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COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION III

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STATE OF WASHINGTON,

Respondent,

v.

GUSTAVO TAPIA RODRIGUEZ,

Appellant.

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BRIEF OF RESPONDENT

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- E NELOS report and TRAX box indicators

**I. ASSIGNMENTS OF ERROR**

1. Mr. Tapia was improperly convicted of premeditated aggravated murder while committing crimes that also provide the basis for felony first-degree murder.
2. Mr. Tapia was improperly convicted of aggravated murder based on the drive-by shooting aggravator.
3. Trial counsel was ineffective for failing to cite cases that supported the State's positions.
4. The trial court was required to violate the defendant's right to control his defense by removing jurors sua sponte.
5. The trial court failed to grant a change of venue motion.
6. The trial court erred in admitting cell site location data.
7. The trial court erred in admitting a *Smith*<sup>1</sup> affidavit.
8. There was insufficient evidence of the deliberate cruelty aggravator.
9. Cumulative error.

**II. ISSUES RELATED TO ASIGNMENTS OF ERROR**

1. Are premeditate murder and felony murder alternative means such that they require proof of different elements?
2. Was there sufficient evidence to prove the kidnapping aggravator?
3. Was there sufficient evidence to prove the drive-by shooting aggravator?

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<sup>1</sup> *State v. Smith*, 97 Wn.2d 856, 651 P.2d 207 (1982).

4. Was counsel ineffective for failing to object to the use of officers as translators?
5. Was counsel ineffective for failing to remove jurors?
6. Was counsel ineffective for failing to cite cases that were either already cited or supported the State's position?
7. Was counsel ineffective for failing to further enquire as to what jurors heard?
8. Was counsel ineffective for failure to object to admissible, relevant information?
9. Did the trial court error in failing to grant a change of venue motion?
10. Did the trial court error in admitting cell site location data?
11. Did the trial court error in admitting a *Smith* affidavit?
12. Were any potential errors harmless?
13. Was there cumulative error?
14. Was there sufficient evidence for the deliberate cruelty aggravator?

### **III. STATEMENT OF THE CASE**

#### **A. The Execution**

On the night of December 21, 2016 Josh Bechtel arranged on Facebook to meet Jill Sundberg at the Shady Tree RV Park to buy heroin from her. RP 716, 735, 736. After he bought the heroin, he left but continued to communicate with her. Jill Sundberg's last communication to Mr. Bechtel was at 12:07 AM on the 22<sup>nd</sup>. RP 731. Ms. Sundberg was

often picked up at the Shady Tree. RP 741. Gonzalo Reyes Sr. tried to pick her up on the night of the 21<sup>st</sup>, but did not connect with her. RP 741-42. She later texted him, at about 9:00 PM, that she was going to stay at the Shady Tree. RP 742.

Liliana Alejandres was Jill Sundberg's friend. RP 754. They hung around at the Shady Tree. *Id.* During trial Ms. Alejandres claimed a lack of memory. RP 755-762. However, she gave an interview to Det. Cook on January 5, 2017. RP 777, 785, 800. Excerpts of the interview were admitted as recorded recollections. RP 772-775, 800. Mr. Tapia believed he ran the Shady Tree RV Park. RP 800. Ms. Alejandres also stated that Mr. Tapia pretended to be part of a cartel. She was scared that she was going to end up like Jill. RP 813. She knew Mr. Tapia as a businessman with a bigger boss involved in drugs. RP 816.

On the night of December 21, 2016 Leslie Silva Diaz visited the Shady Tree RV Park with her friends Carlos Lopez and Destiny Rivera. RP 822, 863. They were smoking meth with Chato (Salvador Espinoza Gomez) in his trailer. RP 823, 1188. Later Jill joined them. RP 824. Jill would stay with Chato from time to time. RP 1186. They were also joined by a person named Tom or Don. RP 837, 1053.

Mr. Tapia and his crew Julio Ambrosio Mendez Villanueva, Fernando Marcos Gutierrez (Zapatos) and Ambrosio Mendez Villanueva

(Chivo or Chivito) started the evening drinking in Gustavo Tapia's trailer, where they all lived. RP 1049-50. Later they went over to another trailer Mr. Gutierrez owned but was being rented by Chato. RP 1051, 1189.

After the group in Chato's trailer was joined by Albarran Verona, Gutierrez and Mendez Villanueva, they had a bottle of tequila, beer and drugs. RP 826. After a while Silva Diaz, Lopez and Rivera left the small trailer to return to Quincy, leaving Jill behind with the men. RP 827, 1052. Jill Sundberg and Mr. Tapia started arguing. Tom/Don left during this argument, leaving Jill with the four men from Mr. Tapia's trailer and Chato. RP 1054. Mr. Albarran Verona could not understand them, so did not know what they were talking about. RP 1055. During this time, Mr. Tapia ordered Albarran Verona, Mendez Villanueva and Gutierrez to go ensure someone was not stealing things at the park laundry mat. RP 1054. About 10 minutes after Mr. Albarran Verona returned to the trailer Mr. Tapia left with Mr. Gutierrez and Mr. Mendez Villanueva. RP 1054. Mr. Gutierrez then called Mr. Espinoza Gomez and told him Mr. Tapia wanted him and to go over to Mr. Tapia's trailer. RP 1192. Mr. Albarran Verona was left behind to make sure Ms. Sundberg did not leave. RP 1055, 1192.

Mr. Tapia told Espinoza Gomez that Ms. Sundberg had said something he didn't like, and that Mr. Espinoza Gomez should get her out of his trailer. RP 1195. Espinoza Gomez refused. *Id.*

Mr. Mendez Villanueva and Mr. Gutierrez returned to Mr. Espinoza Gomez's trailer and said they were to take Ms. Sundberg to Mr. Tapia's truck. RP 1055, 1196. Ms. Sundberg pulled a knife to resist, but Mr. Gutierrez pulled out a gun, and Mr. Albarran Verona disarmed Ms. Sundberg. RP 1056-57. The three of them forced Ms. Sundberg into the middle of the back seat of Mr. Tapia's SUV. Mr. Espinoza Gomez was ordered to accompany them. RP 1059, 1197. Mr. Tapia drove west on I-90, got off and took the road that goes down to the river. RP 1060. They arrived at a parking area with a restroom a bit after midnight. RP 1060. Mr. Gutierrez used a cell phone charging cord to tie up Ms. Sundberg's hands. RP 1061. Mr. Albarran Verona took Ms. Sundberg about five meters from the vehicle. RP 1062. Ms. Sundberg asked "why?" RP 1062. Mr. Tapia ordered Ms. Sundberg to kneel. RP 1062. Mr. Albarran Verona lowered Ms. Sundberg's head down. RP 1063. Gustavo Tapia then emptied an entire magazine from his pistol into Ms. Sundberg's head and back. RP 1063, 1200.

The group of men then got back into the Tahoe. RP 1064. They started to drive away and then stopped. RP 1064. Mr. Mendez Villanueva got out with a piece of cardboard and a knife, ran over and stuck the cardboard to Ms. Sundberg's back with the knife. RP 1064. The group then drove to a store in Quincy to buy beer. RP 1067. They then returned

to the trailer park, collected all of Ms. Sundberg's belongings, drove to the Vantage Bridge and dumped her belongings into the river. RP 1068, 1202. They then returned to the trailer park. RP 1068. That evening Ms. Silva-Diaz's group returned to the park to drop off Mr. Lopez and saw Mr. Tapia show up in his Yukon with Zapatos, Julio, Chato and another Hispanic male. RP 836.

The next day Tapia, Espinoza Gomez, Mendez Villanueva and Albarran Verona went to a store in Ephrata to buy ammunition and then to an orchard on the road to Kennewick by the river, near Desert Aire. RP 1070, 1203. They went shooting in a clearing in the orchard. RP 1070. Gutierrez stayed behind at the trailers. RP 1238. Mr. Tapia later told Mr. Albarran Verona that Ms. Sundberg had insulted his daughter. RP 1074.

Late in the morning of December 22, 2019 Lynnly Kunz was taking her dog for a run off of the Old Vantage Highway. RP 902. She found a dead body in the parking area of the trail. RP 902. She left to call the police. RP 904. She then drove back, showed the officer the body, provided information and then left the area. RP 905.

### **B. The Investigation**

Detective Cook responded to the scene on the Old Vantage Highway, a dead-end road leading to the Columbia River. RP 876. There he found a body with a sign on it and a knife. In the area of the body were

numerous bullets and shell casings that were collected. RP 884, 983-91. Bullet fragments and clothing with bullet holes were collected during the autopsy. RP 992-94. Through tattoos and law enforcement records, the body was identified as Jill Sundberg. 994-95.

During the investigation officers interviewed several people, and collected buccal swabs for DNA analysis from many of them, including the five people involved in the Sundberg killing. RP 995, 1323. Fernando Gutierrez's DNA was found on the gun from Julio Albarran Verona's backpack, along with a DNA mixture from several other people. RP 1337-38. There was also a Bud Light can found at the scene with Mr. Espinoza Gomez's DNA on it. RP 1342-43.

Officers obtained a video from the Short Stop convenience store in Quincy. On the video time stamp of 12/22/16 at about 12:50 AM, officers recognized Mr. Albarran Verona and Mr. Gutierrez purchasing items at the store. RP 1307.

Officers obtained call data and NELOS records from AT&T. RP 1274. These are records maintained by AT&T for their business. RP 909-918. NELOS records are historical location records used by engineers in determining coverage areas. RP 917. Det. Cox uploaded the files to a company called ZETX. RP 1275. ZETX prepares a .KML file that will show the data in the files in relation to Google maps. RP 1275. Using the

processed phone records officers were able to find a clearing in an orchard in the Mattawa area that was approximately 200-300 yards long by 200-300 yards wide. RP 1292-93. No person had been able to adequately direct the detectives to the orchard. *Id*, RP 1320. In the clearing the officers were able to use the phone records to focus on a specific area and used metal detectors to find shell casings. RP 1294, 1298. They also found a Modelo beer can at the orchard. RP 1310.

NELOS is a system, developed by AT&T, used to geo locate cell phones. RP 1579, *Mark Austin et al*, Location Estimation of a Mobile Device in a UMTS Network, U.S. Patent number US20120052883A1 (granted May 5, 2013)(NELOS patent). NELOS uses assisted GPS, coupled with relative timing offsets of signals to and from cell towers to locate 3G mobile devices with GPS like accuracy, regardless of whether the GPS receiver is available on the phone. The system uses this information from crowdsource devices and towers to determine propagation delay and calibrate information such as timing offset. *NELOS patent*. A NELOS report will generate a data line that has an item number, an IMEI (serial number) for the phone, a connection time (UTC), a location in longitude and latitude, and an estimated location accuracy. RP 1585, Ex. 150.

ZETX created an animation displaying the NELOS data, with Mr. Tapia's information in red, Mr. Albarran Verona's information in green, Mr. Espinoza Gomez's information in blue, and Mr. Gutierrez's information in orange. RP 1583–1588. The software also adjusts the UTC time to local time. RP 1585-86. The ZETX .KML file creates a box that displays the information from the NELOS record and shows a pin icon for the location. RP 1599-1601, 1966, Ex. 1. It also shows a circle designating the accuracy rating around the pin. RP 1608-10. For call detail records, which show a phone call the ZETX animation shows an antenna pattern and the information from the records in a box. Ex. 1, 00:26. ZETX maps the data from AT&T records. RP 1665-67.

The tighter the range NELOS reports as accurate the more likely the phone is to be within the circle depicted. RP 1618. Also, when NELOS reports positions that coincide with towers those positions are often not accurate. RP 1624-26. AT&T also provides a disclaimer to use the NELOS records with caution. RP 1652.<sup>2</sup> Verizon uses a different location system. RP 1704.

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<sup>2</sup> The Court reporter occasionally quotes the prosecutor as referring to “air” circles when talking about the NELOS data. The correct term should be “error” circles. RP 1701.

The ZETX animation and the AT&T records track the witness testimony. It shows the group in the vicinity of the Shady Tree RV Park on the evening of the 21<sup>st</sup> until about 10 minutes after midnight on the 22<sup>nd</sup>, at which time Mr. Tapia's and Mr. Espinoza Gomez's phones start moving. Ex. 1, 03:00-07:10. At 12:21:52 the records located Mr. Tapia's phone at the parking lot where Ms. Sundberg's body was found, with an accuracy likely better than 25 meters. Ex. 1, 08:40. Officers made the drive between the Shady Tree and the murder scene in about 11 minutes going the speed limit or slightly under. RP 1758-59. It then shows the group going to Quincy, where Mr. Gutierrez and Mr. Albarran Verona are seen on the Short Stop security camera. Ex. 1, 13:50-15:20. At about 1:23 in the morning the cell phone data goes down to the area of the Vantage Bridge on the Columbia River. Ex. 1, 16:00-17:45. At about 1 PM on the 22<sup>nd</sup> the group is shown in Ephrata. Ex. 1, 19:00-20:00. The group returns to the Shady Tree and leaves Gutierrez behind. They then travel to the orchard. Ex.1, 20:00-25:00. There are then a large number of points in the Orchard. Ex. 1, 25:00-26:15. The data then shows the group returning to the Shady Tree. Ex. 1, 26:15-29:30.

Modelo beer cans have the same lot numbers as the boxes that they are distributed in. RP 944. The lot number on the cans and the box stabbed into Jill Sundberg was distributed around Grant County. RP 953.

The detectives made an overhead image of the orchard clearing using a drone in July of 2017. RP 957.

During the search warrant of a house on Road 5 Det. Messer found a gun in the toilet tank. RP 960, 962. Ambrosia Mendez Villanueva was also arrested at that house. RP 1278. The gun in the toilet tank matched a shell casing found in Mr. Tapia's Tahoe. RP 1477-78. During the search the detectives also found a shell casing at a vehicle at the house. At that same time officers also arrested Albarran Verona at a different address. RP 1281. Officers found a gun in Albarran Verona's backpack. RP 1287. That gun matched shell casings found both at the scene of the homicide off Old Vantage Highway and the orchard. RP 1472, 1519-20.

### **C. The Trial**

Gustavo Tapia was charged, by a consolidated amended information, with murder in the first degree under the alternative means of premeditation and felony murder predicated on kidnapping. CP 55-56. He was also charged with aggravators under RCW 10.95.020(7) (premeditated murder during the course of a drive-by shooting) and (11)(d)(premeditated murder during the course of a kidnapping). He was also charged with a deliberate cruelty aggravator under RCW 9.94A.535(3)(1) and a firearm enhancement. CP 56. He faced an

additional charge of unlawful possession of a firearm in the second degree. CP 56.

Mr. Albarran Verona agreed to plead guilty to testify against Mr. Tapia in this case, as well as two people in another case. RP 1076. During motions in limine, the defense indicated it was going to impeach Mr. Albarran Verona and other witnesses with their plea agreement. RP 34. As part of that plea agreement he had to testify truthfully. RP 1075-76. Mr. Albarran Verona testified that he was scared to testify because of what might happen in prison. RP 1103-04. He also testified if he did not tell the truth he could be charged with murder or attempted murder in another case and receive a longer sentence in this case. RP 1077, 1104, 1110.

Mr. Ambrosio Mendez Villanueva was called as a witness. During his testimony he claimed a lack of memory about what happened. RP 1419-1420. During a police interview Mr. Mendez Villanueva had signed a *Smith* Affidavit. He claimed he did not recognize the document, but did recognize the signature as his. RP 1426. Mr. Mendez Villanueva pled guilty to murder, and took an 18-year sentence. He was offered a 10-year sentence in exchange for testimony, but refused. RP 1426. The Court found Mr. Mendez Villanueva's claim of lack of memory to not be credible. RP 1443.

Deputy Dave Delarosa, a native Spanish-speaking deputy, testified to his background. RP 1726. He was the interpreter for Det. Green's interview of Mr. Mendez Villanueva and reviewed the transcript of that interview. RP 1727. During the interview Det. Green typed up a statement under the penalty of perjury for Mr. Mendez Villanueva to sign. RP 1730. Dep. Delarosa explained to Mr. Mendez Villanueva what "under penalty of perjury" meant. RP 1741. The Court concluded that Mr. Mendez Villanueva's claim of lack of memory was feigned. RP 1735. Defense counsel had a Certified Court Interpreter review the recordings and create a transcript of the interview. RP 1741.

The State called a Court Certified Interpreter to translate the cardboard sign that was stuck into Jill Sundberg's back. RP 1797. He interpreted the sign to say, "This is for all the rats that are fucking around, women and rats that have no respect for the Gulf Cartel." RP 1797-98. The word "rats" was used to mean "snitch" or "informant." RP 1798.

The jury returned verdicts finding Mr. Tapia guilty of all counts. In addition it answered special verdict forms unanimously finding that Mr. Tapia committed all alternative means and aggravators alleged. RP 2276-80.

#### IV. ARGUMENT

##### A. Mr. Tapia was properly convicted of aggravated first-degree murder.

1. *Mr. Tapia confuses the concepts of First-Degree Felony Murder with Premeditated Murder with aggravating factors.*

Mr. Tapia was charged with first-degree murder by the alternative means of premeditated first-degree murder and felony murder predicated upon the murder being committed in the course of or furtherance of a kidnapping. In addition, he was convicted of the aggravating circumstances of kidnapping and drive-by shooting as it relates to the premeditated first-degree murder. It should be noted that the aggravator statute, RCW 10.95.020(7), does not use the term drive-by shooting, but the elements of the aggravator are very similar to the crime of drive-by shooting, RCW 9A.36.045, and thus the term drive-by shooting aggravator is a convenient short hand when referring to this aggravator. It actually has no place in the actual language of the aggravator.

Mr. Tapia states, "First-degree felony-murder is not subject to a sentence of aggravated first-degree murder. Yet, the Legislature saw fit to include felony murder as an aggravating factor, even though it limited aggravated first-degree murder to premeditated murder." Brief of Appellant at 14. This misstates the law and misinterprets the statute.

Felony murder is not an aggravating factor for premeditated murder. Premeditated murder has the mens rea element of an intent to kill that was premeditated beforehand. Felony murder does not have a mens rea of intent to kill. Instead, the State must prove the mens rea of the underlying felony, and that a death resulted during the commission of the crime. If someone commits premeditated murder while committing the other felony, in this case kidnapping and drive-by shooting, then the aggravator applies. The State has to prove both the intent to kill and the intent required for the underlying felony for aggravated first-degree murder.

The State did prove the intent to kill and the intent for the underlying felony. In the special verdict forms the jurors unanimously found the killing to be premeditated. CP 1244. They also unanimously found the intent for kidnapping to commit assault 2, to inflict bodily injury and to inflict extreme mental distress. CP 1247, 1249-50. Because the jury found the State had proved the mens rea for both the kidnapping and the premeditated murder, it appropriately found the State proved aggravated murder beyond a reasonable doubt. Because aggravated first-degree murder and felony murder do not have the same elements they do not implicate double jeopardy concerns when charged as alternative means in the same count.

2. *There was sufficient evidence to prove kidnapping.*

In order to prove kidnapping the State must present evidence from which a reasonable trier of fact could conclude the Mr. Tapia or an accomplice abducted Jill Sundberg with the intent to commit a felony, the intent to inflict bodily injury or the intent to inflict extreme emotional distress. RCW 9A.40.020. "Abduct means to restrain a person by either (a) secreting or holding him or her in a place where he or she is not likely to be found, or (b) using or threatening to use deadly force." RCW 9A.40.010(1). "Restrain means to restrict a person's movements without consent and without legal authority in a manner which interferes substantially with his or her liberty. Restraint is "without consent" if it is accomplished by (a) physical force, intimidation, or deception..." RCW 9A.40.010(6). Mr. Tapia cites *State v. Green*, 94 Wn.2d 216, 229, 616 P.2d 628, 636 (1980), for the proposition that the killing itself is not restraint, therefore Mr. Tapia did not kidnap Ms. Sundberg. However, he ignores the fact that his accomplices forced Ms. Sundberg out of the trailer and into the Yukon at gunpoint, drove her to a remote area, tied her hands with a cell phone charging cord, dragged her out of the Yukon, and then shot her. Ms. Sundberg was abducted by the threat of deadly force, restrained against her will, and taken to a place where she was unlikely to be found. The restraint/abduct element of the kidnapping was met well

before Ms. Sundberg was executed. There was more than sufficient evidence to prove kidnapping.

3. *The drive-by shooting was completed by the same act as the murder.*

Mr. Tapia argues that the drive-by shooting ended before the actual act of murder was committed. The drive-by shooting aggravator provides: “The murder was committed during the course of or as a result of a shooting where the discharge of the firearm, as defined in RCW 9.41.010, is either from a motor vehicle or from the immediate area of a motor vehicle that was used to transport the shooter or the firearm, or both, to the scene of the discharge.” RCW 10.95.020. The discharge of the firearm occurred when Mr. Tapia shot Ms. Sundberg in the head and upper body. They were about 15 feet away from the Yukon that brought Mr. Tapia and the gun to the parking lot where she was killed, with nothing in between the car and the shooting, and thus were within the immediate area of the vehicle that transported both the shooter and the firearm. Thus, the murder was committed as a result of the shooting that was in the immediate area of the vehicle. There is a connection, and the drive by was completed by the exact same act as the murder. Mr. Tapia’s argument simply does not match the facts.

The case that Mr. Tapia relies upon, *State v. Hachaney*, 160 Wn.2d 503, 511, 158 P.3d 1152, 1156 (2007), is not on point. In *Hachaney* the arson was committed to cover up the murder, the victim was already dead when the fire started. In this case, both the kidnapping and the drive-by shooting were started before the murder, and were completed simultaneous with the murder. The murder was committed in the course of the two aggravating circumstances.

Mr. Tapia was charged with premeditated murder with aggravating circumstances. He was charged with premeditated and felony murder in one count, as alternative means, CP 55, and aggravating circumstances were alleged immediately afterwards. CP 56. There was no need to charge Mr. Tapia with the separate crimes of drive-by shooting and kidnapping. Mr. Tapia does not cite any case law to the contrary. No doubt if the State has brought separate drive-by shooting and kidnapping charges Mr. Tapia would be arguing, possibly successfully, that they should be dismissed under a double jeopardy analysis. *State v. Arndt*, 453 P.3d 696, 712 (Wash. 2019); *State v. Muhammad*, 451 P.3d 1060, 1081 (Wash. 2019). Mr. Tapia was convicted of precisely what he was appropriately charged with.

## **B. Counsel Was Not Ineffective.**

### *1. Legal Standard*

A court reviews ineffective assistance of counsel claims de novo. *State v. Sutherby*, 165 Wn.2d 870, 883, 204 P.3d 916 (2009). A defendant claiming ineffective assistance of counsel has the burden to establish that (1) counsel's performance was deficient, and (2) the performance prejudiced the defendant's case. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Failure to establish either prong is fatal to an ineffective assistance of counsel claim. *Id.* at 700.

Counsel's performance is deficient if it falls below an objective standard of reasonableness. *State v. Stenson*, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997), *cert. denied*, 523 U.S. 1008 (1998). Our scrutiny of counsel's performance is highly deferential; we strongly presume reasonableness. *State v. Grier*, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011).

In his challenges Mr. Tapia makes many assumptions about defense counsel and the record. "The burden is on a defendant alleging ineffective assistance of counsel to show deficient representation based on the record established in the proceedings below." *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251, 1257 (1995).

2. *There is no issue using an officer for interpreter for witness/suspect interviews.*

Mr. Tapia argues that counsel was ineffective for failing to object to anything from the interviews from Spanish speaking witnesses because an officer served as an interpreter, and officers are so inherently biased that anything coming from those interviews must be suppressed. Counsel was not ineffective because this is an unwarranted extension of the law that has no chance of succeeding. Defense counsel was not ineffective for not raising it.

The first issue with Mr. Tapia's theory is the remedy for a biased witness is not suppression, it is cross-examination. *State v. Lee*, 188 Wn.2d 473, 489, 396 P.3d 316, 324 (2017). Deputy Delarosa testified about his background in the Spanish language and was available for cross-examination. That is all that is required. *State v. Cervantes*, 62 Wn. App. 695, 700, 814 P.2d 1232, 1235 (1991), used a potential co-defendant who had a motive to have Cervantes inculcate himself. Deputy Delarosa had no such motive. In addition, the *Cervantes* Court noted another case in which "there were no means available to verify the brother's questioning in Spanish was a true translation of the trial court's interrogation." *Id.* at 700. In this case the recordings of the interviews were reviewed by a court certified interpreter. This provides more than an adequate control on

the bias of the officer. If there was a conflict in the interpretation, it could have been brought out in front of the jury. There was no conflict of interpretation claimed.

In addition, a Spanish-speaking officer has no more conflict or bias than an English-speaking officer. An English-speaking officer speaking to an English-speaking defendant or witness has to listen to what is said, internalize the meaning, and then relay that meaning to someone else. The English-speaking officer usually does not relay information word for word, but instead conveys meaning. A Spanish-speaking officer is no different. He listens to the Spanish-speaking interview subject, internalizes the message, and then conveys the meaning in English. The potential for bias is the same. Recorded interviews and cross-examination are the cure in both cases<sup>3</sup>. While the Spanish recorded interviews require a specialist interpreter or bilingual attorney to review, where as any English speaking attorney can review an English interview, this is not grounds to discard the evidence.

Defense counsel also had the opportunity to interview each of the witnesses using an independent interpreter. He did so. In *State v. Garcia-*

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<sup>3</sup> The State does not mean to suggest a recording of the interview should be a prerequisite to its introduction into evidence, but it is something the jury could consider.

*Trujillo*, 89 Wn. App. 203, 209, 948 P.2d 390, 393 (1997), the court held that “[w]e agree that *Agent Bejar’s* (the officer translator’s) testimony that Garcia made such a statement to him during the interview would not have constituted hearsay under ER 801.” (Emphasis in original). Mr. Tapia appears to conclude that once a witness talks to a Spanish-speaking officer witnesses are irrevocably tainted. Here the witnesses were interviewed and testified with court certified interpreters after their interviews with officers. Mr. Albarran Verona gave a considerably different story to Deputy Delarosa than what he testified to at trial. RP 2078, 2087. There is absolutely no logic or case law behind this argument. Use of officer translators does not result in a per se exclusion of the interview or the witness, and counsel was not ineffective for advancing this argument.

Even if the information from the interviews were excluded from trial, it would not have affected the case. Mr. Albarran Verona and Mr. Espinoza Gomez testified consistent with their later interviews, although not necessarily the initial one given to officers, and their testimony, combined with the cell phone and other evidence, provides more than enough evidence that there is no reasonable probability that the case would have come out differently.

