[Cite as *State v. Gibson*, 2015-Ohio-1679.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

State of Ohio

Appellee

v.

Traquawn Gibson

Appellant

Court of Appeals Nos. L-13-1222
L-13-1223

Trial Court Nos. CR0201301232
CR0201301115

DECISION AND JUDGMENT

Decided: May 1, 2015

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
Brenda J. Majdalani, Assistant Prosecuting Attorney,
for appellee.

Lawrence A. Gold, for appellant.

* * * * *

JENSEN, J.

{¶ 1} Appellant, Traquawn Gibson, appeals his convictions, challenging the trial court's denial of his motion to sever, rulings regarding the admissibility of Facebook and SoundCloud evidence, the sufficiency of the evidence on a charge of participation in a criminal gang, and the imposition of financial sanctions without consideration of his ability to pay. For the reasons that follow, we affirm the judgment of the trial court.

{¶ 2} On the evening of October 18, 2012, Limmie Reynolds was sitting in his car with his best friend, Deonta Allen, smoking marijuana. The car was parked on the 1900 block of Fernwood Avenue in Toledo, Lucas County, Ohio.

{¶ 3} A few minutes past 10:00 p.m., three young men approached Limmie's car from the rear. They wanted to purchase some marijuana, but Limmie told them he did not have any to sell. Limmie recognized two of the men—Stephaun Gaston and Kevin Martin—but did not know the third man.

{¶ 4} Seconds later, Limmie's car door opened. The man Limmie did not know put a gun in his face. The man said, "on Kent, give it up." Limmie and Deonta jumped out of the car and began to run. Limmie was shot through the torso, yet managed to run for help. Deonta was shot through the torso and collapsed before he reached the back steps of a nearby home.

{¶ 5} When first responders arrived, they transported Limmie to the hospital. He was treated for a torn lung and broken ribs. Deonta was pronounced dead at the scene; a bullet had passed through the right ventricle of his heart.

{¶ 6} The next morning, Toledo Police detectives interviewed Limmie at the hospital. Limmie identified two suspects by name and suggested that "the people that committed the crime were from the Moody Manor." That evening, Limmie was shown a full-face photo array of possible suspects but was not able to identify the man with the gun. A photograph of appellant was included in the photo array.

{¶ 7} Within a week or two of the shooting, Limmie's brother, Delewan, indicated that "some of the people that were involved" had Facebook accounts. Thereafter, Detective Bart Beavers searched on-line and found public Facebook profiles pages associated with Martin and Gaston.

{¶ 8} Meanwhile, on November 19, 2012, Crejonnia Bell ("C.J.") was hanging out with her friend Sharde Johnson when she received a phone call from appellant. He wanted to see her. Reluctantly, C.J. went to find him. According to Sharde, C.J. had recently ended a 6-7 month relationship with appellant.

{¶ 9} Sometime between 9:30 and 10:00 p.m., residents of West Weber Street saw a man in a grey sweat suit arguing with a woman—later identified as C.J.—on West Weber Street. Moments later, the man pulled out a gun and began shooting. The woman ran onto the front porch of 32 West Weber. The gunman followed. After firing several shots, the gunman shot himself in the leg. The gunman began pounding on the door and exclaimed, "they're shooting at us out here." When the door opened, the woman either crawled in or was drug into the house. The gunman followed. Moments later the gunman came back outside and yelled, "did anyone see which way they ran?"

{¶ 10} When police officers arrived, appellant was inside the house, standing shirtless by the couch. He was wearing grey sweatpants. When officers asked appellant to explain what happened, appellant explained that while he and C.J. were standing out in the street, "someone came from between the houses and started shooting." Appellant was not able to describe the shooter or provide any information as to where the shooter may

have gone after firing several shots. Officers found appellant's white t-shirt and grey sweatshirt hanging on a chair in the dining room; there was a significant amount of gunshot residue on both. When asked, appellant admitted that he was wearing the clothing during the attack.

{¶ 11} When paramedics arrived, C.J. was alive, but mostly unresponsive. As they began working on her, she regained consciousness. C.J. was able to describe her symptoms to medical personal but either could not, or simply would not, identify the shooter. Hours after her arrival at the hospital, C.J. died from multiple gunshot wounds to the head and torso.

{¶ 12} When the police interviewed the crowd that gathered outside of 32 West Weber Street, residents described what they had witnessed and identified appellant as the shooter. Escorted by a uniformed officer, appellant was transported to the hospital and treated for a gunshot wound to his leg. Just before 5:00 a.m., appellant was released from the hospital and escorted to the police station for questioning.

{¶ 13} When questioned by Detective Kermit Quinn, appellant denied shooting C.J., but admitted his affiliation with the Moody Manor Bloods. Detective Quinn observed several holes and what appeared to be gunshot residue on appellant's white t-shirt. Appellant was taken into custody.

{¶ 14} On January 18, 2013, in Lucas C.P. No. CR0201301115, appellant was indicted on one count of aggravated murder with a firearm specification, in violation of

R.C. 2903.01(A) and (F) and 2941.145, for the shooting death of C.J. Bell (the "West Weber indictment").

{¶ 15} On February 7, 2013, in Lucas C.P. No. CR0201301232, appellant was indicted on one count of murder with a firearm specification in violation of R.C. 2903.02(B), 2929.02, and 2941.145, for the shooting death of Deonta Allen; one count of felonious assault with a firearm specification in violation of R.C. 2903.11(A)(2) and 2941.145; one count of aggravated robbery with a firearm specification in violation of R.C. 2911.01(A)(1) and 2941.145; and one count of participating in a criminal gang in violation of R.C. 2923.42(A) and (B) (the "Fernwood indictment").

{¶ 16} On February 14, 2013, the trial court joined the Fernwood and West Weber indictments to be tried together pursuant to Crim.R. 13 and 8(A). The trial court denied appellant's motion to sever and the matter proceeded to trial by jury.

{¶ 17} At the conclusion of the trial, the jury found appellant guilty of aggravated murder and the attached firearm specification, as charged in the West Weber indictment. Appellant was ordered to serve a term of life in prison, without the possibility of parole. In regard to the crimes charged in the Fernwood indictment, the jury found appellant guilty of murder while committing aggravated robbery and the attached firearm specification; felonious assault and the attached firearm specification; aggravated robbery and the attached firearm specification; and participating in a criminal gang. As to the murder charge, appellant was ordered to serve a term of life in prison with a possibility of parole after 15 years. As to the charge of felonious assault, appellant was ordered to

serve a term of eight years in prison. As to the charge of aggravated robbery, appellant was ordered to serve a term of 11 years in prison. In regard to the participating in a criminal gang charge, appellant was ordered to serve a term of eight years in prison. The sentences imposed under the Fernwood indictment were ordered to be served consecutively to one another and consecutive to the sentence imposed under the West Weber indictment. All of the firearm specifications in the case merged for a single mandatory and consecutive term of three years in prison.

{¶ 18} It is from these judgments that appellant has filed timely notices of appeal, and the cases have been consolidated for purposes of appeal. Appellant asserts four assignments of error for our review.

