[Cite as *State v. Glenn*, 2009-Ohio-6549.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

BUTLER COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NO. CA2009-01-008
	:	O P I N I O N
- vs -		12/14/2009
	:	
WILLIAM A. GLENN,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
Case No. CR2008-06-1056

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Brian K. Harrison, P.O. Box 80, Monroe, OH 45050, for defendant-appellant

YOUNG, P.J.

{¶1} Defendant-appellant, William A. Glenn appeals his conviction in the Butler County Court of Common Pleas for aggravated robbery with a gun specification. We affirm appellant's conviction.

{¶2} Late in the evening of May 29, 2008, Lauren Truman and Nicole Hahn were entertaining Darren Rinfrow in Truman's Fairfield home. At approximately 2:00

a.m. on May 30, 2008, two masked African-American men dressed in black came into Truman's home with weapons and demanded money from Rinfrow. Truman ran upstairs to call the police, Hahn ran out of the house and Rinfrow gave the intruders $350 in cash. After the police arrived on the scene, they took statements from Truman, Hahn and Rinfrow regarding the theft. Hahn's initial statement did not provide the police with any information regarding the intruders' identities.

{¶3} The police subpoenaed Hahn's cellular telephone records and found a series of text messages between Hahn, Marcus Morris and appellant.[1] Upon being confronted with her texts, Hahn implicated Morris and appellant in the robbery. The police obtained Morris' and appellant's cellular telephone records, and search warrants for their homes. After executing the search warrant on Morris' home, the police found two weapons, which matched the description of the intruders' weapons, and a large sum of cash. Both Morris and appellant were indicted for aggravated robbery in violation of R.C. 2911.01(A)(1) with gun specifications pursuant to R.C. 2941.145.[2]

{¶4} During the three-day jury trial, Hahn testified that she texted Morris, who she explained was with appellant, "[b]ra I got a lick for you right now." Hahn translated this text as meaning that she had "someone over there with some drugs and money that we needed some guys to get." Hahn indicated in her next texts to Morris that Rinfrow had money or drugs and that he should be armed. Approximately 17 minutes later, Hahn texted appellant to "[c]ome in" and "[h]urry up." Appellant

1. Although the cellular number was registered to Hahn's grandmother, Susan Knodel, Hahn testified that she used the cellular phone/number associated with the account.

2. Hahn was also indicted for complicity to the aggravated robbery, after she testified before the grand jury that she knew about the robbery.

texted Hahn "[y]up 2min" and "[w]ere he at in da house." Hahn replied to appellant via text, "[o]n the couch to the right soon as you walk in hurr."

{¶5} Although, Hahn testified that she could not see the intruder's faces because they were masked, she was able to identify them as Morris and appellant based on "their body structure and how they sound[ed] and look[ed]." Hahn also identified the weapons seized at Morris' home as belonging to the persons who robbed Rinfrow. Lastly, Hahn testified that she received $25 from both Morris and appellant, ostensibly for her part in the robbery; she stated "[t]hey [both] said that was easy. Let's do that again…"

{¶6} The jury also heard testimony from Rinfrow, who identified the intruders as African-American males, and stated the weapons sized from Morris' home appeared to be consistent with the weapons used during the robbery. In addition to testimony from several police officers and investigators and appellant's mother, a Verizon representative and a Cincinnati Bell Telephone representative testified about and presented records of the parties' cellular telephone numbers and texts. The jury found appellant guilty of aggravated robbery with a gun specification. The trial court sentenced appellant to five years for the robbery and three years for the gun specification, to be served consecutively. Appellant filed a timely appeal raising three assignments of error.

{¶7} Assignment of Error No. 1:

{¶8} "THE FAILURE OF THE INDICTMENT FOR AGGRAVATED ROBBERY UNDER [R.C.]2911.01(A)(1) TO INCLUDE A MENS REA ELEMENT IS STRUCTURAL ERROR THAT REQUIRES REVERSAL OF APPELLANT'S CONVICTION."

{¶9} In his first assignment of error, appellant contends that his indictment for aggravated robbery was defective and constituted structural error, because it failed to include a mens rea element. We find no merit to this argument.