### 3. *Juror Challenges*

Mr. Tapia challenges jurors number 15 and 28 because they indicated they had a hardship and the Court did not remove them, therefore defense counsel should have. RCW 2.36.100 governs dismissal for hardship. Judges have broad discretion in deciding what is an “undue hardship.” *State v. Ingels*, 4 Wn.2d 676, 683, 104 P.2d 944, 947 (1940). Here Mr. Tapia argues that his attorney should have done more to disqualify these jurors for their hardship. However, he does not establish that counsel did not have a reason for leaving them on. Trial counsel was actually in the courtroom talking to the jurors, seeing their expressions and hearing their tones of voice. For Mr. Tapia to establish that counsel was ineffective he would have to establish that no reasonable trial counsel would have not picked these jurors over others. He has not even tried to identify which jurors would have been better. A juror who does not want to be there is just as likely to take it out on the State as he is the defendant, and there is no per se exclusion.

Mr. Tapia asserts that it was error not to question juror 44 about his wife’s work with the prosecutor’s office. The record does not support this contention. The experienced public defender on this case would have been more than familiar with the prosecutor’s office. He would have been well aware that the employee works in a separate division and a separate

building from the prosecutors handling Mr. Tapia's case. Juror 44 did not raise his paddle when asked if he knew anything about the case. RP 110-11. Because a record was not fully developed, including what the defense counsel did and did not already know, the record is simply insufficient to evaluate this claim. The presumption of effective assistance means that there is presumably a reason counsel did not need to ask more questions.

In addition, Mr. Tapia has to establish that with reasonable probability the outcome would have been different. He has not identified what juror defense counsel should have picked instead, or how that would have made the trial different. In an ineffective assistance of counsel claim, it was his burden to do so.

Mr. Tapia also challenges Juror 35 for not appreciating the fact that the school he was working at was tagged. Mr. Tapia claimed that there was "obvious racial bias underlying the response to the prosecuting attorney's question." He also compared the statement to one where a juror said, "I see a lot of black people dealing drugs." To be upset by vandalism does not make someone automatically racist. There is no "obvious racial bias" underlying the response to the question. If there was trial counsel, who was there and could observe the juror, was in the best place to pick up on it. Mr. Tapia does not establish ineffective assistance of counsel.

Nor does Mr. Tapia establish the trial judge should have excused the juror for cause. “Implicit in the Sixth Amendment is the criminal defendant's right to control his defense.” *State v. Lynch*, 178 Wn.2d 487, 491, 309 P.3d 482, 485 (2013). For a trial judge to jump in and remove a juror without being asked by the defense attorney inserts the trial judge into defense strategy. The case did not involve tagging. The defense attorney may have liked this juror more than others.

Given the strategic importance of voir dire and the wide room for strategic decisions a defendant can make concerning which jurors to strike or accept, a court must not wade into the jury selection process *sua sponte* dismissing jurors absent an unmistakable demonstration of bias lest it interfere with a defendant's right to control his defense.

*State v. Lawler*, 194 Wn. App. 275, 284–85, 374 P.3d 278, 282 (2016).

The comment simply did not rise to the level of justification needed to remove a juror *sua sponte*. In *Lawler*, the juror bias was much clearer than in this case, yet the Court still held there was no duty to dismiss *sua sponte*.

#### 4. *Juror's Failure to Hear*

Jurors informed the bailiff they were having trouble hearing. RP 1215. The parties asked, and the court agreed, to remind the jury to raise their hand if there was an issue. Both parties participated in the discussion and no one asked the trial court to do more, despite an offer by the Court.

RP 1215-16. It is the appellant's responsibility to ensure an adequate record. There was no objection noted. This alleged error is not a manifest constitutional error under RAP 2.5, and the court should decline to review it. It is alleged as statutory error under RCW 2.36.110. In addition, the parties in the courtroom, who heard the testimony and the radios, did not believe that it was a big issue. Therefore, there is no record of what was missed, and any error was not manifest.

Nor was defense counsel ineffective for failing to enquire. Perhaps he felt that repeating the testimony would be bad for his client. Perhaps he believed, having been present and heard everything, that what would have been missed would be de minimus. Nor does the record show that, with reasonable probability, the result would have been any different.

##### 5. *Failure to Cite State v. Ish*

In its motions in limine the State asked the defense to indicate whether it intended to impeach the State's witnesses in regards to their plea agreements. CP 842. The defense indicated it would. RP 34, 44-52. The State specifically cited to *State v. Ish*, 170 Wn.2d 189, 241 P.3d 389, 392 (2010), in its motion in limine, thus the trial court was already aware of the case. CP 842. In addition, the Court of Appeals, in analyzing *Ish*, has noted "Where there is little doubt that the defendant will attack the veracity of a State's witness during cross-examination, for example, the

State is entitled to engage in preemptive questioning of its witness on direct to “take the sting” out of the inevitable damaging cross-examination.” *State v. Smith*, 162 Wn. App. 833, 850, 262 P.3d 72, 80 (2011)(Citing *Ish*, 170 Wn.2d at 199 n. 10). Here the State specifically asked in motions in limine if the defense was going to attack the veracity of the witness, and the defense indicated it would. The State was entitled to take the sting out by asking about the plea agreement first. Defense counsel was not ineffective for failing to raise *Ish*. It was already raised; it just did not make any difference.

In addition, *Ish* noted that this kind of error was harmless in that case. In this case it was also harmless, as the strength of evidence supporting the witness statements was strong.

#### 6. *Failure to Cite State v. Bourgeois*

Mr. Tapia also claims that his counsel should have cited *State v. Bourgeois*, 133 Wn.2d 389, 402, 945 P.2d 1120, 1127 (1997), for the proposition that witnesses’ fear of testifying should not have been admitted. However, the rule in *Bourgeois* is that witness fear is irrelevant unless the witnesses’ credibility is attacked. *Id.* In *Bourgeois*, four witnesses testified as to their fear. The Court ruled that three of the witnesses’ credibility had not been attacked, so it was inappropriate as to them. However, it was fair game to bring out the fear of the witness

whose credibility would be attacked. “It was reasonable for the State to anticipate the attack and ‘pull the sting’ of the defense’s cross-examination.” *Id.* Here the defense indicated in motions in limine that he would attack the witnesses’ credibility. Defense counsel was not ineffective because *Bourgeois* supports the State’s position. In addition, the court found the prejudice slight and the error harmless in that case as well.

#### 7. *Evidence of Cartels*

Mr. Tapia claims his counsel was ineffective failing to renew his motion in limine about gangs to keep out cartel evidence. However, that motion in limine was granted with an exception for evidence about the sign left on the victim’s body. RP 29-30. Defense counsel acknowledged that would come in, and he had no objection to it. *Id.* A recorded recollection of witness Lilliana Alejandres was also admitted where she claimed that Mr. Tapia claimed that he was part of the Cartel. RP 802. This provides a clear nexus between Mr. Tapia and the sign. No other evidence regarding cartels was introduced. Defense counsel was not ineffective because the objection would have served no purpose, and the evidence was admissible.

### **C. Change of Venue Motion**

The mere fact of media coverage does not prove prejudice. *State v. Welty*, 65 Wash. 244, 249, 118 P. 9 (1911). In *State v. Jeffries*, 105 Wn.2d 398, 717 P.2d 722, cert. denied, 479 U.S. 922, 107 S. Ct. 328, 93 L. Ed. 2d 301 (1986), there was no need to change venue due to six months of publicity (factual in nature) for an aggravated first-degree murder in a county of a population of 50,000. See also *State v. Rupe*, 101 Wn.2d 664, 674, 683 P.2d 579 (1984), (publicity that is largely factual in nature and that dissipated over several months did not prejudice the jury); *State v. Gilchrist*, 91 Wn.2d 603, 609, 590 P.2d 809, 812 (1979), (the court did not abuse its discretion in denying a change of venue where the 19 news articles were responsible and factual rather than inflammatory).

In *State v. Jackson*, 150 Wn.2d 251, 270, 76 P.3d 217 (2003), the Washington Supreme Court noted, “the fact that the vast majority of the venire had heard about the case is not the relevant question--the relevant question is whether the jurors at the trial had such fixed opinions that they could not be impartial. Voir dire provides a means to make this determination.” *State v. Jackson*, 150 Wn.2d 251, 270, 76 P.3d 217 (2003). Even if local prejudice exists, the Defendant can, by challenges, obtain a jury unaffected by it. *State v. Comer*, 176 Wash. 257, 268, 28 P.2d 1027, *appeal dismissed*, 292 U.S. 610, 54 S. Ct. 782, 78 L. Ed. 1470

(1934); *State v. Schafer*, 156 Wash. 240, 245, 286 P. 833 (1930); *State v. Lindberg*, 125 Wash. 51, 55, 215 P. 41 (1923); *State v. Vane*, 105 Wash. 170, 173, 177 P. 728 (1919). *See also Sheppard v. Maxwell*, 384 U.S. 333, 354-55, 86 S. Ct. 1507, 16 L. Ed. 2d 600 (1966) (judge's refusal to take precautions against the influence of pretrial publicity did not prejudice defendant's right to due process although the case was a veritable media circus).

Reviewing courts assess whether a trial court abused its discretion in denying a venue change motion by using factors established 46 years ago in *State v. Crudup*, 11 Wn. App. 583, 524 P.2d 479, *review denied*, 84 Wn.2d 1012 (1974) (the *Crudup* factors). *State v. Hoffman*, 116 Wn.2d 51, 72, 804 P.2d 577, 588 (1991). These factors are:

(1) the inflammatory [sic] or noninflammatory nature of the publicity; (2) the degree to which the publicity was circulated throughout the community; (3) the length of time elapsed from the dissemination of the publicity to the date of trial; (4) the care exercised and the difficulty encountered in the selection of the jury; (5) the familiarity of prospective or trial jurors with the publicity and the resultant effect upon them; (6) the challenges exercised by the defendant in selecting the jury, both peremptory and for cause; (7) the connection of government officials with the release of publicity; (8) the severity of the charge; and (9) the size of the area from which the venire is drawn.

*Id.* at 72 (quoting *Crudup*, 11 Wn. App. at 587). Because of factors (4), (5) and (6) most change of venue motions are heard after attempting to select a jury.

The trial court brought in two jury panels on consecutive days. The morning of the second day the court discussed articles that were appearing in the local press. RP 190-198. When the trial judge asked if anyone had heard of the case, 36 jurors out of 121 indicated they had heard of it. RP 110-11, 259. Jurors 9, 18 20, 41, 58, 95 and 109 indicated this might influence them. *Id.* The Court brought in each juror who said they could not be fair for individual voir dire. RP 137-186. All of these jurors were removed for cause and/or hardship, and did not cause the defendant to use a preemptory challenge. CP 1035-1037. The Court also individually talked to all the jurors who had heard of the case who might have read the recent articles before being warned by the court to avoid them. RP 274-342. None of them indicated they had seen the stories.

In his analysis of the *Crudup* factors Mr. Tapia ignores the factors that counsel against a change in venue. The articles he complained about are at CP 1032-34. They do have some information beyond what the jurors heard at trial, but not a lot, and not beyond what most jurors would expect for a gruesome murder with a sign referencing a cartel stabbed into the victim. The first factor marginally weighs towards a change of venue.

None of the jurors indicated they had seen these articles. That indicates they were not widely circulated. The second factor weighs against a change in venue. For the articles Mr. Tapia attached to his motion, they were recent, but none of the jurors saw them. All the other articles were months or years old. This factor weighs against a change in venue. The Court exercised great care in choosing the jury, and did not encounter undue difficulty. This factor weighs against a change in venue. The jurors who were very familiar with the case were removed. This factor weighs against a change in venue. The jurors who were not removed were only vaguely familiar with the publicity. The defendant exercised his challenges and removed the jurors who indicated they were more than vaguely familiar with the case. This factor weighs against a change in venue. The government had nothing to do with the publicity. This factor weighs against a change in venue. This was a very serious charge. This factor weighs in favor of a change in venue. Grant County has a population of about 100,000. It is the 13<sup>th</sup> biggest county in Washington.<sup>4</sup> This is twice the size of the County deemed sufficient in *Jeffries*, a death penalty case. This factor weighs against a change in venue.

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[https://ofm.wa.gov/sites/default/files/public/dataresearch/pop/april1/ofm\\_april1\\_population\\_final.pdf](https://ofm.wa.gov/sites/default/files/public/dataresearch/pop/april1/ofm_april1_population_final.pdf) (Last visited February 12, 2020).

While balancing tests are not applied in a mechanistic manner, it is clear that the factors weighing against a change in venue outweigh the factors for the change in venue, and the trial court did not abuse its discretion in denying the change of venue motion.

#### **D. Cell Site Location Information**

##### *1. The Frye<sup>5</sup> Standard*

Our Supreme Court adopted the Frye test for determining admissibility of novel scientific evidence. *State v. Martin*, 101 Wn.2d 713, 719, 684 P.2d 651 (1984); *see also State v. Riker*, 123 Wn.2d 351, 360 n.1, 869 P.2d 43 (1994) (reaffirming the Frye test in a criminal case despite *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993).) In determining if novel scientific evidence satisfies Frye, the court performs "a searching review which may extend beyond the record and involve consideration of scientific literature as well as secondary legal authority." *State v. Copeland*, 130 Wn.2d 244, 255-56, 922 P.2d 1304 (1996) (citing *State v. Cauthron*, 120 Wn.2d 879, 887-88, 846 P.2d 502 (1993)).

Objections regarding the manner in which the generally accepted theories and methods were applied in a particular case will generally not

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<sup>5</sup> *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923).

preclude the admission of scientific evidence. Such concerns go to the weight of the evidence, unless the flaws are so serious that the results would not even be helpful to the jury as required by ER 702. *See, e.g., State v. Copeland*, 130 Wn.2d 244, 270, 922 P.2d 1304 (1996); *State v. Gentry*, 125 Wn.2d 570, 586-88, 888 P.2d 1105, *cert. denied*, 516 U.S. 843 (1995); *State v. Kalakosky*, 121 Wn.2d 525, 540-41, 852 P.2d 1064 (1993).

In Washington, there are two prongs to the *Frye* test: (1) whether the scientific theory upon which the evidence is based is generally accepted in the relevant scientific community, and (2) whether the technique used to implement that theory is also generally accepted by that scientific community. If there is a significant dispute between qualified experts as to the validity of the scientific evidence, either as to the theory or the implementing technique, it may not be admitted. A third prong, which asks whether a generally accepted technique was performed correctly on a given occasion, is included in some states as part of the *Frye* test, but in Washington, prong three inquiries go to weight, not to admissibility.

*Gentry*, 125 Wn.2d. at 585-86. A *Frye* hearing is unnecessary “if evidence does not involve a novel scientific theory or principle.” *State v. Vermillion*, 112 Wn. App. 844, 862, 51 P.3d 188 (2002).

## 2. *NELOS Information*

Mr. Tapia words his challenge as a *Frye* challenge to both the NELOS data and the ZETX presentation. This shows a basic

misunderstanding about what the ZETX presentation was. This brief will discuss NELOS data and the ZETX presentation separately.

NELOS is a network location system used by AT&T to locate phones on the network. The present disclosure provides devices, systems, and methods to utilize relative timing offset information reported by one or more mobile devices. When coupled with AGPS information reported by one or more mobile devices, the offset information is be used to calibrate calculations and subsequently to locate all 3G mobiles with GPS-like accuracy, whether or not a GPS receiver is available on said mobile device being located. A determination of a propagation delay between one or more cell sites and a mobile device is reported to a network and used to calibrate unknown information such as a timing offset, to improve the accuracy of a detected location. The relative timing offset can be applied to determine a location for all other mobile devices within the area served by the known base station. The present disclosure utilizes this method in conjunction with information crowd-sourced from a plurality of mobile devices.

U.S. Patent abstract 8,447,328.

What is claimed is:

1. A method, comprising: receiving, by a system comprising a processor, computed timing difference information for a base station device pair, comprising a first and second base station device associated with a network, and a first mobile device on a network, the computed timing difference information based on a propagation delay determined from global positioning system information for the first mobile device and known locations of base station devices comprising the base station device pair; determining, by the system, timing offset information for the base station device pair relative to the first mobile device based on a

difference between first measured timing difference information and the computed timing difference information; receiving, by the system, second measured timing difference information for the base station device pair from a second mobile device on a network; and determining, by the system, a location of the second mobile device based in part on the timing offset information for the base station device pair and the second measured timing difference information.

U.S. Patent 8,447,328. This system is very similar in principle to GPS.

The system takes the GPS timing signal and using multiple towers creates a location for the device, using other cell phones in the area to adjust for atmospheric and other conditions that could affect the propagation of the radio signal. Instead of using satellites, it uses towers for its information. In one of the diagrams from the patent, CP 1100, the system shows the interlocking arcs from various towers showing the intersection arcs denoted by blocks arranged in an arc. GPS has long been an accepted and widely adopted technology, and not challengeable under the *Frye* standard. *See Still v. State*, 917 So.2d 250 (Fla. Dist. Ct. App. 2005).

NELOS has been used in court cases around the country. *State v. Lynn*, 251 So. 3d 1262, 1270 (La. Ct. App. 2018), *writ denied*, 267 So. 3d 1129 (La. 2019)(allowed after *Daubert* hearing); *State v. Burke*, 2018-T-0032, 2019 WL 2172718, at \*17 (Ohio Ct. App. May 20, 2019)(unpublished)(Cited pursuant to Rep.Op.R. 3.4)(Ohio 2012)

(Appendix A); *State v. Singleton*, 263 So. 3d 1269, 1282 (La. Ct. App. 2019), *reh'g denied* (Feb. 6, 2019), *writ not considered*, 279 So. 3d 913 (La. 2019); *People v. Grant*, 338615, 2019 WL 6340247, at \*3 (Mich. Ct. App. Nov. 26, 2019)(unpublished)(Cited pursuant to MCR 7.215(c)(1); *State v. Brown*, 256 So. 3d 431, n. 1 439 (La. Ct. App. 2018), *writ denied*, 267 So. 3d 597 (La. 2019) (Appendix B); *Commonwealth v. Morales*, 833 MDA 2016, 2017 WL 1957754, at \*9 (Pa. Super. Ct. May 11, 2017)(unpublished) (Pa. App. Proc. Rule 126) (Appendix C); *United States v. Evans*, 5:17-CR-39-FL-1, 2018 WL 7051095, at \*2 (E.D.N.C. Dec. 20, 2018), *report and recommendation adopted*, 5:17-CR-39-FL-1, 2019 WL 238033 (E.D.N.C. Jan. 16, 2019) (Appendix D); *State v. Cooley*, 247 So. 3d 1159, 1165 (La. Ct. App. 2018), *writ denied*, 266 So. 3d 899 (La. 2019).

AT&T is a multi-national company that has likely spent millions of dollars on the NELOS system. Rival cell phone companies have similar systems. Verizon uses a system called RTT. T-Mobile has TDOA or timing advance information. Sprint has a system called PCMD. All of these systems use similar concepts to locate cell phone handsets. It is highly doubtful that multiple cell phone companies would spend millions of dollars on systems that had no basis in science. *See State v. Kane*, 23 Wn. App. 107, 112, 594 P.2d 1357, 1361 (1979). (Certainly when the

computer-generated evidence is provided by a well-established national banking institution, maintaining numerous branches in the state, it is reasonable for a court to assume that the “electronic-computer” equipment is reliable.)

Electronic tracking has been vetted by Washington Courts. While the particular application of the technology is fairly new, electronic tracking is not. In *State v. Vermillion*, 112 Wn. App. 844, 862, 51 P.3d 188, 198 (2002), the court held that a *Frye* hearing was not required for an electronic tracker in a bank moneybag. In *State v. Ramirez*, 425 P.3d 534, 543 (Wash. Ct. App. 2018), *as amended on reconsideration in part* (Oct. 23, 2018), *review denied*, 192 Wn.2d 1026, 435 P.3d 266 (2019), and *cert. denied*, 140 S. Ct. 329, 205 L. Ed. 2d 154 (2019), the court recognized that simple use of proprietary data or software did not take location analysis outside of the *Frye* standard.

The evidence also showed the cell phone location data was accurate. The State introduced evidence showing the cell phone locations of Mr. Tapia and his group over the course of about 18 hours from the night of December 21, 2016 into the day of the 22<sup>nd</sup>. The cell phone data not only tracked the witness testimony of what they did over the course of those 18 hours, but it also matched up with the physical evidence, including a video in the Quincy Short Stop and a shell casing found in an

orchard by means of the cell phone data that matched to one at the murder scene. The cell phone evidence also put Mr. Tapia's phone at the scene of the murder at the time of the murder with range location accuracy likely better than 25 meters. The murder site was approximately eight miles, or approximately 13,500 meters, from the Shady Tree RV Park where Mr. Tapia claimed to be. A circle with a radius of 13,500 meters has an area of over 572 million square meters. A circle with a radius of 25 meters has an area of just under 2000 square meters. In other words, a random 25-meter radius circle placed within 8 miles of the Shady Tree RV Park has about a one in 286,000 chance of landing exactly on the murder scene. The odds of the NELOS system generating a random profile that matched the testimony and physical evidence are simply astronomical.

### 3. *ZETX/TRAX Software*

Mr. Tapia also claims the ZEXT software called TRAX does not meet the *Frye* rule. However, the ZETX software involves no special scientific principles or laws, but is simply a program to covert lines of data on a report from AT&T into a useful form that can be understood by the jury. For example, if one examines the TRAX box that appears at 9:27 on exhibit one, and compares it to line 941 of Mr. Tapia's cell phone NELOS report from exhibit 150 the data is the same (Appendix E). The TRAX box shows the phone number, the location accuracy taken from the NELOS

report, the latitude and longitude, and a time adjustment from the UTC time of the NELOS report to Pacific Standard Time. The software then plots the latitude and longitude, and places a circle around it to depict the location accuracy. There is no novel scientific principle here. The same exercise could easily, albeit tediously, be done by hand with a map, a ruler and a compass. Google Maps is a long-standing program that many people use in their day-to-day lives. There simply is no novel scientific principles involved in plotting circles on a map or adjusting UTC time to local time.

**E. *Smith* Affidavit**

Mr. Tapia misstates the record in regards to the *Smith* affidavit. It was done during the officer's interview of Mr. Mendez Villanueva, not during plea negotiations. While the prosecutor read it in closing arguments, and during that reading inserted some comments where the *Smith* affidavit intersected with other testimony, those portions were the prosecutor's closing argument, not part of the affidavit. See Ex. 163. Mr. Mendez Villanueva acknowledged it was his signature on the *Smith* Affidavit. Deputy Delarosa explained the penalty of perjury language to Mr. Mendez Villanueva after reading it to him in Spanish.

In deciding whether to admit a sworn affidavit as substantive evidence, a court looks at a four-part test:

(1) whether the witness voluntarily made the statement, (2) whether there were minimal guaranties of truthfulness, (3) whether the statement was taken as standard procedure in one of the four legally permissible methods for determining the existence of probable cause, and (4) whether the witness was subject to cross examination when giving the subsequent inconsistent statement.

*State v. Otton*, 185 Wn.2d 673, 680, 374 P.3d 1108, 1111 (2016)<sup>6</sup>. “In many cases, the inconsistent statement is more likely to be true than the testimony at trial as it was made nearer in time to the matter to which it relates and is less likely to be influenced by factors such as fear or forgetfulness. A decision to admit or exclude evidence is generally reviewed for an abuse of discretion.” *State v. Phillips*, 431 P.3d 1056, 1065 (Wash. Ct. App. 2018), *review denied*, 193 Wn.2d 1007, 438 P.3d 116 (2019).

This case is very similar to *Phillips*, where the Officer wrote the affidavit for the witness and reviewed it with her, and the witness claimed lack of memory. As *Phillips* held, the fact that the Officer wrote the document and then reviewed it with the witness is not fatal. *Id.* at 674. The trial court judge found the claim of lack of memory to be not credible in both cases. Mr. Tapia claims that because a Spanish-speaking officer participated in completing the affidavit it is somehow not reliable. The

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<sup>6</sup> Mr. Tapia cites case law regarding recorded recollections under ER 803(a)(5), which are different than *Smith* Affidavits under ER 801(d)(1).

State is unclear as to why a bilingual Spanish-speaking officer is somehow considered more unreliable than an English speaking one. The interview was recorded, so any unreliability in the translation or undue coercion could have been brought out at trial. Mr. Mendez Villanueva signed the statement voluntarily, under the penalty of perjury, during a recorded interview. He was subject to cross-examination. The trial court did not abuse its discretion in admitting the *Smith* Affidavit.

#### **F. Harmless Error**

Non-constitutional evidentiary error is reviewed under the rule that error is not prejudicial unless, within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred. *State v. Howard*, 127 Wn. App. 862, 871, 113 P.3d 511, 516 (2005). Mr. Tapia makes several allegations of evidentiary error. However, no particular piece of evidence in this case was critical. Taken together the cell phone evidence, testimony of witnesses and physical evidence create an overwhelming picture of what happened, and prove that Mr. Tapia executed Jill Sundberg in that cold, lonely parking lot. Any given evidentiary error would be harmless because there is not a reasonable probability it would change the outcome.

#### **G. Cumulative Error**

There being no significant error, cumulative error does not apply.

## **H. Deliberate Cruelty Aggravating Circumstance**

Mr. Tapia argues that the deliberate cruelty aggravating factor does not apply to the facts of his case. This issue is moot if the appellate court affirms the aggravated murder conviction, as the trial court did not base its sentence on this aggravating factor.

Deliberate cruelty against the victim has been found to justify an exceptional sentence ... when the defendant's conduct in committing the offense includes gratuitous violence and is significantly more serious or egregious than typical of the crime. Deliberate cruelty was defined as consisting “of gratuitous violence, or other conduct which inflicts physical, psychological or emotional pain as an end in itself.” Also, conduct leading to multiple injuries, which itself may be an aggravating factor, may in turn justify a finding of deliberate cruelty. *State v. Franklin*, 56 Wn. App. 915, 918, 786 P.2d 795, 797 (1989). In *Franklin*, the infliction of a second stab wound was considered deliberately cruel.

Mr. Tapia and his group dragged Jill Ms. Sundberg out at gunpoint, tied her up in the back of a vehicle where she was held against her will between two men, dragged out of the car and forced to kneel, and then Mr. Tapia emptied a magazine in the back of her head and shoulders. The terror she must have felt being dragged to her death would have been unimaginable. She was asking “why?” This goes beyond simple

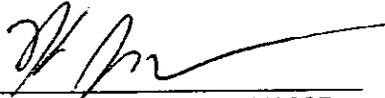
premeditated murder into infliction of fear and terror for cruelties sake. In addition, the emptying of an entire 13-round magazine into Jill Sundberg's body was unnecessary and gratuitously cruel.

