**[Cite as *State v. Williams*, 2018-Ohio-4612.]**

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
**No. 106563**

**STATE OF OHIO**

PLAINTIFF-APPELLEE

vs.

**REGINALD D. WILLIAMS**

DEFENDANT-APPELLANT

**JUDGMENT:**
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-17-615670-A

**BEFORE:** E.T. Gallagher, J., McCormack, P.J., and Jones, J.

**RELEASED AND JOURNALIZED:** November 15, 2018

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EILEEN T. GALLAGHER, J.:

**{¶1}** Defendant-appellant, Reginald D. Williams, appeals from his convictions following a jury trial. He raises the following assignments of error for review:

> 1. The trial court erred when it admitted text messages to and from A.G. and Williams. The text messages were not properly authenticated.
>
> 2. The trial court erred when it admitted [s]tate's [e]xhibit [No.] 5, which were text messages to and from A.G. and parties who did not testify. These text messages were inadmissible hearsay.
>
> 3. The convictions were not supported by sufficient evidence.
>
> 4. The convictions were against the manifest weight of the evidence.

5. Williams was denied his right to the effective assistance of trial counsel as guaranteed to him by the Sixth Amendment to the U.S. Constitution and Article 1, Section 10, of the Ohio Constitution.

**{¶2}** After careful review of the record and relevant case law, we affirm Williams's convictions.

## I. Procedural and Factual History

**{¶3}** In June 2017, Williams was named in an eight-count indictment, charging him with two counts of trafficking in persons in violation of R.C. 2905.32(A)(2)(a); two counts of compelling prostitution in violation of R.C. 2907.21(A)(2)(a); single counts of commercial sexual depiction of a minor in violation of R.C. 2907.19(B); rape in violation of R.C. 2907.02(A)(2), with a sexually violent predator specification; unlawful sexual conduct with a minor in violation of R.C. 2907.04(A); and possession of criminal tools in violation of R.C. 2923.24(A), with a forfeiture specification. The matter proceeded to a jury trial, where the following relevant evidence was adduced.

**{¶4}** A.G. (d.o.b. July 20, 2000) testified that when she was 15 years old, her friend, C.H., introduced her to Williams. A.G. and C.H. were admitted prostitutes. A.G. testified that the purpose of her meeting with Williams was to develop a working relationship where Williams would facilitate hotel rooms "and stuff" for her and C.H. in exchange for a portion of the money paid to them for sex.

**{¶5}** A.G. stated that she primarily communicated with Williams through text messaging, but had met him in person three or four times. On one occasion, A.G. went to Williams's residence. She testified that Williams took provocative photographs of her while she laid on a bed in her underwear. Williams used the photographs in an escort advertisement on a website

called “backpage.com.” A.G. testified that Williams used her email address and password to post the advertisement on backpage.com. The advertisement included the following description:

> Hi, I’m Bri. I’m 19, five feet, nice boobs, pretty smile, nice body. Will do anything depending on how much you want to spend. Don’t be cheap. No black men under 35. Call or text now. Unrushed, clean, safe and discreet. Ask about my “two girls” special.

**{¶6}** Once Williams posted the photographs of A.G. on the website, there came a time where A.G. went to a hotel with Williams to “meet with some people” to “have sex with basically.” On March 19, 2016, Williams checked into the America’s Best Value Inn and Suites in Independence, Ohio. Williams was alone and used his state identification to check into the hotel. A.G. testified that after Williams checked into the hotel, he brought her inside through a side door and took her to his room. He then went back downstairs for a period of time. A.G. testified that she smoked marijuana and fell asleep while she was waiting in the room. After a period of time, she was awakened by Williams calling her on her cell phone because there was “a john at the door waiting.” When A.G. opened her hotel-room door, there was a man waiting for her. A.G. testified that the man came into the room, looked at her, and quickly left without saying a word. A.G. stated that Williams was mad at her for falling asleep and demanded that she pay him back for the cost of the hotel room because they did not make any money.

**{¶7}** Williams and A.G. then left the hotel together and went to Williams’s vehicle. A.G. testified that once they got inside Williams’s vehicle, “he was acting like he didn’t want to take me home, so I got out, and I went and sat in the lobby” to wait for a ride home.

**{¶8}** Janita Hughes was employed at America’s Best Value Inn and Suites as a front desk clerk. Hughes testified that on March 20, 2016, an underage female entered the lobby at

approximately 3:30 a.m. The female, who was later identified as A.G., told Hughes that she was staying in room 317. When Hughes confirmed that there was no guest staying in room 317, she began calling the police when Officer Shane Bates of the city of Independence Police Department walked into the hotel lobby.

