheard" the defendant bragging about killing the victim in this case; was present with other members of the gang shortly after the shooting and is readily accessible and known to other members of the group. So the State believes that disclosing the fourth witness' information would also subject them to coercion.

{¶ 17} The prosecutor explained that the state believed other members of Blake's

1. The state initially filed a certification of non-disclosure for five witnesses, but at the hearing the state revealed that it had voluntarily revealed Witness # 5, Joe Eckles, to defense counsel and provided counsel with a summary of his testimony.

gang had the ability to act and carry out any threats even without Blake being present. The record from the hearing also reveals that although the state withheld the names of these witnesses, it provided Blake's counsel with summaries of the witnesses' anticipated testimony to assist in the preparation of his defense and for cross-examination.

{¶ 18} Blake argues that testimony by the prosecutor alone, without supporting evidence, is not enough to warrant the non-disclosure of the witnesses. We find that such testimony by the prosecutor is proper under the requirements found in Crim.R. 16(D) and (F). The Staff Notes to Crim.R. 16 confirm that supporting evidence, beyond the prosecutor's testimony, is unnecessary when the court reviews the state's nondisclosure of a witness; it states:

> The prosecutor should possess extensive knowledge about the case, including matters not properly admissible in evidence but highly relevant to the safety of the victim, witnesses, or community. Accordingly, the rule vests in the prosecutor the authority for seeking protection by nondisclosure, and deference when making a good faith decision about predictable prospective human behavior.

{¶ 19} Based on the foregoing facts, Blake failed to show that the trial court's refusal to reveal the identities of the four witnesses was arbitrary or unreasonable. The prosecutor provided reasonable, articulable grounds, including the nature of the case, specific course of conduct of both Blake and his associates, and a prior threat to one of the witnesses, to believe that disclosure would compromise the witnesses' safety and possibly subject them to intimidation or coercion. As this case involved the activities of a known, violent street gang, it was appropriate for the court to consider whether the gang would retaliate against those persons set to testify against Blake. The prosecutor's testimony revealed that each of these witnesses was easily accessible and known to the other members of Blake's gang. The gang's history of felonious assault, shootings, and other illegal activity indicated that these witnesses could be subject to threats or harm if their identities were revealed. Specifically,

Blake had already threatened Witness Two which provided a prior instance of a threat sufficient to warrant the non-disclosure of this witness. We hold that under these circumstances, the trial court did not abuse its discretion in refusing to disclose the names of these four witnesses pursuant to Crim.R. 16(D).

{¶ 20} Finally, Blake argues that upon finding nondisclosure was proper, the trial court was required to consider "Crim.R. 16(B)(1)(e) which provides for the perpetuation of testimony wherein the defendant has a right of cross examination." Crim.R. 16(B)(1)(e) no longer exists. Rather, the only rule that allows for the perpetuation of testimony is Crim.R. 16(G). Crim.R. 16(G) permits the state to "perpetuate the testimony of relevant witnesses in a hearing before the court, in which hearing the defendant shall have the right of cross-examination." This hearing only occurs by request of the state where the court has ordered disclosure of material previously certified under Crim.R. 16(F). This rule does not apply when a defendant seeks the perpetuation of testimony.

{¶ 21} Blake's first assignment of error is overruled.

{¶ 22} Assignment of Error No. 2:

{¶ 23} IT WAS ERROR TO ADMIT INTO EVIDENCE EXHIBT 40 WHICH CONSISTS OF PRINTOUTS OF TEXT MESSAGES TO AND FROM DIFFERENT PHONES AS THE SAME WERE NOT PROPERLY AUTHENTICATED OR PROPERLY IDENTIFIED AS COMING TO OR FROM ANY PHONE CONTROLLED BY THE APPELLANT AND THEIR ADMISSION IS UNDULY PREJUDICIAL AND NOT PROPERLY ADMISSIBLE AS A BUSINESS RECORD EXCEPTION TO THE HEARSAY RULE.

