DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

ALVIN C. GAYLE,
Appellant,

v.

STATE OF FLORIDA,
Appellee.

No. 4D16-1975

[April 19, 2017]

Appeal from the Circuit Court for the Fifteenth Judicial Circuit, Palm Beach County; Glenn Kelley, Judge; L.T. Case No. 502015CF005571A.

W. Grey Tesh, West Palm Beach, for appellant.

Pamela Jo Bondi, Attorney General, Tallahassee, and Melynda L. Melear, Assistant Attorney General, West Palm Beach, for appellee.

FORST, J.

Appellant Alvin Gayle raises three arguments on appeal regarding his conviction of and sentence for the offense of lewd or lascivious battery. We affirm the trial court on all three issues. Below, we explain our holding regarding Appellant's argument related to the hearsay nature of an exhibit introduced. We affirm on the other two issues without comment, but specifically note that our holding on Appellant's ineffective assistance claim is based on the lack of a definitively clear record at this stage of the proceeding. *See Mansfield v. State*, 758 So. 2d 636, 642 (Fla. 2000). Our affirmance on this issue is without prejudice to Appellant filing a motion under Florida Rule of Criminal Procedure 3.850 and providing evidence in the trial court to support his claim.

Background

Appellant met the victim at a party thrown by Appellant's niece, the victim's friend at the time. When the offenses allegedly occurred, the victim was fourteen years old and Appellant was thirty-nine. Following the party at which they met, Appellant text-messaged and called the victim often. Eventually, per the State, their relationship grew sexual.

The victim testified that she and Appellant engaged in sexual relations on multiple occasions. On one particular day, Appellant picked the victim up from school and brought her to her house. After the victim locked the door, Appellant and the victim had sex. The victim's sister arrived home during this time. She observed Appellant come out of the victim's bedroom (the victim was in the living room). Appellant claimed to have been in the bathroom. Appellant then left in a hurry.

The victim went to the police station and had a sexual battery evidence kit assembled. At the station, the victim's phone had an "extraction" performed on it. The data from that extraction was assembled into an "Extraction Report," which contained a transcript of text messages between Appellant and the victim.

Appellant was charged with lewd or lascivious battery. His defense was that the State failed to prove that he ever had sex with the victim. At trial, the Extraction Report was admitted into evidence with minimal predicate testimony, over Appellant's hearsay objection. The Report contained text messages dating back to two months before Appellant was caught by the victim's sister, including one in which Appellant directly stated he was having sex with the victim. This message was highlighted by the State during closing argument, with the State asking the jury, "[w]hat's more clearer [sic] than that?"

Appellant was found guilty of one count of lewd or lascivious battery and received a minimum mandatory sentence of twenty-five years in prison as a dangerous sexual felony offender. This appeal follows.

Analysis

"[T]he question of whether evidence falls within the statutory definition of hearsay is a matter of law, subject to *de novo* review." *Burkey v. State*, 922 So. 2d 1033, 1035 (Fla. 4th DCA 2006).

"'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." § 90.801(1)(c), Fla. Stat. (2015). "Except as provided by statute, hearsay evidence is inadmissible." § 90.802, Fla. Stat. (2015).

Appellant argues that the Extraction Report was hearsay and that the State failed to lay the necessary foundation for its admission under the business records exception. *See* § 90.803(6), Fla. Stat. (2015); *Yisrael v. State*, 993 So. 2d 952, 956 (Fla. 2008). The State responds that the Report

was not admitted to prove the truth of the matter asserted, making it not hearsay at all, and further that the statements were Appellant's own, placing them under the party admission exception to hearsay.[1] *See* § 90.803(18), Fla. Stat. (2015).

On May 19, 2015, Appellant allegedly sent a text message to the victim confirming that he was in a sexual relationship with her. This was clearly "a statement, other than one made by the declarant while testifying." § 90.801(1)(c). The State, however, argues that this message, as well as the others, was not introduced into evidence with the intent of proving the truth of the matter asserted. *See Eugene v. State*, 53 So. 3d 1104, 1109 (Fla. 4th DCA 2011) (holding that emails were not hearsay because they were not used to prove the truth of the assertions therein). But unlike in *Eugene*, the State's closing argument in this case proves otherwise. The State used this statement as part of its attempt to prove that Appellant was having sex with the victim, and referred to the message as the clearest evidence of the very thing the text asserted. This text message was hearsay.