**{¶9}** Officer Bates testified that he was patrolling the parking lot of the hotel when he observed an unaccompanied teenager in the hotel lobby. Officer Bates was suspicious and went into the hotel to determine if the teenager was with a parent. During the initial conversation, A.G. lied and told Officer Bates that she was with her family and was a guest at the hotel. However, after further questioning, A.G. admitted that Williams had brought her to the hotel. Based on what A.G. stated, Officer Bates searched the adult section of backpage.com and confirmed that A.G.'s advertisement was active. Ultimately, Officer Bates determined that it was necessary to transport A.G. to the police station. At the police station, A.G. gave a brief statement in the presence of her mother. Thereafter, A.G. was taken to the hospital to determine whether a sexual assault had occurred. However, A.G. did not undergo an examination.

**{¶10}** At a later date, Officer Bates had the opportunity to interview A.G. outside the presence of her mother. Based on the information provided during the interview, the police obtained a warrant to search Williams's residence for electronic devices that may have been used to place the advertisement on backpage.com. In addition, the police were looking for the blanket pictured in A.G.'s advertisement photographs. Upon executing the warrant, the police recovered "multiple cell phones, a laptop, and the blanket in question."

**{¶11}** In the course of the police investigation, data was extracted from A.G.'s cell phone using a program called Cellebrite. The data was compiled into a report, marked state's exhibit No. 5. At trial, A.G. acknowledged that the phone number that was receiving and sending the

text messages in state's exhibit No. 5 was her phone number at the time she went to the hotel with Williams in March 2016. A.G. testified that she saved Williams's phone number in her phone and designated his contact name as "Plug."

**{¶12}** During A.G.'s direct examination, the state thoroughly questioned A.G. about relevant text messages contained in state's exhibit No. 5. On March 14, 2016, Williams texted A.G. while she was in school. The text read: "be ready after you get out with a sexy bra and panties." On March 15, 2016, Williams texted A.G., "We gon trap from 3-9." Williams explained the financial arrangement to A.G. as follows:

> I'm gonna take you everywhere you gotta go, Boo. Rather it be — to be a lick or just going home. I get a third of what you make. So 150 a hour lick, you keep a hundred. I get 50.

**{¶13}** A.G. testified that a "lick" referred to a man who would have sex with her in exchange for money. Later that afternoon, Williams texted A.G., "you got on sexy panties and a bra, or do I have to go buy you some for our photo shoot?" He further stated, "[a]fter this little photo shoot I'll take you to the lick and then take you home." A.G. testified that after she left school on March 15, 2016, she was transported by Williams to Superior Avenue in Cleveland, Ohio. A.G. testified that she was dropped off and met with a man who made contact through backpage.com. After Williams dropped A.G. off, he texted her, "[c]all me if you need anything." A.G. stated that she "was supposed to have sex with [the man]" but decided not to go through with it because she "wasn't up to it."

**{¶14}** At 8:58 p.m. on March 15, 2016, A.G. received a text message from Williams stating that he wanted to add photographs of A.G. with C.H. to the backpage.com advertisement to promote a "two-girl special." Williams stated to A.G. that after he got her set up on the

website, the phone was not going to stop ringing. A.G. testified that she interpreted Williams's text message as stating that he believed a lot of men would be responding to the advertisement.

**{¶15}** On March 16, 2016, Williams texted A.G. "[l]ittle mama, we gon have licks all day once you get wit me and post the ad." A.G. responded, stating "[b]ut I got to be in by 4:30, 5, so you need to at least try to set one up." A.G. stated that "set one up" meant set up a date with a man. He responded, "let me see what I can do." Later that afternoon, Williams sent A.G. a text message emphasizing his desire to post an advertisement, stating:

> You playing. An ad only take a minute to set up. And I gotta get with you to do it 'cause I ain't putting my email on shit. You gotta do this how I know it works best or it ain't gonna work, baby girl.

**{¶16}** A.G. testified that she then provided Williams with her email address and password to use on the backpage.com advertisement. Later that afternoon, A.G. texted Williams, "Did you put the ad up? Do you got any?" Williams responded that he was leaving work and "will do it now." Williams later stated to A.G. that he was posting photographs on the website. He indicated that he wanted to post more photographs and videos on the advertisement but A.G. was forcing him to move too fast.

**{¶17}** On March 19, 2016, Williams sent A.G. a text message stating that he had three "moves" set up for A.G. for a total of $275. A.G. stated that a "move" referred to a man having sex with her for money. During the text message conversation, A.G. and Williams discussed the fact that C.H. would not be joining them at the hotel because she was menstruating. A.G. expressed that she was aggravated, while Williams stated, "more money for us." At 9:07 p.m., Williams texted A.G., "What up girl. We on a all night flight." A.G. testified that she interpreted the text message as a statement that she was going "to be out all night * * * doing moves, like, at the hotel."

**{¶18}** During her cross-examination, A.G. conceded that she had personally placed an advertisement on backpage.com and had engaged in sex for money before she met Williams. She further admitted that she never paid Williams money because she never went through with having sex for hire during their brief relationship.