{¶ 24} In his second assignment of error, Blake argues that Exhibit 40, which contained over 50 pages of text messages, was improperly admitted. Specifically, Blake contends: (1) the exhibit was not properly authenticated pursuant to Evid.R. 901(B)(6); (2) the exhibit did not qualify as a business record under Evid.R. 803(6); and (3) the exhibit should

have been excluded pursuant to Evid.R. 403(A).

{¶ 25} We first note that Blake failed to object at trial to Exhibit 40 on the basis of authentication pursuant to Evid.R. 901(B)(6) or assert that the exhibit did not qualify as a business record under Evid.R. 803(6). Evid.R. 103(A)(1) requires a party to timely object and state the specific ground for the objection. Because Blake failed to object on these bases at trial, these arguments are waived unless the admission of the cellular telephone records amounted to plain error. *State v. Wagers,* 12th Dist. No. CA2009-06-018, 2010-Ohio-2311, ¶ 48; Crim.R. 52(B). An alleged error is plain error only if it is "obvious," and "but for the error, the outcome of the trial clearly would have been otherwise." *State v. Jackson*, 12th Dist. No. CA2011-01-001, 2011-Ohio-5593, ¶ 13, citing *State v. Perez,* 124 Ohio St.3d 122, 2009-Ohio-6179, ¶ 181.

{¶ 26} Generally, hearsay is inadmissible, unless it falls within one of the numerous exceptions found in the Rules of Evidence. *State v. Sims,* 12th Dist. No. CA2007-11-300, 2009-Ohio-550, ¶ 12. One such exception is the business records exception under Evid.R. 803(6). This court has found on more than one occasion that a cellular telephone record may fall within the business records exception. *See e.g., State v. Thomas*, 12th Dist. No. CA2010-10-099, 2012-Ohio-2430, ¶ 19; *State v. Glenn*, 12th Dist. No. CA2009-01-008, 2009-Ohio-6549, ¶ 16.

> To qualify for admission under Rule 803(6), a business record must manifest four essential elements: (i) the record must be one regularly recorded in a regularly conducted activity; (ii) it must have been entered by a person with knowledge of the act, event or condition; (iii) it must have been recorded at or near the time of the transaction; and (iv) a foundation must be laid by the "custodian" of the record or by some "other qualified witness."

State v. Davis, 116 Ohio St.3d 404, 2008-Ohio-2, ¶ 171, quoting Weissenberger, *Ohio Evidence Treatise*, Section 803.73, 600 (2007). Even if these elements are established, a business record may be excluded if the "source of information or the method or

circumstances of preparation indicate lack of trustworthiness." *Davis* at ¶ 171, Evid.R. 803(6). However, before a business record is admitted pursuant to Evid.R. 803(6), the record must be properly identified or authenticated.

{¶ 28} The requirement of authentication or identification as a condition precedent to admissibility is satisfied by introducing "evidence sufficient to support a finding that the matter in question is what its proponent claims." Evid.R. 901(A); *State v. Moshos,* 12th Dist. No. CA2009-06-008, 2010-Ohio-735, ¶ 11. This threshold requirement for authentication of evidence is low and does not require *conclusive* proof of authenticity. *State v. Easter*, 75 Ohio App.3d 22, 25 (4th Dist.1991). Instead, the state only needs to demonstrate a "reasonable likelihood" that the evidence is authentic. *State v. Thomas*, 12th Dist. No. CA2010-10-099, 2012-Ohio-2430, ¶ 15; *State v. Bell,* 12th Dist. No. CA2008-05-044, 2009-Ohio-2335, ¶ 30. Blake argues that the text messages should have been authenticated pursuant to Evid.R. 901(B)(6) and compared the messages to a telephone conversation. However, we find these records are more analogous to a business record and could have been authenticated as such.