{¶10} Recently, in *State v. Lester,* Slip Opinion No. 2009-Ohio-4225, the Supreme Court was faced with an identical argument. The *Lester* court stated that the General Assembly, by not specifying a mens in R.C. 2911.01(A)(1), intended to impose strict liability for the "element of displaying, brandishing, indicating possession of, or using a deadly weapon." Id. at ¶32. The court then specifically held that "the state is not required to charge a mens rea for this element of the crime of aggravated robbery under R.C. 2911.01(A)(1)." Id. at ¶33. Therefore, pursuant to *Lester*, the state was not required to include a mens rea in appellant's indictment for aggravated robbery pursuant to R.C. 2911.01(A)(1). Appellant's first assignment of error is hereby overruled.

{¶11} Assignment of Error No. 2:

{¶12} "THE TRIAL COURT ABUSED ITS DISCRETION IN ADMITTING HEARSAY DOCUMENTS PREJUDICIAL TO APPELLANT."

{¶13} In his second assignment of error, appellant argues the trial court erred in admitting Hahn's cellular telephone records, which included texts from the cellular telephone connected to appellant. We disagree.

{¶14} In general, the admission of relevant evidence lies within the sound discretion of the trial court. *State v. Sage* (1987), 31 Ohio St.3d 173, paragraph two of the syllabus. "In order for appellant to succeed on this proposition, he must show that the trial court abused its discretion in the admission * * *and that the appellant has been materially prejudiced thereby." *State v. Martin* (1985), 19 Ohio St.3d 122,

129. An abuse of discretion is more than just an error of law or judgment; it implies the trial court's decision in admitting the evidence was unreasonable, arbitrary or unconscionable. See *State v. Hancock,* 108 Ohio St.3d 57, 2006-Ohio-160, ¶129-30.

{¶15} It appears from the record that the trial court admitted Hahn's cellular telephone records pursuant to the business records exception to the hearsay rule. Appellant argues the trial court should not have admitted the records because they were hearsay, and did not fall under an exception to the hearsay rule. Specifically, appellant challenges whether the documents were properly authenticated, and whether they were reliable. Because appellant maintains the records were improperly admitted, he argues he was prejudiced by their admission.

{¶16} "Hearsay is generally inadmissible, unless it falls within the scope of an exception within the Rules of Evidence." *State v. Sims*, Butler App. No. CA2007-11-300, 2009-Ohio-550, ¶12, citing *State v. DeMarco* (1987), 31 Ohio St.3d 191, 195; Evid.R. 802. One such exception is the "records of regular conducted activity," more commonly known as the business records exception. Evid.R. 803(6). See, also, R.C. 2317.40. This court has found, "[a] telephone record or other such document can often fall within the business record exception provided under Evid.R. 803(6)." *Moore v. Vandemark Co, Inc.*, Clermont App. No. CA2003-07-063, 2004-Ohio-4313, ¶16, citing *State v. Knox* (1984), 18 Ohio App.3d 36, 37. See, also, *State v. Hirtzinger* (1997), 124 Ohio App.3d 40, 49.

{¶17} "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 (2007) 600, Section 803.73. "Even after these elements are established, however, a business record may be excluded from evidence if 'the source of information or the method or circumstances of preparation indicate lack of trustworthiness.'" *Davis* at ¶171, quoting Evid.R. 803(6).

{¶18} Before application of Evid.R. 803(6), and prior to admission of a business record, the record must be properly identified or authenticated, "by evidence sufficient to support a finding that the matter in question is what its proponent claims." Evid.R. 901(A). See, also, *State v. Bell*, Clermont App. No. CA2008-05-044, 2009-Ohio-2335, ¶17; *Hirtzinger* at 49. "The provisions of Evid.R. 901(A) require only that a proponent of a document produce "evidence *sufficient to support a finding* that the matter in question" is what the proponent claims it to be. (Emphasis sic.) *State v. Easter* (1991), 75 Ohio App.3d 22, 25. "This low threshold standard does not require *conclusive* proof of authenticity, but only sufficient foundational evidence for the trier of fact to conclude that the document is what its proponent claims it to be." (Emphasis sic.) Id., citing 1 Weissenberger, Ohio Evidence (1991) 4-5, Section 901.2; Giannelli, Ohio Evidence Manual (1990) 6, Section 901.01.