First Assignment of Error

{¶ 19} In his first assignment of error, appellant states:

> The trial court abused its discretion by denying Appellant's motion to sever, thereby depriving Appellant of a fair trial in violation of his constitutional rights under the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 9, 10 and 16 of the Ohio Constitution.

For the reasons that follow, we find the trial court did not abuse its discretion in denying appellant's pre-trial and renewed motions to sever.

{¶ 20} Preliminarily, we note that appellant does not challenge the propriety of the initial joinder under Crim.R. 13 and 8(A). Rather, his argument addresses the trial

court's denial of his motion to sever under the theory of prejudicial joinder under Crim.R. 14. Thus, we decide this matter under the assumption that the two indictments were properly joined as offenses based on two transactions connected together. *See State v. Torres*, 66 Ohio St.2d 340, 342, 421 N.E.2d 1288 (1981) (appellant who asserted trial court abused its discretion by refusing to grant separate trials under Crim.R. 14 implicitly conceded that the two indictments were properly joined under Crim.R. 13).

{¶ 21} On March 18, 2013, appellant filed a motion to sever the joined indictments.[1] He argued there was no common scheme or plan that would constitute a course of criminal conduct and that trying the indictments together would "present an unbelievably prejudicial effect." In response, the state argued that the indictments were properly joined because the offenses are "based on two or more acts or transactions connected together or constituting parts of a common scheme or plan, or are part of a course of criminal conduct." Specifically, the state asserted that appellant murdered C.J. because she had just broken off a relationship with appellant and that she "had information and was witness to" the crimes alleged in the Fernwood indictment. At a pre-trial hearing on the motion to sever, the state asserted:

> At trial three separate witnesses would be presented by the State of Ohio that would give testimony and evidence that [appellant] murdered C.J.

[1] The trial court did not issue a written order reflecting a joinder of the indictments under Crim.R. 13 and 8(A). However, from the context of the record as a whole, it appears the trial court granted, over objection, the state's oral motion for joinder of the Fernwood and West Weber indictments on February 14, 2013.

> Bell * * *. And the evidence through those witnesses would be presented that C.J. Bell was murdered because she was a witness to the murder that occurred on October 18th that was committed by [appellant] * * *.
>
> One witness would testify specifically about statements made by our – by C.J., who is the murder victim on the second murder, regarding this first murder on Fernwood and what she knew about that. Two additional witnesses would testify about statements made by [appellant] that she had to be killed because she knew too much and was leaving him.

Upon consideration of the state's representations, the trial court denied appellant's pre-trial motion to sever.

{¶ 22} At this juncture, it is important to note that the state filed certifications of nondisclosure for seven witnesses under Crim.R. 16(D).[2] A Crim.R. 16(F)[3] hearing was held, in camera, before a second Lucas County Court of Common Pleas judge on the afternoon of March 25, 2013 (hours after the trial court denied appellant's motion to sever). During the hearing, the state indicated that C.J. had driven appellant "from the scene [of the first shooting] back to where he was residing, and that he had talked to her

[2] Crim.R. 16(D) provides, "If the prosecuting attorney does not disclose material or portions of materials under [Crim.R. 16], the prosecuting attorney shall certify to the court that the prosecuting attorney is not disclosing material or portions of material otherwise subject to disclosure" and the reasons therefore.

[3] Crim.R. 16(F) provides, "Upon motion of the defendant, the trial court shall review the prosecuting attorney's decision of nondisclosure or designation of 'counsel only' material for abuse of discretion during an *in camera* hearing conducted seven days prior to trial, with counsel participating."

about it." The state further indicated, "[a] couple of these witnesses will give specific information about the connection there and about the fact that C.J. Bell was murdered because of the information she had about the first murder." In turn, Detective Kermit Quinn revealed the identity of the certified witnesses and their anticipated testimony. At the time of the hearing, four of the six witnesses resided on West Weber Street. The other three each had information that would tie crimes charged in the two indictments together: one was an inmate in the county jail, one is a family member of C.J., and the last is a member of a different subsection of the Moody Manor Bloods. The jail inmate was told by appellant that "he had to kill her because she had information on [the] first murder, that she was a witness, and that she basically had to be taken care of." C.J.'s family member had information about what C.J. had seen and about her fear of appellant. The Moody Manor Blood had heard appellant make statements about killing C.J. because of the murder that appellant and "his boys" had committed on Fernwood a month prior to C.J.'s death. The state indicated that all seven witnesses were fearful because of the nature of the crimes and appellant's affiliation with the Moody Manor Bloods. At the close of the hearing, the judge found no abuse of discretion by the prosecuting attorney relative to the certification of the witnesses. He ordered that their identities remain sealed until disclosed at trial. A transcript of the Crim.R. 16(F) hearing was provided to the trial court days before the trial commenced.

{¶ 23} None of the witnesses the state had identified, in camera, as being able to tie the two murder scenes together testified at trial. Thus, at the close of the state's case,

appellant renewed his motion to sever. The following discussion took place outside the presence of the jury.

> [TRIAL COUNSEL]: We are renewing our motion to sever and I filed it in March and I'm referring back to that. And I think we arrived at a point where we have two totally different murder scenes unconnected by anything significant and I think it's prejudicial joinder, Your Honor.
>
> THE COURT: All right. Explain so we can understand this, what the prejudice would be then if someone were charged with two separate aggravated robberies [occurring within] one month of a period of time[,] more often then [sic] not they are joined for trial. What is unique?
>
> [TRIAL COUNSEL]: If there is a common design or some modus operandi, whatever, I don't believe it's here. I looked at some law last night. They showed that a knifing on a person using a knife in two separate occasions was not enough. We do have two different weapons here, one is .9 millimeter, one is a .45, and they are totally different characteristics. I mean we have a shooting of a girlfriend, alleged shooting of a girlfriend, and another would be kind of an aggravated robbery shooting with different sites, excuse me, different parts of the city, and I don't think they have any connection at all and I think it's prejudicial to join them together.
>
> * * *

[THE STATE]: Before we respond on the merits, Your Honor, we want to indicate one thing. At the outset about the initial decision to pursue joinder and that is that the state made the decision to join these two cases in large part based on the purported testimony of a witness who when called to the stand yesterday, September 25th, refused to testify or cooperate with the state. Thank you.

* * *

Your Honor, the state had met with that witness the Friday before the beginning of trial. He was brought up, he was conveyed from the penitentiary and he did indicate his willingness to testify for the state. We discussed that testimony with him. He was completely on board until he arrived at the doors of the courtroom yesterday. However, Your Honor, there are additional facts in evidence that do join these two cases together. One of those facts, Your Honor, is the timing involved. These murders were committed within a month of each other. They were both committed with semiautomatic firearms. There's testimony that the defendant was wearing the same exact outfit at both murders.

* * *

It could be concluded that was somewhat of a uniform for him, Your Honor. Additionally, the defendant's own statements made on November 18th, the day that CJ Bell was killed, two fire fighters at separate

> times when they were assisting in his treatment stated that he was a suspect in another murder that had been committed and that he believed this to be retaliation for him having been involved in that murder. There is some evidence regarding the phone calls made and the text messages made on October 18th, both right before and right after the murder of Deonta Allen and the shooting of Limmie Reynolds that puts CJ Bell and [appellant] together using each other's phones and contacting each other which leads to strong inferences that she had knowledge about this murder. And additionally, Your Honor, there was testimony that on November 18th, the day she was killed, she was afraid to see [appellant] and did not want to see him on that day.