## V. CONCLUSION

The evidence was overwhelming that Gustavo Tapia executed Jill Sundberg in a frozen, lonely parking lot early in the morning of December 22, 2016. He was properly convicted of aggravated murder based on kidnapping and drive-by shooting. Defense counsel acted effectively and professionally. The trial court properly denied the motion to change venue, and properly admitted the cell phone cite location evidence. There was sufficient evidence for the deliberate cruelty aggravator, although the issue is moot if the trial court is affirmed. The trial court should be affirmed on all aspects of this case.

Respectfully submitted, this 26<sup>th</sup> day of March 2020.

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## WESTLAW

2019 WL 2172718

CHECK OHIO SUPREME COURT RULES FOR REPORTING OF OPINIONS AND  
WEIGHT OF LEGAL AUTHORITY.

State v. Burke Court of Appeals of Ohio, Eleventh District, Trumbull County  
 Court of Appeals of Ohio, Eleventh District, Trumbull County May 20, 2019 Slip Copy 2019 WL 2172718 2019 -Ohio- 1951 (Approx. 19 pages)

STATE of Ohio, Plaintiff-Appellee,

v.

Austin Taylor BURKE, Defendant-Appellant.

NOS. 2018-T-0032, 2018-T-0035

Decided 5/20/2019

Criminal Appeals from the Trumbull County Court of Common Pleas. Case Nos. 2017 CR 00403 & 2017 CR 00541.

**Attorneys and Law Firms**

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**OPINION**

TIMOTHY P. CANNON, J.

{¶1} Appellant, Austin Taylor Burke, appeals from the judgments of conviction issued by the Trumbull County Court of Common Pleas in case Nos. 2017 CR 403 and 2017 CR 541 on March 27, 2018. This consolidated appeal stems from three separate matters: a homicide, an armed robbery, and possession of a deadly weapon while under detention. The issues raised on appeal relate to a motion to suppress evidence, motions to sever offenses for trial, the jury's verdict in case No. 2017 CR 403, and the entry of sentence in case No. 2017 CR 541. We affirm the trial court's judgments of conviction in both cases and remand case No. 2017 CR 403 for the limited purpose of entering a nunc pro tunc sentencing entry.

**Case No. 2017 CR 403**

{¶2} On June 12, 2017, 22-year-old Kenneth Brandon Hayes Sample ("Brandon") was reported missing by his parents. That morning, Brandon's car was found abandoned on a bike path in Niles, Ohio. Three days later, on the morning of June 15, 2017, Brandon was found deceased in a remote and densely overgrown area of Bristol Township, Ohio. Following an investigation, on the morning of June 20, 2017, the Warren Police Department issued a murder warrant for the arrest of Austin Taylor Burke ("Austin"), who was 18 years old at the time.

{¶3} Shortly after 10:00 p.m. on the night of June 20, 2017, Pizza Joe's restaurant in Cortland, Ohio, was robbed at gunpoint. Within the hour, Austin was discovered at an apartment across the street from Pizza Joe's and gave officers a false name, false birth date, and false telephone number. Austin was arrested for failure to disclose personal information and obstructing official business, as well as the active murder warrant, and was later charged with the armed robbery of Pizza Joe's.

{¶4} On June 26, 2017, a Grand Jury indicted Austin on six counts:

- (1) Aggravated Murder, an unclassified felony with a firearm specification, in violation of R.C. 2903.01(B)&(F) and R.C. 2941.145;

(2) Aggravated Robbery, a first-degree felony with a firearm specification, in violation of R.C. 2911.01(A)(1)&(C) and R.C. 2941.145;

(3) Tampering with Evidence, a third-degree felony, in violation of R.C. 2921.12(A)(1)&(B);

(4) Having Weapons while under Disability, a third-degree felony, in violation of R.C. 2923.13(A)(2)&(B);

(5) Having Weapons while under Disability, a third-degree felony, in violation of R.C. 2923.13(A)(2)&(B); and

(6) Aggravated Robbery, a first-degree felony with a firearm specification, in violation of R.C. 2911.01(A)(1)&(C) and R.C. 2941.145.

{¶5} Counts 1, 2, and 4 arose from allegations that on or about June 12, 2017, Austin shot and killed Brandon with a firearm at the end of Peck Leach Road in Bristol and then took Brandon's vehicle, drove it to Niles, and abandoned it on the bike trail. Count 3 was prosecuted on the basis that Austin tampered with evidence related to the homicide. Counts 5 and 6 arose from allegations that on or about June 20, 2017, Austin robbed the Pizza Joe's in Cortland at gunpoint and then hid the firearm in the apartment across the street. At all relevant times, Austin was prohibited by law from having a firearm due to a prior juvenile delinquent adjudication for aggravated burglary. The indictment was designated as case No. 2017 CR 403. Austin pled not guilty and failed to post a \$ 1,000,000.00 bond.

\*2 {¶6} On October 23, 2017, defense counsel filed a motion to sever the counts related to June 12, 2017, from the counts related to June 20, 2017, for purposes of trial. The state of Ohio opposed the motion. The trial court summarily denied the motion on December 14, 2017.

{¶7} On December 28, 2017, defense counsel filed multiple motions to exclude or suppress evidence. The state opposed the motions, and the trial court held a hearing on January 8, 2018. On January 29, 2018, the trial court denied the defense motions.

{¶8} On the first day of trial, March 5, 2018, defense counsel filed a motion to sever Counts 4 and 5 (having weapons while under disability) from the remaining counts in the indictment. The trial court denied the motion, noting that "stipulations regarding such prior convictions are permitted and may minimize any potential prejudicial effect." No such stipulation was offered.

{¶9} The jury trial began with a jury view of the location in Bristol where Brandon's body was found, the location in Niles where Brandon's car was found, the location of a house in Niles where Austin and Brandon were last seen together, the location of the armed robbery in Cortland, and the location of an apartment in Cortland where the firearm was found.

{¶10} At the conclusion of the state's case-in-chief, defense counsel moved for Crim.R. 29 acquittal, which was denied. Defense counsel also renewed its motion to sever the homicide charges from the armed robbery charges and its motion to sever the weapons under disability charges. The renewed motions were denied, and the defense rested.

{¶11} The jury returned a verdict of guilty on all charges and specifications on March 9, 2018. The matter was referred to the adult probation department for a presentence investigation report prior to sentencing.

{¶12} Austin filed a motion for acquittal and a motion for new trial due to the alleged improper joinder of the criminal offenses for trial, pursuant to Criminal Rules 8 and 14, which were opposed by the state and denied by the trial court. The trial court found that Austin failed to demonstrate an affirmative showing of prejudice in having the offenses tried together and noted that the jury was instructed to consider each offense as separate and distinct.

{¶13} The state filed a sentencing memorandum, detailing Austin's criminal and behavioral issues while detained at the Trumbull County Jail, his criminal and juvenile delinquent history, the seriousness of the instant offenses, and his "utter lack of remorse." The state subsequently filed a supplemental memorandum detailing an apparent escape attempt from the jail and requesting a sentence of life imprisonment without the possibility of parole.

{¶14} The sentencing hearing was held on March 27, 2018. Defense counsel requested a sentence of 20 years to life on the aggravated murder charge, to run concurrent with the

sentences imposed for the aggravated robbery and weapons under disability charges, plus 9 years on the firearm specifications.

{¶15} The trial court sentenced Austin as follows: Count 1: life imprisonment with parole eligibility after 30 years, plus 3 years mandatory on the firearm specification, to run prior to and consecutive, for a total of 33 years; Count 2: 11 years, concurrent to Count 1, with the firearm specification merged; Counts 3, 4, and 5: 36 months each, concurrent to each other and concurrent to the other counts; Count 6: 11 years, plus 3 years mandatory on the firearm specification, to run prior to and consecutive, for a total of 14 years. Count 6 was ordered to run consecutive to Counts 1-5. A nunc pro tunc entry was issued for the purpose of clarifying for the Ohio Department of Rehabilitation and Correction that Austin's total imprisonment term is 47 years prior to eligibility for parole.

#### **Case No. 2017 CR 541**

{¶16} While Austin was detained in the Trumbull County Jail on the above charges, he was found in possession of an improvised knife/shank. On August 15, 2017, he was indicted on one count of Possession of a Deadly Weapon while under Detention, a first-degree felony in violation of R.C. 2923.131(B)&(C)(2)(a). The indictment was designated as case No. 2017 CR 541. Austin pled guilty to this charge on February 8, 2018. The plea agreement included waiver of a presentence investigation report and a jointly recommended prison sentence of 3 years, to be imposed consecutive to any sentence imposed under case No. 2017 CR 403.

{¶17} A sentencing hearing was held March 27, 2018. The trial court sentenced Austin to 11 years in prison, to be served consecutive to the sentence imposed in case No. 2017 CR 403. Thus, Austin is currently serving a life sentence with parole eligibility after 58 years in prison.

#### **Assignments of Error**

{¶18} Austin noticed an appeal from each sentencing entry, which have been consolidated upon request of his appellate counsel. Austin now raises the following five assignments of error for review:

- [1.] The trial court erred in taking evidence of cell tower location data that the state searched and seized without a warrant.
- [2.] The trial court erred in hearing a separate unrelated robbery with Burke's murder charge.
- [3.] The jury returned a verdict against the manifest weight of the evidence.
- [4.] The combined effect of any two or more errors above renders the cause reversible under the cumulative error doctrine.
- [5.] The trial court erred in sentencing Burke to maximum consecutive terms of imprisonment as to his weapon-in-detention conviction.

#### **Motion to Suppress**

{¶19} Under his first assignment of error, Austin maintains that the trial court erred in failing to suppress evidence of cell site data information, which was obtained by investigators via Grand Jury Subpoena, but not a warrant, allegedly in contravention of his Fourth Amendment rights.

{¶20} "Appellate review of a motion to suppress presents a mixed question of law and fact. When considering a motion to suppress, the trial court assumes the role of trier of fact and is therefore in the best position to resolve factual questions and evaluate the credibility of witnesses." *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, ¶8, 797 N.E.2d 71, citing *State v. Mills*, 62 Ohio St.3d 357, 366, 582 N.E.2d 972 (1992). "Consequently, an appellate court must accept the trial court's findings of fact if they are supported by competent, credible evidence." *Id.*, citing *State v. Fanning*, 1 Ohio St.3d 19, 437 N.E.2d 583 (1982). "Accepting these facts as true, the appellate court must then independently determine, without deference to the conclusion of the trial court, whether the facts satisfy the applicable legal standard." *Id.*, citing *State v. McNamara*, 124 Ohio App.3d 706, 707, 707 N.E.2d 539 (4th Dist.1997).

{¶21} The Fourth Amendment to the United States Constitution provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

{¶22} "The Fourth Amendment proscribes all unreasonable searches and seizures. It is a restraint on the government." *State v. Banks-Harvey*, 152 Ohio St.3d 368, 2018-Ohio-201, ¶17, 96 N.E.3d 262, citing *United States v. Ross*, 456 U.S. 798, 825, 102 S.Ct. 2157, 72 L.Ed.2d 572 (1982). " [S]earches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions." *Id.*, quoting *Katz v. United States*, 389 U.S. 347, 357, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967).

\*4 {¶23} On December 28, 2017, Austin filed a "Motion to Suppress Cell Site Data Information – Unlawful Seizure." Austin asserted the investigating officers violated his Fourth Amendment rights by seizing his cellular telephone records from AT&T and searching data referred to as Historical Precision Location Information ("HPLI") without first obtaining a warrant. The state responded on January 3, 2018, arguing a warrant is not required to obtain HPLI because it is not a search that is protected by the Fourth Amendment. The state submitted that the information was properly obtained from AT&T through a Grand Jury Subpoena.

{¶24} The trial court held a hearing on January 8, 2018, during which it ordered the prosecution to provide defense counsel with a copy of the Grand Jury Subpoena used to obtain Austin's HPLI. On January 29, 2018, the trial court denied Austin's motion, stating:

[I]n order for the Fourth Amendment to protect the seizure of information or property, there must be a legitimate expectation of privacy in such. The Supreme Court has held repeatedly that the Fourth Amendment does not prohibit the obtaining of information revealed to a third party and conveyed by him to Government authorities[.] *United States v. Miller*, 425 U.S. 435, 443, 96 S.Ct. 1619, 48 L.Ed.2d 71. This includes cell phone providers.

There is a core distinction between personal cell phone data held within the confines of the personal device and data or information retained by a cell phone provider. The former may have a privacy interest depending on the circumstances, the latter does not. The Court finds the 'pinging' information and the historical location data retained by the cell phone provider are synonymous with the identity of telephone numbers dialed by a user previously determined to hold no legitimate expectation of privacy. *Smith v. Maryland*, (1979) 442 U.S. 735, 99 S.Ct. 2577, 61 L.Ed.2d 220. The devices and technology may have changed; the ultimate premise and application of such have not.

Therefore, the Court finds since there is no expectation of privacy in either the historical cell phone location information or the pinging information, there is no corresponding right under the Fourth Amendment. The motions to suppress the cell-site data are not well taken and are hereby denied.

{¶25} On June 22, 2018, after the trial court had issued its ruling on Austin's motion to suppress—indeed, after the data was presented to the jury and Austin had been convicted—the United States Supreme Court held that the government's acquisition of these cell site records is, in fact, a search protected by the warrant requirement of the Fourth Amendment. *Carpenter v. United States*, 585 U.S. —, 138 S.Ct. 2206, 201 L.Ed.2d 507 (2018), syllabus.

{¶26} "Cell-site location information," the descriptive term used in *Carpenter*, may be considered synonymous with "historical precision location information," the term used in the case sub judice. The United States Supreme Court provided a brief explanation of the data at issue: "Cell phones perform their wide and growing variety of functions by continuously connecting to a set of radio antennas called 'cell sites.' Each time a phone connects to a cell site, it generates a time-stamped record known as cell-site location information (CSLI). Wireless carriers collect and store this information for their own business purposes." *Id.*

{¶27} When cell site location information is obtained by the Government, however, it reveals location points that catalog a person's movements over a period of time: "[t]hey give the Government near perfect surveillance and allow it to travel back in time to retrace a person's whereabouts, subject only to the five-year retention policies of most wireless carriers." *Id.* The Supreme Court held that because "individuals have a reasonable expectation of privacy in the whole of their physical movements[,] [a]llowing government access to cell-site records \* \* \* contravenes that expectation." *Id.* Accordingly, a warrant supported by probable cause is required to obtain such data from an individual's wireless carrier. *Id.*

\*5 {¶28} Here, the state concedes that investigators obtained Austin's HPLI from AT&T without a warrant. It maintains there is no exclusionary remedy, however, because the

investigators obtained the data via Grand Jury Subpoena in good faith reliance on judicial precedent that existed at the time.

{¶29} The suppression of evidence "is not an automatic consequence of a Fourth Amendment violation." *State v. Hoffman*, 141 Ohio St.3d 428, 2014-Ohio-4795, ¶24, 25 N.E.3d 993, quoting *Herring v. United States*, 555 U.S. 135, 137, 129 S.Ct. 695, 172 L.Ed.2d 496 (2009). "The exclusionary rule is a judicially created remedy for Fourth Amendment violations. The question whether the evidence seized in violation of the Fourth Amendment should be excluded is a separate question from whether the Fourth Amendment was violated." *State v. Castagnola*, 145 Ohio St.3d 1, 2015-Ohio-1565, ¶92, 46 N.E.3d 638, citing *United States v. Calandra*, 414 U.S. 338, 348, 94 S.Ct. 613, 38 L.Ed.2d 561 (1974) and *United States v. Leon*, 468 U.S. 897, 906, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984).

{¶30} The good-faith exception to the exclusionary rule provides that evidence will not be suppressed "when the police act with an objectively 'reasonable good-faith belief' that their conduct is lawful or when their conduct involves only simple, 'isolated' negligence." *Davis v. United States*, 564 U.S. 229, 238, 131 S.Ct. 2419, 180 L.Ed.2d 285 (2011), quoting *Leon*, *supra*, at 909, 104 S.Ct. 3405 and *Herring*, *supra*, at 137, 129 S.Ct. 695. Accordingly, "[e]vidence obtained during a search conducted in reasonable reliance on binding precedent is not subject to the exclusionary rule." *Id.* at 241, 131 S.Ct. 2419.

{¶31} At the time of the search at issue here, *Carpenter* had not yet been decided. The Sixth Circuit's precedent was that individuals "have no such expectation [of privacy] in the locational information" obtained from a wireless carrier. *United States v. Carpenter*, 819 F.3d 880, 888 (6th Cir.2016). Therefore, obtaining such information was not considered a "search" under the Fourth Amendment. *Id.* at 890. See also *State v. Gipson*, 6th Dist. Erie No. E-10-038, 2012-Ohio-515, ¶30-31 (upholding the denial of a motion to suppress cell phone records which "were obtained through a subpoena in a context devoid of an expectation of privacy").

{¶32} Austin has not, and cannot, deny that the investigators who obtained his HPLI from AT&T did so in compliance with binding precedent and with an objectively reasonable good-faith belief that their actions were lawful. "While *Carpenter* is obviously controlling going forward, it can have no effect on [the defendant's] case. The exclusionary rule's 'sole purpose...is to deter future Fourth Amendment violations.'" *United States v. Chavez*, 894 F.3d 593, 608 (4th Cir.2018), quoting *Davis*, *supra*, at 236-237, 131 S.Ct. 2419. "About all that exclusion would deter in this case is conscientious police work." *Davis*, *supra*, at 241, 131 S.Ct. 2419. See also *United States v. Zoghates*, 901 F.3d 137, 143-144 (2d Cir.2018) and *United States v. Goldstein*, 914 F.3d 200, 201-202 (3d Cir.2019). Thus, we conclude the good-faith exception to the exclusionary rule applies to Austin's HPLI that was searched in violation of the Fourth Amendment. The trial court did not err in failing to suppress the evidence.

{¶33} The first assignment of error is without merit.

#### **Trial Testimony and Other Evidence**

{¶34} To analyze the next three assignments of error it is necessary to thoroughly review the evidence presented at trial. The trial took place approximately nine months after Austin was arrested for Brandon's murder and the armed robbery of Pizza Joe's.

\*6 {¶35} At the time of Brandon's death in June 2017, he was living with his parents in Warren, Ohio, and worked at Kraftmaid in Middlefield, Ohio. He was 22 years old. Brandon's father, Kenneth Sample, testified that Brandon used to work as a Corrections Officer with the Department of Youth Services ("DYS") in Massillon, Ohio, from September 2016 until February 2017.

{¶36} On June 11, 2017, around 11:00 p.m., Brandon stopped at home after mowing his grandmother's grass in Bristol Township, Ohio. Brandon told Mr. Sample he was taking his friend, Josh White, home. At the time, Mr. Sample was unaware that Josh was living in Akron, Ohio. That was the last time Mr. Sample saw Brandon alive.

{¶37} Josh and Brandon had been friends since they were around 12 and 13 years old, respectively. Josh was 22 years old at the time of trial. Josh testified that he lived with his mother in Akron but was in the Warren area with Brandon on June 11. Brandon, driving a white Chevrolet Malibu, picked up Josh from a friend's house in Niles around 5:00 or 5:30 p.m. They went to Brandon's grandmother's house in Bristol to mow her grass and then went to a friend's house in Warren to swim. They were there until approximately 11:00 p.m. Josh did not have a driver's license or a car at the time, so Brandon took Josh back to his home in

Akron that night. Josh testified that, on the way to Akron, Brandon said he was going to meet up with Austin, appellant herein, later that night. Brandon told Josh that Austin had offered him a lot of money to do something, but Brandon would not specify what he had to do. Brandon dropped off Josh in Akron around 12:30 a.m. on June 12. That was the last time Josh ever spoke to Brandon.

{¶38} Josh testified that he had never met Austin, but he knew that Brandon had met Austin at DYS, where Brandon used to work. Detectives later confirmed that Brandon worked at DYS while Austin was an inmate. Austin had been adjudicated delinquent for aggravated burglary.

{¶39} Mr. Sample woke up for work around 4:30 a.m. the morning of June 12 and noticed Brandon was not home. He immediately texted Brandon and received a response that said, "I'm on my way home, bro," which Mr. Sample testified was indicative of Brandon's usual responses. Mr. Sample tried calling Brandon's phone numerous times starting around 4:50 a.m., but the calls went straight to voicemail.

{¶40} Brandon was supposed to meet his father at church that evening but did not show up as planned at 5:30 p.m. Mr. Sample contacted the Warren Police Department who entered Brandon into L.E.A.D.S. as a missing person. Mr. Sample then drove to Kraftmaid and waited until Brandon's shift started at 8:00 p.m., but Brandon did not show.

{¶41} Detective John Greaver with the Warren Police Department first became involved with the missing person report the following morning, June 13. He spoke with Brandon's mother, Stephanie Sample, about who Brandon may have been in contact with on June 11. Based on information she provided, some of which she had obtained from Josh, police officers reported to Brandon's grandmother's house in Bristol. Josh testified that he suggested the police should "check the woods behind his grandma's home" because he knew Austin was also from that area and he had a "bad feeling." Detective Greaver reported to Austin's house in Bristol, where the 18-year-old lived with his mother, but no one was home.

\*7 {¶42} The 911 center "pinged" Brandon's phone and advised Detective Greaver that the last known location of the phone was in Bristol at 4:38 a.m. on June 12. Mr. Sample accessed Brandon's cell phone account and provided the call and text history to Detective Greaver. Brandon had received a phone call at 1:18 a.m. from what was later determined to be Austin's phone number and had called an Akron number at 2:14 and 2:15 a.m. Detective Greaver testified that the Akron number was never investigated or identified. The text exchange between Mr. Sample and Brandon around 4:40 a.m. was the last activity on Brandon's phone.

{¶43} Also on June 13, Detective Greaver learned from the Niles Police Department that Brandon's white Chevrolet Malibu had been located on a bike path in Niles the morning of June 12. Officer Chris Mannella with the Niles Police Department testified that the vehicle was found abandoned approximately 100-150 yards from the trailhead of the bike path, wedged between a standing tree and a felled tree, around 7:30 a.m. At that time, Brandon had not yet been reported missing. No evidence was recovered from the vehicle. Officer Mannella testified that he did not see any blood or evidence of drugs in the vehicle. None of his reports indicate there was mud on the exterior or interior of the vehicle, but he affirmed some mud on the rear tire is visible in the photographs that were taken when the vehicle was found.

{¶44} By this point, there were news and media reports circulating that Brandon was missing and that his car had been located in Niles.

{¶45} Later that day, Detective Greaver met with Austin's ex-girlfriend, Makayla Egbert,<sup>1</sup> at the Niles Police Department. Makayla reported she had received information that Austin killed Brandon, returned to her cousins' house covered in blood, and told one of her cousins that he had set Brandon's head on fire.

{¶46} Makayla reported by phone later that evening that she heard from a friend that Austin dumped Brandon's body on "Hatchet Man Road." Detective Greaver inquired of other officers and learned that the road locally known as "Hatchet Man Road" is located in Bristol. It was originally thought that "Hatchet Man Road" was Hyde Oakfield Road, but when the officers reported there on June 14 they were unable to locate anything. Detective Greaver contacted the Ohio Department of Natural Resources ("ODNR") who said they could show the detectives the exact location of "Hatchet Man Road" the following day.

{¶147} After reaching out to Austin on his cell phone, the officers met Austin at his home in Bristol. Austin told them that on June 11 he was walking home from Willow Lake, which is a couple miles from his home. Brandon stopped and gave him a ride home around 7:30 p.m. Austin said there was another male in the car, maybe named "Josh" or "Tyler," and that they both had heroin. Austin said he did not leave his house that night after Brandon dropped him off.

{¶148} The next morning, June 15, the officers met ODNR personnel at "Hatchet Man Road," which had been determined was Peck Leach Road, a dead-end road in Bristol. The area was very dry and overgrown. They searched the area and initially saw no signs of Brandon or that he had been there. As they were returning to their vehicles, the officers smelled something decaying. They checked over a small hill, where they observed a deceased body on the ground.

\*8 {¶149} Detective David Morris, with the City of Cortland Police Department and Trumbull County Homicide Task Force, was called to photograph the scene and arrived around 11:00 a.m. He testified that the day was dry and very hot, already 80 degrees, but he observed a few mud puddles in a roadway past where the body had been found. The body was found lying face down, already in a state of decomposition, and a shirt was pulled over the head. The clothes on the body were wet, most likely from the decomposition.

{¶150} Detective Morris collected a shoe that was found off the body and matched the shoe still on the body. Detective Greaver testified that the location of the shoe indicated the body may have been moved and dragged over the hill. Detective Morris affirmed, however, that he could not say whether the victim was killed there or transported there, or even whether the victim had been shot.

{¶151} The body was identified as Brandon using dental x-rays. Brandon's cell phone, wallet, and car keys were never recovered. The clothing Brandon was wearing was never tested and was eventually destroyed. No shell casings were ever found at the scene.

{¶152} Dr. Humphrey Germaniuk, the coroner and medical examiner for Trumbull County, performed Brandon's autopsy on June 19, 2017. He also testified as an expert witness in pathology. Dr. Germaniuk testified that x-rays revealed at least one definite gunshot wound to the back of Brandon's head and one probable gunshot wound to the right side of his neck; fragments were visible on the x-ray inside the skull and in the soft tissues of the neck behind the ear. Dr. Germaniuk determined the manner of Brandon's death was homicide. The cause of death was the penetrating gunshot wound to the head.

{¶153} Brandon's body was already in a state of moderate decomposition and covered in maggots. The maggots had consumed much of the skin and most of the brain. In attempting to wash off the maggots, Dr. Germaniuk lost the fragment from the side of the neck. A fragment was removed from the skull, which was later determined to be off-white and non-metallic; it was not consistent with a bullet fragment. Due to the decomposition, Dr. Germaniuk was unable to observe any evidence of close-range firing such as soot or stippling.

{¶154} An entrance wound, one-quarter of an inch in diameter, was visible on the left side of the back of the skull. Dr. Germaniuk suggested that the wound was most likely made by a small caliber bullet, e.g., .32, .25, or .22 caliber. A potential second gunshot wound was visible on the right side of the neck. Dr. Germaniuk did not observe any exit wounds.