{¶19} In order to properly authenticate business records, a witness must "testify as to the regularity and reliability of the business activity involved in the creation of the record." *Hirtzinger* at 49. Firsthand knowledge of the transaction is not required by the witness providing the foundation; however "'it must be

demonstrated that the witness is sufficiently familiar with the operation of the business and with the circumstances of the record's preparation, maintenance and retrieval, 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 Rule 803(6).'" *State v. Vrona* (1988), 47 Ohio App.3d 145, 148, quoting 1 Weissenberger's Ohio Evidence (1985) 75-76 Section 803.79. See, also, *Moore* at ¶18.

{¶20} With these principles in mind, we now turn to the record to determine whether Hahn's cellular telephone records were properly admitted under the business records exception to the hearsay rule; and whether those records were properly authenticated. In support of admission of the records, the state presented the testimony of Gerard Foltz, a Safety and Security manager for Cincinnati Bell Telephone Company (CBT). Foltz testified that CBT provided the Fairfield Police Department with text message information from Hahn's cellular telephone. Although Foltz did not check every record, he testified that the state's copy appeared to be the same as the copy he brought with him to court to show the documents were consistent. Foltz stated he has access to the records as a security manager, and that "the records are kept in the normal course of business." Foltz testified that Hahn's cellular telephone records contained both outgoing and incoming text messages which showed the number from whence the text originated and its destination. Although Foltz acknowledged that messages longer than 50 spaces would be missing and messages containing 160 spaces would appear "jumbled;" he also testified that most of the messages appeared to be intact. Finally, the testimony by Foltz also established that the records were prepared on May 30, 2008.

{¶21} Unlike the situation present in *Hirtzinger* and *Moore*, the state presented testimony of a CBT representative, who provided an adequate foundation for the record; consistent with the requirements of both Evid.R. 901(A) and 803(6).[3] In addition, because Foltz testified that Hahn's cellular telephone records were recorded during regularly conducted activity, to which he had access, and they were recorded near the date of the robbery; the records were properly admitted by the trial court under the business records exception to the hearsay rule. Because the trial court did not abuse its discretion in admitting Hahn's cellular telephone records, appellant's second assignment of error is overruled.

{¶22} Assignment of Error No. 3:

{¶23} "APPELLANT'S CONVICTION WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

{¶24} In appellant's final assignment of error, he maintains that the jury's guilty verdict is against the manifest weight of the evidence. We do not agree.

{¶25} "An appellate court may only reverse a jury verdict as against the manifest weight of the evidence where there is a unanimous disagreement with the verdict of the jury." *State v. Harry*, Butler App. No. CA2008-01-013, 2008-Ohio-6380, ¶45, citing *State v. Gibbs* (1999), 134 Ohio App.3d 247, 255-56. "Under the manifest weight of the evidence standard, a reviewing court must examine the entire record, weigh all of the evidence and reasonable inferences, consider the credibility of witnesses and determine 'whether in resolving conflicts in the evidence, the jury

3. In both *Hirtzinger* and *Moore* there were attempts to authenticate cellular telephone records via the testimony of the customer, rather than a cellular telephone representative. *Hirtzinger* at 49; *Moore* at ¶18. The appellate court, in both instances, found that the records were not properly authenticated. *Hirtzinger* at 50; *Moore* at ¶18.

clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. The discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction.'" *Harry* at ¶45, quoting *State v. Martin* (1993), 20 Ohio App.3d 172, 175. See, also, *Gibbs* at 256; *State v. Thompkins,* 78 Ohio St.3d 380, 387, 1997-Ohio-52.

{¶26} Appellant argues that because the intruders' faces were completely covered, there was no way to identify appellant as one of the persons who committed the robbery. In addition, appellant argues that the state's key witness, Hahn, provided unreliable testimony since her statements to the police and testimony before the grand jury and at trial were inconsistent and suspect.