**{¶19}** C.H. (d.o.b. March 11, 2001) testified that she met Williams when she was 13 years old. C.H. stated that Williams was dating her close friend and that she lived in the home where her friend and Williams were living. During that period of time, Williams began to have vaginal intercourse with C.H. C.H. testified that she and Williams had sex "often." C.H. testified that she initially did not want to have sex with him because she viewed him as a brother-figure. Over time, however, C.H. developed romantic feelings for Williams.

**{¶20}** At some point, C.H. lost contact with Williams and began engaging in prostitution by posting an advertisement on backpage.com. In December 2015, Williams came back into C.H.'s life. C.H. testified that she had a conversation with Williams about her prostitution and that in March 2016, she and Williams began working together. She explained that Williams would drive her to certain locations to engage in sexual acts for money. In exchange, Williams would keep a majority of the money C.H. earned. C.H. testified that Williams would allow her to keep $30 per day, although Williams would charge each man $200.

**{¶21}** During this relationship, Williams asked C.H. if she had any friends that would be interested in "sell[ing] their body basically." Thereafter, C.H. introduced A.G. to Williams and showed her how to set up a backpage.com account. C.H. testified that she was not present when the photographs used in A.G.'s backpage.com advertisement were taken. However, she stated that she observed the photographs on Williams's personal cell phone. C.H. testified that there was a time she was supposed to go with A.G. and Williams to a hotel to "do tricks," but that she

was unable to attend because she was menstruating. On the date A.G. went with Williams to the hotel, C.H. separately spoke with each of them on the phone on different occasions. She stated that they both seemed "irritable."

**{¶22}** In the midst of trial, the state amended the count of rape to the lesser-included offense of unlawful sexual conduct with a minor. Following deliberations, the jury returned a verdict of guilty on all counts. At sentencing, the trial court imposed an aggregate 30-year term of imprisonment.

**{¶23}** Williams now brings this timely appeal.

## II. Law and Analysis

### A. Admissibility of Text Messages

#### 1. Authentication of Text Messages Sent Between Williams and A.G.

**{¶24}** In his first assignment of error, Williams argues the trial court committed reversible error by admitting testimony regarding the contents of text message conversations that A.G. had with Williams and others. Williams concedes that the text messages sent from him to A.G. are admissible as a statement of a party opponent. However, he argues that the text messages were not properly authenticated pursuant to Evid.R. 901(A).

**{¶25}** Evidentiary rulings made at trial rest within the sound discretion of the trial court. *State v. Lundy*, 41 Ohio App.3d 163, 535 N.E.2d 664 (1st Dist.1987); *State v. Graham*, 58 Ohio St.2d 350, 390 N.E.2d 805 (1979). The term abuse of discretion implies that the court's attitude is unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

**{¶26}** Evid.R. 901 governs the authentication of demonstrative evidence such as recordings of telephone conversations and text messages. The threshold for admission is quite low, as the proponent need only submit "evidence sufficient to support a finding that the matter in question is what its proponent claims." Evid.R. 901(A). This means that "the proponent must present foundational evidence that is sufficient to constitute a rational basis for a jury to decide that the primary evidence is what its proponent claims it to be." *State v. Payton*, 4th Dist. Ross No. 01CA2606, 2002 Ohio App. LEXIS 496, 8 (Jan. 25, 2002). A proponent may demonstrate genuineness or authenticity through direct or circumstantial evidence. *State v. Williams*, 64 Ohio App.2d 271, 274, 413 N.E.2d 1212 (8th Dist.1979). Evid.R. 901(B) provides examples of numerous ways that the authentication requirement may be satisfied, the most common of which is testimony that a matter is what it is claimed to be under Evid.R. 901(B)(1).

**{¶27}** "'[I]n most cases involving electronic print media, i.e., texts, instant messaging, and e-mails, the photographs taken of the print media or the printouts of those conversations are authenticated, introduced, and received into evidence through the testimony of the recipient of the messages.'" *State v. Irwin*, 2d Dist. Montgomery No. 26224, 2015-Ohio-195, ¶ 21, quoting *State v. Roseberry*, 197 Ohio App.3d 256, 2011-Ohio-5921, 967 N.E.2d 233 ¶ 75 (8th Dist.). In *Roseberry*, this court noted that the state could have properly admitted text messages from the defendant through the victim's testimony, "because she was the recipient of the text messages, had personal knowledge of the content, and could [identify] the sender of the messages." *Roseberry*.