{¶ 29} In order to properly authenticate business records, a witness, such as an employee of the company, must "testify as to the regularity and reliability of the business activity involved in the creation of the record." *Thomas* at ¶ 19, quoting *State v. Hirtzinger,* 124 Ohio App.3d 40, 49 (2nd Dist.1997). While firsthand knowledge of the business transaction is not required by the witness providing the foundation, the witness must be familiar with the operation of the business and the "circumstances of the record's preparation, maintenance and retrieval, [such] that he can reasonably testify on the basis of this knowledge that the record is what it purports to be, and that it was made in the ordinary course of business consistent with the elements of Evid.R. 803(6)." *State v. Glenn*, 12th Dist. No. CA2009-01-008, 2009-Ohio-6549, ¶ 19, quoting *State v. Vrona*, 47 Ohio App.3d 145,

148 (9th Dist.1988).

{¶ 30} With these principles in mind, we now turn to the record to determine whether Exhibit 40 was properly authenticated and admitted pursuant to Evid.R. 803(6). In support of admission, the state presented the testimony of Paula Papke, a manager with Cincinnati Bell Corporate Security and the custodian of the records. Papke identified Exhibit 40 as the content of text messages sent from and received by Blake's cellular telephone number December 29, 2010, through January 5, 2011. Papke testified that a limited amount of text message records are stored on the company's network and kept in the usual course of business. She explained that Cincinnati Bell retains these records for about seven days. Papke explained that these records show the telephone number of both the cellular telephone receiving the text and the number for the cellular telephone that sent the text. The record also includes the content of the actual text message and the arrival date and time. Papke did not testify as to the identity of the person who sent or received any of the text messages reflected in Exhibit 40.

{¶ 31} Papke's testimony provided adequate foundation for the records pursuant to both Evid.R. 901(A) and 803(6). As a witness with knowledge of the business operations of Cincinnati Bell, Papke's testimony presented sufficient evidence to support a finding that the matter in question is what the proponent claims, namely the cellular telephone records, including text messages, belonging to a number separately identified as Blake's. She identified Exhibit 40 as the records she retrieved from the company's network in response to the subpoena for that specific number. In addition, because Papke was able to testify that these records were recorded during regularly conducted activity, and the messages were stored and kept in the ordinary course of business, the records were properly admitted under the business records exception to the hearsay rule.

{¶ 32} Blake argues Exhibit 40 was not properly authenticated because there was no

testimony from Papke or any other witness as to who actually prepared, sent, or received the text messages such that the records indicate a lack of trustworthiness. However, this argument goes to the weight of the evidence rather than its admissibility. *State v. Bell,* 12th Dist. No. CA2008-05-044, 2009-Ohio-2335, ¶ 31. As the cellular telephone records were properly authenticated and admitted, the jury was then free to believe or disbelieve Blake's defense that he was not the one sending the text messages. The jury heard and rejected this defense. Accordingly, there was no error, plain or otherwise, in the admission and authentication of Exhibit 40.

{¶ 33} Blake also argues that the admission of Exhibit 40 should have been excluded pursuant to Evid.R. 403(A). Blake's counsel did object to the admission of the cellular telephone records on this basis, arguing that the records as a whole were unduly prejudicial and inflammatory as there were several text messages that were not relevant to any material fact of the case and could encourage the jury to convict merely based on improper character evidence. As this issue was properly preserved for appeal, we review the trial court's admission of Exhibit 40 based on Evid.R. 403(A) for an abuse of discretion. *See State v. Bowman*, 144 Ohio App.3d 179, 184 (12th Dist.2001), citing *State v. Sage*, 31 Ohio St.3d 173 (1987), paragraph two of the syllabus.

{¶ 34} Under Evid.R. 403(A), exclusion of relevant evidence is mandatory where the "probative value [of the evidence] is substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or of misleading the jury." Evid.R. 403(A). For the evidence to be excluded on this basis, "the probative value must be minimal and the prejudice great." *State v. Morales*, 32 Ohio St.3d 252, 257 (1987).