{¶27} "In order to warrant a conviction, the evidence presented must establish beyond a reasonable doubt the identity of the accused as the person who actually committed the crime." *State v. Harris*, Butler App. No. CA2007-11-280, 2008-Ohio-4504, ¶12, citing *State v. Lawwill,* Butler App. CA2007-01-014, 2008-Ohio-3592, ¶11. "The identity of the accused may be established by direct or circumstantial evidence." Id.

{¶28} "[T]he weight to be given the evidence and the credibility of the witnesses are primarily for the trier of the facts." *State v. DeHass* (1967), 10 Ohio St.2d 230, paragraph one of the syllabus. "A defendant is not entitled to reversal of a conviction on manifest weight of the evidence grounds merely because inconsistent testimony was heard at trial." *State v. Day*, Franklin App. No. 04AP-332, 2005-Ohio-359, ¶17, citing *State v. Raver,* Franklin App. No. 02AP-604, 2003-Ohio-958, ¶21. Moreover, because the jury is the "sole judge of the weight of the evidence and the

credibility of witnesses * * * [i]t may believe or disbelieve any witness or accept part of what a witness says and reject the rest." *State v. Antill* (1964), 176 Ohio St. 61, 67.

{¶29} In this case, Rinfrow was unable to identify appellant as one of the persons who robbed him, because the perpetrators' features were masked; although Rinfrow did identify both intruders as African-American males. Hahn also testified that the masked intruders were African-America males; however she further stated that she could identify appellant based on his voice and build.[4] Furthermore, based on the text messages that went back and forth between Hahn and appellant immediately preceding the robbery – in which Hahn urged appellant to hurry and told appellant, upon his query, where Rinfrow was located in the apartment – it was reasonable for the jury to infer that appellant was one of the masked intruders.

{¶30} It is clear from the record, that Hahn's testimony was instrumental in the prosecution's case against appellant. It is also equally clear, that Hahn's statements under oath and her testimony before the grand jury and at trial have some inconsistencies. However, it is probable that Hahn's inconsistent statements were related to her attempts to conceal her involvement in the robbery. Nevertheless, other than her first statement to the police on the morning of the robbery, Hahn's story has been consistent regarding appellant's involvement in the robbery and his identity as one of the masked intruders.

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4. "[MR. KASH – Assistant Prosecuting Attorney]: Going back to the morning of the 30th when these two guys ran in, were you able to identify them as being Will Glenn and Marcus Morris as they came in?

"[MS. HAHN]: Based on what I know them as, yes.

"[MR. KASH]: What do you mean, what you know them as?

"[MS. HAHN]: I can tell their body structure and how they sound and look."

{¶31} It was up to the jury to weigh Hahn's credibility in light of the fact that she had prevaricated more than once while under oath. Indeed, as the Supreme Court stated in *Manson v. Brathwaite* (1977) 432 U.S. 98, 116, 97 S.Ct. 2243, "[j]uries are not so susceptible that they cannot measure intelligently the weight of identification testimony that has some questionable feature." Moreover, during their deliberations, the jury had copies of Hahn's two statements to the police, and her grand jury testimony; so the jury was well aware of what Hahn had said prior to her testimony at trial. Finally, we note that the trial court gave a special jury instruction regarding Hahn's testimony as an accomplice, and cautioned the jury on the credibility and weight to be given to such evidence. See *State v. Mitchell*, Stark App. No. 2008CA00290, 2009-Ohio-5006, ¶34-38.

{¶32} In conclusion, after thoroughly reviewing the record, weighing the evidence, and considering the credibility of the witnesses; we cannot say that the jury clearly lost its way or that it created a miscarriage of justice in convicting appellant of aggravated robbery.[5] Appellant's third assignment of error is overruled.

{¶33} Judgment affirmed.

RINGLAND and HENDRICKSON, JJ., concur.

5. Although appellant's argument, and our response, was focused on the issue of identity, we note that the manifest weight of the evidence also established the remaining elements of the crimes for which appellant was convicted.