{¶155} Dr. Germaniuk further testified that any evidence of the body being dragged or any evidence of a struggle, if either had occurred, was erased by the decompositional changes of the body. He also affirmed there was no evidence that either the body or the clothes had been burned.

{¶156} Detective Greaver interviewed Josh the afternoon after Brandon's body was found. Josh gave a statement that was consistent with his trial testimony regarding his whereabouts and interaction with Brandon on June 11: Brandon picked up Josh in Niles around 5:30 p.m.; they mowed grass at Brandon's grandmother's in Bristol; they went to a friend's house in Warren to swim around 8:30 p.m.; they left her house around 11:00 p.m.; Brandon took Josh home to Akron; on the way there, Brandon said Austin was going to pay him \$ 1,000.00 for his help with something, and Josh told him not to do it. Josh denied that he had ever met Austin or that they had picked up Austin on June 11.

\*9 {¶157} During the interview, the detectives noted injuries to Josh's hand. Detective Greaver recollected that Josh had attributed a cut on his finger to working with sheet metal and

marks on his knuckles to punching a bedpost. Josh testified that the cut was from a broken beer bottle and the marks on his knuckles were from punching his bed post when he heard that Brandon had passed away. Josh also told detectives and testified that he had never seen Brandon use heroin and did not think he ever would have used heroin.

{¶58} The following day, detectives interviewed Meredith Loges, Austin's girlfriend, and again interviewed Makayla Egbert, Austin's ex-girlfriend. Makayla did not testify at trial.

{¶59} Meredith was 18 years old and Austin's girlfriend at the time of his arrest and trial. According to her trial testimony, they started dating in early June 2017. One night that June, Austin took her to "Hatchet Man Road" in Bristol to look for an abandoned house. Meredith drove, and Austin told her how to get there; Rickey Roupe was also in the car, and Rickey's testimony corroborated that this trip occurred. Austin had told them it was a "scary place" because of a legend that a man killed some people there with a hatchet.

{¶60} Over the next few days, the detectives conducted numerous interviews with a group of teenagers and young adults acquainted with Austin. Among those interviewed were Rickey Roupe, Hayle Roupe, Jessica Simms, Deidre Keener, and Nathan Moats. Rickey and Nathan reported to the officers a second time and indicated they had not been truthful in their first interviews.

{¶61} Hayle and Rickey are siblings; Makayla, Austin's ex-girlfriend, is their cousin. Their grandmother, Pam Roupe, owns a home on Mason Street in Niles where Rickey also lives. The Mason Street house is a frequent gathering spot for the young group of friends. All five of them—Rickey, Hayle, Jessica, Deidre, and Nathan—were at the Mason Street house at various times on June 11 and June 12. According to their statements and trial testimony, Austin was also there at different points in time.

{¶62} Deidre Keener was 19 years old at the time of trial. Deidre testified that Austin was at the Mason Street house during the day on June 11, and she heard Austin say he was going to rob somebody for heroin. At some point, Austin left. He returned to the Mason Street house with Brandon around 3:00 or 4:00 a.m. on June 12. Rickey and Nathan were also at the house at that time. Deidre told the police and testified that she saw Brandon sitting in his car in the driveway when Austin came to the door. She did not know who Brandon was at the time but later recognized him when she saw the news reports. She also identified the white Chevrolet Malibu in the photographs from the bike path as the vehicle Austin and Brandon arrived in that night. Deidre did not see either of them using drugs. Over the next couple of days, she saw Austin at the Mason Street house. He was making jokes about dropping a car off on the bike trail. She testified that Austin said he shot Brandon on "Hatchet Man Road."

{¶63} Rickey was 14 years old when he was interviewed by the detectives. He initially told the detectives that Austin arrived at the Mason Street house around 3:00 p.m. on June 11, stayed the entire night, and left around 8:00 or 9:00 a.m. on June 12. During a second interview, Rickey told them that Austin arrived at the Mason Street house between 6:00 and 8:00 p.m. on June 11 and left with Nathan Moats around 12:00 or 1:00 a.m. on June 12 after he had fallen asleep. Rickey stated that when Austin returned the next morning, Austin said he shot Brandon in the forehead and buried the body.

\*10 {¶64} At trial, Rickey testified that he fell asleep on June 11 around 11:00 p.m. or midnight and that Nathan had *not* left with Austin. Rickey said he slept through the night until Austin woke him up the morning of June 12 around 9:00 a.m. Rickey testified that he was mistaken, not lying, when he told the detectives Nathan had left with Austin, because unbeknownst to Rickey, Nathan had fallen asleep in a different room that night. Rickey did admit lying to the detectives during the first interview when he said Austin never left the house that night. Rickey stated he was initially afraid to tell the truth; he knew Austin was "in the gangs and stuff" and did not want to put his life or his grandmother's life in danger. Rickey also testified that he never saw Brandon that night at the Mason Street house, but that because he was asleep from 11:00 p.m. or 12:00 a.m. until 9:00 a.m. the next morning, he would not have known if Brandon was there during that time. Not that morning, but later, Austin told Rickey that he and Brandon went to "Hatchet Man Road," that he told Brandon to get out of the car and get on his knees, and that he shot and killed Brandon.

{¶65} Nathan Moats was 15 years old when he was interviewed by the detectives. He told the detectives that he stayed overnight at the Mason Street house on June 11 and had seen Austin and Brandon there during the early morning hours of June 12. Nathan told the detectives he observed Brandon using heroin, which Brandon said a friend from Akron had

left in his car. At trial, Nathan testified that Austin and Brandon arrived at the house around 1:00 or 2:00 a.m. and left around 3:30 or 4:00 a.m. He testified that when Austin returned later that morning, Austin told him and Rickey that he shot Brandon in the head and left him on "Hatchet Man Road." Nathan admitted that, because he had been scared, he did not tell the police what Austin had said about killing Brandon until he was interviewed a second time.

{¶66} Hayle Roupe was 16 years old when she was interviewed by the detectives. She lived four streets away from Mason Street in Niles. Jessica Simms was 22 years old. They were both at the Mason Street house on June 11. Hayle testified that Austin was there most of the day, but he kept leaving and coming back. Hayle and Jessica left the house around midnight.

{¶67} Jessica testified that Austin had said he was going to rob Brandon and kill him. On cross-examination, Jessica explained that Austin did not mention Brandon by name; she figured out it must have been him after seeing the news reports about the car that was found on the bike path. Jessica stated she had seen Brandon in the car in the driveway at the Mason Street house around the time she was leaving.

{¶68} Hayle testified that after that night, Austin kept coming over to the Mason Street house. Jessica testified that "after he had did it, he came back, you know, bragging about it. We thought he was just playing around. You know. And as the article came about his car and as he was missing and stuff," she and Hayle went to the police. Hayle said they told the Niles Police that Austin had a gun at her grandmother's house.

{¶69} Hayle testified that Austin later told her, Jessica, and Rickey what happened the night of June 11:

He came back to the table and he was like bribing [sic] about the situation. That he had shot somebody in the back of the head and he had taken him down Hatchet Man Road and left his body there. He told me that he got him out in the front of the car and he put him on his knees and he told us that Brandon had looked at him and said, 'Please don't do this. I have a family. I have – I have a life in front of me.' And he said that he couldn't – he couldn't just sit there and look at him no more, time was over, he had to do it. So he shot him. And he said that the car – he took the car from Hatchet Man Road and that it was running out of gas. He had nowhere else to put it. And that's when he had left it on the Niles bike trail.

Hayle said Austin was not upset when he told them what happened, that he was bragging about it. She also testified that Rickey told them Austin had blood all over him when he came back to the house the next morning.

\*11 {¶70} Jessica testified to the conversation as follows:

A: But he [Austin] had said that he was riding with him [Brandon] and that he took him to Hatchet Man Road. I'm not exactly sure what they were going to do, but, you know – Brandon started apologizing to him about an incident that happened while he was in juvey detention. And Austin told him, you know, 'There's no need to apologize. Pull over.' You know. Austin said he took him out of the car and he told him to be quiet, get on his knees. And he told him, you know, excuse my language, he said, 'Fucking look at me,' and when he looked at him he had shot him.

Q: Okay. Did he say where he shot him at?

A: At first he said he only shot him once and then he said twice. But he said right here and in the head.

\* \* \*

A: And what did he tell you about Brandon's car?

Q: He – he said he didn't know what to do with it. He was running out of gas. So he had just left it on the bike trail.

Q: And the bike trail is not too far from 713 Mason Street?

A: No, sir. Less than a mile.

Defense counsel elicited from Jessica that Austin had pointed behind his ear and the middle of his forehead when describing where he had shot Brandon.

{¶71} Hayle and Jessica later gave statements at the Warren Police Department. It was elicited from Hayle on cross-examination that she had told the detectives Austin's motive was to rob Brandon of a large amount of heroin:

Austin had told us that he had known Brandon from DYS. Austin was part of the 82s, and Brandon was part of a Heartless Felon. Brandon was a CO officer. And I guess he had snitched on \* \* \* Austin when he was in DYS or something like that. And Austin had told us that when he was walking down the road he had seen Brandon, asked for a ride. Brandon said he had to go drop somebody off. That he had gotten Austin, and that he wanted to rob him for what he had. And I believe it was only like 4 or 5 pounds of heroin. And that's even if so. I don't know.

{¶72} During the course of his investigation, Detective Greaver obtained a murder warrant for Austin on the morning of June 20, 2017. He instructed the 911 center to "ping" Austin's cell phone in an attempt to locate him. That night, dispatch reported to Detective Greaver that Austin's phone was "pinging" across the street from Pizza Joe's in Cortland, Ohio, which had just been robbed at gunpoint. Dispatch sent the detective a photo of a person who had been detained in Cortland and was giving the officers a false name. Detective Greaver recognized the man in the photo as Austin.

{¶73} Deidre testified that at 10:47 p.m. on June 20, she missed a call from Austin on Facebook messenger. She called him back at 10:50 p.m. and put him on speaker phone; Hayle was in the room. Austin told Deidre that he "came up on a bunch of money." He asked if he could come to the Mason Street house, but Mrs. Roupe would not allow it. Hayle corroborated this account, and a screenshot from Deidre's phone with the call details was presented to the jury.

{¶74} Stephanie Kerstetter, the general manager of Pizza Joe's, testified that \$ 775 00 was stolen the night of the robbery.

\*12 {¶75} Britni Williams, 18 years old at the time of trial, was working at Pizza Joe's in Cortland the night of June 20. She testified that as they were closing, a man came in demanding money with a small silver gun. Britni testified she was not able to see much of the man's face because he was wearing a ski mask. That night, Britni described the man as tall, wearing sweat pants and a hoodie. Defense counsel elicited that she did not notice any tattoos; Austin has tattoos on his face, neck, left hand, and left arm.

{¶76} Shawn Marx lives on West Main Street in Cortland, approximately 100 yards away from Pizza Joe's. He testified that on June 20 around 10:15 p.m. he was outside smoking a cigarette and saw a man run out of Pizza Joe's in his direction. The man was wearing dark clothing and was "shuffling around" behind a pickup truck approximately 20 feet away from Shawn under a street light. Shawn could see something shiny in the man's pocket, which he assumed was a pistol or something, but he could not see what it was. Shawn testified, "he took off some stuff and I could see his face. He looked at me, I looked at him, and he ran." He saw the man run across the street from Pizza Joe's in between a building and a house. When the police arrived, he told them the direction the suspect had ran. In his statement to police, Shawn described the man as having short dark hair, wearing blue jeans, tennis shoes, a red shirt, and carrying a sweatshirt. Shawn testified that he assumed the man was wearing blue jeans because it was "something dark." He did not mention any tattoos to the police. At trial, Shawn identified Austin as the man he saw that night.

{¶77} Officer John P. Weston with the City of Cortland Police Department viewed multiple videotapes from the robbery at Pizza Joe's, which were also played for the jury. The videos show footage from behind Pizza Joe's where the suspect was located before the robbery; the suspect entering and leaving the restaurant from outside; and the actual robbery inside the restaurant. The suspect was a male wearing a dark hoodie, grey sweatpants, grey tennis shoes, and a mask of some sort. The video shows the suspect running towards the restaurant from across the street, entering at 10:08 p.m. (although the time stamp on the video is one hour behind). He was carrying a plastic grocery bag in his left hand, partially wrapped around the hand, and he pulled a small silver gun from the right pocket of the sweatpants, which left the pocket inside out. He visibly instructed the employees to place the money from the register in the grocery bag. Then he ran out. The entire robbery lasted little more than 30 seconds. The video then depicts the man running from the store, jogging

across the parking lot, then walking across the street between a house and a building. He is not seen on the video removing any clothing.

{¶78} After being advised that the phone of a murder suspect with an active warrant was "pinging" in a building across the street from Pizza Joe's, the officers reported to an apartment in that building. There were a lot of people inside, and the officers asked each of them their name and birth date. Officer Weston testified that one man identified himself as "Nathan Novicky." Dispatch sent the Cortland officers a picture of Austin. The officers determined the name "Nathan Novicky" and the given birth date were false. Detective Greaver, who was investigating Austin for murder, also confirmed for the Cortland officers that Austin was the man in the apartment.

\*13 {¶79} The Cortland officers interviewed each of the other young individuals present in the apartment that night: Leah Smith; Donavon Bunner; Stacie Cassidy; Justin Borawiec; and Melanie Engle, the leaseholder. They all testified at Austin's trial. At the time of trial, Leah was 15 years old, Donavon and Justin were 17; Melanie was 20; and Stacie was 23.

{¶80} During the day of June 20, 2017, the group was swimming at Willow Lake in Champion, Ohio. Another friend, Nick Goett, was also there, as was Austin. Melanie, Stacie, and Justin recently met Austin; he had told them his name was "Nathan." Leah and Donavon knew him as "Austin."

{¶81} When Willow Lake closed for the day, the group left in multiple vehicles and went to Melanie's apartment in Cortland. Late that evening, Melanie's cats escaped from the apartment; some remember it was one cat, others remember two. There was also not a consensus as to the exact time the cats escaped, but it was sometime between 9:00 and 10:00 p.m. Leah testified that she and Donavon went outside to look for the cats; Melanie and Donavon testified that everyone went outside to search.

{¶82} Leah, Donavon, and Stacie testified that they lost track of Austin while they were outside searching for the cats. Stacie said Austin was inside the apartment when she came back in, but she does not know where he was when she was outside. Donavon did not realize Austin had left but remembers him coming back to the apartment. Leah remembered Austin returning to the apartment with a lot of money in his hands; he was wearing grey sweatpants and a black hoodie. Leah did not ever tell the police that she had seen Austin with money that night. Neither Donavon nor Stacie remember seeing Austin with any money.

{¶83} Justin testified that he did not go outside with the others to search for the cats. At some point, Justin testified, he did not know where Austin was. In his statement to the police that night, he indicated that Austin went to the bathroom; when Austin came back to the living room, the police arrived.

{¶84} Melanie testified that while everyone was searching for her cats, Nick became upset and decided to walk to Burger King, which was about a 10- to 15-minute walk from her apartment. At 9:58 p.m., Melanie received a text from her sister, who worked at Burger King, asking why Nick was there. A screenshot from Melanie's phone of this conversation was introduced as an exhibit. Melanie then drove to Burger King, waited while Nick finished eating, and drove him home to Vienna, Ohio. While she was gone, Melanie received a text from her mother that Pizza Joe's had just been robbed and to be careful. When Melanie returned to her apartment, the police were outside; they knocked on her door shortly thereafter. She also did not see Austin with any money.

{¶85} Leah and Donavon testified that they heard Austin give the false name of "Nathan," but they did not inform the police officers that it was not his real name.

{¶86} The state introduced a picture of Melanie, Leah, and Donavon with Austin. All three of them acknowledged it was taken some time during the day of June 20 at Melanie's apartment. Austin is wearing grey sweatpants in the picture.

{¶87} Detective Morris obtained written consent from Melanie to search the apartment, which was in a state of disarray. Officer Nicholas Mancini with the City of Cortland Police Department was present for the search. He and Officer Weston both testified that the officers collected a pair of grey tennis shoes, a pair of grey sweatpants, and a plastic grocery bag. The shoes were found on the floor in the bedroom; the sweatpants and grocery bag were found in a laundry basket underneath a record album.

\*14 {¶88} According to their testimony, the grey tennis shoes appeared similar to those the robbery suspect was wearing because of white markings visible on the back. Inexplicably,

one shoe was missing its shoelace. The grey sweatpants appeared similar to those worn by the suspect, and the right pocket was turned inside out as it had been in the video when the man pulled out the gun. The grocery bag also appeared similar to the one the man had wrapped around his left hand and then used to collect the money. The officers never located a dark hoodie or face mask.

{¶89} Austin was arrested on the active murder warrant, as well as for obstructing official business and failing to disclose his personal information. Officer Brandon Rice with the City of Cortland Police Department transported Austin to the police station and confiscated his cell phone.

{¶90} The next morning, June 21, Detective Greaver and his partner Mirandized and then interrogated Austin at the Trumbull County Jail regarding Brandon's death. Austin again told the detectives that Brandon had picked him up on June 11 around 7:30 p.m. while he was walking home from Willow Lake and that there was another person in the car. After Brandon dropped him off, Austin stayed at home. Austin also told the officers that he thought there were drugs in Brandon's car and that Brandon was taking his friend back to Akron after he dropped off Austin. He denied meeting up with Brandon later that night.

{¶91} The detectives obtained search warrants for DNA swabs from Austin and subpoenaed cell phone records from AT&T, Austin's wireless carrier. They also received Austin's cell phone and other physical evidence from the City of Cortland Police Department. Detective Greaver testified that he later attempted to subpoena cell phone records for Brandon's cell phone, but he did not receive a response from the carrier prior to trial.

{¶92} Detective Morris testified that he called and spoke to Nick Goett, the young man who had walked to Burger King the night of the robbery. Nick told the detective that he had been at Melanie's apartment on June 20, but he left prior to the robbery. Nick declined to appear at the police station to give a written statement. He did not testify at Austin's trial.

{¶93} Detective Morris returned to Melanie's apartment on June 21 to continue with the search. Finding nothing relevant, he left. Melanie's parents were at her apartment that day to move her back home, and they received permission to clean the apartment. Melanie's mother, Stephanie Taylor, testified that while she was cleaning, she discovered a small black bag with ammunition and a gun. Melanie had two vases filled with wooden flowers in the kitchen. Mrs. Taylor removed the flowers from one vase and discovered the heavy black bag. She squeezed it and determined there were bullets inside. Her husband went outside and told the officers what she had found. Mrs. Taylor removed the flowers from the other vase and saw the gun.

{¶94} Officer Mancini then discovered \$ 545.00 inside an empty hair dye box in a blue grocery bag in the kitchen. Melanie testified that the bag had been used for trash in her bathroom and she had moved it to the kitchen that morning when they were cleaning. She had not noticed the money inside.

{¶95} Detective Morris was called back to the apartment, where he collected the gun and ammunition pouch. It was a silver .22 caliber handgun with a marbled handle. A certified trace of the firearm revealed that it was a Taurus .22 caliber pistol. It had been purchased by and was registered to Jamie Lee Sell, Austin's mother. The prosecution entered the gun into evidence.

\*15 {¶96} On June 21, Detective Greaver was contacted by the mother of Austin's girlfriend Meredith. She provided the detective with a video she found on Meredith's cell phone, which depicted Austin shooting a small silver handgun. The video was played for the jury. Meredith testified that the video was taken before June 9, 2017, which is the day she left for a cruise.

{¶97} The prosecution also introduced two pictures it had recovered from Austin's cell phone. Meredith identified Austin in both pictures: one showed his face, and one showed the tattoos on his left arm and hand. In one picture, Austin is seen holding two handguns: one is small and silver with a marbled handle, the other is larger. The picture is overlaid with a caption that reads, "My two baddest bitches. And they loyal." In the other picture, Austin's tattooed left arm is visible; he is holding a small silver handgun with a marbled handle and wearing a pair of grey tennis shoes.

{¶98} Meredith admitted she had seen Austin with a small silver handgun that had marbled markings on the handle, but when asked if the gun presented at trial was the one she had seen Austin with, Meredith stated: "I don't know. It looked a little similar."

{¶99} To the contrary, many other trial witnesses positively identified the silver Taurus .22 pistol as the handgun they had seen Austin carry. Rickey, Nathan, Deidre, and Hayle all identified the gun. Hayle testified that Austin told her he had the gun at the Mason Street House on June 11. Deidre testified that she saw Austin with the gun at the Mason Street house a couple days prior to June 11. Nathan testified it was one of two guns he had seen Austin carry.

{¶100} Dan Lester Jr., a Lieutenant with the Trumbull County Sheriff's Office, testified that he is the administrator of the inmate phone call recording system at the Trumbull County Jail. After Austin was arraigned, he placed a phone call to his mother, the recording of which was played for the jury. In the recording, Austin's mother asks him if the gun was registered. Austin responds that he does not think it was registered. She later asks him if they will find his prints on the gun. Austin says he does not know what gun she is talking about and that she is saying too much on the phone about the case.

{¶101} Lynda Eveleth, a forensic scientist with BCI, testified as an expert in the area of DNA analysis. She collected DNA samples from the silver Taurus .22 and compared them with a known swab of DNA from Austin. She was unable to match Austin's DNA with any swab from the firearm. Her conclusion was that the DNA swab from the magazine indicated a mixture of DNA; an unknown male DNA profile was detected, but Austin was excluded as the major contributor. There was additional DNA detected, but it was insufficient to make a comparison. The DNA swabs from the trigger, ammunition, and other handled areas of the firearm were not suitable for comparison.

{¶102} Michael Roberts, a forensic scientist in the firearms department of BCI, determined the silver Taurus .22 was an LR caliber semiautomatic pistol. It was operable at the time of testing. He also received a magazine and nine cartridges from the detectives, but there were no cartridge casings for comparison testing. Mr. Roberts examined the fragment recovered from Brandon's scalp that was initially believed to be a bullet fragment. During his analysis, however, he did not observe any "rifling." The item was off-white in color and nonmetallic, which is inconsistent with a bullet fragment. It also had hair on it. The origin of the fragment could not be determined.

\*16 {¶103} Joann Gibb, a computer forensic specialist with BCI, testified as an expert in the analysis of cell phones. On or about July 28, 2017, the Warren Police Department presented Ms. Gibb with Austin's cell phone for analysis. Using software, Ms. Gibb was able to produce the phone's text message and call history. Ms. Gibb was asked to find any contact between Brandon's number and Austin's number on June 11 and 12, 2017.

{¶104} A printout of an extraction report was introduced with a history of texts and calls to and from Brandon's number, designated with the name "B Samps," on June 11 through June 13, 2017. According to Josh's testimony, "B Samps" was Brandon's nickname.

{¶105} Brandon called Austin at 8:26 p.m. on June 11; the call was only connected for 2 seconds. Between 10:01 and 10:23 p.m. on June 11, the two exchanged texts indicating they were trying to get together that night after Brandon dropped Josh off in Akron. Each of these texts had been deleted from Austin's phone, but Ms. Gibbs was able to recover them. Austin called Brandon at 1:18 a.m. on June 12; the call lasted 43 seconds.

{¶106} There was no more contact between the two phone numbers until June 13, after Brandon had been reported missing. Austin texted Brandon three times. There were no responses from Brandon's phone. These three texts had not been deleted from Austin's phone:

Yo, is you straight n---- you're all over facebook!? Wtf hmu

Turner and someone named stephanie hmu askin if I seen you and my names in your missing photos I can't be having this kinda attention dawg if youre hiding or you O.D on some boii ima be fucking pissed

Bro!?!?!?

{¶107} The prosecution also introduced an extraction report produced by Ms. Gibb with a history of texts between Austin and Brittani Merten on June 12.

{¶108} Brittani, who was 18 years old at the time of trial, testified that she knew Austin through her brother, Nathan Moats. She had seen Austin with a small "blue like marble" firearm at her apartment in June 2017. A little after midnight on June 12, Austin sent Brittani a text that read, "see if my clip for the 9mm is out there." Brittani testified that Rickey and

Nathan had been "playing" with one of Austin's guns that was "a little bigger than the other one" she had previously described, and they had lost the clip. Brittani responded to Austin that she did not see the clip anywhere. Later, Brittani asked Austin where he was, and at 2:08 a.m. on June 12, Austin texted Brittani that he was in Niles. According to Detective Greaver, he had contacted Brittani during the investigation, but she did not have any information regarding Brandon.

{¶109} William Moskal, a criminal intelligence analyst with BCI, testified about "cell site mapping," which is the process of using information obtained from cellular companies to map the towers that are associated with phone calls and texts. Detective Greaver asked Mr. Moskal to analyze the cell site data obtained from AT&T regarding Austin's phone for June 12 beginning at midnight. The data had been obtained from AT&T via Grand Jury Subpoena. The prosecutor introduced into evidence the cell phone records obtained from AT&T and two reports generated by Mr. Moskal.

{¶110} One report shows a map of cell site location information when Austin's phone was used to send a text or make a phone call: e.g., it indicates the date and time; the length of a call; the number called or texted; and the applicable cell tower. It does not show the exact location of the phone, merely the location of the cell tower to which the phone connected. AT&T refers to this report as "AU."

\*17 {¶111} The other report shows a map indicating where and when Austin's phone "pinged" a cell tower, even if the phone was not being used at the time. The "pings" are often random; the information is used internally by AT&T for network distribution purposes. AT&T refers to this report as "NELOS." This report was the subject of Austin's motion to suppress: it provides the Historical Precision Location Information ("HPLI").

{¶112} Mr. Moskal mapped the locations of where Brandon's body was found on Peck Leach Road in Bristol (labeled "body location"), where Austin lived in Bristol (labeled "5106 Miller South Road, Bristolville"), where Brandon's car was found on the bike path in Niles (labeled "location of victim's car"), and the Mason Street house in Niles (labeled "713 Mason Street").