{¶ 35} It is clear from the record that the authorship of the text messages detailed in Exhibit 40 was an issue in the case. Albert Givens and Detective Bush provided testimony connecting Blake to the cellular telephone number from which these records came. Both

testified that Blake's number was the same as that in Exhibit 40. The text messages sent from that number were highly relevant as these messages showed a continuous sequence of events that occurred just prior to the shooting and in the days following the shooting. The text messages sent to this number from other persons were still relevant, not for the truth of the matter asserted, but rather in establishing authorship and showing Blake's response to these messages. Several of the text messages sent to this number referred to Blake by name or by his nickname, "Face."[2] Such text messages made it more likely that all of the text messages came from Blake. Finally, any possible prejudice presented by Exhibit 40 is diminished as Blake had an opportunity and did in fact cross-examine both Papke and Detective Bush regarding the fact that they could not state who in fact sent the text messages contained in Exhibit 40. Accordingly, we find the trial court did not err in admitting Exhibit 40 as the danger of unfair prejudice was minimal and did not substantially outweigh the probative value of the evidence. Blake's second assignment of error is overruled.

{¶ 36} Assignment of Error No. 3:

{¶ 37} IT WAS ERROR TO ALLOW THE TESTIMONY OF MAKISHA CONLEY AND BROOKE KIN[K]AID, BIANCA CALAO[U]N AND LA KESHA CALAOUN AND ALBERT GIVENS TO STAND AS THE SAME SHOULD HAVE BEEN STRICKEN FROM THE RECORD AND THE JURY ADVISED TO DISREGARD IT.

{¶ 38} In his third assignment of error, Blake argues that the testimony of five witnesses should have been excluded pursuant to Evid.R. 403(A) and (B).

{¶ 39} All relevant evidence is admissible, unless otherwise excluded by law. Evid.R. 402. However, relevant evidence must be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or of misleading the

2. Detective Bush testified that Blake is also known as "Face."

jury." Evid.R. 403(A). A court also has the discretion to exclude otherwise admissible evidence, if the probative value is substantially outweighed by "needless presentation of cumulative evidence." Evid.R. 403(B). However, Blake failed to object to the testimony of these five witnesses at trial, and accordingly waived all but plain error. *See State v. Wagers,* 12th Dist. No. CA2009-06-018, 2010-Ohio-2311, ¶ 48; Crim. R. 52(B). As stated previously, an alleged error is plain error only if it is "obvious," and "but for the error, the outcome of the trial clearly would have been otherwise." *State v. Jackson*, 12th Dist. No. CA2011-01-001, 2011-Ohio-5593, ¶ 13, citing *State v. Perez,* 124 Ohio St.3d 122, 2009-Ohio-6179, ¶ 181.

{¶ 40} Bianca Calaoun and Makisha Conley were eyewitnesses to the murder and testified that they saw Blake shoot Moton that night. Both witnesses also confirmed that Blake was a member of the "Baltimore Street Gangsters." La'Kesha Calaoun testified that after the shooting, Blake contacted her by phone twice, told her he was going to kidnap her, and he was "going to kill [her] and [her] friends." The Calaoun sisters and Conley all testified they received money from the victim's mother, Bridgette Moton. Mrs. Moton paid for Bianca's taxi to the police station, and she gave $100 to La'Kesha and $200 to Conley. However, each witness testified that the money did not change their testimony in any way. Brooke Kinkaid testified that a few weeks after the shooting, she told Middletown detectives that she overheard Blake tell people he shot Moton "in the temple, the side of the face and shot him several times." Finally, Albert Givens provided Blake's telephone number. Blake now argues "[t]he testimony of all the witnesses was tainted by either bribery or lack of actual visual contact and in the case of one person, by someone who was not even present," and therefore should have been excluded.