{¶ 24} Under Crim.R. 13, a "trial court may order two or more indictments * * * to be tried together, if the offenses * * * could have been joined in a single indictment." Under Crim.R. 8(A), two or more offenses may be joined in one indictment if they are (1) of the same or similar character, or (2) are based on the same act or transaction, or (3) are based on two or more acts or transactions connected together or constituting parts of a common scheme or plan, or (4) are part of a course of criminal conduct. *See also* R.C. 2941.04.

{¶ 25} "Because joinder of indictments for a single trial is favored for judicial economy, the defendant bears the burden of claiming prejudice to prevent the joinder and providing sufficient information for the trial court to weigh the right to a fair trial against

the benefits of joinder." *State v. Newman*, 6th Dist. Erie Nos. E-11-065, E-11-066, 2013-Ohio-414, ¶ 17, citing Crim.R. 14; *Torres*, 66 Ohio St.2d 340, 421 N.E.2d 1288 (1981), syllabus; and *State v. Schaim*, 65 Ohio St.3d 51, 59, 600 N.E.2d 661 (1992). "Whether to try two cases separately or jointly is within the discretion of the trial court." *State v. Bradley*, 6th Dist. Erie No. E-13-013, 2015-Ohio-395, ¶ 9, citing *State v. Thompson*, 127 Ohio App.3d 511, 523, 713 N.E.2d 456 (8th Dist.1998). An abuse of discretion is demonstrated where the trial court's attitude in reaching its decision was unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

{¶ 26} To prevail on a claim that the trial court erred in denying a motion to sever, an appellant has the burden of demonstrating three facts. *State v. Schaim*, 65 Ohio St.3d 51, 59, 600 N.E.2d 661 (1991). "He must affirmatively demonstrate (1) that his rights were prejudiced, (2) that at the time of the motion to sever he provided the trial court with sufficient information so that it could weigh the considerations favoring joinder against the defendant's right to a fair trial, and (3) that given the information provided to the court, it abused its discretion in refusing to separate the charges for trial." *Id.*, citing *Torres* at syllabus. *See also State v. Garber*, 6th Dist. No. F-85-12, 1986 WL 15251, *2 (Dec. 24, 1986). "If a motion to sever is made at the outset of a trial, it must be renewed at the close of the state's case or at the conclusion of all of the evidence so that a Crim.R. 14 analysis may be conducted in light of all the evidence presented at trial." *State v.*

Rojas, 6th Dist. Lucas No. L-11-1276, 2013-Ohio-1835, ¶ 34, citing *State v. Hoffman*, 9th Dist. Summit No. 26084, 2013-Ohio-1021, ¶ 8.

{¶ 27} Here, appellant asserts the trial court abused its discretion when it failed to take into consideration the "highly prejudicial nature of the evidence that would be presented to the jury on two separate and unrelated accusations of murder." However, appellant fails to affirmatively demonstrate how he was prejudiced by the trial court's denial of his motion to sever. Moreover, appellant fails to explain how he would have defended differently had the indictments been severed. *See State v. Lott*, 51 Ohio St.3d 160, 165, 555 N.E.2d 293 (1990).

{¶ 28} This court has previously held that "joinder is not prejudicial when the jury is believed capable of separating the proof as to each charge because the evidence of each of the crimes is simple and direct, or the evidence of one offense is admissible in the trial of the other as "other acts" evidence under Evid.R. 404(B)." *State v. Townsend*, 6th Dist. No. L-00-1290, 2002 WL 538032, *7 (Apr. 12, 2002) (citations omitted). "These two tests are disjunctive and need not be satisfied together to negate a claim of prejudicial joinder." *State v. Cameron*, 10th Dist. No. 09AP-56, 2009-Ohio-6479, ¶ 35, citing *State v. Mills*, 62 Ohio St.3d 357, 362, 582 N.E.2d 972 (1992).

{¶ 29} At trial, evidence of the crimes charged in the Fernwood and West Weber indictments involved separate witnesses, separate victims, and separate evidence. Appellant does not point to any portion of the record that would suggest confusion,

overlap of testimony, or commingling of the victims, offenses, or charges. *See State v. Robinson*, 6th Dist. No. L-09-1001, 2010-Ohio-4713, ¶ 52.

{¶ 30} Further, the trial court cautioned the jury immediately prior to deliberations to consider each count and the evidence applicable to each count separately and to state its findings as to each count uninfluenced by its verdict on any other counts. "Absent evidence to the contrary, we indulge the presumption that the jury followed the instructions of the trial court." *State v. Brewer*, 2d Dist. Montgomery No. 15166, 1996 WL 78376, *5 (Feb. 23, 1996), citing *State v. Ferguson*, 5 Ohio St.3d 160, 163, 450 N.E.2d 265 (1983).

{¶ 31} Upon review of the in-camera hearing, we conclude that had the state's three witnesses testified, as anticipated, the crimes charged in the two indictments would have been "connected" under Crim.R. 8(A). Accordingly, at the time the trial court denied the pre-trial motion to sever—albeit based solely on the state's representations—it did not abuse its discretion. At the end of the state's case, there was not sufficient evidence to "connect" the crimes under Crim.R. 8(A). However, the evidence introduced by the state to support the crimes alleged in the two indictments was simple, direct, and capable of being separated. *See State v. Lewis*, 6th Dist. Nos. L-09-1224, L-09-1225, 2010-Ohio-4202, ¶ 33 ("Ohio appellate courts routinely find no prejudicial joinder where the evidence is presented in an orderly fashion as to the separate offenses or victims without significant overlap or conflation of proof."). Thus, the trial court did not abuse

its discretion in denying appellant's renewed motion to sever. Accordingly, appellant's first assignment of error is not well-taken.

Second Assignment of Error

{¶ 32} In his second assignment of error, appellant states:

> The trial court erred in allowing the introduction of prejudicial evidence by the state without the establishment of a proper foundation.

Appellant argues that printouts from Facebook and an audio recording downloaded from SoundCloud were introduced without establishing a proper foundation as to relevance, authenticity and authorship.

{¶ 33} At trial, the state presented, over objection, three exhibits purporting to represent printouts from appellant's public Facebook profile page. It also presented two exhibits purporting to represent printouts from public Facebook profile pages belonging to Kevin Martin and Stephaun Gaston. After careful consideration, and for the reasons set forth below, we find that the printouts presented by the state were relevant to the participation in a criminal gang charge under Evid.R. 401 and 104(B) and sufficiently authenticated under Evid.R. 901(A) and 104(A). Thus, the trial court did not abuse its discretion when it allowed the evidence to be presented to the jury. The trial court abused its discretion, however, when it allowed an audio recording downloaded from SoundCloud to be played for the jury. Nonetheless, admission of this evidence was harmless error. Appellant's second assignment of error is not well-taken.