{¶113} The cell site data from the AU and HPLI/NELOS reports indicate that Austin's phone connected to or "pinged" off of AT&T cell towers in the following locations the early morning of June 12, 2017:

- 12:09 a.m. – Bristol near 5106 Miller South Road (AU)
- 1:18 a.m. – Bristol northeast of 5106 Miller South Road (AU)
- 2:08 a.m. – Niles near the location of victim's car and 713 Mason Street (AU)
- 3:46 a.m. – the city of Warren (AU)
- 4:51 a.m. – Bristol between 5106 Miller South Road and the body location (HPLI/NELOS)
- 4:53 a.m. – Bristol near 5106 Miller South Road (HPLI/NELOS)
- 5:14 a.m. – Bristol between 5106 Miller South Road and the body location (AU)
- 5:41 a.m. – the city of Warren (HPLI/NELOS)
- 9:57 a.m. – Niles near the location of victim's car and 713 Mason Street (HPLI/NELOS)
- 10:57 a.m. – Niles near the location of victim's car and 713 Mason Street (HPLI/NELOS)
- 11:57 a.m. – Bristol near 5106 Miller South Road (AU)

{¶114} Finally, Timothy Cook testified that he was an inmate at the Trumbull County Jail when Austin was there in June and July 2017. He overheard Austin tell another inmate that "he shot him, it didn't seem real because there wasn't that much blood. But he said he did it." Timothy contacted the Warren Police and gave a statement. Timothy testified that he offered the statement hoping to receive a benefit, but none of his charges were dropped, he was not released from jail, and he did not receive a reduced sentence. Timothy stated he was "forced" to provide his testimony at Austin's trial.

#### **Motion to Sever**

{¶115} Under his second assignment of error, Austin argues the trial court erred in failing to sever for trial the offenses related to the armed robbery from the offenses related to the homicide.

{¶116} "Two or more offenses may be charged in the same indictment, information or complaint in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character, or are based on the same act or transaction, or 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." Crim.R. 8(A). However, even when two or more offenses are properly charged in the same instrument under Crim.R. 8(A), it may be necessary to order separate trials under Crim.R. 14. *State v. Gordon*, 152 Ohio St.3d 528, 2018-Ohio-259, ¶20, 98 N.E.3d 251.

{¶117} "The law favors joining multiple criminal offenses in a single trial." *State v. Franklin*, 62 Ohio St.3d 118, 122, 580 N.E.2d 1 (1991). This is because joint trials "conserve state funds, diminish inconvenience to witnesses and public authorities, and avoid delays in bringing those accused of crime to trial." *Bruton v. United States*, 391 U.S. 123, 134, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968)." *Id.* at ¶18. Permitting joinder also "conserves resources by avoiding duplication inherent in multiple trials and minimizes the possibility of incongruous results that occur in successive trials before different juries." *State v. Hamblin*, 37 Ohio St.3d 153, 158, 524 N.E.2d 476 (1968) (citation omitted).

\*18 {¶118} "Notwithstanding the policy in favor of joinder," Crim.R. 14 permits a defendant to request severance of the counts in an indictment 'on the grounds that he or she is prejudiced by the joinder of multiple offenses.' " *State v. Clinton*, 153 Ohio St.3d 422, 2017-Ohio-9423, ¶44, 108 N.E.3d 1, quoting *State v. LaMar*, 95 Ohio St.3d 181, 2002-Ohio-2128, ¶49, 767 N.E.2d 156. "If it appears that a defendant or the state is prejudiced by a joinder of offenses \* \* \* in an indictment, information, or complaint, or by such joinder for trial together of indictments, informations or complaints, the court shall order an election or separate trial of counts, \* \* \* or provide such other relief as justice requires." Crim.R. 14.

{¶119} "The defendant 'has the burden of furnishing the trial court with sufficient information so that it can weigh the considerations favoring joinder against the defendant's right to a fair trial.' " *Clinton*, *supra*, at ¶44, 108 N.E.3d 1, quoting *State v. Torres*, 66 Ohio St.2d 340, 343, 421 N.E.2d 1288 (1981). "But even if the equities appear to support severance, the state can overcome a defendant's claim of prejudicial joinder by showing either that (1) it could have introduced evidence of the joined offenses as 'other acts' under Evid.R. 404(B) or (2) the 'evidence of each crime joined at trial is simple and direct.' " *Id.*, quoting *State v. Lott*, 51 Ohio St.3d 160, 163, 555 N.E.2d 293 (1990).

{¶120} Prior to trial, Austin sought severance pursuant to Crim.R. 8(A) and relief from prejudicial joinder pursuant to Crim.R. 14. Relevant to his assignment of error, he requested separate trials for (1) the charges that arose from the shooting death of Brandon on or about June 12, 2017, and (2) the charges that arose from the armed robbery at Pizza Joe's on June 20, 2017. Defense counsel renewed the motion to sever at the close of the state's case-in-chief and again raised the issue in a motion for new trial.

{¶121} Austin argued the offenses were misjoined under Crim.R. 8 because the crimes were not of the same or similar character, were not of the same act or transaction, and were not connected as part of a common scheme or course of criminal conduct. Alternatively, he argued severance was necessary under Crim.R. 14 because he would suffer extreme prejudice in that evidence of each crime would be inadmissible in the trial of the other and, because the evidence is not simple and direct, a joint trial would create confusion and unnecessary complexity.

{¶122} The state responded that the evidence was simple and direct with regard to all counts and that Austin failed to make a showing of actual prejudice. It maintained the charges all stemmed from the same transaction and were part of a larger course of criminal conduct, and the facts were "straight-forward, uncomplicated, and interrelated." "In fact," the state asserted, "the defendant made admissions to witnesses regarding the Aggravated Murder and then made admissions to some of the same people after the robbery stating he had gotten a lot of money." Further, the state reasoned, the court could provide a limiting instruction to the jury.

{¶123} The trial court summarily denied relief at each juncture.

{¶124} "We review a trial court's ruling on a Crim.R. 14 motion for an abuse of discretion." *Clinton*, *supra*, at ¶46, 108 N.E.3d 1, citing *State v. Hand*, 107 Ohio St.3d 378, 2006-Ohio-18, ¶166, 840 N.E.2d 151. An "abuse of discretion" occurs when a trial court fails "to exercise sound, reasonable, and legal decision-making." " *State v. Beechler*, 2d Dist. Clark No. 09-CA-54, 2010-Ohio-1900, ¶62, quoting *Black's Law Dictionary* 11 (8th Ed.2004).

{¶125} "A defendant who appeals the denial of relief bears a heavy burden:

\*19 '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.'

*Clinton, supra*, at ¶46, 108 N.E.3d 1, quoting *State v. Schaim*, 65 Ohio St.3d 51, 59, 600 N.E.2d 661 (1992).

{¶126} The disagreement on appeal centers around whether the evidence of each crime joined at trial was "simple and direct."

{¶127} "Simple and direct" has become an often-undefined catchphrase in judicial opinions. It stems from the concept that joinder of unrelated offenses is not prejudicial when the evidence as to each is not weak, is direct and uncomplicated, and can reasonably be separated as to each offense. See *State v. Torres*, 66 Ohio St.2d 340, 343-344, 421 N.E.2d 1288 (1981), citing *United States v. Ragghianti*, 527 F.2d 586 (9th Cir.1975) and *United States v. Catena*, 500 F.2d 1319 (3d Cir.1974). In other words, the "simple and direct" test is satisfied when the evidence is sufficient to sustain each verdict, regardless of whether the charges were tried together, and when the jury will not be, or has not been, confused as to which evidence proves which act. See *id.*, citing *State v. Roberts*, 62 Ohio St.2d 170, 175, 405 N.E.2d 247 (1980); see also *State v. Coley*, 93 Ohio St.3d 253, 754 N.E.2d 1129 (2001).

{¶128} As the venerable Judge Learned Hand explained:

There is indeed always a danger when several crimes are tried together, that the jury may use the evidence cumulatively; that is, that, although so much as would be admissible upon any one of the charges might not have persuaded them of the accused's guilt, the sum of it will convince them as to all. This possibility violates the doctrine that only direct evidence of the transaction charged will ordinarily be accepted, and that the accused is not to be convicted because of his criminal disposition. Yet in the ordinary affairs of life such a disposition is a convincing factor, and its exclusion is rather because the issue is practically unmanageable than because it is not rationally relevant. When the accused's conduct on several separate occasions can properly be examined in detail, the objection disappears, and the only consideration is whether the trial as a whole may not become too confused for the jury.

*United States v. Lotsch*, 102 F.2d 35, 36 (2d Cir.1939).

{¶129} Here, although joining offenses for trial always carries a risk of prejudice, we conclude Austin has not affirmatively demonstrated that his rights were prejudiced by the joinder of these offenses for trial. The evidence as to each charge was uncomplicated: there were no competing expert witnesses for the jury to unravel, and there was minimal scientific evidence with which the jury had to contend. Additionally, the relevant evidence as to each event was not generally overlapping and was easy to separate. With the exception of the coroner, the witnesses related to the events of June 12, 2017, were called prior to the witnesses related to the events of June 20, 2017. A few witnesses had testimony relevant to both dates, but, again, questions were asked of them in chronological order.

{¶130} Further, the trial court admonished the jury to consider each offense as "separate and distinct." It instructed the jury, in relevant part, as follows:

\*20 [T]he charges set forth in each count of the indictment constitute a separate and distinct matter. You must consider each count and the evidence applicable to each count separately, and you must state your findings as to each count uninfluenced by your verdict as to any other count. The defendant may be found guilty or not guilty of any one of the offenses charged.

{¶131} There is no reason for this court to believe that the jury did not heed these instructions or that the trial, as a whole, became too confused for the jury. Austin has not established on appeal that the trial court, given the information provided, abused its discretion in refusing to separate the charges for trial.

{¶132} The second assignment of error is without merit.

**Manifest Weight**

{¶133} In his third assignment of error, Austin maintains his convictions are against the manifest weight of the evidence.

{¶134} "Weight of the evidence concerns 'the inclination of the *greater amount of credible evidence*, offered in a trial, to support one side of the issue rather than the other.'" *State v. Thompkins*, 78 Ohio St.3d 380, 387, 678 N.E.2d 541 (1997) (emphasis added), quoting *Black's Law Dictionary* 1594 (6th Ed.1990).

'The court, reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. The discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction.'

*Id.*, quoting *State v. Martin*, 20 Ohio App.3d 172, 175, 485 N.E.2d 717 (1st Dist.1983).  
"When a court of appeals reverses a judgment of a trial court on the basis that the verdict is against the weight of the evidence, the appellate court sits as a 'thirteenth juror' and disagrees with the factfinder's resolution of the conflicting testimony." *Id.*, quoting *Tibbs v. Florida*, 457 U.S. 31, 42, 102 S.Ct. 2211, 72 L.Ed.2d 652 (1982).

{¶135} To convict Austin of the charged offenses, the state was required to prove the following elements beyond a reasonable doubt:

**Aggravated Murder**: On or about June 12, 2017, Austin did purposely cause the death of Brandon, while committing or attempting to commit, or while fleeing immediately after committing or attempting to commit, aggravated robbery. R.C. 2903.01(B).

**Aggravated Robbery**: On or about June 12 and June 20, 2017, in attempting or committing a theft offense as defined in R.C. 2913.01, or in fleeing immediately after the attempt or offense, Austin did have a deadly weapon on or about his person or under his control, and either displayed the weapon, brandished it, indicated he possessed it, or used it. R.C. 2911.01(A)(1).

**Tampering with Evidence**: Knowing that an official proceeding or investigation is in progress, or is about to be likely to be instituted, Austin did alter, destroy, conceal, or remove any record, document, or thing, with purpose to impair its value or availability as evidence in such proceeding or investigation. R.C. 2921.12(A)(1).

**Having Weapons While Under Disability**: On or about June 12 and 20, 2017, having not been relieved from disability under operation of law or legal process, Austin did knowingly acquire, have, carry, or use any firearm, when he had been adjudicated a delinquent child for the commission of an offense that, if committed by an adult, would have been a felony offense of violence, to-wit: aggravated burglary with a firearm specification. R.C. 2923.13(A)(2).

**\*21 Firearm Specifications**: At the time of committing Aggravated Murder and both Aggravated Robberies, Austin did have a firearm on or about his person or under his control and brandished the firearm, indicated that he possessed it, or used it to facilitate the offense. R.C. 2941.145.

{¶136} Austin asserts there was a lack of forensic evidence supporting his conviction for aggravated murder. Although there was no DNA or firearm evidence connecting Austin to the crime, there was forensic evidence in the form of the HPLI cell tower data. As discussed above, that data was properly before the jury.

{¶137} Austin further maintains the witness testimony was unforgivably inconsistent and contradictory. The jury was in the best position to consider the certainty and reliability of the young witnesses' testimony. Some witnesses did conflict as to specific times or details at issue, but the information provided and the general time frames established by the testimony provided a generally consistent timeline of events on the days in question. It was revealed

that a few of the teenage witnesses had initially lied to the police about what they knew, either in an effort to protect Austin or because they were scared of Austin. However, the record does not reveal any incentive the witnesses may have had to provide testimony against Austin's interests, perhaps except for fellow inmate Timothy Cook. Further, it is understandable that there may be slight discrepancies between the teenagers' trial testimony and statements they made in a stressful situation that had occurred nine months prior.

{¶138} The cell phone data was admissible, reliable, and certain. Austin's actions in deleting text messages, lying to the police about his whereabouts, and making admissions to his friends are all indicative of guilt. He told multiple witnesses where he left Brandon's body. After this information was given to the police, that is precisely where the body was found. The witness testimony, although at times inconsistent, provided direct evidence of identity, motive, plan, intent, opportunity, and means. We conclude the jury did not lose its way in resolving conflicts in the evidence, nor did it create a manifest miscarriage of justice in rendering verdicts of guilty. Austin's convictions are not against the manifest weight of the evidence.

{¶139} The third assignment of error is without merit.

#### **Cumulative Error**

{¶140} In his fourth assignment of error, Austin argues that cumulative errors committed by the trial court, even if determined to be harmless, require a reversal of his convictions under the cumulative error doctrine.

{¶141} The Ohio Supreme Court recognized the doctrine of cumulative error in *State v. DeMarco*, 31 Ohio St.3d 191, 509 N.E.2d 1256 (1987), at paragraph two of the syllabus: "Although violations of the Rules of Evidence during trial, singularly, may not rise to the level of prejudicial error, a conviction will be reversed where the cumulative effect of the errors deprives a defendant of the constitutional right to a fair trial." Application of the doctrine is not limited to violations of the Rules of Evidence, as is evident in *State v. Neyland*, 139 Ohio St.3d 353, 2014-Ohio-1914, ¶257, 12 N.E.3d 1112 (citations omitted): "Under this doctrine, a conviction will be reversed when the cumulative effect of errors in a trial deprives a defendant of a fair trial, even though each of the numerous errors does not individually constitute cause for reversal."

\*22 {¶142} Austin made multiple admissions to multiple witnesses. He received a fair trial, and we concluded that his above assignments of error are without merit. Therefore, the doctrine does not call for reversal in the case sub judice.

{¶143} The fourth assignment of error is without merit.

#### **Sentence in Case No. 2017 CR 541**

{¶144} An appellate court generally reviews felony sentences under the standard of review set forth in R.C. 2953.08(G)(2):

The court hearing an appeal under division (A), (B), or (C) of this section shall review the record, including the findings underlying the sentence or modification given by the sentencing court.

The appellate court may increase, reduce, or otherwise modify a sentence that is appealed under this section or may vacate the sentence and remand the matter to the sentencing court for resentencing. The appellate court's standard for review is not whether the sentencing court abused its discretion. The appellate court may take any action authorized by this division if it clearly and convincingly finds either of the following:

- (a) That the record does not support the sentencing court's findings under division (B) or (D) of section 2929.13, division (B)(2)(e) or (C)(4) of section 2929.14, or division (I) of section 2929.20 of the Revised Code, whichever, if any, is relevant;
- (b) That the sentence is otherwise contrary to law.

"Under this standard, an appellate court upholds the imposed felony sentence unless: (1) required mandatory findings are clearly and convincingly not supported by the record, or (2) the sentence is clearly and convincingly contrary to law." *State v. Aldrich*, 11th Dist. Ashtabula No. 2017-A-0033, 2017-Ohio-8944, ¶32 (citations omitted); see also *State v. Wilson*, 11th Dist. Lake No. 2017-L-028, 2017-Ohio-7127, ¶18, quoting *State v. Marcum*, 146 Ohio St.3d 516, 2016-Ohio-1002, ¶23, 59 N.E.3d 1231.

{¶145} Austin's final assignment of error relates to case No. 2017 CR 521. He challenges the trial court's imposition of a maximum 11-year sentence for possessing a deadly weapon while under detention, a first-degree felony, which was ordered to run consecutive to the sentences imposed in case No. 2017 CR 403.

{¶146} Austin challenges the consecutive nature of the sentence. However, the trial court was required, as a matter of law, to order any sentence imposed for this charge, a felony violation of R.C. 2923.131, to run consecutively to the sentence imposed in case No. 2017 CR 403. Thus, this argument is not well taken. See R.C. 2929.14(C)(2) ("if an offender who is under detention at a detention facility commits a felony violation of section 2923.131 of the Revised Code, \* \* \* any prison term imposed upon the offender for one of those violations shall be served by the offender consecutively to the prison term or term of imprisonment the offender was serving when the offender committed that offense and to any other prison term previously or subsequently imposed upon the offender").

{¶147} Austin also claims imposition of the maximum allowable sentence is contrary to law because "the major justification" was his murder conviction, which, as he maintains, was invalid. This argument is also not well taken. The trial court never indicated that "the major justification" for the length of the sentence was Austin's murder conviction. The trial court stated it had considered the overriding principles and purposes of felony sentencing and all relevant seriousness and recidivism factors, pursuant to R.C. 2929.11 and R.C. 2929.12. See *State v. DelManzo*, 11th Dist. Lake No. 2007-L-218, 2008-Ohio-5856. {¶23 ("[a] trial court is not required to give any particular weight or emphasis to a given set of circumstances; it is merely required to consider the statutory factors").

\*23 {¶148} The trial court further declared it had reviewed the presentence investigation report prepared for case No. 2017 CR 403 and, directly addressing Austin, stated: "Mr. Burke, I've reviewed your presentence investigation. Based on your criminal history as a juvenile, an adult, and your record at the jail, and all the things you've done, this Court sees you -- not any redeeming social value for you in any way, shape or form."

{¶149} Notwithstanding the murder and multiple other convictions in case No. 2017 CR 403, the presentence investigation report confirms that Austin has an extensive criminal history. Also, in addition to possessing the improvised knife/shank while under detention for case No. 2017 CR 403, Austin's record of behavioral issues in the jail includes an apparent escape attempt.

{¶150} Austin has failed to demonstrate that his sentence in case No. 2017 CR 541 is clearly and convincingly contrary to law. Thus, his fifth assignment of error is without merit.

#### **Sentence in Case No. 2017 CR 403**

{¶151} "Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." Crim.R. 52(B). Although not brought to our attention on appeal, this court notes, sua sponte, that the March 27, 2018 sentencing entry and the April 11, 2018 nunc pro tunc sentencing entry in case No. 2017 CR 403 contain plain errors that may be corrected by the trial court nunc pro tunc.

{¶152} Pursuant to R.C. 2929.14(C)(4), the trial court must find that consecutive service "is necessary to protect the public from future crime or to punish the offender." The trial court must also find that consecutive sentences "are not disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the public." *Id.* The trial court must further find that at least one of the following applies:

(a) The offender committed one or more of the multiple offenses while the offender was awaiting trial or sentencing, was under a sanction imposed pursuant to section 2929.16, 2929.17, or 2929.18 of the Revised Code, or was under post-release control for a prior offense.

(b) At least two of the multiple offenses were committed as part of one or more courses of conduct, and the harm caused by two or more of the multiple offenses so committed was so great or unusual that no single prison term for any of the offenses committed as part of any of the courses of conduct adequately reflects the seriousness of the offender's conduct.

(c) The offender's history of criminal conduct demonstrates that consecutive sentences are necessary to protect the public from future crime by the offender.

*Id.* A trial court's failure to make the R.C. 2929.14(C)(4) findings at the sentencing hearing renders the sentence contrary to law, "requiring the vacation of the sentence and a remand to the trial court for resentencing." *State v. Aikens*, 11th Dist. Trumbull No. 2014-T-0124, 64 N.E.3d 371, 2016-Ohio-2795, ¶61, citing *State v. Bonnell*, 140 Ohio St.3d 209, 2014-Ohio-3177, ¶37, 16 N.E.3d 659. However, "a trial court's failure to incorporate the findings required by R.C. 2929.14(C) in the sentencing entry after making those findings at the sentencing hearing does not render the sentence contrary to law" and may be corrected via a nunc pro tunc entry. *Id.*, citing *Bonnell*, *supra*, at ¶30, 16 N.E.3d 659.

¶153 The record reflects the trial court made the requisite findings at the sentencing hearing, stating: "It is necessary to punish the defendant and protect the public and not disproportionate, as the offender's criminal history shows that consecutive sentences are necessary to protect the public." The trial court, however, failed to incorporate the finding under R.C. 2929.14(C)(4)(c) in its sentencing entry, merely writing: "the Court finds that consecutive service is necessary to protect the public from future crime and to punish the Defendant, and that consecutive sentences are not disproportionate to the seriousness of the Defendant's conduct and to the danger the Defendant poses to the public." The fact that it is Austin's *criminal history* that demonstrates consecutive sentences are necessary to protect the public is the portion that was omitted.

\*24 ¶154 Therefore, we remand this matter for the trial court to issue a nunc pro tunc sentencing entry, incorporating the R.C. 2929.14(C)(4)(c) finding that was made at the sentencing hearing. See, e.g., *State v. Oip*, 11th Dist. Ashtabula Nos. 2015-A-0033, 2016-Ohio-3508, ¶19; *State v. Stewart*, 11th Dist. Trumbull No. 2017-T-0063, 2018-Ohio-1678, ¶16-24; and *State v. Bell*, 8th Dist. Cuyahoga No. 106842, 2019-Ohio-340, ¶108-112.

¶155 Finally, we note that the sentencing entries in case No. 2017 CR 403 incorrectly state that Austin's convictions for aggravated robbery included forfeiture specifications. This should also be corrected, nunc pro tunc, to reflect that Austin's convictions for aggravated robbery included firearm specifications, as was reflected in the indictment, jury instructions, and jury verdict forms.

#### **Conclusion**

¶156 The judgment of the Trumbull County Court of Common Pleas in case No. 2017 CR 541 is hereby affirmed.

¶157 The judgment of the Trumbull County Court of Common Pleas in case No. 2017 CR 403 is hereby affirmed. The matter is remanded for the trial court to enter a nunc pro tunc sentencing entry consistent with this opinion.

MATT LYNCH, J.,

MARY JANE TRAPP, J.,

concur.

#### **All Citations**

Slip Copy, 2019 WL 2172718, 2019 -Ohio- 1951

#### **Footnotes**

- 1 Ms. Egbert did not testify at trial. "Makayla" is the spelling of Ms. Egbert's name provided in the transcript. We note, however, that other portions of the record indicate the correct spelling of her name is "Michaela."

End of  
Document

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## WESTLAW

2019 WL 6340247

Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

**People v. Grant**

Court of Appeals of Michigan. | November 26, 2019 | Not Reported in N.W. 2d | 2019 WL 6340247 (Approx. 4 pages)

UNPUBLISHED  
Court of Appeals of Michigan.

PEOPLE of the State of Michigan, Plaintiff-Appellee,

v.

Matthew Ryan GRANT, Defendant-Appellant.

No. 338615

November 26, 2019

Wayne Circuit Court, LC No. 16-007093-01-FC

Before: Cameron, P.J., and Cavanagh and Shapiro, JJ.

**Opinion**

Per Curiam.

\*1 Defendant appeals his jury trial convictions of two counts of assault with intent to commit murder (AWIM), MCL 750.83, two counts of assault with a dangerous weapon (felonious assault), MCL 750.34, discharge of a firearm from a vehicle, MCL 750.234a, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant was sentenced to prison terms of 11 to 20 years for his AWIM convictions, 2 to 4 years for his felonious assault convictions, 1 to 10 years for his discharge of a firearm from a vehicle conviction, and a consecutive 2-year term of imprisonment for his felony-firearm conviction. We affirm.

**I. BACKGROUND**

The evidence at trial established that HW, then 17 years old, and defendant met on MeetMe, a dating application. Defendant offered HW \$1,000 in exchange for sex. Specifically, HW was to introduce defendant to her friend, and they were all to engage in a "threesome." Defendant and HW met at a Del Taco parking lot where he gave her the money. From there, their accounts diverge.

HW testified that she told defendant that they would hang out later when her friend got off work. She left the parking lot and proceeded to pick up her boyfriend, Muhammad Adbuljami. While driving, HW noticed defendant's vehicle in her rear-view mirror but initially did not think much of it. When HW reached an intersection, her vehicle stalled and she stopped at a gas station; defendant pulled up next to her vehicle. HW testified that defendant exited his vehicle and came "charging" at the driver's side of her vehicle. HW, who was scared, started her vehicle, and pulled out of the gas station. Defendant returned to his vehicle and followed HW as she wove in and out of traffic, speeding. Eventually, defendant pulled up to the passenger side of HW's vehicle and fired shots—two hit her vehicle, one hit her right shoulder, and one hit her neck. Adbuljami testified consistently with HW; they both identified defendant as the shooter.

According to defendant, HW told him to follow her after the cash exchange. He testified that he did so for a while, but he lost track of her when she ran a red light. He then returned home.

Initially, HW was not forthcoming with the police about her prior involvement with the shooter. She eventually told Redford Police Detective Sergeant Kevin Crittenden "[t]he truth." Officers executed a search warrant on defendant's home and .38 caliber bullets were seized from the vehicle he drove the night of the shooting. A loaded .38 caliber gun was

seized from another vehicle belonging to defendant. A bullet was recovered from HW's vehicle, and State Police Sergeant Dean Molnar, an expert in firearm tool marks, classified the fired bullet as being in the .38/9mm caliber class.

After sentencing, defendant filed a motion for a new trial, claiming ineffective assistance of counsel. The trial court denied the motion.

## II. ANALYSIS

Defendant argues that the trial court erred in denying his motion for a new trial. We disagree.<sup>1</sup>

\*2 "To establish a claim of ineffective assistance of counsel, a defendant must show both that counsel's performance was deficient and that counsel's deficient performance prejudiced the defense." *People v. Riley (After Remand)*, 468 Mich. 135, 140; 659 N.W.2d 611 (2003). A trial counsel's performance is deficient if "it fell below an objective standard of reasonableness under prevailing professional norms." *Id.* To show prejudice, "the defendant must show the existence of a reasonable probability that, but for counsel's error, the result of the proceeding would have been different." *People v. Carbin*, 463 Mich. 590, 600; 623 N.W.2d 884 (2001).

Defendant first argues that defense counsel was ineffective for failing to consult or present his own ballistic expert. However, he fails to establish that his proposed ballistics expert would have provided him a substantial defense.