{¶ 41} The testimony of each of these witnesses was relevant and not unfairly prejudicial to Blake. The testimony of Bianca Calaoun and Conley was highly probative as it identified Blake as the shooter. La'Kesha Calaoun and Kinkaid provided evidence of Blake's

behavior after the shooting, including his bragging about the shooting and threatening a potential witness. Unfavorable evidence is not equivalent to unfairly prejudicial evidence. *State v. Bowman*, 144 Ohio App.3d 179, 185 (12th Dist.2001). The fact that some of these witnesses were provided money by the victim's mother does not render their testimony irrelevant or unfairly prejudicial. Rather, these facts go to the credibility of the witness, which the jury was entitled to consider when assigning weight to their testimony. Givens' testimony was also relevant and highly probative as he connected Blake to a telephone number from which incriminatory text messages were sent. Accordingly, we find that there was no error, plain or otherwise, in the trial court's decision to admit the testimony of these five witnesses. Blake's third assignment of error is overruled.

{¶ 42} Assignment of Error No. 4:

{¶ 43} THE EVIDENCE IN THE INSTANT CASE WAS INSUFFICIENT TO SUPPORT A CONVICTION AND THE CONVICTION AND VERDICT [WERE] AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

{¶ 44} In his fourth assignment of error, Blake argues that the testimony and evidence presented in this case "was so tainted by contradiction, bribes and cumulative innuendo that it was insufficient to support a conviction and the conviction was against the manifest weight of the evidence." However, the state asserts Blake waived all but plain error as to the sufficiency of the evidence because he failed to renew his Crim.R. 29(A) motion at the close of all evidence. Blake moved for a judgment of acquittal at the end of the state's case. The motion was denied, and Blake presented one witness in his defense. The state then recalled Detective Bush on rebuttal. Blake never renewed his Crim.R. 29(A) motion.

{¶ 45} It is unsettled whether a defendant waives the issue of sufficiency for appeal by failing to renew a Crim.R. 29(A) motion at the close of all evidence during a jury trial. In fact, there is not only a conflict among the appellate districts, but there is also a conflict within this

district as to the effect of a defendant's failure to renew a Crim.R. 29 motion during a jury trial. The Supreme Court has yet to weigh in on this specific issue. We hereby take this opportunity to clarify the law in this district.

{¶ 46} Ohio appellate courts have addressed a defendant's failure to renew a Crim.R. 29(A) motion at the close of all evidence during jury trials in two competing ways. Some courts have found that the defendant waives any sufficiency argument for appeal by failing to renew the Crim.R. 29(A) motion at the close of all evidence. *See, e.g., State v. Fussel*, 8th Dist. No. 87739, 2006-Ohio-6438, ¶ 37-45; *State v. Calloway*, 4th Dist. No. 10CA3147, 2011-Ohio-173, ¶ 7-8; *State v. Harmon*, 9th Dist. No. 223999, 2005-Ohio-3631, ¶ 17-20. Other courts have found the opposite, holding that the defendant's failure to renew a Crim.R. 29(A) motion at the close of all evidence does not waive a challenge to the sufficiency of the evidence as a defendant preserves his right to object to the alleged insufficiency by entering a "not guilty" plea. *See, e.g., State v. Cooper*, 170 Ohio App.3d 418, 2007-Ohio-1186, ¶ 13 (4th Dist.); *State v. Schenker*, 5th Dist. No.2006AP050027, 2007-Ohio-3732, ¶ 35; *State v. Thorton*, 9th Dist. No. 23417, 2007-Ohio-3743, ¶ 13-14.

{¶ 47} Admittedly, this court has followed both approaches. For example, in *State v. Willis,* 12th Dist. No. CA2010-10-079, 2011-Ohio-3519, ¶ 22; and *State v. Stout*, 12th Dist. No. CA2010-04-039, 2010-Ohio-4799, ¶ 9, we found that a defendant who moves for a Crim.R. 29(A) acquittal at the close of the state's case during a jury trial waives any error in the denial of the motion if he puts on a defense and fails to renew his motion at the close of all evidence.