A. What is Facebook?

{¶ 34} Facebook has been described as "a widely-used social-networking website * * * that allows users to connect and communicate with each other." *Ehling v. Monmouth-Ocean Hosp. Service. Corp.*, 961 F.Supp.2d 659, 662 (D.N.J.2013). "Every Facebook user must create a Profile Page, which is a webpage that is intended to convey information about the user." *Id.* An individual's "Profile Page can include the user's contact information; pictures; biographical information, such as the user's birthday, hometown, educational background, work history, family members, and relationship status; and lists of places, musicians, movies, books, businesses, and products that the user likes." *Id.* In addition to a profile page, each user has a "News Feed." *Id.* "The News Feed aggregates information that has recently been shared by the user's Facebook friends." Facebook pages are public, by default. *Id.* "However, Facebook has customizable privacy settings that allow users to restrict access to their Facebook content." *Id.*

{¶ 35} Facebook users often "post content—which can include text, pictures, or videos—to that user's profile page" delivering it to the user's subscribers. *Parker v. State*, 85 A.3d 682, 686 (Del.2014). These posts often include information relevant to a criminal prosecution: "party admissions, inculpatory or exculpatory photos, or online communication between users." *Id.* Authentication concerns arise in regard to printouts from Facebook "because anyone can create a fictitious account and masquerade under another person's name or can gain access to another's account by obtaining the user's

username and password," and, consequently, "[t]he potential for fabricating or tampering with electronically stored information on a social networking sight" is high. *Griffin v. State*, 419 Md. 343, 19 A.3d 415, 421 (2011). *See also Campbell v. State*, 382 S.W.3d 545, 550 (Tex.App.2012) ("Facebook presents an authentication concern * * * because anyone can establish a fictitious profile under any name, the person viewing the profile has no way of knowing whether the profile is legitimate."); *Smith v. State*, 136 So.3d 424, 433 (Miss.2014) (in regard to Facebook, authentication concerns arise "because anyone can create a fictitious account and masquerade under another person's name.").

B. What is SoundCloud?

{¶ 36} "SoundCloud" is an online social networking service and audio streaming platform that allows users to "share, like, annotate and comment on tracks, and embed a copy of the SoundCloud media player on their own website, blog or Facebook page." The London School of Economics and Political Science, LSE on SoundCloud, http://www.lse.ac.uk/newsAndMedia/videoAndAudio/SoundCloud.aspx (accessed Apr. 1, 2015). *See also* Whiteboard, *Soundcloud co-founder Eric Wahlforss: "How we built SoundCloud"* (Apr. 24, 2013), http://www.whiteboardmag.com/soundcloud-co-founder-eric-wahlforss-berlin-how-we-built-soundcloud/ (accessed Apr. 1, 2015). When a user registers for a free SoundCloud account, he or she can record and publish up to 120 minutes of audio content. Educational Technology and Mobile Learning, *Teachers' Guide to the Use of SoundCloud in Class* (July 19, 2014), http://www.educatorstechnology.com/2014/07/teachers-guide-to-use-of-soundcloud-in.html, (accessed Apr. 1, 2015).

C. Evidentiary Hurdles of Admitting Electronically Stored Information

{¶ 37} The appropriate way to authenticate electrically stored information (ESI) from social networking websites is a matter of first impression for this court. However, for the past several years, courts from other jurisdictions, have addressed the unique issues posed in attempting to introduce various forms of ESI into evidence.

{¶ 38} One of the earliest and most comprehensive cases addressing the evidentiary hurdles of admitting ESI is *Lorraine v. Markel American Insurance Co*., 241 F.R.D. 534 (D.Md.2007). In *Lorraine*, the court identifies and discusses all of the issues a court may need to consider in determining admissibility of ESI under the Federal Rules of Evidence. While the opinion goes into great detail regarding the "evidentiary hurdles," it summarizes its finding as follows:

> Whenever ESI is offered as evidence, either at trial or in summary judgment, the following evidence rules must be considered: (1) is the ESI relevant as determined by Rule 401 (does it have any tendency to make some fact that is of consequence to the litigation more or less probable than it otherwise would be); (2) if relevant under 401, is it authentic as required by Rule 901(a) (can the proponent show that the ESI is what it purports to be); (3) if the ESI is offered for its substantive truth, is it hearsay as defined by Rule 801, and if so, is it covered by an applicable exception (Rules 803, 804, and 807); (4) is the form of the ESI that is being offered as evidence an original or duplicate under the original writing rule, or if not, is there

> admissible secondary evidence to prove the content of the ESI (Rules 101-108); and (5) is the probative value of the ESI substantially outweighed by the danger of unfair prejudice or one of the other factors identified by Rule 403, such that it should be excluded despite its relevance. Preliminarily, the process by which the admissibility of ESI is determined is governed by Rule 104, which addresses the relationship between the judge and the jury with regard to preliminary fact finding associated with the admissibility of evidence. Because Rule 104 governs the very process of determining admissibility of ESI, it must be considered first. *Id.* at 538.

{¶ 39} Since *Lorraine*, several courts have evaluated the admissibility of evidence from social media networking websites under the Federal Rules and comparable state rules, with mixed results. *See, e.g., People v. Beckley*, 185 Cal.App.4th 509, 541, 110 Cal.Rptr.3d 362 (2010) (recognizing ease of altering digital photographs and requiring expert testimony to authenticate photographs taken from appellant's MySpace account); *Griffin v. State*, 419 Md. 343, 19 A.3d 415 (Md.2011) (circumstantial evidence of MySpace user's nickname, birthdate and a photograph of the user "in an embrace" with the defendant, not sufficient "distinctive characteristics" for authentication, "given that someone other than [defendant's girlfriend] could have not only created the site, but also posted the comment at issue"), *Tienda v. State*, 358 S.W.3d 633 (Tex.Crim.App.2012) (internal content of MySpace website posting, including photographs, comments, and music, was sufficient circumstantial evidence to establish a prima facie case such that a

reasonable juror could have found that the social media page was created and maintained by appellant); *People v. Lenihan*, 911 N.Y.S.2d 588 (N.Y. Sup.Ct.2010) (photographs downloaded from MySpace by victim's mother were not properly authenticated in light of the ability to "photo shop"); *Smith v. State*, 136 So.3d 424, 433 (Miss.2014) (name and photograph on Facebook printout not sufficient to link communication to the purported author); *State v. Eleck*, 130 Conn.App. 632, 23 A.3d 818, 823 (2011); *Parker v. State*, 85 A.3d 682, 688 (Del.2014) (once the trial court determines there is evidence sufficient to support a finding that the Facebook evidence is what its proponent claims it to be, the jury will decide whether to accept or reject the evidence); *People v. Glover*, ___ P.3d ___, 2015 WL 795690 (Colo.App.2015) (account name, phone number, photographs, and content of messages sufficient under Rule 901(b) to conclude Facebook account belonged to appellant and that he sent the messages contained therein). While these cases present widely disparate outcomes, they all utilize traditional means to authenticate ESI from social networking websites.