**{¶28}** After careful review of the record, we find the text message conversations between A.G. and Williams were properly authenticated by A.G.'s testimony at trial. Williams correctly notes that, in some instances, A.G. was unable to recall the precise context of certain text

messages. However, under the totality of the circumstances, we find A.G.'s testimony sufficiently demonstrated that the relevant text messages contained in the exhibit were what the proponent claimed them to be. In this case, A.G.'s testimony established that during the relevant time period, she often sent and received text messages from Williams. A.G. confirmed that the relevant text messages contained in state's exhibit No. 5 were between the phone number she had at the time and the phone number Williams provided her following his introductory text message. In addition, the prosecutor questioned A.G. about the nature of each relevant text message, and A.G. testified as to receiving and sending the texts and their purported meaning. *See State v. Lash*, 8th Dist. Cuyahoga No. 104725, 2018-Ohio-1385, ¶ 21; *see also State v. Jaros*, 6th Dist. Lucas No. L-10-1101, 2011-Ohio-5037, ¶ 21 (the victim's testimony identifying the text messages on her cellular phone as being sent from the defendant's email address, which she had frequently received emails from and was familiar with, was sufficient to authenticate the text messages under Evid.R. 901).

**{¶29}** Because the text messages were properly authenticated under Evid.R. 901(B)(1), we find no merit to Williams's assertion that testimony from a representative of A.G.'s cell phone carrier was required to authenticate the subject text messages sent between Williams and A.G. Moreover, it is clear from the record that the text messages at issue were not subpoenaed from a cell phone carrier. Rather, the contents of state's exhibit No. 5 were taken directly from A.G.'s cell phone and did not derive from a regularly kept business record. Accordingly, the hearsay exception in Evid.R. 803(6) and its authentication requirements do not apply to the text messages in this case. *See State v. Norris*, 2d Dist. Clark No. 2015-CA-22, 2016-Ohio-5729, ¶ 38, citing *State v. Wilson*, 5th Dist. Holmes No. 15CA015, 2015-Ohio-5588, ¶ 50-51 (finding that text messages recovered from the defendant's cell phone by a forensic specialist during the

criminal investigation were not business records because the text messages were not recovered from the cellular carrier, but from the phone itself).

**{¶30}** Based on the foregoing, we find the trial court did not abuse its discretion in admitting the text messages between A.G. and Williams into evidence, as the messages were properly authenticated.

### 2. Hearsay

**{¶31}** In his second assignment of error, Williams argues the trial court committed reversible error by admitting text message conversations that were between A.G. and individuals who did not testify at trial. As stated, Williams concedes that the text messages sent from him to A.G. are admissible as a statement of a party opponent. However, Williams broadly contends that text messages sent between A.G. and individuals who did not testify at trial constituted inadmissible hearsay.

**{¶32}** 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." Evid.R. 801(C). A statement can be a written assertion. Evid.R. 801(A). Statements made outside of the courtroom, offered at trial to prove the truth of what they assert, are generally inadmissible as "hearsay" unless an exception applies. Evid.R. 801(C); Evid.R. 802; *State v. DeMarco*, 31 Ohio St.3d 191, 195, 509 N.E.2d 1256 (1987).

**{¶33}** State's exhibit No. 5 contained all text messages A.G. sent and received from March 13, 2016, to March 20, 2016, including text messages sent to and from individuals who did not testify at trial. In this assigned error, Williams has failed to direct this court to portions of the record where text messages sent to or from individuals who did not testify at trial were

used by the state to support Williams's convictions. Nor does Williams identify the specific text message conversations he now challenges as being inadmissible hearsay. *See* App.R. 16.

**{¶34}** Nevertheless, our review of the exhibit indicates that many of the text messages include inconsequential conversations between A.G. and her friends or family members that were not relevant to the charges levied against Williams. To the extent the text message conversations with individuals who did not testify at trial constituted inadmissible hearsay and should have been redacted, we find the failure to do so did not affect the outcome of trial, and was therefore harmless.

**{¶35}** In this case, the testimony of A.G. and C.H., and the text message conversations between Williams and A.G. were material to the state's case. As stated, the text messages sent by Williams to A.G. are not hearsay because they are statements by a party opponent under Evid.R. 801(D)(2). In addition, we find the text messages sent by A.G. to Williams are not hearsay because they are statements that were not offered for the truth of the matter asserted, but rather to provide context to Williams's numerous text messages. *See Norris*, 2d Dist. Clark No. 2015-CA-22, 2016-Ohio-5729, ¶ 37.

**{¶36}** Based on the foregoing, we find the trial court did not abuse its discretion by admitting state's exhibit No. 5 into evidence. Williams's first and second assignments of error are overruled.

### B. Sufficiency of the Evidence

**{¶37}** In his third assignment of error, Williams argues his convictions were not supported by sufficient evidence.

**{¶38}** Sufficiency is a test of adequacy. Whether the evidence is legally sufficient to sustain a verdict is a question of law. *State v. Thompkins*, 78 Ohio St.3d 380, 386, 678 N.E.2d

541 (1997). When reviewing the sufficiency of the evidence to support a criminal conviction, an appellate court examines 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. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph two of the syllabus.