{¶ 48} However, in *State v. Dixon*, 12th Dist. No. CA2007-01-012, 2007-Ohio-5189, ¶ 11, this court held that appellant's plea of "not guilty" preserved the right to object to the sufficiency of the evidence on appeal. In so holding, we relied upon two Ohio Supreme Court cases, *State v. Carter*, 64 Ohio St.3d 218, 223 (1992); and *State v. Jones*, 91 Ohio St.3d

335, 346 (2001). In both *Carter* and *Jones*, the Supreme Court stated that the appellant's "not guilty plea preserved his right to object to the alleged insufficiency of the evidence proving the prior offense." *Carter* at 223; *Jones* at 346.[3]

{¶ 49} It is has long been the rule in a non-jury trial, that the defendant's plea of not guilty serves as a motion for judgment of acquittal and obviates the necessity of renewing a Crim.R. 29 motion at the close of all evidence. *Dayton v. Rogers*, 60 Ohio St.2d 162, 163 (1979). Several appellate districts, including this district, have recognized that *Carter* and *Jones* extended the reasoning from *Rogers* to jury trials, as well. *See, e.g., Dixon* at ¶ 11, fn. 4; *State v. Coe,* 153 Ohio App.3d. 44, 2003-Ohio-2732, ¶ 19 (4th Dist.); *State v. Schenker*, 5th Dist. No.2006AP050027, 2007-Ohio-3732, ¶ 35.

{¶ 50} We decide to follow our previous decision in *Dixon* and clarify that a defendant's failure to renew a motion for judgment of acquittal under Crim.R. 29(A) at the close of all evidence does not waive a challenge to the sufficiency of the evidence on appeal. *See Jones* at 346; *Carter* at 223; *Dixon* at ¶ 11; *Coe* at 19. Rather, as in a non-jury trial, the defendant preserves his right to object to the alleged insufficiency of the evidence by entering a "not guilty" plea. *Id.* As Blake entered a not guilty plea and preserved the issue of sufficiency for appeal, we now proceed to address the merits of Blake's argument that the state provided insufficient evidence to support his conviction and that his conviction was against the manifest weight of the evidence.

{¶ 51} As this court has stated previously, "a finding that a conviction is supported by the weight of the evidence must necessarily include a finding of sufficiency." *State v. Bryant*, 12th Dist. No. CA2011-06-109, 2012-Ohio-678, ¶ 12, quoting *State v. v. Wilson*, 12th Dist.

3. Although we recognize that both *Jones* and *Carter* involved proving prior convictions pursuant to a death penalty specification, we find that the ability of a defendant to challenge the sufficiency of the evidence as to a prior conviction is no different than challenging the sufficiency of a conviction as a whole.

No. CA2006-01-007, 2007-Ohio-2298, ¶ 35. Consequently, while a review of the sufficiency of the evidence and a review of the manifest weight of the evidence are separate and legally distinct concepts, this court's determination that Blake's conviction was supported by the manifest weight of the evidence will be dispositive of the issue of sufficiency. *State v. Rigdon,* 12th Dist. No. CA2006-05-064, 2007-Ohio-2843, ¶ 30.

> An appellate court's function when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. The relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt.

State v. Dixon, 2007-Ohio-5189, ¶ 13, quoting *State v. Jenks*, 61 Ohio St.3d 259 (1991), paragraph two of the syllabus.

{¶ 52} A manifest weight challenge concerns the inclination of the greater amount of credible evidence, offered in a trial, to support one side of the issue rather than the other. *State v. Clements,* 12th Dist. No. CA2009-11-277, 2010-Ohio-4801, ¶ 19. A court considering whether a conviction is against the manifest weight of the evidence must review the entire record, weigh the evidence and all reasonable inferences, and consider the credibility of the witnesses. *State v. Bryant*, 12th Dist. No. CA2011-06-109, 2012-Ohio-678, ¶ 13, citing *State v. Hancock,* 108 Ohio St.3d 57, 2006-Ohio-160, ¶ 39. However, while appellate review includes the responsibility to consider the credibility of witnesses and weight given to the evidence, "these issues are primarily matters for the trier of fact to decide since the trier of fact is in the best position to judge the credibility of the witnesses and the weight to be given the evidence." *State v. Mick*, 12th Dist. No. CA2011-08-017, 2012-Ohio-1598, ¶ 17. Consequently, an appellate court will overturn a conviction due to the manifest weight of the evidence only in extraordinary circumstances to correct a manifest miscarriage of justice,

and only when the evidence presented at trial weighs heavily in favor acquittal. *State v. Thompkins*, 78 Ohio St.3d 380, 387, 1997-Ohio-52.