{¶ 40} The author of the *Lorraine* decision, the Honorable Paul W. Grimm[4], has collaborated on a number of articles detailing the admissibility of ESI. *See* Hon. Paul W. Grimm, et al., *Back to the Future: Lorraine v. Markel American Insurance Co. and New Findings on the Admissibility of Electronically Stored Information*, 42 Akron L. Rev. 357

[4] The Honorable Paul W. Grimm is the Chief United States Magistrate Judge for the United States District Court for the District of Maryland.

(2009) ("*Grimm I*"). *See also* Hon. Paul W. Grimm, et al., *Authentication of Social Media Evidence*, 36 Am.J. Trial Advoc. 433 (2013) ("*Grimm II*").

{¶ 41} In *Grimm II*, the authors discuss the two lines of cases that have emerged in recent years. *Id.* at 441. "One line of cases sets an unnecessarily high bar for the admissibility of social media evidence by not admitting the exhibit unless the court definitively determines that the evidence is authentic." *Id.* *See also Griffin v. State*, 19 A.3d 415 (Md.2011); *Commonwealth v. Wallick*, No. CP-67-CR-5884-2010 (Pa.Ct.Com.Pl. Oct.2011); and *People v. Beckley*, 110 Cal.Rptr.3d 362 (Ct.App.2010). "Another line of cases takes a different tact, determining the admissibility of social media evidence based on whether there was sufficient evidence of authenticity for a reasonable jury to conclude that the evidence was authentic." *Grimm II* at 441. *See Tienda v. State*, 358 S.W.3d 633 (Tex.Crim.App.2012); *State v. Assi*, No. 1 CA-CR 10-0900, 2012 WL 3580488 (Ariz.Ct.App. Aug. 21, 2012); *People v. Valdez*, 135 Cal.Rptr.3d 628 (Ct.App.2011); and *People v. Clevenstine*, 891 N.Y.S.2d 511 (N.Y.App.Div.2009). In *Grimm II*, the authors suggest that the approach taken in the second line of cases more appropriately considers the necessary interplay between Rules 901 and 104(a) and (b) of the Federal Rules of Evidence. *Grimm II* at 455. The authors conclude:

> It is clear that the best approach for authenticating and admitting social media evidence is to follow Rules 104(a) and (b). Following such an approach, courts consider evidence from all sources (even if not from a live witness) – including documents, whether electronic or hard copy – on a

continuum. That is, clearly authentic evidence is admitted, clearly inauthentic evidence is excluded, and everything in between is conditionally relevant and admitted for the jury to make the final determination of authenticity. *Id.* at 465.

D. Ohio Law

{¶ 42} In Ohio, preliminary questions of admissibility are governed by Evid.R. 104[5]. This rule provides, in relevant part, as follows:

> (A) Questions of admissibility generally. Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (B). In making its determination it is not bound by the rules of evidence except those with respect to privileges.
>
> (B) Relevancy conditioned on fact. When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.

{¶ 43} Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less

[5] Evid.R. 104 is identical to the Federal Rule counterpart discussed in *Grimm I*. The Federal Rule counterpart discussed in *Grimm II* was amended, effective December 1, 2011.

probable than it would be without the evidence." Evid.R. 401. Relevant evidence is admissible under Evid.R. 402.

{¶ 44} The authenticity requirement is satisfied by "evidence sufficient to support a finding that the matter in question is what the proponent claims." Evid.R. 901(A). "Evid. R. 901(B) and 902 establish methods by which a document may be authenticated by extrinsic evidence or by which it may be self-authenticated so extrinsic evidence is not required because the document possesses on its face indicia of authenticity which are sufficient to support the finding that the document is what it purports to be." *State v. Smith*, 63 Ohio App.3d 71, 74, 577 N.E.2d 1152 (11th Dist.1989).

{¶ 45} Previously, we described the Evid.R. 901(A) authentication requirement in a per curium opinion as follows:

> "[T]he showing of authenticity is not on a par with more technical evidentiary rules, such as hearsay exceptions, governing admissibility. Rather, there need be only a prima facie showing, to the court of authenticity, not a full argument on admissibility." Thus, once a prima facie showing has been made to the court that a document is what its proponent claims, it should be admitted. At that point the burden of going forward with respect to authentication shifts to the opponent to rebut the prima facie showing by presenting evidence to the trier of fact which would raise questions as to the genuineness of the document. The required prima facie showing of authentication need not consist of a preponderance of the

> evidence. Rather, all that is required is substantial evidence from which the trier of fact might conclude that a document is authentic. * * * "[I]t is the [trier of fact] who will ultimately determine the authenticity of the evidence, not the court." The only requirement is that there has been substantial evidence from which [the trier of fact] could infer that the document was authentic. *Hartford Insurance Co. v. Parker*, 6th Dist. No. L-82-181, 1982 WL 6662, *7 (Dec. 3, 1982), quoting *Zenith Radio Corp. v. Matsushita Elec. Indus. C*o., 505 Fed.Supp. 1190, 1219 (E.D.Penn.1980).

{¶ 46} "The evidence necessary to support a finding that the document is what a party claims it to be has a very low threshold, which is less demanding than the preponderance of the evidence." *State v. White*, 4th Dist. Scioto No. 03CA2926, 2004-Ohio-6005, ¶ 61, quoting *Burns v. May*, 133 Ohio App.3d 351, 355, 728 N.E.2d 19 (12th Dist.1999). "Circumstantial evidence, as well as direct, may be used to show authenticity." *State v. Paster*, 2014-Ohio-3231, 15 N.E.3d 1252, ¶ 32 (8th Dist.), quoting *State v. Pruitt*, 8th Dist. Cuyahoga No. 98080, 2012-Ohio-5418, ¶ 10.

{¶ 47} Our interpretation of the authentication requirement in *Hartford Insurance Co., supra,* is in line with *Lorraine* in that "because authentication is essentially a question of conditional relevancy, the jury ultimately resolves whether evidence admitted for its consideration is that which the proponent claims." *Lorraine*, 241 F.R.D. at 539, quoting *United States v. Branch*, 970 F.2d 1368, 1370 (4th Cir.1992). Thus, we believe the less stringent approach to authentication of social media outlined in *Grimm II* is the

proper approach here. In other words, a trial court "need not find that the evidence is necessarily what the proponent claims, but only that there was sufficient evidence that the jury might ultimately do so." *Lorraine* at 542, quoting *United States v. Safavian*, 435 F.Supp.2d 36, 38 (D.D.C. 2006). As stated above, once the prima facie threshold is met, "the burden of going forward with respect to authentication shifts to the opponent to rebut the prima facie showing by presenting evidence to the trier of fact which would raise questions as to the genuineness of the document." *Hartford Insurance Co.* at *7, quoting *Zenith*, 505 Fed.Supp. at 1219.

E. Admissibility of Printouts from Public Facebook Profile Pages

{¶ 48} We turn now to the admissibility of printouts from the Facebook profile pages purporting to belong to appellant, Martin, and Gaston. We note that under this assignment of error our discussion is limited to the trial court's rulings relating to the authenticity of the printouts and the state's use of the images contained thereon to identify the appellant as the perpetrator and then demonstrate appellant's association with known gang members. The subject Facebook profile pages contain few words beyond those discussed below. Thus, our discussion and analysis applies only to the very narrow use of public Facebook profile pages as they were utilized in this matter.