**1. Trafficking in Persons**

**{¶39}** Williams was convicted of two counts of trafficking in persons in violation of R.C. 2905.32(A)(2)(a). That statute provides, in relevant part:

> (A) No person shall knowingly recruit, lure, entice, isolate, harbor, transport, provide, obtain, or maintain, or knowingly attempt to recruit, lure, entice, isolate, harbor, transport, provide, obtain, or maintain, another person if any of the following applies:
>
> * * *
>
> (2) The other person is less than sixteen years of age * * *, and * * * the offender's knowing recruitment, luring, enticement, isolation, harboring, transportation, provision, obtaining, or maintenance of the other person or knowing attempt to recruit, lure, entice, isolate, harbor, transport, provide, obtain, or maintain the other person is for any of the following purposes:
>
> (a) To engage in sexual activity for hire[.]

**{¶40}** "Sexual activity for hire," means an implicit or explicit agreement to provide sexual activity, engage in an obscene, sexually oriented, or nudity oriented performance, or be a model or participant in the production of obscene, sexually oriented, or nudity oriented material, whichever is applicable, in exchange for anything of value. R.C. 2905.32(F)(2).

**{¶41}** On appeal, Williams argues the state failed to present sufficient evidence that he knowingly recruited or attempted to recruit A.G. and C.H. to engage in sexual activity for hire. Williams contends that A.G.'s backpage.com advertisement does not mention that it was advertising prostitution. He notes that A.G. was not nude in her advertisement photographs and that the advertisement specifically states that the "donation" paid to A.G. is "for time and companionship, not prostitution."

**{¶42}** In this case, the record reflects that between March 14, 2016, and March 20, 2016, Williams sent numerous text messages to A.G., who was 15 years old at the time. In many of the text messages, Williams expressed his desire to take sexual photographs of A.G. to use on a website advertisement that was created to facilitate "dates" with unknown men. The text messages between A.G. and Williams further revealed their financial arrangement. Williams stated that "he would take [A.G.] everywhere [she] need to go" and, in exchange, he would get one-third of the money she earned from each "lick." A.G. explained that a "lick" referred to someone who would have sex with her in exchange for money. In addition, A.G. testified that Williams transported her to various locations to meet with men who used backpage.com. She testified that although she did not end up having sex with any of the men, the purpose of Williams transporting her to the men was to have sex in exchange for money.

**{¶43}** Given A.G.'s testimony that the backpage.com advertisement was used to generate customers who would pay A.G. money in exchange for sex, whether the advertisement was for "time and companionship, and not prostitution," as Williams suggests, goes to the weight of the evidence.

**{¶44}** With respect to C.H., she testified that when she was 15 years old, Williams "asked [her] to" engage in prostitution. C.H. explained that she and Williams posted an advertisement

on backpage.com that contained photographs of her. Thereafter, she began to engage in sexual acts in exchange for money. C.H. testified that Williams transported her to hotels to engage in sex for hire. In addition, C.H. testified that Williams required her to pay him a majority of the money she was paid for each sexual act.

**{¶45}** Viewing the foregoing evidence in a light most favorable to the prosecution, we find a reasonable trier of fact could find beyond a reasonable doubt that Williams knowingly recruited and transported A.G. and C.H., who were under the age of 16, to engage in sexual activity for hire.

**2. Compelling Prostitution**

**{¶46}** Williams next challenges the evidence supporting his convictions for compelling prostitution in violation of R.C. 2907.21(A)(2)(a). The statute provides, in pertinent part:

> No person shall knowingly * * * [i]nduce, procure, encourage, solicit, request, or otherwise facilitate * * * [a] minor to engage in sexual activity for hire, whether or not the offender knows the age of the minor[.]

**{¶47}** Williams argues that the state did not establish that he encouraged A.G. or C.H. to engage in sexual activity for hire. He contends that the evidence demonstrates that "neither of the women engaged in any acts of prostitution as a result of [his] actions." Contrary to Williams's argument, however, there is no language in R.C. 2907.21(A)(2)(a) that requires the minor to actually complete the sexual act in exchange for value. All that the state is required to establish is that the defendant encouraged or requested the minor child to engage in such activity.

**{¶48}** In this case, the testimony overwhelmingly demonstrates that Williams routinely requested and encouraged A.G. and C.H. to engage in sexual activity for money. Over a short period of time, Williams sent A.G. numerous text messages that encouraged her to take provocative photographs for an escort advertisement. Once the photographs were posted on the

advertisement, Williams encouraged A.G. to post videos of her dancing on backpage.com.; he transported A.G. to locations to meet with men who responded to the advertisement; and he informed A.G. that he would earn one-third of the money she earned. Similarly, C.H. testified that Williams asked her to engage in prostitution. She explained that Williams transported her to locations where she engaged in sexual acts for money and, in exchange, Williams kept a majority of the money she was paid.