An attorney's decision whether to retain or call witnesses, including expert witnesses, is a matter of trial strategy. *People v. Ackerman*, 257 Mich. App. 434, 455; 669 N.W.2d 818 (2003). In general, the failure to call a witness can constitute ineffective assistance of counsel only when it "deprives the defendant of a substantial defense." *People v. Hoyt*, 185 Mich. App. 531, 537-538; 462 N.W.2d 793 (1990). "A substantial defense is one that might have made a difference in the outcome of the trial." *People v. Chapo*, 283 Mich. App. 360, 370; 770 N.W.2d 68 (2009) (quotation marks and citation omitted).

Sergeant Molnar classified the markings on the bullet recovered from HW's vehicle as consistent with being fired from a .38/9 mm caliber gun. Molnar fired test bullets from defendant's .38 caliber gun for comparison purposes. But the results were "inconclusive," meaning that Molnar could not match or eliminate defendant's gun as the one that fired the bullet recovered from HW's vehicle. Molnar explained that "with some firearms and sometimes older firearms, they just don't mark that well, the rifling and the individual marks inside of the barrel don't transfer over for lack of a better term, on to the bullet surface itself. So the marks were not there."

Defendant's claim of ineffective assistance of counsel is premised on a ballistics investigation report authored by Steven Howard. Howard inspected defendant's firearm, but there are no indications that he performed any tests. Instead, Howard provides his general opinion that the gun was in good condition and there was no reason why it should have produced "clean" test bullets. He also notes that there are many possible weapons in existence that could have produced the markings found on the fired bullet.

Even assuming that Howard is qualified to testify about firearm markings, we fail to see how his opinion would have substantially aided the defense. Howard maintains that, if defendant's gun fired the shots at HW, then the marking on tests bullets should have matched the fired bullet. But he does not cite any evidence or support for that conclusion. Further, he concedes that the lack of matching marks between the bullets does not eliminate defendant's gun. So, ultimately, Howard and Molnar arrive at the same place: the test results in this case were inconclusive.

Howard nonetheless opines that it was misleading for Molnar to tell the jury that he could not eliminate defendant's weapon given the vast number of guns in existence that could have produced the markings found on the fired bullet. However, defense counsel established on cross-examination that the bullet could have been fired from a range of guns. For instance, counsel asked Molnar, "Now you would agree that a .38 Special, there are many, many, many, of those weapons in the public, in the country?" Sergeant Molnar responded, "Yes." Counsel then asked, "And you would agree that there is more than one manufacturer other than Charter Arms that manufactures a .38 Special, correct?" Sergeant Molnar responded, "Yes, sir." Counsel also asked, "So we have established that this bullet could have been fired from a 9 millimeters [sic] weapon or a 357 weapon. That you're positive, right?" Sergeant Molnar responded, "Yes, they are all in the 38 caliber class." Thus, while an exact

number of possible firearms were not presented to the jury, counsel adequately made the point that Howard emphasizes in his report.

\*3 Defendant also contends that “[t]he spent bullet may not have been a .38/9[.]” However, defendant’s contention is merely speculation as Howard does not dispute that the bullet was in the .38/9mm caliber class. Rather, he merely noted the slim difference of diameters between bullets within that class.

In sum, Molnar testified that the test results were inconclusive, and Howard concedes that testing could not have eliminated defendant’s gun. Further, this case was about *who* fired the shots at HW’s vehicle. And there was ample evidence presented to the jury that defendant was the shooter. Accordingly, defendant fails to show that Howard’s proposed testimony would have affected the outcome at trial.

Next, defendant argues that defense counsel was ineffective for failing to consult or present his own forensic cell expert. Again, defendant fails to establish that he was denied a substantial defense.

Detective Sergeant Crittenden testified that he received certified records for defendant’s and HW’s cell phones. Based on the records, Crittenden compiled a cell phone map for the night in question showing defendant’s and HW’s respective locations. For defendant, Crittenden used the Network Event Location System (NELOS), which provides “an approximate location” for a cell phone receiving service from ATT. Crittenden testified that “NELOS is not GPS within feet. NELOS is an approximation of the [cell phone].” Accordingly, he could only give an approximation of defendant’s location. Crittenden concluded that at about 9:44 p.m.—shortly before the estimated time of the shooting—defendant’s and HW’s phones were in the same general area.

Defendant’s proposed expert, Spencer Mclanville, emphasizes in his report that NELOS does provide exact GPS locations. As discussed, Crittenden made this same point to the jury at trial. Defense counsel also cross-examined Crittenden about the radius of the approximate locations on the map before aptly concluding: “All this pure mapping does is just show Mr. Grant coming down to the area, being in the area for a while and going back up, right?” Crittenden responded affirmatively.

Mclanville nonetheless takes issue with Crittenden’s methodology and asserts that he failed to accurately explain to the jury the size of the approximate areas shown on the map. He also asserts that it was “pure speculation” for Crittenden to make claims about the vehicles traveling on particular roads. However, Mclanville does not expressly disagree with Crittenden’s conclusion that defendant and HW were in the same general area at 9:44 p.m. on the night of the shooting. Indeed, that was undisputed at trial because defendant testified to meeting up with HW and following her in the time leading up to the shooting. Thus, defendant fails to establish that a competing expert attacking Crittenden’s methodology and approximations would have made a difference at trial.

Finally, defendant argues that defense counsel failed to adequately impeach key prosecution witnesses.

“Counsel may provide ineffective assistance if counsel unreasonably fails to develop the defendant’s defenses by adequately impeaching the witnesses against the defendant.” *People v. Lane*, 308 Mich. App. 38, 68; 862 N.W.2d 446 (2014). “Decisions regarding whether to call or question a witness are presumed to be matters of trial strategy.” *People v. Putman*, 309 Mich. App. 240, 248; 870 N.W.2d 593 (2015).

\*4 HW admitted at trial that she used MeetMe to communicate with men besides defendant and that she had offered to perform various sex acts for those men in exchange for money. She testified that she did not follow through with these offers—she said these things in order to get money. She also said that defendant was the only person from MeetMe that she met in person. During cross-examination, defense counsel used a 185-page document of MeetMe conversations to question HW about her conversations with other men. HW admitted to telling various untruths about her personal life to people in these messages.

Defendant maintains that there were “missed opportunities” to impeach HW with the MeetMe messages. Specifically, defendant highlights that HW proposed on multiple occasions to meet at Del Taco to exchange cash after which the man would follow HW to her home. Defendant asserts that these messages would have illustrated to the jury that HW “likely had many jilted and angry paramours.” He also contends that the message would have corroborated his testimony that HW told him to follow her after the cash exchange.

It must be noted that these messages do not establish that HW actually met with anyone else from MeetMe. She was simply proposing terms; defendant does not point to any message showing that a meeting with someone besides defendant occurred. That said, the messages would have at least supported defendant's testimony that HW told him to follow her.

Even assuming that it was objectively unreasonable for counsel not to question HW about those messages, defendant fails to explain how this line of questioning would have, more likely than not, led to a different outcome at trial. First, the jury may have believed defendant's testimony that HW told him to follow her. The key issue at trial was what transpired *after* defendant began following her. Second, defendant argues that the messages would have shown the jury that there were possibly other men with a motive to commit these crimes. But there was substantial evidence that defendant was the perpetrator. It was undisputed that defendant was following HW in the time leading up to the shooting. And the jury plainly found credible HW and Abduljami's testimony identifying defendant as the shooter. The .38 caliber ammunition found in defendant's vehicle provided supporting circumstantial evidence. Given all of this, there is not a reasonable probability that further exploration of the MeetMe messages would have led to a different outcome at trial.

Defendant identifies some alleged inconsistencies in HW and Abduljami's testimony that involve minor or insignificant details. Defendant argues that HW's testimony that she and defendant parted amicably with plans to meet later for a threesome is inconsistent with her testimony that defendant later pulled up next to her at a gas station and angrily charged her vehicle. It cannot be definitively said what motivated defendant's actions. He may have realized he was being defrauded, or he may have been angered by HW picking up her boyfriend. In any event, the critical question was not why defendant was upset, but what he did thereafter.

The second alleged inconsistency is that HW testified that defendant parked beside them at the gas station while Abduljami testified that the vehicle parked behind them. Defendant does not explain how highlighting this minor inconsistency would have aided his defense. The mere fact that trial counsel did not cross-examine the witnesses on all contradictory aspects of their testimony and prior statements does not constitute ineffective assistance of counsel. See *People v. McFadden*, 159 Mich. App. 796, 800; 407 N.W.2d 78 (1987). The same can be said for the third alleged inconsistency, which is that Abduljami testified that he rolled down his window when they were stalled at the intersection, but a police officer testified that HW's passenger window was busted and the rear passenger window was rolled down.

\*5 Affirmed.

#### All Citations

Not Reported in N.W. Rptr., 2019 WL 6340247

#### Footnotes

- 1 We review a trial court's decision to deny a motion for a new trial for an abuse of discretion. See *People v. Miller*, 482 Mich. 540, 544; 759 N.W.2d 850 (2008). "An abuse of discretion occurs when the trial court's decision falls outside the range of principled outcomes." *People v. Sharpe*, 502 Mich. 313, 324; 918 N.W.2d 504 (2018). "Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law. A judge first must find the facts, and then must decide whether those facts constitute a violation of the defendant's constitutional right to effective assistance of counsel." *People v. LeBlanc*, 465 Mich. 575, 579; 640 N.W.2d 246 (2002). The trial court's findings of fact are reviewed for clear error, and questions of constitutional law are reviewed *de novo*. *Id.*

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## WESTLAW

2017 WL 1957754

Only the Westlaw citation is currently available.

**NON-PRECEDENTIAL DECISION—SEE SUPERIOR COURT I.O.P. 65.37**

Superior Court of Pennsylvania.

**Commonwealth v. Morales**

Superior Court of Pennsylvania. | May 11, 2017 | Not Reported in A.3d | 2017 WL 1957754 (Approx. 15 pages)

COMMONWEALTH of Pennsylvania, Appellee

v.

Mathew Stefan MORALES, Appellant

No. 833 MDA 2016

FILED MAY 11, 2017

Appeal from the Judgment of Sentence February 16, 2016, In the Court of Common Pleas of Lancaster County, Criminal Division at No(s): CP-36-CR-0001430-2015

BEFORE: SHOGAN, MOULTON, and PLATT, JJ.

MEMORANDUM BY SHOGAN, J.:

\*1 Appellant, Mathew Stefan Morales, appeals from the February 16, 2016 judgment of sentence entered in the Court of Common Pleas of Lancaster County following a jury trial. We affirm.

In its opinion, the trial court presented the facts of the crime in an extensive fourteen-page summary of the evidence presented at trial. See Trial Court Opinion, 9/2/16, at 2–15. Briefly, testimony established that Manheim Township Police and Lancaster City Bureau of Police were dispatched at 3:20 a.m. on June 21, 2014, to the area of the 1100 block of Helen Avenue for a report by an individual on a cell phone reporting that he had been shot. N.T., 2/8/16, 93–94, 114–115. Manheim Township Officer Kelly Spence testified that the victim, Xavier Garriga, was lying on his back and bleeding, with a cell phone in his hand, in the 800 block of New Holland Pike.<sup>1</sup> *Id.* at 116–117. Three spent shell casings and a spent .40 caliber bullet were also located and documented. *Id.* at 167, 182–191. The victim died of a “through-and-through” gunshot wound to the chest from a bullet that “went completely through the body, so there was no bullet within the body.” N.T., 2/11/16, at 542. The Commonwealth presented an extensive and exhaustive case of circumstantial evidence against Appellant. See Trial Court Opinion, 9/2/16, at 2–15.

At the conclusion of the four-day trial, the jury convicted Appellant on February 12, 2016, of first-degree murder, 18 Pa.C.S. § 2502(a). Appellant waived a presentence investigation, and the trial court sentenced Appellant on February 16, 2016, to life imprisonment without the possibility of parole. N.T., 2/12/16, at 8. On February 17, 2016, Appellant filed a post-sentence motion requesting a new trial and asserting that the verdict was against the weight of the evidence. Appellant filed a second post-sentence motion on February 24, 2016, contesting certain costs assessed against him. While post-sentence motions were pending, Appellant filed a premature notice of appeal on March 14, 2016, at Superior Court Docket Number 423 MDA 2016, which he withdrew the next day.

The trial court denied both post-sentence motions by separate orders on April 5, 2016. Appellant filed an untimely notice of appeal on May 9, 2016, docketed in this Court at 744 MDA 2016.<sup>2</sup> Apparently realizing his misstep, Appellant presented a Motion to Reinstate Appellate Rights *Nunc Pro Tunc* to the trial court.<sup>3</sup> On May 18, 2016, the trial court reinstated Appellant’s right to appeal *nunc pro tunc*, and Appellant filed the instant notice of appeal on May 23, 2016. Both Appellant and the trial court complied with Pa.R.A.P. 1925.<sup>4</sup>

\*2 Appellant raises the following issues on appeal, which we have reordered for ease of disposition:

## SELECTED TOPICS

Criminal Law

Evidence

Proper Admission of Routine Business Records

## Secondary Sources

Admissibility of records other than police reports, under Rule 803(6), Federal Rules of Evidence, providing for business records exception to hearsay rule

61 A.L.R. Fed. 359 (Originally published in 1983)

...This annotation collects and analyzes those federal cases which discuss the admissibility, under Rule 803(6) of the Federal Rules of Evidence providing for the business records exception to the hearsay...

## APPENDIX B: FEDERAL REGULATIONS

Employer’s Guide to Fringe Benefit Rules Appendix B

...(a) Fringe benefits--(1) In general. Section 61(a)(1) provides that, except as otherwise provided in subtitle A of the Internal Revenue Code of 1986, gross income includes compensation for services, in...

**Rule 803. Exceptions to the Rule Against Hearsay—Regardless of Whether the Declarant Is Available as a Witness**

Fed. Rules of Evidence Rule 803 (3d ed.)

...At common law, the exceptions to the hearsay rule all reflected in a theoretical way some special trustworthiness of and necessity for admitting the general category of hearsay embraced by the exceptio...

See More Secondary Sources

## Briefs

**Consolidated Brief for Appellee United States of America**

2011 WL 2603659

UNITED STATES OF AMERICA, Appellee, v. Akhil BANSAL, Frederick Mullinix, Appellants. United States Court of Appeals, Third Circuit. June 24, 2011

...Because the defendants were charged in an indictment with violations of federal criminal law, the district court had subject matter jurisdiction over the case pursuant to 18 U.S.C. § 3231. Based upon t...

**Consolidated Brief for Appellee United States of America**

2011 WL 10099281

UNITED STATES OF AMERICA, Appellee, v. AKHIL BANSAL FREDERICK MULLINIX, Appellants. United States Court of Appeals, Third Circuit. June 27, 2011

...Because the defendants were charged in an indictment with violations of federal criminal law, the district court had subject matter jurisdiction over the case pursuant to 18 U.S.C. § 3231. Based upon t...

## JOINT APPENDIX, VOL. I

2016 WL 321119

CRST VAN EXPEDITED, INC., Petitioner, v.

A. Whether the evid[er]nce presented at trial was insufficient to find defendant guilty of first degree murder.

B. Whether the trial court abused its discretion in concluding that jury's verdict was not against the weight of evidence presented at trial.

Appellant's Brief at 1 (full capitalization omitted).

We first address Appellant's argument regarding the sufficiency of the evidence. In reviewing the sufficiency of the evidence, we must determine whether the evidence admitted at trial and all reasonable inferences drawn therefrom, viewed in the light most favorable to the Commonwealth as verdict winner, were sufficient to prove every element of the offense beyond a reasonable doubt. *Commonwealth v. Diamond*, 83 A.3d 119 (Pa. 2013). "[T]he facts and circumstances established by the Commonwealth need not preclude every possibility of innocence." *Commonwealth v. Colon-Plaza*, 136 A.3d 521, 525-526 (Pa. Super. 2016) (quoting *Commonwealth v. Robertson-Dewar*, 829 A.2d 1207, 1211 (Pa. Super. 2003)). It is within the province of the fact-finder to determine the weight to be accorded to each witness's testimony and to believe all, part, or none of the evidence. *Commonwealth v. Tejada*, 107 A.3d 788, 792-793 (Pa. Super. 2015). The Commonwealth may sustain its burden of proving every element of the crime by means of wholly circumstantial evidence. *Commonwealth v. Mucci*, 143 A.3d 399, 409 (Pa. Super. 2016). Moreover, as an appellate court, we may not re-weigh the evidence and substitute our judgment for that of the fact-finder. *Commonwealth v. Rogal*, 120 A.3d 994 (Pa. Super. 2015).

Beyond reference to two cases setting forth the above standards, Appellant's two-sentence sufficiency argument in his brief is vague and conclusory, and his claim is undeveloped. Appellant's Brief at 6. Appellant wholly fails to refer to any supporting case law. Appellant does not offer any reason for his claim of insufficient evidence, beyond his bald assertion that premeditation is lacking, and he does not espouse any recitation of how or why the trial court abused its discretion. Appellant's citation to seventy-eight pages of notes of testimony, without any explanation, is insufficient to support such a claim. *Commonwealth v. Woodard*, 129 A.3d 480, 509 (Pa. 2015) (quoting *Wirth v. Commonwealth*, 95 A.3d 822, 837 (Pa. 2013), which stated that "where an appellate brief fails to ... develop an issue in any other meaningful fashion capable of review, that claim is waived. It is not the obligation of an appellate court to formulate [the] appellant's arguments for him.") (internal quotations omitted)). Therefore, we find the issue waived. However, even if the issue had been properly preserved, we would find it lacks merit based upon the trial court's extensive analysis in its Pa.R.A.P. 1925(a) opinion. Trial Court Opinion, 9/2/16, at 19-22.

Appellant also assails the weight of the evidence. "The weight of the evidence is a matter exclusively for the finder of fact, who is free to believe all, part, or none of the evidence and to determine the credibility of the witnesses." *Commonwealth v. Gonzalez*, 109 A.3d 711, 723 (Pa. Super. 2015). In *Commonwealth v. Clay*, 64 A.3d 1049 (Pa. 2013), our Supreme Court set forth the following standards to be employed in addressing challenges to the weight of the evidence:

"3 A motion for a new trial based on a claim that the verdict is against the weight of the evidence is addressed to the discretion of the trial court. *Commonwealth v. Widmer*, 560 Pa. 308, 319, 744 A.2d 745, 751-[7]52 (2000); *Commonwealth v. Brown*, 538 Pa. 410, 435, 648 A.2d 1177, 1189 (1994). A new trial should not be granted because of a mere conflict in the testimony or because the judge on the same facts would have arrived at a different conclusion. *Widmer*, 560 A.2d at 319-[3]20, 744 A.2d at 752. Rather, "the role of the trial judge is to determine that 'notwithstanding all the facts, certain facts are so clearly of greater weight that to ignore them or to give them equal weight with all the facts is to deny justice.'" *Id.* at 320, 744 A.2d at 752 (citation omitted). It has often been stated that "a new trial should be awarded when the jury's verdict is so contrary to the evidence as to shock one's sense of justice and the award of a new trial is imperative so that right may be given another opportunity to prevail." *Brown*, 538 Pa. at 435, 648 A.2d at 1189.

An appellate court's standard of review when presented with a weight of the evidence claim is distinct from the standard of review applied by the trial court:

Appellate review of a weight claim is a review of the exercise of discretion, not of the underlying question of whether the verdict is against the weight of the evidence. *Brown*, 648 A.2d at 1189. Because the trial judge has had the opportunity to hear and see the evidence presented, an appellate court will give the gravest

EQUAL EMPLOYMENT OPPORTUNITY  
COMMISSION, Respondent.  
Supreme Court of the United States  
Jan. 19, 2016

...P. DAVID LOPEZ General Counsel  
CAROLYN L. WHEELER Acting Associate  
General Counsel SUSAN R. OXFORD  
Attorney EQUAL EMPLOYMENT  
OPPORTUNITY COMMISSION Office of  
General Counsel 131 M St., N.E., 5th Floor ...

See More Briefs

#### Trial Court Documents

##### United States of America v. Benton

2016 WL 2839319  
UNITED STATES OF AMERICA, Plaintiff, v.  
Jesse R. BENTON, John F. Tate and  
Dimitrios N. Kesari, Defendants.  
United States District Court, S.D. Iowa,  
Central Division.  
Apr. 20, 2016

...The original indictment in this matter charged that from in or about October, 2011, to in or about August, 2014, Defendants violated reporting requirements established by the Federal Election Campaign ...

##### U.S. v. York

2018 WL 7505617  
UNITED STATES OF AMERICA, v. James  
YORK, aka: James Neil York, James Ridge,  
James Neal York, YD, York Dog, Jamari  
York.  
United States District Court, E.D. California.  
Oct. 05, 2018

...[] pleaded guilty to count(s) 1, 13, 26 of the indictment. [ ] pleaded nolo contendere to count(s) \_\_, which was accepted by the court. [ ] was found guilty on count(s) \_ after a plea of not guilty. The...

##### In re Jennifer Convertibles, Inc.

2010 WL 6982748  
In re: JENNIFER CONVERTIBLES, INC.,  
Debtors.  
United States Bankruptcy Court, S.D. New  
York.  
July 18, 2010

...FN1. The Debtors in these chapter 11 cases, along with the last four digits of each Debtor's federal tax identification number, if applicable, are: (i) Jennifer Convertibles, Inc. (4646); (ii) Jennifer...

See More Trial Court Documents

consideration to the findings and reasons advanced by the trial judge when reviewing a trial court's determination that the verdict is against the weight of the evidence.

*Commonwealth v. Farquharson*, 467 Pa. 50, 354 A.2d 545 (Pa. 1976). One of the least assailable reasons for granting or denying a new trial is the lower court's conviction that the verdict was or was not against the weight of the evidence and that a new trial should be granted in the interest of justice.

*Widmer*, 560 Pa. at 321–[3]22, 744 A.2d at 753 (emphasis added).

*Clay*, 64 A.3d at 1054–1055. "Thus, the trial court's denial of a motion for a new trial based on a weight of the evidence claim is the least assailable of its rulings." *Commonwealth v. Diggs*, 949 A.2d 873, 879–880 (Pa. 2008).

Appellant suggests that "no reasonable jury could conclude" that Commonwealth witness Luis Fuentes "was credible." Appellant's Brief at 5. Similarly, he avers that the jury could not have believed the testimony of forensic reconstructionist Sergeant Jeffrey Jones. *Id.* at 5–6. Finally, Appellant posits that in light of the testimony of forensic biologist Jennifer Sears, the jury could not have concluded Appellant fired the shot that killed the victim. The Commonwealth responds that the jury observed the witnesses and their demeanor and decided the weight, if any, to accord to their testimony. Commonwealth's Brief at 8. Moreover, all of the testimony cited by Appellant was corroborated by other evidence presented, including video, time-distance analysis, bullet-trajectory analysis, and the three shell casings found at the scene. *Id.*

In the case at bar, the jury was free to believe all, part, or none of the evidence against Appellant. *Gonzalez*, 109 A.3d at 723. It chose to believe the evidence presented by the Commonwealth, as was its right. *Id.* Based upon our review of the record, we conclude this issue lacks merit; we rely on the thorough and detailed opinion of the Honorable Donald R. Totaro.<sup>5</sup> The court weighed all of the evidence, found that it supported the verdict, and determined that the jury's verdict was not so contrary to the evidence as to shock one's sense of justice. Trial Court Opinion, 9/2/16, at 15–19. This Court will not assume the role of fact-finder and reweigh the evidence. Accordingly, based on the trial court's opinion, we conclude that the trial court did not abuse its discretion in refusing to grant relief on Appellant's challenge to the weight of the evidence.

\*4 Judgment of sentence affirmed.

Judgment Entered.

Attachment

**IN THE COURT OF COMMON PLEAS OF LANCASTER COUNTY, PENNSYLVANIA  
CRIMINAL**

COMMONWEALTH OF PENNSYLVANIA,

v.

MATHEW S. MORALES

833 MDA 2016

CP–36–CR–0001430–2015

**PA R.A.P. 1925 OPINION**

BY TOTARO, J.

On February 8, 2016, Mathew S. Morales ("Appellant") appeared before the court for a jury trial on Information Number 1430–2015, for one count of Criminal Homicide (18 Pa.C.S.A. § 2501(a)). At the conclusion of a four-day jury trial, Appellant was found guilty of Murder of the First Degree (18 Pa.C.S.A. § 2502(a)). On February 16, 2016, Appellant was sentenced to a mandatory term of life imprisonment without the possibility of parole. See Sentencing Order.

On February 17, 2016, Appellant filed a Post–Sentence Motion alleging the jury's verdict was against the weight of the evidence presented at trial and was "so contrary to the evidence as to shock one's sense of justice." As such, Appellant asked the court to set aside the verdict and grant him a new trial. *Id.* On April 5, 2016, the Court issued an Order denying said Motion.<sup>1</sup>

On May 23, 2016, Appellant filed the instant Notice of Appeal to the Superior Court of Pennsylvania.<sup>2</sup> Thereafter, Appellant filed a timely Statement of Errors Complained of on Appeal ("Statement") setting forth the following allegations of error: (1) the jury's verdict was against the weight of the evidence; and (2) there was insufficient evidence of intent for the jury to find Appellant guilty of Murder of the First Degree. See Statement. This opinion is written pursuant to Rule 1925(a) of the Pennsylvania Rules of Appellate Procedure.<sup>3</sup>

#### TESTIMONY

Officer Kelly Spence ("Spence") of the Manheim Township Police Department ("MTPD") testified that on June 21, 2014, she was working the 6 p.m. to 6 a.m. shift when she received a call at around 3:20 a.m. indicating a person was down in the 1100 block of Helen Avenue. (Notes of Transcript at 114–15) ("N.T."). Spence responded to the scene and began searching backyards, side streets and sidewalks for the person who was down. *Id.* at 116. Spence then heard an officer say they found an individual laying on the sidewalk in the 800 block of New Holland Pike, Manheim Township, and she responded to that location. *Id.* at 116–17.

\*5 Upon arrival, Spence saw an individual, later identified as Xavier Garriga ("Garriga") laying on his back, bleeding, barely breathing, with a cell phone in his tight hand. (N.T. at 117). While at the scene, Spence discovered a shell casing on the road near the fog line in the eastbound lane, which she marked by placing a wet piece of notebook paper on the road near the casing. *Id.* at 118–19. Two additional casings were found in the roadway and they were marked in a similar manner. *Id.* at 120. According to Spence, at least one shell casing appeared to have been run over. *Id.* at 124.