Although normally inadmissible, hearsay may be admitted when a statutory exception is met. § 90.802-804. The State relies here on the exception found in section 90.803(18)(a), which allows the admission of "[a] party's own statement" for use against that party. Appellant argues that he did not admit at trial that the text message was sent by him, and therefore that it was not an admission. The State, however, introduced evidence, through the victim's testimony, that Appellant was the person who sent the text. Appellant's argument that he did not send the text may have been appropriate in an attempt to convince the jury the message should not be given much weight, but the victim's testimony that he in fact sent the message was sufficient to allow its admission under section 90.803(18). *See Gammon v. State*, 778 So. 2d 390, 392 (Fla. 2d DCA 2001) (affirming a revocation of probation based on the probationer's own statements which, at the hearing, he denied having made, on the basis that the admissions would have been admissible under section 90.803(18)).

Appellant's primary argument, however, is not whether his statement was admissible under section 90.803(18), but whether the State was required to establish the business records exception to hearsay in order to introduce the Extraction Report. *See* § 90.803(6), Fla. Stat. (2015). It

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[1] The State does not attempt to argue that it did lay the proper foundation for the business records exception to hearsay, and the transcript confirms that the required testimony for that exception was not elicited.

appears that Appellant is attempting to argue (although he does not explicitly state as much) that the Report was its own level of hearsay requiring a second exception. *See* § 90.805, Fla. Stat. (2015) (dealing with "[h]earsay within hearsay"); *Henderson v. State*, 135 So. 3d 472, 476-78 (Fla. 2d DCA 2014) (explaining the concept of double hearsay).

Per the State's witness at trial, the Extraction Report was generated through the following procedure:

> What we do is we basically extract the data from the memory on the phone. It could be a logical or physical extraction. And then the data is then parsed out and reconstructed to see what information was on the phone, which often times includes active and deleted data on the phone.

For hearsay purposes, a "statement" is "[a]n oral or written assertion" made by a "declarant." § 90.801(1)(a)-(c), Fla. Stat. (2015). A "declarant" is "a person who makes a statement." § 90.801(1)(b), Fla. Stat. (2015). The word "person" includes "individuals, children, firms, associations, joint adventures, partnerships, estates, trusts, business trusts, syndicates, fiduciaries, corporations, and all other groups or combinations," but does not include machines. § 1.01(3), Fla. Stat. (2015).

The text message at issue was a statement, as it was made by a person (Appellant). On the other hand, the Extraction Report was not a "statement" made by a "person"—it was created by a machine that extracted the messages from the victim's phone. It therefore was not hearsay and, thus, a second hearsay exception was not required. *See* Adam Wolfson, Note, *"Electronic Fingerprints": Doing Away with the Conception of Computer-Generated Records as Hearsay*, 104 MICH. L. REV. 151, 157-58 (2005) (noting that a minority of states "distinguish between computer-stored records and computer-generated records, and maintain that computer-generated records cannot be hearsay because they are 'not dependent upon the observations and reporting of a human declarant.'" (quoting *State v. Armstead*, 432 So. 2d 837, 836-40 (La. 1983))).

As described by the State's witness, the Report is much more akin to a photograph than it is to a written assertion by an individual or business. The Report shows the state of a part of the world at a given moment in time—the contents of the victim's cell phone—in the same way that a photograph provides a record of the visible light directly in front of the lens at a given time. Neither situation involves any interpretation or assertion. *See Symonette v. State*, 100 So. 3d 180, 183-84 (Fla. 4th DCA 2012) (holding that photographs of a phone were "genuinely what the State

claims—pictures," without suggesting that pictures were themselves a statement); *see also A.J.M. v. State*, 182 So. 3d 895, 896 (Fla. 4th DCA 2016) (after determining that the words on a sign outside a restaurant amounted to a non-hearsay verbal act, this Court affirmed the admission of a photograph of the sign without consideration of whether the photograph itself would be hearsay). Accordingly, we hold that the Extraction Report generated by the computer program in this case is not a "statement" made by a "declarant," and therefore is not hearsay.[2]