{¶ 53} Blake was charged with murder, in violation of R.C. 2903.02(A), which states: "No person shall purposely cause the death of another." The state presented testimony of two eyewitnesses, Biana Calaoun and Makisha Conley. Both women testified that Blake shot Moton three times that night. Brooke Kinkaid, testified that on January 31, 2011 she told police she overheard Blake say that he shot Moton "in the temple, the side of the face, and shot him several times." The autopsy performed by Dr. Harsharger corroborated these details. He explained that Moton had been shot in the temple at close range, about six to eight inches to two feet away, and above the right ear, and in the upper back of the neck on the right side.

{¶ 54} The state also offered text messages from a cellular telephone belonging to Blake. Detective Bush and Albert Givens identified the phone number as belonging to Blake. Detective Bush also testified as to the content of these messages. Some of these text messages included references to Blake by his given name, and his nickname, "Face." Many of the other text messages provided insight into what happened the night of the shooting. Just after midnight on January 1, 2011, there is a text that states "on my way to tha [sic] K". Shortly thereafter, a text is sent from this same telephone number which states: "Ok ollie and third actin scared so we grabbing some more bullets [sic]."[4] At approximately 2:15 a.m., shortly after the shooting, there is another outgoing text that states, "Call me asap real shit life or death [sic]." A few hours later, there are text messages explaining the need "to lay low" and "jus getting seen by a couple cameras to cover my tracks [sic]." In the afternoon of January 1st, there is a text message sent which states: "Call an see if I got a warrant [sic]."

4. Detective Bush testified that "30" was the nickname of Greg Kennedy, a BSG gang member.

The state also presented evidence that Blake attempted to cover up the crime. On January 2, 2011, two text messages were sent from the telephone connected to Blake which stated: "Somebody started shootin and we all ran nobody saw shit tell erybody same story flat out [sic]." There were also several messages sent from the telephone that asked people to delete any messages and any pictures of "dem [sic] guns." Finally, there is a text sent out that simply reads "Omerta." Detective Bush testified that "Omerta" means a code of silence, especially when talking to the police.

{¶ 55} Blake argues that the testimony was tainted by contradiction and bribes such that the weight of the evidence does not support his conviction. Although there was testimony that Calaloun and Conley both received money from the victim's mother, both women testified that this money did not change or impact their testimony. Furthermore, as mentioned above, the evidence of payment by Mrs. Moton goes to credibility, and the jury was in the best position to judge the credibility of these witnesses. Based on the overwhelming evidence against Blake, we simply cannot say the jury clearly lost its way so as to create a manifest miscarriage of justice requiring his murder conviction to be reversed.

{¶ 56} Blake was also charged with having weapons while under disability, in violation of R.C. 2923.13(A)(3). R.C. 2923.13(A)(3) states that no person shall knowingly acquire, have, carry, or use any firearm, if the person "has been convicted of any felony offense involving the illegal possession * * * [of] any drug of abuse." At trial, the jury heard testimony regarding Blake's prior convictions for possession of cocaine and attempted possession of cocaine. Furthermore, the state offered as exhibits certified copies of the judgment of conviction for both offenses. There was also testimony by two eyewitnesses that they saw Blake with a gun and saw him use it when he shot Moton. The state provided substantial evidence upon which the jury could have reasonably found Blake guilty of having a weapon while under disability.

{¶ 57} Accordingly, we find Blake's conviction for murder and having weapons under a disability were not against the manifest weight of the evidence. As Blake's convictions were not against the manifest weight of the evidence, we also necessarily conclude that the conviction was supported by sufficient evidence. Blake's fourth and final assignment of error is overruled.

{¶ 58} Judgment affirmed.

POWELL, P.J., and HUTZEL, J., concur.