**{¶49}** Viewing the foregoing evidence in a light most favorable to the prosecution, we find a reasonable trier of fact could find beyond a reasonable doubt that Williams knowingly encouraged and/or requested the minor victims to engage in sexual activity for hire.

**3. Commercial Sexual Depiction of a Minor**

**{¶50}** Williams was convicted of commercial sexual depiction of a minor in violation of R.C. 2907.19(B). The statute provides:

> No person shall knowingly purchase or otherwise obtain advertising space for an advertisement for sexual activity for hire that includes a depiction of a minor.

**{¶51}** Williams argues that the backpage.com advertisement cannot constitute an advertisement for sexual activity for hire where the advertisement expressly states that payment is for "time and companionship, not prostitution." We are unpersuaded.

**{¶52}** As stated, A.G. provided ample testimony that Williams used her personal email address and password to post provocative photographs of her on a backpage.com advertisement. She stated that the purpose of the advertisement was to engage in sexual activity with men in exchange for money. C.H. corroborated A.G.'s testimony, confirming that she observed the backpage.com advertisement and the photographs of A.G. on Williams's cell phone. Viewing the foregoing evidence in a light most favorable to the prosecution, we find a reasonable trier of

fact could find beyond a reasonable doubt that Williams knowingly obtained advertisement space for an advertisement for sexual activity for hire that includes a depiction of a minor.

**4. Unlawful Sexual Conduct with a Minor**

**{¶53}** Williams was convicted of two counts of unlawful sexual conduct with a minor in violation of R.C. 2907.04(A). That statute provides:

> No person who is eighteen years of age or older shall engage in sexual conduct with another, who is not the spouse of the offender, when the offender knows the other person is thirteen years of age or older but less than sixteen years of age, or the offender is reckless in that regard.

**{¶54}** Sexual conduct is defined as "vaginal intercourse between a male and female; anal intercourse, fellatio, and cunnilingus between persons regardless of sex[.]" R.C. 2907.01(A). For purposes of vaginal or anal intercourse, "[p]enetration, however slight," is sufficient to complete those acts. *Id*.

**{¶55}** Williams argues that the evidence supporting his conviction is predicated on the testimony of an admitted prostitute who lacked credibility. However, Williams's argument goes to the weight of the evidence and not its sufficiency. In this case, both counts of unlawful sexual conduct with a minor related to Williams's sexual relationship with C.H. C.H. testified that when she was 13 years old, she had a sexual relationship with Williams. She explained that Williams inserted his penis into her vagina. She testified that she initially did not want to have sex with Williams, but eventually continued to have sex with him because she developed romantic feelings. At trial, the state maintained that one count pertained to the sexual activity that occurred while C.H. was living in the same home as Williams, while the second count pertained to the sexual activity that resumed once C.H. and Williams began working together.

**{¶56}** Viewing the foregoing evidence in a light most favorable to the prosecution, we find a reasonable trier of fact could find beyond a reasonable doubt that Williams engaged in sexual conduct with then 13-year-old C.H.

**5. Possession of Criminal Tools**

**{¶57}** Williams was convicted of possession of criminal tools in violation of R.C. 2923.24(A). The statute provides that "[n]o person shall possess or have under the person's control any substance, device, instrument, or article, with purpose to use it criminally."

**{¶58}** Williams reiterates his position that his cell phones could not be criminal tools for trafficking in persons where the backpage.com advertisement was for "time and companionship" and not for prostitution. Again, we are unpersuaded by this position. In light of A.G.'s testimony, a reasonable trier of fact could conclude that the backpage.com advertisement was promoting sex for hire despite the coded language used therein. In this case, the testimony presented at trial demonstrated that Williams used a cell phone to recruit A.G. to engage in prostitution. He further used a cell phone to take provocative photographs of A.G. and posted them onto backpage.com. C.H. testified that she viewed the photographs of A.G. on Williams's personal cell phone. Viewing the foregoing evidence in a light most favorable to the prosecution, we find a reasonable trier of fact could find beyond a reasonable doubt that Williams possessed a cell phone with the purpose to use it criminally.

**{¶59}** Williams's third assignment of error is overruled.

### C. Manifest Weight of the Evidence

**{¶60}** In his fourth assignment of error, Williams argues his convictions were against the manifest weight of the evidence.

**{¶61}** A manifest weight challenge attacks the credibility of the evidence presented and questions whether the state met its burden of persuasion at trial. *State v. Whitsett*, 8th Dist. Cuyahoga No. 101182, 2014-Ohio-4933, ¶ 26, citing *Thompkins*, 78 Ohio St.3d at 387, 678 N.E.2d 541; *State v. Bowden*, 8th Dist. Cuyahoga No. 92266, 2009-Ohio-3598, ¶ 13. Because it is a broader review, a reviewing court may determine that a judgment of a trial court is sustained by sufficient evidence, but nevertheless conclude that the judgment is against the weight of the evidence.