Our holding on this issue conforms to the decision of the Florida Supreme Court in *Jean-Phillipe v. State*, 123 So. 3d 1071 (Fla. 2013). In that case, the court affirmed the admission of "text messages downloaded from [a] phone by law enforcement officers." *Id.* at 1078. However, the main issue in *Jean-Phillipe* was the purpose of the introduction of the messages—whether it was to prove the truth of the matter asserted. *Id.* at 1080. The court held that most of the messages were not admitted for this purpose, and that those that were hearsay were subject to the party admission exception under section 90.803(18)(a). *Jean-Phillipe*, 123 So. 3d at 1080. Whether the issue of double-hearsay was argued at all, or whether the court simply dismissed that argument without discussion, is unclear, as is the exact form the downloaded messages took. We therefore do not rely solely upon *Jean-Phillipe* in reaching our holding today. Nonetheless, the court's conclusion that the text messages downloaded by law enforcement were not hearsay is supportive of our more detailed analysis.

Conclusion

Because the Extraction Report was not hearsay, and because the State established an exception to the hearsay that was Appellant's own statements, we affirm the trial court's admission of the Report. As noted above, we affirm without discussion the other issues presented in Appellant's appeal, though we do so without prejudice to Appellant raising a Rule 3.850 claim of ineffective assistance of counsel with respect to Appellant's rejection of a plea offered by the State.

Affirmed.

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[2] This holding should not be read as a comment on any challenge to the authenticity of a report similar to that generated in this case. Counsel here did not challenge the Report's authenticity by, for example, claiming that the Report was not an accurate representation of the data on the phone. We therefore only address the hearsay question and express no opinion on the merits of an authenticity challenge.

CIKLIN, C.J., concurs.
LEVINE, J., concurs specially with opinion.

LEVINE, J., concurring specially.

I concur in affirmance, but for different reasons. As such, I write separately to expound on those reasons.

I find that the trial court did not "clear[ly] abuse [its] discretion" in admitting the extraction report as nonhearsay evidence. *Jones v. State*, 963 So. 2d 180, 185 (Fla. 2007). The extraction report consisted of an exchange of text messages between appellant and the victim over a period of time. The state did not offer the extraction report to show the truth of the matter asserted within the text messages. Rather, the state offered the extraction report to establish a timeframe and show the existence of a relationship between appellant and the victim.

The state's reference to one of the text messages in closing argument for a nonhearsay purpose does not change the fact that the trial court properly admitted the extraction report as nonhearsay evidence. Moreover, appellant did not object to the state's reference to this particular text message during closing argument.[3] Assuming this issue is preserved, I agree that this text message was admissible under the hearsay exception for a statement by a party-opponent. *See* § 90.803(18)(a), Fla. Stat.

I find it unnecessary to consider whether the extraction report "was its own level of hearsay requiring a second exception" for two reasons. First, because the text messages comprising the extraction report were not hearsay, it follows then that the extraction report itself was not hearsay. *See State v. Espiritu*, 176 P.3d 885, 891 (Haw. 2008) (holding that the victim could testify about statements which were admissible under the hearsay exception for party admissions because "if evidence is hearsay admissible under an exception to the rule against hearsay, then testimony about such evidence is admissible"). Second, the majority acknowledges that it only "appears that Appellant is attempting to argue" the issue and that he did not "explicitly state as much." It is well-established that "it is not the function of the Court to rebrief an appeal. We basically work within the framework of the briefs although, admittedly, there are instances where errors are so glaring or fundamental that a court will adjudicate

[3] Thus, it is questionable whether any argument with respect to the hearsay nature of this text message is even preserved for review. *See Brooks v. State*, 762 So. 2d 879, 898 (Fla. 2000).

them on its own initiative in its original opinion." *Polyglycoat Corp. v. Hirsch Distribs., Inc.*, 442 So. 2d 958, 960 (Fla. 4th DCA 1983). This case does not present an instance of any error, no less "glaring or fundamental" error, necessitating deviation from the briefs.

Finally, while I agree in affirming appellant's ineffective assistance of counsel claim, I make no comment on the viability of any rule 3.850 motion.

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Not final until disposition of timely filed motion for rehearing.