Detective John Wettlaufer ("Wettlaufer"), of the MTPD, testified that he arrived on the scene at approximately 5:15 a.m. on June 21, 2014. (N.T. at 165–67). Upon arrival, Wettlaufer processed the scene and secured three shell casings that were found in the street.<sup>4</sup> *Id.* at 167, 182–89. Wettlaufer also documented a bottle of orange juice, a shopping bag, a blood-stained t-shirt, a container of nachos, a pool of blood, a baseball cap, and a sandwich in a Turkey Hill wrap. *Id.* at 167, 172–74. A Samsung cell phone was found near the hat and nachos. *Id.* at 194–95. When moving the blood-stained T-shirt, Wettlaufer found a spent bullet consistent with a .40 caliber class, on the edge of the sidewalk where the nachos were located. *Id.* at 175, 190–91.

Detective Brian Freysz ("Freysz") has been employed by MTPD since 2000, and has worked as a detective since 2005. (N.T. at 228). On June 21, 2014, Freysz was informed that officers had gone to the Turkey Hill store located at 806 New Holland Avenue, a short distance from the crime scene, and discovered there had been an altercation between two customers. *Id.* at 229–30. Freysz responded to the Turkey Hill to interview one of the clerks. *Id.* at 232.

That clerk, Angel Mateo-Viera ("Viera") testified at trial that on June 21, 2014, he was employed at the Turkey Hill on New Holland Avenue working the 11:00 p.m. to 7:00 a.m. shift as a cashier. (N.T. at 128–29). Viera recalled an argument that took place at roughly 3:00 a.m. between two men near the cash register inside the Turkey Hill. *Id.* at 129–30.

According to Viera, one of the men (later identified as Garriga) entered the store by himself and was there for a few minutes. (N.T. at 30–31). Five to ten minutes later, two other men arrived by vehicle, parked at a gas pump, and entered the Turkey Hill. *Id.* at 132–34. Viera identified one of those men as Appellant. *Id.* at 132–35. After they entered the store, Viera heard Garriga make a comment to Appellant about the gold necklace Appellant was wearing. *Id.* at 135–36. Appellant responded to Garriga in a sarcastic and macho manner, telling Garriga to mind his own business. *Id.* at 137–39. The two continued to exchange words, and the conversation escalated with both men raising their voices. *Id.* When Appellant told Garriga they could take it outside to settle it, Garriga obliged. *Id.* at 139–40. During the conversation between Garriga and Appellant, Viera observed that the third male was attempting to calm Appellant and get him to leave the store, telling Appellant it "wasn't worth it" *Id.* at 141–42. According to Viera, the third male never raised his voice, used profanity, made any threats, or displayed a weapon. *Id.* Eventually, Appellant and the third male left the store while Garriga remained inside to purchase nachos. *Id.* at 143–44, 157.

\*6 After Garriga left the store, Viera saw him and Appellant exchanging words in the parking lot. (N.T. at 144–45). The third male was not part of that exchange. *Id.* at 144–45. Garriga eventually walked away from Appellant, left the parking lot, and crossed the street. *Id.* at 145. Appellant returned to his car, pumped gas, and got into the driver's seat while the third

male got into the right passenger side of the car. *Id.* at 146. Viera then saw Appellant drive out of the parking lot and make a right turn onto New Holland Avenue. *Id.* at 146–47. About one hour later, police officers arrived to ask Viera questions about what he had observed that night and to request the Turkey Hill surveillance video. *Id.* at 159.<sup>5</sup>

Freysz further testified that on June 21, 2014, he recovered the Turkey Hill surveillance video and distributed images to the news media in an effort to identify the individuals in the video. (N.T. at 234–36). As a result, at approximately 9:00 p.m. on that same day, Appellant and Luis Fuentes (“Fuentes”) went to the Lancaster City Bureau of Police (“LCBP”) station to speak to officers regarding the Turkey Hill incident. *Id.* at 237–38. Thereafter, Appellant and Fuentes were transported as guests to the MTPD station to be interviewed. *Id.* at 238.<sup>6</sup>

At trial, Fuentes was called to testify as a witness. (N.T. at 337). According to Fuentes, he and Appellant grew up together and he had been to Appellant's house multiple times. *Id.* at 327–39, 378. Fuentes knew that Appellant kept a .45 caliber handgun, a .40 caliber gun, and ammunition in his house. *Id.* at 339. Additionally, he knew Appellant usually carried his .45 caliber and his .40 caliber guns on his person and in his Camry. *Id.* at 340–41.

Fuentes recalled for the jury the events of June 21, 2014. (N.T. at 341). He stated he was eating at McDonald's when Appellant called and asked if he wanted to accompany Appellant to “P's house.” *Id.* Fuentes agreed to go and Appellant picked him up at McDonald's. *Id.* at 341–42. After leaving McDonald's, Appellant and Fuentes drove alone to Turkey Hill to purchase a Dutch Master cigar and gas. *Id.* at 342–43.

Upon arriving at Turkey Hill, Appellant parked by a gas pump. (N.T. at 343–44). Fuentes and Appellant walked into Turkey Hill, at which time Fuentes observed a customer, later identified as Garriga, standing in front of the cash register. *Id.* at 344–45. Fuentes stated Garriga appeared to be drunk because of his speech and body movements. *Id.* at 346. Fuentes saw Garriga say something smart to Appellant and the two began to get loud with each other. *Id.* at 346–47. In reference to a gold necklace Appellant was wearing, Fuentes heard Garriga say “what's up with that chain?” *Id.* at 347–48, 384. According to Fuentes, Appellant became angry with Garriga, they were standing face-to-face, and Garriga challenged Appellant to a fight. *Id.* at 348–50, 385–86. Fuentes stated he never got involved in the argument, which lasted for five to ten minutes. *Id.* at 350. Rather, Fuentes tried to get Appellant to leave, but Appellant would not listen and remained in the store. *Id.* at 350–51.

\*7 Appellant and Garriga continued to argue inside the Turkey Hill as Fuentes returned to the car. (N.T. at 351–52). Appellant then left the store and went outside to put gas in his car. *Id.* at 352. Fuentes eventually went back into the store to purchase a cigar, and Appellant went back into the store after him for an unknown reason. *Id.* at 352–53. Garriga was still inside. *Id.* at 353. Fuentes then observed Appellant and Garriga arguing in the parking lot. *Id.* At this point, Fuentes was back in the car and he could hear their loud voices but could not understand what was being said. *Id.* at 353–54. After the argument ended, Garriga exited the parking lot on foot and turned right towards the railroad bridge. *Id.* at 354–56. Fuentes stated he saw Garriga carrying a store bag as he walked away. *Id.* at 387.

Shortly thereafter, Appellant returned to the car and drove out of the parking lot with Fuentes in the front passenger seat. (N.T. at 356). Appellant made a right turn and traveled east on New Holland Avenue towards the bridge. *Id.* at 356–57. According to Fuentes, who was admittedly “kind of drunk and high,” Appellant then slowed down as he approached the bridge, put the driver's window down, and Fuentes heard three shots. *Id.* at 357–58, 389. Fuentes stated he did not see what Appellant was shooting at, but he heard three shots being fired and heard shell casings hitting the windshield. *Id.* at 358–61. After the shots were fired Appellant began to drive faster, and as Fuentes looked to his left he saw a bag fall on the sidewalk. *Id.* Fuentes also saw Appellant holding a black .40 caliber gun in his right hand after the shooting. *Id.* at 360. Fuentes stated he saw Appellant with the gun about two weeks prior to this incident at a church basketball game, when Appellant told Fuentes he needed to buy the gun because his other gun had been stolen from his car. *Id.* at 361–62.

After the shooting, Appellant drove for approximately 20 minutes on New Holland Avenue until they got to P's house, where they stayed for 10 to 15 minutes. (N.T. at 363). After they left P's house, Appellant drove back towards Lancaster city on New Holland Avenue, but made a U-turn down a back road once they approached the crime scene and saw police lights. *Id.* at 363–64. Fuentes stated he and Appellant did not speak about the shooting until they saw the police lights, and at that point Appellant indicated the cops might question them because they were at the Turkey Hill. *Id.* at 363, 393–96. Appellant then dropped Fuentes off at a friend's house in the city. *Id.* at 364–65, 396.

Later that morning, Fuentes saw on the news that Garriga had died. (N.T. at 365). When Fuentes saw a picture of Appellant and himself on the news that afternoon, he called Appellant. *Id.* at 365–66. Appellant told Fuentes they had to “stick to the same story” and tell the police they went straight from Turkey Hill to P’s house and did not argue with anyone. *Id.* at 367. Fuentes and Appellant then went to the police station to be interviewed. *Id.* at 367–68.<sup>7</sup>

<sup>8</sup> On June 22, 2014, Wettlaufer assisted in searching Appellants vehicle, a 2005 silver Toyota Camry. (N.T. at 200). According to Wettlaufer, the car was pretty clean and locked as if the carpet mats had recently been vacuumed. *Id.* at 201. No weapons or ammunition were recovered. *Id.* at 200. Wettlaufer collected gunshot residue (“GSR”) samples from different areas of the car using collection kits, including the inside left front door, steering wheel, top of the dashboard on the left side of the vehicle, left side of the front seat, inside of the right front door, outside of the right roof, right side of the top dashboard, and right side of the front seat. *Id.* at 201–04. Each kit was sealed separately and sent to RJ Lee laboratory. *Id.* at 204, 298.

Allison Laneve (“Laneve”), a forensic scientist at the RJ Lee Group who conducts primer GSR analysis, performed a GSR analysis of the eight GSR samples obtained from Appellant’s car. (N.T. at 463–64, 475–77). Laneve explained there were four total particles found in the interior of the car, two on each side, which are highly specific to the discharge of a firearm. *Id.* at 478–81, 500–01. Although she could not give an opinion as to how the GSR came to be in Appellant’s vehicle, or how long it was there, Laneve testified that GSR might be found in a vehicle if someone discharged a gun on it, near it, or within it, or if something with gunshot residue on it came into contact with the vehicle. *Id.* at 483–84, 491–92.

On June 27, 2014, police executed a search warrant at Appellant’s residence. (N.T. at 268). Among the items found were a pistol box for a Glock semiautomatic pistol, a loaded .45 caliber magazine and unloaded .40 caliber magazines, a thigh holster and two belt holsters that could hold a .45 caliber or Glock .40 caliber gun, an envelope containing two test-fired rounds for Appellant’s Glock .40 caliber gun (sent to Pennsylvania State Police ballistics lab), a gun case for a pistol, a membership card to a shooting range, certification that Appellant was qualified to shoot at the range, and a silhouette target with multiple bullet holes. *Id.* at 268–85. Police also found a loaded AK 47 machine gun between the mattress and box spring in Appellant’s bedroom and a loaded Mossberg 500 in the living room behind the cushion of a couch. *Id.* at 275–76.<sup>8</sup>

At trial, counsel stipulated to the ballistics analysis performed in this case (N.T. at 501–03). According to Darren Mortorf, a firearms and tool mark examiner at the Pennsylvania State Police Harrisburg Regional Laboratory: (1) the three discharged casings found at the crime scene, identified as Commonwealth Exhibits 5–A, 5–B, and 5–C, were discharged from the same unknown firearm;<sup>9</sup> (2) the two test-fired casings recovered from Appellant’s home, identified as Commonwealth Exhibit 10, were discharged from the same, unknown firearm; (3) a definite determination could not be made as to whether Commonwealth Exhibits 5–A through C and Exhibit 10 were discharged from the same firearm; (4) Commonwealth Exhibits 5–A through C and Exhibit 10 could have been discharged within a firearm manufactured or marketed by Glock and Smith & Wesson Sigma; and (5) Commonwealth Exhibit 6, the discharged and mutilated metal jacketed bullet found at the crime scene, was of the .40 caliber class and it could have been discharged from a firearm manufactured by Glock. *Id.* at 503–06.

<sup>9</sup> As part of the investigation, Appellant consented to an extraction on his cell phone, and arrangements were made to pick up his phone the following Monday. (N.T. at 289, 318–19). However, Freysz testified that when the phone was turned over by Appellant there appeared to be blocks of information missing from the cell phone when they did the extraction. *Id.* at 289. Nevertheless, the records they were able to obtain were provided to Detective, Steye Owens (“Owens”) of LCPD, who was asked to plot Appellant’s cell phone records to identify Appellant’s location prior to, during, and after Garriga was shot. *Id.* at 290.

Owens testified that in 2007, he began specializing in cell phone technology to assist investigators in determining calls, call duration, and types of usage of cell phones. (N.T. at 506–07). Owens explained he also uses reports generated by cell phone providers to determine the general location of the phone when a call is made. *Id.* at 507–08. In the present case, Owens was asked to look at a set of cell phone records provided by AT&T for Appellant’s cell phone activity on June 21, 2014, to determine whether calls were made, to identify the location of the specific cell phone towers used at the beginning and end of each

call or data usage, and to provide the general location of Appellant and his cell phone when those phone calls were made or data was used. *Id.* at 508–18.

Records showed that on June 21, 2014, Appellant received an incoming telephone call at 3:19 a.m. using a tower sitting almost right on top of Turkey Hill, indicating Appellant's phone was very close to that Turkey Hill. (N.T. at 519–21). At 3:27 a.m., there was an outgoing telephone call made from Appellant's cell phone which used a tower in another sector that showed Appellant was moving from west to east. *Id.* At 3:40 a.m., AT&T used their Network Event Location System ("NELOS"), which is a way of tracking where a cell phone is located, to determine Appellant was in the area of New Holland. *Id.* at 521–23. Owens stated that this data indicated Appellant's phone was moving eastbound along New Holland Avenue (Route 23) from the Turkey Hill to New Holland between 3:19 a.m. and 3:43 a.m. *Id.* 524.

Owens further testified that at 3:43 a.m., there was an incoming call and a NELOS hit, as well as another NELOS hit at 3:58 a.m., which showed the movement of Appellant's cell phone back towards Lancaster along Route 23. (N.T. at 524). At 4:05 a.m., the cell phone was again moving westbound on Route 23. *Id.* at 524–25. Phone calls at 4:13 a.m., 4:18 a.m., and 4:19 a.m. also showed continued movement from east to west. *Id.* at 525. Owens noted that between 3:43 a.m. and 4:19 a.m., records showed Appellant was traveling westbound from New Holland to Lancaster City following Route 23. *Id.* at 526.<sup>10</sup> From the 4:19 a.m. call until 11:33 a.m., all phone activity used the same tower which was located in the same sector as Appellant's residence, and a NELOS hit at 6:01 a.m. was directly adjacent to his residence. *Id.* at 525–26.

At trial Freysz identified the victim as Garriga, who lived approximately 3/4 of a mile from where he was shot, in the direction where he was walking. (N.T. at 230–32). On June 23, 2014, Dr. Wayne K. Ross, M.D. ("Ross"), a forensic pathologist, performed an autopsy on Garriga's body. *Id.* at 534–38.<sup>11</sup> Ross observed abrasions on Garriga's hand, elbow, and wrist, as well as a gunshot wound. *Id.* at 540. The bullet entered Garriga's right shoulder at a height of 58½ inches, broke his arm, reentered the right side of his chest, went through his right lung, completely through his spine slicing it in half, through the left lung, and exited out of his left armpit region at 55 inches from Garriga's left heel. *Id.* at 541. Ross did not recover a bullet. *Id.* at 542. The gunshot wound traveled from the right to left side, slightly front to back, and in a slight downward motion. *Id.* at 543–44.

<sup>10</sup>As a result of this fatal gunshot wound, Garriga had bleeding in both of his lungs and he was paralyzed such that his legs immediately gave out and he dropped straight to the ground. (N.T. at 541–42). However, the wound was not instantly fatal and Garriga was still able to use his arms until he bled out. *Id.* at 542, 545. Ross opined to a reasonable degree of medical certainty that Garriga's cause of death was a gunshot wound to the chest, and the manner of death was homicide. *Id.* at 545–46. Moreover, Garriga's recent abrasions were consistent with scrapes from a fall. *Id.* at 546.<sup>12</sup> Ross further opined that the range of fire was from at least three to four feet away or greater, because there was no evidence of soot or gunshot residue found on Garriga's body and the gunshot hole was only one-half by one-half inch, which is indicative of a distant gunshot wound. *Id.* at 543.

During trial, Wettlaufer testified that on June 21, 2014, in addition to the items he found at the crime scene which he previously identified for the jury, he located a fresh mark in the brick mortar of the wall of a building at 851 New Holland Avenue. (N.T. at 176–77). According to Wettlaufer, this was indicative of a fresh bullet strike. *Id.* He found a fresh strike on a branch that was less than a foot away from the brick mortar. *Id.* Wettlaufer found a third impact strike on a second branch closer to the front of the bush. *Id.* at 179–80. Wettlaufer then found a disintegrated fragment of copper jacketing from a bullet on the ground below the strike on the wall. *Id.* at 177, 192–93.

Wettlaufer, who is trained in trajectory involving damage to physical objects such as walls, conducted a process called trajectory rod lining, which involved finding at least two points and lining up an aluminum rod between the points to deduce the direction the bullet would have traveled once it left the barrel of the gun. (N.T. at 178–79). In this case, Wettlaufer lined up the aluminum rod between the strike in the brick mortar, the strike in the branch near the brick mortar, and the strike in the branch near the front of the bush. *Id.* at 178–82. He took measurements of permanent objects at the scene, including a fire hydrant and PP&L pole. *Id.* at 196–97. Wettlaufer then measured the bullet strikes and the distance from the fire hydrant and the curb to each item found at the scene so he could triangulate the items. *Id.* at 197–99. These measurements were sent to another officer for analysis. *Id.* at 197.

On August 27, 2014, detectives returned to the scene with an exemplar vehicle that was the same year, make, and model as Appellant's vehicle, to see if the trajectory would be consistent with a vehicle on the road or a person standing in the road. (N.T. at 206–07). The trajectory was done by pulling fluorescent string from various places on the car to the location where a bullet impacted the bush and brick wall. *Id.* at 208–10. Wettlaufer testified that based on the measurements and analyses performed, the results were consistent with a bullet being fired from the driver's front window or the left rear window of Appellants eastbound vehicle. *Id.* at 208–12.<sup>13</sup>

Furthermore, according to testimony from Freysz, two nearby businesses, Tommy's Auto and ECORE, had surveillance cameras facing New Holland Avenue on June 21, 2014. (N.T. at 264–65). Those videos, which were reviewed and found to contain footage relevant to the investigation, were given to Sergeant Jeffrey Jones ("Jones"), a certified crash reconstructionist employed by MTPD, who was asked to review the surveillance videos in order to reconstruct the incident and document the timing of vehicles on New Holland Avenue. *Id.* at 264–66, 304–05.

\*11 Jones testified he has been employed by MTPD for 31 years; where he focuses primarily on accident reconstruction and commands the Lancaster County Major Crash Investigation Unit. (N.T. at 549–51). Additionally, Jones runs his own business doing accident reconstruction for personal injury cases. *Id.* at 552. In the present case, Jones synched together surveillance videos from Turkey Hill, Tommy's Auto, and ECORE, which Collectively showed the entrance of the bridge that crosses over New Holland Avenue, New Holland Avenue, and the corner of New Holland Avenue and Fountain Avenue. *Id.* at 561–69. Jones then prepared a PowerPoint to illustrate for the jury his analysis in this case. *Id.* at 569–71; Commonwealth's Exhibit 18.

According to Jones, the bullet that struck and killed Garriga was fired from Appellant's vehicle. (N.T. at 600). Jones testified that the videos showed Appellant accelerating his vehicle when he exited the Turkey Hill parking lot, he slowed down at the location where the shots were fired, and Appellant then accelerated in order to reach the camera from Tommy's Auto in the calculated time. *Id.* at 599–600. Jones opined that Appellant's vehicle was the only vehicle to match the timing of Garriga's walking, the 911 call, and Garriga's subsequent death. *Id.* at 600.<sup>14</sup>

## DISCUSSION

### I. The Jury's Verdict Was Not Against the Weight of the Evidence

\*12 In his Statement, Appellant alleges the jury verdict was against the weight of the evidence because testimony of the Commonwealth's key witness, Luis Fuentes, was so self-serving and contradictory to his prior statements to police that no reasonable jury could have found his testimony to be credible. *See* Statement. Additionally, the DNA evidence, gunshot residue evidence, time-distance analysis, and trajectory analysis, taken as a whole, were more indicative of Appellant's innocence than his guilt. *Id.*

An allegation that the verdict is against the weight of the evidence is addressed to the discretion of the trial court, and the trial court will award a new trial only when the jury's verdict is so contrary to the evidence as to shock one's sense of justice. *Commonwealth v. Lyons*, 71 A.3d 1053, 1067 (Pa. 2013) (citations omitted). "Trial judges, in reviewing a claim that the verdict is against the weight of the evidence do not sit as the thirteenth juror." *Commonwealth v. Widmer*, 744 A.2d 745, 752 (Pa. 2000). A trial court's exercise of discretion in finding that a verdict is or is not against the weight of the evidence is one of the "least assailable reasons for granting or denying a new trial," *Commonwealth v. Dupre*, 866 A.2d 1089, 1102 (Pa. Super. 2005) (citing *Commonwealth v. Widmer*, 744 A.2d 745, 753 (Pa. 2000)).

For a defendant to prevail on a challenge to the weight of the evidence, "the evidence must be so tenuous, vague and uncertain that the verdict shocks the conscience of the court." *Commonwealth v. Talbert*, 129 A.3d 536, 546 (Pa. Super. 2015) (quoting *Commonwealth v. Sullivan*, 820 A.2d 795, 806 (Pa. Super. 2003)). In determining whether this standard has been met, appellate review is limited to whether the trial judge's discretion was properly exercised, and relief will only be granted where the facts and inferences of record disclose a palpable abuse of discretion. *Commonwealth v. Smith*, 985 A.2d 886, 897 (Pa. 2009).

"The trial judge may not grant relief based merely 'on some conflict in testimony or because the judge would reach a different conclusion on the same facts.'" *Commonwealth v. Sanchez*, 36 A.3d 24, 27 (Pa. 2012) (quoting *Commonwealth v. Blakeney*, 946 A.2d 645,

653 (Pa. 2008)). The finder of fact is free to believe "all, part, or none of the evidence and to determine the credibility of the witnesses." *Smith*, 985 A.2d at 897 (citing *Commonwealth v. Diggs*, 949 A.2d 873, 879 (Pa.2008)). Questions concerning inconsistent testimony go to the credibility of the witnesses, and it is solely for the finder of fact to resolve any conflicts or inconsistencies in the evidence. *Commonwealth v. Lewis*, 911 A.2d 558, 566 (Pa. Super. 2006); *Commonwealth v. Upshur*, 764 A.2d 69, 74 (Pa. Super. 2000).

In *Upshur, supra*, the appellant claimed the jury's verdict finding him guilty of murder of the first degree was against the weight of the evidence because the only eyewitness to the crime had given conflicting accounts of the incident in statements to the police and during trial, which made his testimony "wholly unworthy of belief," 764 A.2d at 72. In support of this argument, the appellant pointed to inconsistencies in the record regarding the eyewitness accounts and descriptions of the assailant. *Id.* On appeal, the Superior Court stated it was solely for the jury to determine credibility of the witnesses, and to resolve conflicts or inconsistencies in the evidence. *Id.* at 74. Thus, the Superior Court concluded the verdict was not against the weight of the evidence presented at trial because the jury determined the testimony of the Commonwealth witness was credible. *Id.*

\*13 In *Ferguson, supra*, the appellant claimed the weight of the evidence did not support his robbery conviction's because "certain DNA evidence recovered by police did not match [his] DNA," and no evidence proved that a gun recovered by police and belonging to appellant was the one used in the commission of the crime. 107 A.3d at 212. On appeal, the Superior Court noted the jury was free to believe all, part, or none of the evidence, and determine the weight the evidence was to be given. *Id.* at 212-13. The Superior Court found no abuse of discretion and affirmed the appellant's convictions. *Id.* at 213.

Presently, Appellant claims that Fuentes could not be found to be a credible witness. However, pursuant to *Upshur* and *Ferguson*, it was solely up to the jury to decide whether to believe the testimony of Fuentes, and the amount of weight it deserved. Further, the testimony of Fuentes was corroborated by other evidence Appellant asserts was exculpatory, and the jury was within its power to determine how much weight to give that evidence. Although DNA evidence was inconclusive, gunshot residue was found in Appellant's car. The trajectory analysis put the shooter in this vicinity of where Appellant's vehicle was located when Fuentes heard Appellant fire the shots. The time-distance analysis demonstrated that Appellant was traveling much slower than the six other identified vehicles in the vicinity where Garriga was shot, and Appellant's car would have been at the location of the shooting at the time of the incident.

Additionally, there was other evidence corroborating the testimony of Fuentes not referenced by Appellant in his Statement. Testimony from the Turkey Hill clerk and video from the store established that Appellant had an angry confrontation with Garriga shortly before the shooting, where Appellant was acting macho and offered to fight Garriga. This testimony from the clerk contradicted the statement given by Appellant to police, where Appellant claimed he simply told Garriga to have a blessed day. Three shell casings were found in the roadway at the scene of the shooting, consistent with the three shots heard by Fuentes. Evidence found at Appellant's house showed he was at one time in possession of a .40 caliber Glock, which ballistics showed could have been the murder weapon. Furthermore, Appellant's cellular telephone records confirmed the testimony of Fuentes that he and Appellant returned to Lancaster City from New Holland on Route 23 until they saw police activity. The records also refuted the statement given by Appellant to police that they took a different route.

In the present case, the jury's verdict was not so contrary to the evidence as to shock one's sense of justice, nor was it against the weight of the evidence. Therefore, Appellant's claim in this regard is without merit.

## **II. There was Sufficient Evidence of Intent for the Jury to Find Appellant Guilty of Murder of the First Degree**

Appellant also claims there was insufficient evidence of intent for the jury to find him guilty of murder of the first degree. See Statement. Appellant states that even if all of the evidence presented by the Commonwealth was to be believed and taken in a light most favorable to the Commonwealth, there was no evidence of premeditation or intent to kill because Appellant made no statements of intent, the lethal shot was not inflicted on a vital part of the human body, and there is no evidence that Appellant specifically aimed his weapon at the victim. *Id.* Thus, Appellant's actions demonstrated, at worst, a depraved indifference to the value of human life and the jury's verdict should have been guilty of murder of the third degree. *Id.*

\*14 To preserve a sufficiency of the evidence claim, a 1925(b) Statement must specify the element or elements on which the evidence was insufficient. *Commonwealth v. Melvin*, 103 A.3d 1, 42 (Pa. Super. 2014) (quoting *Commonwealth v. Williams*, 959 A.2d 1, 252, 1257 (Pa. Super. 2008)). In his Statement, Appellant satisfies this requirement by claiming there was no evidence of premeditation or intent to kill. See Statement.