{¶ 49} In his brief, appellant asserts that neither Detective William Noon nor Detective Bart Beavers had sufficient personal knowledge about the ownership and control of the Facebook profile pages to meet the threshold admissibility requirements set forth in Evid.R. 901(B)(1). Courts have interpreted this subsection of the rule to allow

"'any competent witness who has knowledge that a matter is what its proponent claims may testify to such pertinent facts, thereby establishing, in whole or in part, the foundation for identification.'" *Secy. of Veterans Affairs v. Leonhardt*, 3d Dist. Crawford No. 3-14-04, 2015-Ohio-931, ¶ 43, quoting *TPI Asset Mgt. v. Conrad-Eiford*, 193 Ohio App.3d 38, 950 N.E.2d 1018, 2011-Ohio-1405, ¶ 15 (2d Dist.). In response, the state asserts that printouts from the public Facebook profile pages were properly authenticated under Evid.R. 901(B)(4). This subsection of the rule explains that "[a]ppearance, contents, substance, internal patterns or other distinctive characteristics, taken in conjunction with the circumstances" conform with the authentication requirement. *Id.* We believe that a combination of both personal knowledge of the appearance and substance of the public Facebook profile pages, taken in conjunction with the following direct and circumstantial evidence was sufficient to meet the threshold admissibility requirement set forth in Evid.R. 901(B)(1).

{¶ 50} Detective Beavers testified that it was clear from Limmie's first interview that the individuals involved in the Fernwood shooting were from the Moody Manor apartment complex. Within 24 hours of the shooting, Limmie picked both Stephaun Gaston and Kevin Martin out of a photo array. Within a few weeks of the shooting, Detective Beavers learned from one of Limmie's family members that Gaston and Martin had Facebook accounts. Detective Beavers explained:

> There's a search mechanism on Facebook that allows you to put in different search terms, for example, if somebody's name you can search by

> last name, by first name, by combination of first and last name, or in this case the majority of them had Young Money that was part of their name, so if I punch in Young Money I could see anybody that would have used that combination of letters that would have maybe been in the Toledo area. So I did kind of a variety of searches to come up with that.

{¶ 51} When Detective Beavers searched for the two individuals identified by Limmie, he was able to locate Facebook profile pages of individuals claiming residence in Toledo and utilizing terminology associated with the Young Money subsection of the Moody Manor Bloods. Detective Beavers explained that when he searched for Gaston aka "Oozie," he found a public Facebook profile page utilizing the username "Oozie Montana YungSavage Mayor." When he searched for Martin aka "Kfifty," Detective Beavers found the public Facebook profile page utilizing the username "Kfifty Youngmoney Boss."

{¶ 52} On November 1, 2012, Detective Beavers created printouts of the Facebook profile pages. At trial, Detective Beavers indicated that other than minor formatting issues, state's exhibit Nos. 111 and 112 accurately reflected the Facebook profile pages he viewed on his computer screen and attributed to Gaston and Martin, respectively.

{¶ 53} On December 18, 2012, Limmie contacted Detective Beavers indicating he had been on Facebook and found the man who held a gun to his face. According to Detective Beavers, Limmie indicated that "[h]e had actually seen pictures of Traquawn

Gibson and that he saw the lips and the lips that were seen on Facebook were the lips of the individual that had the gun that shot him and Deonta Allen that night." Once again, Limmie was shown a photo array of possible suspects by a blind administrator. This time, however, the top half of the suspects' faces were covered up. When asked if any of the modified photos resembled the man who held a gun to his face, Limmie picked out a photo of appellant.

{¶ 54} Detective Beavers testified that on February 5, 2013, he created printouts of the "Traquawn Gibson YoungMoney" Facebook profile page. Detective Beavers further testified that state's exhibit Nos. 113, 114, and 115 accurately reflect the Facebook profile page he viewed on his computer screen and that he attributed to appellant.

{¶ 55} Detective William Noon is a certified gang specialist on the Toledo Police Gang Task Force. He testified that there are 18 documented street gangs in Toledo, one of which is known as the Moody Manor Bloods. Detective Noon explained, "the Moody Manor is a low income housing project right here in Central Toledo and it's called the Moody Manors so [the members] call themselves the Moody Manor Bloods."

{¶ 56} Detective Noon indicated that during his decade on the task force, he has dealt with the Moody Manor Bloods "hundreds of times." The factions or subgroups within the Moody Manor Bloods call themselves "Kent Head," "Young Money," or "Manor Boyz."

{¶ 57} Detective Noon testified that appellant's street name is "Hot Boy" and that appellant is a member of the Young Money subgroup of the Moody Manor Bloods.

Detective Noon indicated that through his work on the Gang Task Force he had been aware of appellant for at least three years. While performing surveillance as a gang task force investigator, Detective Noon observed appellant with known Moody Manor Blood members, i.e., Keshawn Jennings, Antwaine Jones and James Moore, in a park across the street from the Moody Manor apartment complex.

{¶ 58} Detective Noon testified that the Gang Task Force database includes information on all known and suspected gang members in the area. According to information compiled in the database, appellant admitted his membership to the Moody Manor Bloods on at least two separate occasions to Toledo police officers. Detective Noon further indicated that on one occasion appellant "was stopped wearing a tribute shirt to Montrese Moore who was a Moody Manor Blood that was killed."

{¶ 59} Detective Noon testified that Facebook is an important investigative tool because it shows the associations and nicknames of known and suspected gang members. State's exhibit No. 114 is a printout of a color photograph depicting ten young black men in what appears to be the stands of a sporting event. The printout is dated November 1, 2012, and was taken from the "Traquawn Gibson Young Money" Facebook profile page. Detective Noon identified appellant sitting with known gang members, some of whom are displaying Moody Manor gang signs.

{¶ 60} State's exhibit No. 115 is a screenshot of artwork taken from the "Traquawn Gibson Young Money" Facebook profile page. When questioned by the state, Detective Noon provided the following testimony about the exhibit:

Q. Could you tell us what you are seeing in that exhibit?

A. That's I would call it a monicker for the Moody Manor Boyz.

Q. What do you mean by a monicker?

A. It just shows his affiliation with the Moody Manor or I should say it has names that I'm familiar with nicknames of street gang members from the Moody Manors and talks about their block, 2200 block Kent, V block Sherman which is all the streets that's around the Moody Manors.

* * *

Q. In your investigation and your specialization with the gang task force, what does that moniker, which gang does that represent?

A. It has a Y and M and stands for Young Money and it says 2200 so it would stand for 2200 block of Kent, Moody Manor Bloods and the Young Money Group.

Q. And I believe you testified before that [appellant] his street name is Hot Boy; is that correct?

A. That's correct.

Q. Is that nickname contained within that graphic you are seeing?

A. Yes.

Q. Okay. And you also told us about Kfifty, is his street name depicted in that graphic you are seeing?

A. Kfifty is in this, yes.

Q. Do you recognize any of the other street names contained in that graphic?

A. Yeah, Pete is Pete Mohammed, he's a Moody Manor Blood. Dee gotti is Deshaun Gott. D-Crisp is Darious Crisp, Monster is Dewaun Wilson. It says Flocka which is David Adams, Tay gotti is Deonta Gott. I'm not sure of a couple of the other ones though.