**{¶62}** "When considering an appellant's claim that a conviction is against the manifest weight of the evidence, the court of appeals sits as a 'thirteenth juror' and may disagree 'with the factfinder's resolution of conflicting testimony.'" *Thompkins*, quoting *Tibbs v. Florida*, 457 U.S. 31, 42, 102 S.Ct. 2211, 72 L.Ed.2d 652 (1982). The reviewing court must examine the entire record, weigh the evidence and all reasonable inferences, consider the witnesses' credibility, and determine whether, in resolving conflicts in the evidence, the trier of fact clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. *Thompkins*, citing *State v. Martin*, 20 Ohio App.3d 172, 485 N.E.2d 717 (1st Dist.1983). In conducting such a review, this court remains mindful that the credibility of witnesses and the weight of the evidence are matters primarily for the trier of fact to assess. *State v. DeHass*, 10 Ohio St.2d 230, 227 N.E.2d 212 (1967), paragraphs one and two of the syllabus. Reversal on manifest weight grounds is reserved for the "exceptional case in which the evidence weighs heavily against the conviction." *Thompkins* at 387.

**{¶63}** In challenging the weight of the evidence supporting his convictions, Williams argues the state's case was predicated on the testimony of two admitted prostitutes who lacked credibility. Williams reiterates the arguments raised in his third assignment of error, and

broadly asserts that "A.G. and C.H. both admitted to lying on many occasions during the investigation." As stated, the credibility of witnesses and the weight of the evidence are matters primarily for the trier of fact to assess. In this case, defense counsel zealously cross-examined A.G. and C.H. regarding their sexual history and propensity to lie. The jury, as the trier of fact, was in the best position to weigh the witnesses' credibility and was free to give weight to the victim's testimony despite their past indiscretions. Deferring to the trier of facts assessment of credibility, as we must, we are unable to conclude that this is the exceptional case in which the evidence weighs heavily against the convictions.

**{¶64}** Williams's fourth assignment of error is overruled.

### D. Ineffective Assistance of Counsel

**{¶65}** In his fifth assignment of error, Williams argues he was denied his right to the effective assistance of trial counsel as guaranteed to him by the Sixth Amendment to the U.S. Constitution and Article 1, Section 10, of the Ohio Constitution.

**{¶66}** To establish a claim for ineffective assistance of counsel, Williams must show that his trial counsel's performance was deficient and that the deficient performance prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Bradley*, 42 Ohio St.3d 136, 538 N.E.2d 373 (1989). To establish prejudice, the defendant must demonstrate there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland* at 694.

**{¶67}** In evaluating a claim of ineffective assistance of counsel, a court must give great deference to counsel's performance. *Id*. at 689. "A reviewing court will strongly presume that counsel rendered adequate assistance and made all significant decisions in the exercise of

reasonable professional judgment." *State v. Pawlak*, 8th Dist. Cuyahoga No. 99555, 2014-Ohio-2175, ¶ 69. Thus, "[t]rial strategy or tactical decisions cannot form the basis for a claim of ineffective counsel." *State v. Foster*, 8th Dist. Cuyahoga No. 93391, 2010-Ohio-3186, ¶ 23, citing *State v. Clayton*, 62 Ohio St.2d 45, 402 N.E.2d 1189 (1980). Additionally, the failure to do a futile act cannot be the basis for claims of ineffective assistance of counsel, nor could such a failure be prejudicial. *State v. Kilbane*, 8th Dist. Cuyahoga No. 99485, 2014-Ohio-1228, ¶ 37.

**1. Motion in Limine**

**{¶68}** On appeal, Williams first argues defense counsel rendered ineffective assistance of counsel by failing to file a motion in limine to exclude state's exhibit No. 5. Williams contends that the exhibit was not authenticated and contained inadmissible hearsay.

**{¶69}** This court has held that the decision to forgo filing a motion in limine falls within the "wide range of professionally competent assistance." *State v. Doumbas*, 8th Dist. Cuyahoga No. 100777, 2015-Ohio-3026, ¶ 66, citing *Strickland*, 466 U.S. at 690, 104 S.Ct. 2052, 80 L.Ed.2d 674. While counsel may have requested the trial court to redact certain text messages found in state's exhibit No. 5 that were not relevant to the charges levied against Williams, we find a motion to exclude the exhibit in its entirety would have been futile. As previously discussed, the text messages between A.G. and Williams did not violate the evidentiary rules against hearsay evidence and were properly authenticated by A.G.'s direct-examination testimony. Moreover, the failure to redact certain text messages that were not relevant to Williams's criminal activity did not affect the outcome of the proceedings. Accordingly, we find counsel's strategic decision to not file a motion in limine falls within the realm of professionally competent assistance and does not constitute deficient performance by counsel.