{¶ 61} In regard to the printout from the "Oozie Montana YungSavage Mayor" Facebook profile page, Detective Noon identified a photograph depicting Stephaun Gaston. When asked whether the profile name had any gang significance, Detective Noon stated:

Oozie is his street nickname. That is what he goes by. And Young Savage is something they claim to be. I mean there's – you hear Young Money, you'll hear that I'm a young savage which means he's a young guy and it refers to being a younger gang member.

{¶ 62} In regard to the printout from the "Kfifty Youngmoney Boss" Facebook profile page, Detective Noon identified a photograph of four men. He identified one of the men as Kevin Martin. When asked whether the Facebook profile page had any gang significance, Detective Noon stated:

I see where it says Young Money which is a subset of the Moody Manors or that is what we believe to be and we also see what my

interpretation is they are making and forming an M with their fingers * * *

and so they are showing it stands for the M's in Moody Manor.

{¶ 63} In regard to state's exhibit No. 113, a printout from the "Traquawn Gibson YoungMoney" Facebook profile page, Detective Noon identified a photograph of appellant.

{¶ 64} On cross-examination Detective Noon indicated that he did not "know for fact" who created the above mentioned Facebook pages or what computer was used to create them. He further admitted that he did not "know for sure" whether appellant had any control over the Facebook pages associated with the profile named "Traquawn Gibson YoungMoney" or whether Stephaun Gaston and Kevin Martin had any control over the Facebook pages associated with the profile names "Oozie Montana YungSavage Mayor" and "Kfifty Youngmoney Boss."

{¶ 65} At trial, Limmie explained that "on Kent" is a phrase utilized by members of the bloods street gang. When appellant said, "on Kent, give it up" to him on October 18, 2012, Limmie knew he was being robbed by a Moody Manor Blood.

{¶ 66} Detective Noon testified that the phrase, "on Kent" is significant because only the Moody Manor Bloods use the phrase. He indicated that the phrase "is used for several different things. It could be said as on Kent as in this is who is doing whatever is being done at the time. I'm on Kent which I'm claiming to be a Moody Manor Blood or it could mean that's the truth, on Kent, I'm telling you the truth."

{¶ 67} In regard to the shooting at 32 West Weber Street, Eric Pinkham, a paramedic on the scene, testified that while he was assisting appellant to the life squad, appellant began "talking out loud." Pinkham testified:

> He seemed – he said he blamed his gangster lifestyle for what happened to I guess it was his girlfriend and that her parents were going to blame him I think and it was about some other shooting, there was some other shooting that he was involved with that something retaliation, I was confused.

{¶ 68} Detective Kermit Quinn testified that hours after C.J.'s shooting, appellant admitted his association with the Moody Manor Boys.

{¶ 69} Finally, according to Detective Beavers, the internal content of the subject Facebook pages had been made private under the privacy settings utilized by the owners of the accounts. Thus, only a limited amount of "public" content was available to him. This information is relevant to the authenticity of the accounts because it demonstrates that the accounts' creators asserted control over the internal content of the websites. Further, that the owners utilized unique usernames and chose to display certain photographs on the publicly accessible portions of the accounts suggests that the owners did not consider the pictures misleading or falsified. Together, these factors tend to support the genuineness of the postings.

{¶ 70} Considering all of the evidence cited above—including, but not limited, to the unique street names, gang terminology, photos, artwork, and gang signs utilized on

the subject public Facebook profile pages in conjunction with both direct and circumstantial evidence of the proposed owners' gang affiliation—we find that substantial evidence was submitted from which a reasonable juror could conclude that the various Facebook profile pages were attributable to appellant, Gaston, and Martin. Thus, the trial court did not abuse its discretion in admitting the evidence.

F. Admissibility of SoundCloud Soundtrack

{¶ 71} We turn now to the admissibility of the audio recording downloaded from SoundCloud.

{¶ 72} In his testimony before the jury, Detective Noon indicated that during his investigation into the Fernwood shooting, he became familiar with a song entitled "Wooty Woo La La La" a recording of which he found on SoundCloud. When asked to explain SoundCloud, Detective Noon indicated:

> Sound Cloud is a website that is new to me within the last year, year and half where we're finding a lot of gang related music on and I don't know if it's uploaded and how they upload it or you have to be a member of Sound Cloud but it's a free site that you can go to and listen to music.

{¶ 73} Detective Noon indicated that when he became aware of the song, he searched "Google" which took him to SoundCloud. He explained what he saw when he reached the song on SoundCloud: "It show up – it shows up the song and it will say who it's made by and I don't know the exact names but I know there's a Trappin G and Juan B, Young Money to Little Head. I know that's most of the terms that are in that."

{¶ 74} When asked why the song was significant, Detective Noon provided the following testimony:

A. We were able to listen to the song, only some of the lyrics, and it mentions [appellant] in there, Hot Boy, and it mentions the word fuck Tay as in as far as Mr. Allen who was deceased at the time.

Q. Okay. Does it mention any names of streets in that song at all?

A. It mentions some names of streets, I know Kent is mentioned and I believe it mentions Fernwood too.

Q. And you stated that the street name of Hot Boy is mentioned in that song as well?

A. It does say Hot Boy, yes

Q. Okay. Song mentions killing crabs; is that right?

A. That's correct.

Q. Okay. * * * can you tell us what crabs are, what that signifies?

A. * * * If you're a Crip and someone calls you a crab it's very disrespectful to a Crips gang member. * * * .

{¶ 75} Over trial counsel's objection, the state was allowed to introduce a recorded copy of the song "Wooty Woo La La La." The trial court delivered the following limiting instruction before the song was played in open court:

I want to instruct you that this tape which is identified as Exhibit Number 116 is played in reference to your consideration as it relates to

> Count 4 of the charge and that count is referred to as participating in a criminal gang. It cannot be used for any purpose to identify the defendant as the perpetrator as to Count 1 which is the charge of murder as it relates to the victim Deonta Allen.

{¶ 76} Detective Noon testified that while he did have an opportunity to listen to the song he did not "have the occasion to speak to any known Moody Manor Bloods gang members" about it. On cross-examination Detective Noon indicated that he did not know when the song was written or when it was uploaded to the SoundCloud webpage.

{¶ 77} Two significant "evidentiary hurdles" are triggered by this evidence: authenticity and hearsay. As to the latter, it is clear that the song is being offered for its substantive truth, in other words, the song was introduced because its lyrics are significant to the gang's involvement in the shootings alleged in the Fernwood indictment. Thus, it is hearsay as defined by Evid.R. 801 and does not appear to be covered by an applicable exception. As to authenticity, we find that the state failed to present substantial evidence from which a reasonable juror could conclude that the song was attributable to a member of the Moody Manor Bloods. Pursuant to the above, we find that the trial court abused its discretion when it allowed the song into evidence. Any error, however, in its admission was harmless. We find no reasonable probability that the outcome of the trial would have been different had the song been excluded.

Third Assignment of Error

{¶ 78} In his third assignment of error, appellant states:

> The trial court erred to the prejudice of Appellant in overruling Appellant's Rule 29 motion for acquittal on the charge of participation in a criminal gang.

We disagree.

{¶ 79} Civ.R. 29(A) provides:

> The court on motion of a defendant or on its own motion, after the evidence on either side is closed, shall order the entry of a judgment of acquittal of one or more offenses charged in the indictment, information, or complaint, if the evidence is insufficient to sustain a conviction of such offense or offenses. The court may not reserve ruling on a motion for judgment of acquittal made at the close of the state's case.

{¶ 80} Sufficiency of the evidence is a legal standard that tests whether the evidence introduced at trial is legally adequate to support a jury verdict as to all elements of the crime. *State v. Thompkins*, 78 Ohio St.3d 380, 386, 678 N.E.2d 541 (1997). The proper analysis under a sufficiency of the evidence standard 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. Williams*, 74 Ohio St.3d 569, 576, 660 N.E.2d 724 (1996), quoting *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph two of the syllabus. In order to

affirm the denial of a Crim.R. 29 motion, we need only find that there was legally sufficient evidence to sustain the guilty verdict. *Thompkins* at 386.

{¶ 81} Appellant asserts that his conviction for participation in a criminal gang activity is based upon insufficient evidence because "no causal relationship or connection between the charges and Appellant's involvement with the Manor Boyz was established * * * and any connection with the Manor Boyz was through evidence improperly introduced as discussed in Appellant's Second Assignment of Error."

{¶ 82} R.C. 2923.42(A) provides:

> No person who actively participates in a criminal gang, with knowledge that the criminal gang engages in or has engaged in a pattern of criminal gang activity, shall purposely promote, further, or assist any criminal conduct, as defined in division (C) of section 2923.41 of the Revised Code.

{¶ 83} R.C. 2923.41(C) defines "criminal conduct" as "the commission of, an attempt to commit, a conspiracy to commit, attempt to commit, conspire to commit, or be in complicity in the commission of an offense listed in division (B)(1)(a), (b), or (c) of this section * * *." The offenses listed in R.C. 2923.41(B)(1) are "(a) [a] felony * * * (b) [a]n offense of violence * * * [and] (c) [a] violation of section 2907.04, 2909.06, 2911.211, 2917.04, 2919.23, or 2919.24 of the Revised Code, section 2921.04 or 2923.16 of the Revised Code, section 2925.03 of the Revised Code if the offense is trafficking in marihuana, or section 2927.12 of the Revised Code."

{¶ 84} In addition to the admissible evidence discussed in appellant's second assignment of error, it is important to note that the jury found appellant guilty of the murder of Deonta Allen, felonious assault, and aggravated robbery. Pursuant to R.C. 2901.01(A)(9), murder (2903.02); felonious assault (2903.11); and aggravated robbery (2911.01) are offenses of violence. According to testimony presented at trial, appellant committed these crimes in the presence of known gang members, i.e., Stephaun Gaston and Kevin Martin, while uttering a phrase specific to the Moody Manor Bloods, i.e., "on Kent."

{¶ 85} Furthermore, when asked whether he had ever been involved in the prosecution of known Moody Manor Bloods for crimes of violence, Detective Noon indicted that he was involved in 40-50 prosecutions involving "[m]urder, felonious assault, aggravated assault, [and] breaking into habitations." Over objections, the trial court allowed the state to produce certified judgment entries in criminal cases involving three known Moody Manor Bloods: Keshawn Jennings, Antwaine Jones[6], and Stephaun Gaston[7].

[6] In certified judgment entries dated August 5, 2013, the trial court found co-defendants Keshawn Jennings and Antwaine Jones guilty of aggravated murder, murder, attempted murder, improperly discharging a firearm at or into a habitation, and four counts of felonious assault. *See State v. Jennings*, Lucas C.P. No. CR0201202661 (Aug. 15, 2013), *State v. Jones*, Lucas C.P. No. CR0201202661 (Aug. 15, 2013).

[7] In a certified judgment entry dated March 21, 2013, the trial court found Stephaun Gaston guilty of attempted burglary. *See State v. Gaston*, Lucas C.P. No. CR0201202855. Detective Noon testified that Gaston's conviction involved Scott High School and that appellant was a co-defendant in that case.

{¶ 86} Reviewing the evidence in a light most favorable to the state, any rational trier of fact could have found the essential elements of participation in a criminal gang proven beyond a reasonable doubt. There was sufficient, admissible evidence from which the jury could conclude that appellant, while he was an active member of the Moody Manor Bloods, which he knew engaged in a pattern of criminal conduct, purposely committed criminal conduct. Thus, his conviction for participating in a criminal gang in violation of R.C. 2923.42(A) was supported by sufficient evidence. Appellant's third assignment of error is not well-taken.

Fourth Assignment of Error

{¶ 87} In his fourth assignment of error, appellant states:

> The trial court abused its discretion and erred to the prejudice of Appellant at sentencing by imposing financial sanctions without consideration of Appellant's ability to pay.

Appellant argues that the trial court erred in ordering him to pay court costs without first ascertaining his ability to pay such costs.

{¶ 88} Regarding costs of prosecution, R.C. 2947.23(A)(1)(a) provides: "In all criminal cases, including violations of ordinances, the judge or magistrate shall include in the sentence the costs of prosecution, including any costs under section 2947.231 of the Revised Code, and render a judgment against the defendant for such costs." This section "requires a sentencing court to impose the costs of prosecution against all convicted defendants." *State v. Wright*, 6th Dist. Wood No. WD-11-079, 2013-Ohio-1273, ¶ 5,

citing *State v. White*, 103 Ohio St.3d 580, 2004-Ohio-5989, 917 N.E.2d 393, ¶ 8; *see also State v. Dupuis*, 6th Dist. Lucas No. L-12-1035, 2013-Ohio-2128, ¶ 13 ("Pursuant to R.C. 2947.23, the trial court is required to impose 'the costs of prosecution' on all convicted defendants, including those who are determined to be indigent for purposes of obtaining appointed defense counsel at trial."). Given the trial court's *obligation* to impose costs of prosecution under R.C. 2947.23, this court has held that "[t]he trial court is not required to hold a hearing or otherwise determine an offender's ability to pay before ordering him to pay costs." *State v. Reigsecker*, 6th Dist. Fulton No. F-03-022, 2004-Ohio-3808, ¶ 10, citing *State v. Fisher*, 12th Dist. Butler No. CA98-09-190, 2002-Ohio-2069.

{¶ 89} In light of the foregoing, we find that the trial court did not err by ordering appellant to pay the costs of prosecution. Appellant's fourth assignment of error is not well-taken.

Conclusion

{¶ 90} Based on the foregoing, the judgment of the Lucas County Court of Common Pleas is affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24(A).

Judgment affirmed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J. _____
JUDGE

Thomas J. Osowik, J. _____
JUDGE

James D. Jensen, J. _____
CONCUR.
JUDGE