**2. Failure to Request a *Daubert* Hearing**

**{¶70}** Williams next argues that trial counsel rendered ineffective assistance of counsel by failing to challenge the reliability of the software used to extract the text messages from A.G.'s cell phone. Williams contends that counsel should have "demanded that an expert testify in regards to the Cellebrite extraction of the phone records and requested a hearing on the issue of how the technology works" pursuant to *Daubert v. Merrell Dow Pharmaceuticals, Inc*., 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993).

**{¶71}** In *Daubert*, the United States Supreme Court held that the trial court must act as a "gatekeeper" to ensure both the relevance and reliability of expert scientific testimony before admitting it. In order to aid in determining the threshold reliability of such testimony, *Daubert* identified several factors for courts to consider in addressing the issue. These factors, along with *Daubert's* approach to the reliability issue, were later adopted by the Ohio Supreme Court in *Miller v. Bike Athletic Co.*, 80 Ohio St.3d 607, 687 N.E.2d 735 (1998), and reaffirmed in *State v. Nemeth*, 82 Ohio St.3d 202, 694 N.E.2d 1332 (1998).

**{¶72}** Noting the general principle that "expert scientific testimony is admissible if it is reliable and relevant to the task at hand," the *Miller* court stated:

> In evaluating the reliability of scientific evidence, several factors are to be considered: (1) whether the theory or technique has been tested, (2) whether it has been subjected to peer review, (3) whether there is a known or potential rate of error, and (4) whether the methodology has gained general acceptance.

*Miller* at 611, citing *Daubert* at 593-594. Under Evid.R. 702(C), the issue for the trial court is not whether the testimony is correct but whether the underlying data, methods, and processes are such that they can be trusted to generate reliable information. *Id.* at 614. The standard is reliability, not infallibility.

**{¶73}** In this case, the state introduced the testimony of Gary Stein, who discussed his specialized knowledge and experience in using the Cellebrite program. Stein testified that he is employed by the Cuyahoga County Prosecutor's Office as a criminal investigator and digital forensic examiner. Stein testified that the Cellebrite software is used to extract data from electronic devices, including cell phones and computers. Stein explained that the program "goes into the phone, bypasses the normal system that you would see on your phone, and gets into the hard drive of the device." The information gathered from the device is analyzed and compiled into a report. The report provides a summary of the device and breaks down the recovered data into separate categories for text messages, call logs, locations, and pictures. Stein testified that he has been employed by the county for "ten plus years" and has used the Cellebrite program to extract data from phones "over 800 times." In this case, Stein used the Cellebrite program to extract digital data from A.G.'s cell phone. The summary report generated by the program set forth all text messages sent and received on A.G.'s cell phone from March 14, 2016, to March 20, 2016.

**{¶74}** After careful consideration, we are unable to conclude that counsel's failure to challenge the reliability of the forensic software amounted to ineffective assistance of counsel. There is nothing in the record that calls into question the reliability of Cellebrite or Stein's use of the program. Here, Stein provided ample testimony concerning his extensive experience with the Cellebrite program and the software's widespread use in agencies throughout Cuyahoga County. In addition, Stein amply explained how he extracted the data from the cell phone and how he read that data — specialized knowledge that he acquired through his training and experience.

> Forensic investigation increasingly requires the use of computer software or other technological devices for the extraction of data. While an investigator must have specialized knowledge in the use of the particular software or device, it is not required — nor is it practical — for an investigator to have expertise in or knowledge about the underlying programming, mathematical formulas, or other inner-workings of the software.

*State v. Pratt*, 200 Vt. 64, 128 A.3d 883, 891-892 (2015) (surveying multiple cases involving the use of computer software and other technological devices for the extraction of data).

**{¶75}** Undeniably, Stein was unable to offer scientific expert testimony relating to the underlying programming, methods, and processes of the Cellebrite software. Collectively, however, A.G.'s corroboration of the relevant text messages and Stein's testimony concerning his experience with the extraction software confirmed that Cellebrite produced accurate and reliable results in this case.

**{¶76}** Under such circumstances, there is no indication that the Cellebrite report would have been excluded had a *Daubert* hearing been requested. *See State v. Calhoun*, 8th Dist. Cuyahoga No. 105442, 2017-Ohio-8488 (holding that testimony concerning an officer's training and experience with Cellebrite software and hardware and his extraction of data from a cell phone through Cellebrite was properly admitted). Accordingly, we find trial counsel's tactical decision to forego a challenge to the reliability and accuracy of the report generated by the Cellebrite program was the product of trial strategy. *See State v. Sands*, 11th Dist. Lake No. 2007-L-003, 2008-Ohio-6981, ¶ 108 (noting also that the decision to raise a *Daubert* challenge is a matter of trial strategy).

**{¶77}** Williams's fifth assignment of error is overruled.

**{¶78}** Judgment affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution. The defendant's convictions having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

EILEEN T. GALLAGHER, JUDGE

TIM McCORMACK, P.J., and
LARRY A. JONES, SR., J., CONCUR