A challenge to the sufficiency of the evidence is a question of law. *Commonwealth v. Heater*, 899 A.2d 1126, 1131 (Pa. Super. 2006). When reviewing a sufficiency of the evidence claim, appellate courts are governed by the following principles:

[The] standard [for] reviewing sufficiency of the evidence is whether the evidence at trial, and all reasonable inferences derived therefrom, when viewed in the light most favorable to the Commonwealth as verdict winner, are sufficient to establish all elements of the offense beyond a reasonable doubt. [The Court] may not weigh the evidence, or substitute [its] judgment for that of the fact-finder. Additionally, the evidence at trial need not preclude every possibility of innocence, and the fact-finder is free to resolve any doubts regarding a defendant's guilt unless the evidence is so weak and inconclusive that as a matter of law no probability of fact may be drawn from the combined circumstances. When evaluating the credibility and weight of the evidence, the fact-finder is free to believe all, part, or none of the evidence. For purposes of [the Court's] review under these principles, [the Court] must review the entire record and consider all of the evidence introduced.

*Commonwealth v. Love*, 896 A.2d 1,277, 1283 (Pa. Super. 2006) (internal quotations and citations omitted). The Commonwealth may sustain its burden of proof wholly by circumstantial evidence, as long as the combination of the evidence links the accused to the crime beyond a reasonable doubt. *Commonwealth v. Estep*, 17 A.3d 939, 943 (Pa. Super. 2011); *Commonwealth v. Lee*, 956 A.2d 1024, 1027 (Pa. Super. 2008).

To find a person guilty of murder of the first degree, the Commonwealth must prove that: (1) a human being was unlawfully killed; (2) the person accused is responsible for the killing; and (3) the accused acted with specific intent to kill. *Commonwealth v. Johnson*, 985 A.2d 915, 920 (Pa. 2009) (quoting *Commonwealth v. Baumhammers*, 960 A.2d 59, 68 (Pa. 2008)); 18 Pa.C.S.A. § 2502(a). An intentional killing is a "killing by means of poison or by lying in wait, or any other kind of willful, deliberate, and premeditated killing." *Commonwealth v. Hitcho*, 123 A.3d 731, 746 (Pa. 2015) (quoting 18 Pa.C.S.A. § 2502(d)). "[T]he period of reflection required for premeditation to establish the specific intent to kill 'may be very brief; in fact the design to kill can be formulated in a fraction of a second. Premeditation and deliberation exist whenever the assailant possesses the conscious purpose to bring about death.'" *Commonwealth v. Rivera*, 983 A.2d 1211, 1220 (Pa. 2009) (internal quotations and citations omitted).

A specific intent to kill may be proven through circumstantial evidence. *Johnson*, 985 A.2d at 920 (quoting *Baumhammers*, 960 A.2d 68). Furthermore, specific intent to kill may be inferred from the accused's use of a deadly weapon on a vital part of the victim's body. *Rivera*, 983 A.2d at 1220. In *Commonwealth v. Talbert*, 129 A.3d 536 (Pa. Super. 2015), where the appellant claimed there was insufficient evidence to sustain a conviction of murder of the first degree, the Superior Court held that lungs are considered a vital part of the body. *Id.* at 543.

\*15 In *Commonwealth v. Washington*, 927 A.2d 586 (Pa. 2007), the appellant argued that there was insufficient evidence to sustain a conviction of murder of the first degree because he merely aimed in the victim's direction, which could not "rationally support an inference that he had the specific intent to kill; rather, the evidence is equally consistent with the probability that [he] sought only to scare or wound" the victim. *Id.* at 607. The Superior Court found that the appellant's claim had no merit, specifically rejecting the proposition that it had to find an appellant intentionally aimed at a vital part of the victim's body before it could find sufficient evidence to support an inference of the specific intent to kill. *Id.* Rather, the Superior Court held that in determining whether the evidence is sufficient to support an inference of the specific intent to kill, "the critical inquiry is the use of a deadly weapon on a vital part of the body, not the intentional aiming of the weapon at a vital part of the body." *Id.* (emphasis in original) (internal quotations and citations omitted).

In the case *sub judice*, evidence introduced at trial and all reasonable inferences derived therefrom, viewed in the light most favorable to the Commonwealth as the verdict winner, was sufficient to prove beyond a reasonable doubt that Appellant acted with premeditation and an intent to kill. Appellant was involved in an angry confrontation with Garriga at Turkey Hill, offering to take it outside so they could fight. Shortly thereafter, Appellant fired his gun three times at Garriga, inflicting a single gunshot wound. The act of firing a total of three shots at the victim, by a sportsman who had knowledge of guns and belonged to a club where he took target practice, demonstrated more than an intent to scare the victim.

Additionally, the bullet fired by Appellant went through Garriga's right lung, completely through his spine, and then through the left leg. As the Superior Court concluded in *Talbert*, because the lung is a vital part of the body, a specific intent to kill may be inferred. Additionally, as the Superior Court established in *Washington*, it makes no difference whether Appellant intentionally aimed for Garriga's lung when he fired the gun, since he used a deadly weapon on a vital part of the body.

The evidence presented in this case by the Commonwealth, and all reasonable inferences derived therefrom, was sufficient to establish all elements of the offense of murder of the first degree beyond a reasonable doubt. Therefore, Appellant's claim in this regard must fail.

#### CONCLUSION

Based on the foregoing, the jury's verdict finding Appellant guilty of murder of the first degree was not against the weight of the evidence and it was supported by sufficient evidence. Therefore, this appeal should be denied.

September 2, 2016

Date

BY THE COURT:

/s/

DONALD R. TOTARO, JUDGE

#### All Citations

Not Reported in A.3d, 2017 WL 1957754.

#### Footnotes

- \* Retired Senior Judge assigned to the Superior Court.
- 1 Police and the Lancaster-Wide Communications dispatch center utilized the pings from the cell phone to locate the victim. N.T., 2/8/16, at 93-95, 115-117.
- 2 The appeal was marked "Discontinued" on June 27, 2016.
- 3 The docket entries do not reveal the filing date of the motion, but it is attached to the trial court's order dated May 17, 2016, that was filed on May 18, 2016. There is no order quashing the appeal as untimely by this Court; indeed, the appeal at 744 MDA 2016 was not marked as "Discontinued" until June 27, 2016. Thus, on May 17, 2016, the trial court did not have jurisdiction to entertain Appellant's Motion to Reinstate Appellate Rights *Nunc Pro Tunc*. As noted *supra* in note 1, however, that appeal eventually was marked discontinued by this Court, and the trial court granted the *nunc pro tunc* right to appeal. Therefore, in the interest of judicial economy, we consider the appeal.
- 4 On July 15, 2016, pursuant to Pa.R.A.P. 3517, this Court dismissed the instant appeal for Appellant's failure to file a docketing statement. In response to counsel's explanatory petition, we reinstated the appeal on August 3, 2016.
- 5 The parties are directed to attach the opinion in the event of future proceedings in this case.
- 1 Appellant filed a separate Post-Sentence Motion on February 24, 2016, contesting costs assessed against him at the time of sentencing for expenses incurred by a Commonwealth expert witness. The motion was denied on April 5, 2016, and Appellant has not raised that issue on appeal.

- 2 On March 14, 2016, Appellant filed his first Notice of Appeal (423 MDA 2016) while the post-sentence motion was still pending. That appeal was withdrawn on March 15, 2016. On May 9, 2016, Appellant untimely filed his second Notice of Appeal (744 MDA 2016), more than 30 days after the post-sentence motion was decided. On May 18, 2016, Appellant's right to appeal was reinstated *nunc pro tunc*. On May 23, 2016, Appellant filed the pending Notice of Appeal (833 MDA 2016).
- 3 The Notice of Appeal at 833 MDA 2016 established a deadline of July 22, 2016, for submission of the original record. However, on July 15, 2016, the Superior Court dismissed the appeal for failure of Appellant to comply with Pa. R.A.P. 3517. On August 3, 2016, Superior Court entered an order reinstating the appeal. On August 12, 2016, the trial court sent a letter to Superior Court requesting additional time for submission of the original record, for the reasons stated therein. See Letter.
- 4 The first shell casing was found lying farthest from the crime scene. (N.T. at 184–85). The second shell casing was found in the northeast lane on New Holland Avenue. *Id.* at 187–88. The third casing was found on the center fog line of the road. *Id.* at 188–89. They all appeared to be damaged. *Id.* at 184–89. Wettlaufer explained that these bullets were fired from a semiautomatic gun. *Id.* at 186–87.
- 5 The jury viewed a 28 minute surveillance video from the Turkey Hill which recorded the incident, while Viera narrating what was happening. (N.T. at 147–59); Commonwealth Exhibit # 3.
- 6 Appellant's interview was recorded on a DVD by MTPD and published to the jury. (N.T. at 241–52); Commonwealth Exhibit # 9. During the interview, Appellant admitted to being at the Turkey Hill but denied involvement in the shooting, claiming he simply told Garriga to "have a blessed day" when confronted by Garriga. (DVD: Statement of Appellant at 22:15:30 to 22:21:09). After the interview, police retrieved a water bottle used by Appellant for later DNA analysis. (N.T. at 299).
- 7 At trial, Fuentes admitted he lied on June 21, 2014, when he told police he and Appellant did not see Garriga after they left Turkey Hill, he had never seen Appellant with a gun, and he knew nothing about the shooting, because he was the only witness and he was afraid of Appellant. (N.T. at 370–71).
- Fuentes admitted he lied to police during a second interview on August 7, 2014, when he again stated he had no knowledge of what happened to Garriga, because Appellant was still out on the street and Fuentes was scared. (N.T. at 371–72).
- However, on April 29, 2015, after Fuentes was attested and incarcerated twice on unrelated gun charges, he gave a third statement to police where he identified Appellant as the person that shot Garriga and admitted he lied in his previous statements. (N.T. at 308–13, 372–76). Fuentes stated he was not promised a break on his pending gun charges, but admitted he was hopeful his testimony would result in a more lenient sentence. *Id.* at 376, 412–13. Christopher Tallarico, Fuentes' attorney, also testified that no offers had been extended to Fuentes. *Id.* at 426. In explaining why he was now implicating Appellant in the shooting, Fuentes stated: "[b]ecause I knew I was lying and I couldn't sleep at night, and I just felt I was doing the right thing." *Id.* at 376.
- 8 Freysz obtained records showing that Appellant had purchased an AK 47 and a Glock .40 caliber on March 8, 2012. (N.T. at 255). Appellant did have a concealed carry permit, and the AK 47 was legally purchased. *Id.* at 272, 329. Appellant informed detectives during his interview that the .40 caliber gun was stolen, and Freysz confirmed a stolen gun report had been filed on May 19, 2014. *Id.* at 256–57.
- 9 After the ballistics analysis, Jennifer Sears ("Sears"), a forensic biologist with NMS Labs, testified she received three spent cartridge casings, a known DNA sample from Appellant, and a known DNA sample from Fuentes. (N.T. at 447–50). She testified that the first and third casings did not produce a DNA

profile, while the second casing produced a partial DNA profile which excluded Appellant and Fuentes as the source. *Id.* at 451–53. Sears explained how it is possible to touch an item without leaving an identifiable DNA profile, particularly spent shell casings which are often difficult to work with because of the surface area and exposure to heat during the firing process. *Id.* at 453–56.

- 10 During his interview, Appellant claimed that when he and Fuentes returned from New Holland to Lancaster City they did not travel on Route 23, and thus did not see police activity on Route 23 near Turkey Hill. Commonwealth Exhibit # 9 (DVD: Statement of Appellant at 22:27:06 to 22:27:40).
- 11 According to Freysz, who was present at the autopsy, \$160 in U.S. currency and a sandwich bag of cocaine were found on Garriga. (N.T. at 257–60). Freysz explained the bag contained a little over three grams of cocaine. *Id.* at 260–61. Freysz did not uncover any evidence indicating that Garriga was involved in dealing drugs or that the shooting was drug related. *Id.* at 261, 322–28, 333–34.
- 12 Ross performed a toxicological analysis as part of the autopsy, which revealed alcohol in Garriga's bloodstream and a blood alcohol concentration of .06 percent. (N.T. at 547).
- 13 Wettlaufer stated there was a margin of error in using string for trajectory analysis, but string was used in this case because a laser pointer would not have been visible due to daylight conditions. (N.T. at 209, 226).
- 14 Jones testified that he used the Turkey Hill video to determine Garriga's walking speed prior to the shooting. (N.T. at 579–81). By finding it took Garriga 21 seconds to walk 75 feet from where he started walking until he disappeared from view, Jones determined Garriga was walking at 3.5714 feet per second. *Id.* Jones then measured how long it would take for Appellant's vehicle to get from the exit of the Turkey Hill parking lot to where Garriga's body was found, traveling at the posted 35 mile per hour speed limit. *Id.* at 586–88. Using an exemplar vehicle with the same engine and transmission, the result was 12.23 seconds. *Id.* Noting that Appellant's vehicle did not leave the Turkey Hill parking lot until 136 seconds after Garriga took his first step, Jones determined it took Appellant's vehicle 148.23 seconds to arrive at the location where Garriga's body was found. *Id.* at 584–585, 588. Using Garriga's walking speed of 3.5714 feet per second, Jones determined that Garriga could walk 52,9.37 feet in 148.23 seconds. *Id.* at 588–89. In fact, the actual distance Garriga walked until he was shot was 535.87 feet, only 6.49 feet more than that projected by Jones at the time Appellant arrived at the location. *Id.* at 589.

Jones ruled out a light-colored SUV seen in a video traveling west on New Holland Avenue (N.T. at 593–96). He also examined seven other vehicles seen passing between the Turkey Hill and Tommy's Auto cameras during the time in question. *Id.* at 597–98. By using these cameras, Jones could determine how long it took for each car to go from point A to point B, the average speed for each vehicle as they passed between those two points, and whether they could have been at the shooting scene when Garriga was shot. *Id.* As a result, Jones determined it took Appellant 26 seconds to travel between the two points, while it took the other six vehicles 15, 16, 16, 11, 16, and 12 seconds respectively. *Id.* at 598–99. The average speed for Appellant's vehicle between these two points was 17.92 mph, in a 35 mile per hour zone, while the average speed for the six other vehicles was 31.07 mph, 29.13 mph, 29.13 mph, 42.37 mph, 29.13 mph, 38.84 mph. *Id.* at 599. This slower speed allowed Appellant to reach Garriga in his timed walk, shoot Garriga, accelerate, and reach Tommy's camera in the calculated time. *Id.* at 600.

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## WESTLAW

2018 WL 7051095

Only the Westlaw citation is currently available.

United States District Court, E.D. North Carolina,

Western Division.

**United States v. Evans**

United States District Court, E.D. North Carolina, Western Division. | December 20, 2018 | Slip Copy | 2018 WL 7051095 (Approx. 7 pages)

UNITED STATES of America

v.

Charles Malone EVANS, Defendant.

No. 5:17-CR-39-FL-1

Signed 12/20/2018

**Attorneys and Law Firms**

Benjamin O. Zelling, United States Attorney's Office, Raleigh, NC, for United States of America.

**MEMORANDUM AND RECOMMENDATION**

Robert B. Jones, Jr., United States Magistrate Judge

\*1 This matter comes before the court on Defendant's Motion to Suppress Cell Phone Data. [DE-56]. The Government responded in opposition to Defendant's motion. [DE-67]. The undersigned held an evidentiary hearing on September 10, 2018, to further develop the record and allowed the parties to file supplemental briefing in order to respond to a case cited by the Government during the hearing. [DE-70, -73]. Defendant filed supplemental briefing in support of his motion, [DE-71], and the Government filed supplemental briefing in opposition, [DE-72]. Accordingly, this matter is ripe for review. For the reasons stated below, it is recommended that Defendant's motion to suppress be denied.

**I. PROCEDURAL BACKGROUND**

This case arises from an investigation into the February 2, 2015 death of Eric Darden ("Darden") from a heroin overdose. On February 8, 2017, a Grand Jury sitting in the Eastern District of North Carolina returned an indictment charging Defendant with two counts: (1) Distribution of a Quantity of Heroin, in violation of 21 U.S.C. § 841(a)(1); and (2) Distribution of a Quantity of Heroin, Resulting in Death or Serious Bodily Injury, in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(C). Indictment [DE-1]. At the suppression hearing, Defendant did not present any evidence. The Government presented the testimony of Sergeant Gregory Pawluk<sup>1</sup> of the Apex Police Department. [DE-73].

**II. STATEMENT OF THE FACTS**

On February 1, 2015, Darden overdosed on heroin and was treated at a local hospital. Gov't's Resp. [DE-67] at 2. Darden checked himself out of the hospital and was transported home by family to recover. *Id.* The next day, on February 2, 2015, officers with the Apex Police Department responded to a reported overdose by Darden, who was later pronounced dead. Hr'g Tr. [DE-73] at 4:17–21. Law enforcement searched Darden's cell phone, which showed that Darden had communicated with William Mayhew ("Mayhew") on February 1, 2015, asking if Mayhew could obtain heroin for Darden. *Id.* at 4:22–5:3. In the last text message Darden sent to Mayhew, hours before the first overdose was reported, Darden informed Mayhew that he was outside Mayhew's residence. Gov't's Resp. [DE-67] at 2. Law enforcement later searched Mayhew's cell phone, which showed that Mayhew had communicated with someone referred to as "CJ." Hr'g Tr. [DE-73] at 5:14–18. During his interview, Mayhew stated that the heroin purchased that day and provided to Darden had come from Defendant, who he knew as "CJ." *Id.* 5:24–6:3.

\*2 On February 25, 2015, Detective Pawluk sought and obtained a search warrant for the telephone number associated with "CJ." Gov't's Resp., Ex. A [DE-67-1]. In the application for the search warrant, Detective Pawluk described the investigation that led law enforcement to

believe "CJ" was the individual who sold heroin to Mayhew on February 1, 2015. *Id.* at 6–8. The phone number associated with "CJ" was listed in the search warrant application. *Id.* at 8. Wake County Superior Court Judge Kendra D. Hill signed the search warrant seeking account holder information, incoming and outgoing phone call records, and text message records including all data sent and received (SMS, MMS, photographs, videos or any other retained data) for a period beginning at 0000 hours EST on January 1, 2015 through 2359 hours EST on February 25, 2015 for the telephone number associated with Defendant. *Id.* at 5–9. Pursuant to the search warrant, Detective Pawluk obtained records from Verizon Wireless indicating that Mayhew and Defendant had exchanged text messages regarding drug sales. Gov't's Resp. [DE-67] at 4.

On April 21, 2015, Detective Pawluk submitted an application for an order authorizing the following: (1) the installation of a pen register, trap and trace device, and direct connect/dispatch services; and (2) the release of "call detail, subscriber information, and cell site information, RTT, historical GPS, precision location information (GPS), E-911, Nelos, or Mobile Locator Service Information." Gov't's Resp., Ex. B [DE-67-2]. In the application for the order, Detective Pawluk described the investigation that led law enforcement to believe that Mayhew purchased heroin from "CJ," who used the phone number associated with Defendant. *Id.* at 1–8. Wake County Superior Court Judge James Hardin signed the order. Pursuant to the order, Detective Pawluk obtained records from Verizon Wireless that indicated Darden, Mayhew, and Defendant were in the same vicinity on the day of the heroin sale that allegedly led to Darden's death. Gov't's Resp. [DE-67] at 5.

### III. DISCUSSION

Defendant moves to suppress all cell phone information and data obtained pursuant to both the February search warrant and the April order, arguing the data was seized as the result of an unlawful search in violation of the Fourth Amendment to the United States Constitution and the Supreme Court's decision in *Carpenter v. United States*, — U.S. —, 138 S.Ct. 2206, 201 L.Ed.2d 507 (2018). Def.'s Mot. [DE-56] at 1.

#### A. The data obtained pursuant to the February 25, 2015 search warrant

Although Defendant moves to suppress "cell phone information and data obtained by an insufficient search warrant signed on February 25, 2015," he makes no arguments that the February search warrant is invalid or that the data was produced in an unconstitutional search. Def.'s Mot. [DE-56] at 1. Rather, Defendant only argues that location data obtained pursuant to the April order ought to be suppressed and references the February search warrant to demonstrate that it did not authorize production of location data, so it cannot justify the constitutionality of the April search. *Id.* at 4.

The February search warrant never purported to seek location data—the type of information protected by the Court in *Carpenter*—but rather sought substantive data such as call logs and text message content. *See* 138 S.Ct. at 2219 (differentiating between the lesser expectations of privacy involving pen registers and telephone call logs with the invasive nature of location information). Therefore, the ruling in *Carpenter* does not apply to the February search warrant. *Id.* Instead, the issue is whether the warrant was sufficient to authorize production of phone call records, text message records, photographs, videos, and any other substantive, non-location information obtained pursuant to the warrant.

The Fourth Amendment provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated...." U.S. Const. amend. IV. The Supreme Court has interpreted the Fourth Amendment to establish only three requirements for search warrants: (1) they must be issued by neutral, disinterested magistrates; (2) they must be supported by probable cause; and (3) they must particularly describe the place to be searched and the things to be seized. *United States v. Dalia*, 441 U.S. 238, 255, 99 S.Ct. 1682, 60 L.Ed.2d 177 (1979) (citations omitted). The February search warrant is facially sufficient. First, the warrant was issued by a detached, neutral North Carolina Superior Court judge. Next, the application contained a sufficient factual basis to support a finding of probable cause where it detailed Darden's overdose, text messages between Darden and Mahew regarding the purchase of heroin, and evidence from Mahew's telephone indicating he purchased drugs from Defendant leading up to the heroin sale to Darden. Gov't's Resp., Ex. A [DE-67-1] at 13–14. Finally, the warrant described with particularity the contents to be seized, i.e., account holder information, call records, and text messages between January 1, 2015 and February 25, 2015 for the specified phone number. *Id.* at 11. Accordingly, because the February search warrant meets the Fourth Amendment requirements, it is recommended that Defendant's

motion to suppress the substantive cell phone information obtained pursuant to the February search warrant be denied.

**B. The location data obtained pursuant to the April 21, 2015 order**

\*3 Defendant argues that the April order is not a warrant in form or substance, so the search of his cell phone location data was unconstitutional. Def.'s Mot. [DE-56] at 5. In supplemental briefing, Defendant further argues that the judge lacked authority to issue the April order, and the April order cannot act as a search warrant under state or federal law. Def.'s Mem. [DE-71] at 3–9. The Government contends that the April order is the functional equivalent of a warrant, so it does not offend the Fourth Amendment or, alternatively, that the good faith exception to the exclusionary rule applies. Gov't's Resp. [DE-67] at 8–15; Gov't's Suppl. Resp. [DE-72] at 4–10.

**1. The state court judge had authority to issue order to disclose cell site location information ("CSLI")**

Defendant argues for the first time in his supplemental briefing that the North Carolina Superior Court judge who signed the April order lacked authority to order a telecommunications company to disclose CSLI because North Carolina state law does not permit a judge to issue an order requiring such information be disclosed to the government. Def.'s Mem. [DE-71] at 3–5.

The April order authorized the installation and use of a pen register and trap and trace device and the release of CSLI and other subscriber information pursuant to 18 U.S.C. § 2703(d), the Stored Communications Act, and N.C. Gen. Stat. §§ 15A-262 and 15A-263. Gov't's Resp., Ex. B [DE-67-2]. The Stored Communications Act ("SCA") authorizes the collection of CSLI. 18 U.S.C. § 2703(c); see *Carpenter*, 138 S.Ct. at 2212 ("[The SCA] permits the Government to compel the disclosure of certain telecommunications records when it 'offers specific and articulable facts showing that there are reasonable grounds to believe' that the records sought 'are relevant and material to an ongoing criminal investigation.' ") (citing 18 U.S.C. § 2703(d)). A state court may issue an order under § 2703 if it is not prohibited by state law. 18 U.S.C. § 2703(d). Defendant, citing N.C. Gen. Stat. §§ 15A-262 and 15A-263, argues that North Carolina law does not grant a judge the authority to issue an order for disclosure of CSLI. However, the SCA does not require a *grant* of authority under state law but rather allows a state court to issue an order under § 2703 unless *prohibited* by state law. 18 U.S.C. § 2703(d). Defendant points to no prohibitive North Carolina law, and prior to *Carpenter* North Carolina courts affirmed the collection of CSLI pursuant to the SCA. See, e.g., *State v. Forte*, 810 S.E.2d 339 (N.C. Ct. App. 2018) (affirming denial of motion to suppress evidence collected from a § 2703 order signed by a state superior court judge); *State v. Perry*, 243 N.C. App. 156, 776 S.E.2d 528 (2015) (affirming use of state court order to obtain CSLI pursuant to 18 U.S.C. § 2703 and N.C. Gen. Stat. §§ 15A-261, 15A-262, and 15A-263). Accordingly, the North Carolina Superior Court judge had authority to issue the April order under the SCA at the time it was signed.

**2. The April 21, 2015 Order was the functional equivalent of a search warrant**

In *Carpenter*, the Supreme Court held that seven days of historical CSLI obtained from a defendant's wireless carriers constituted a Fourth Amendment search for which the government must generally obtain a warrant upon a showing of probable cause. 138 S.Ct. at 2217 & n.3, 2221. As a result, an order issued pursuant to the SCA is insufficient to obtain cell location data because it requires only a showing that the data is "relevant and material to an ongoing criminal investigation," and not a showing of probable cause. *Id.* The Government does not dispute that it conducted a Fourth Amendment search based on the information obtained from Defendant's cell phone, but contends the April order is the functional equivalent of a warrant.

\*4 The April order, on its face, meets the requirements for a search warrant necessary to satisfy the Fourth Amendment under *Dalia*, 441 U.S. at 255, 99 S.Ct. 1682. First, the order was issued by a detached, neutral North Carolina Superior Court judge. Gov't's Resp., Ex. B [DE-67-2] at 15; *Dalia*, 441 U.S. at 255, 99 S.Ct. 1682 (citing *Connally v. Georgia*, 429 U.S. 245, 250–51, 97 S.Ct. 546, 50 L.Ed.2d 444 (1977) (per curiam)). Second, the application for the order contains a sufficient factual showing to establish probable cause that the CSLI from Defendant's phone was relevant and material to the investigation of Darden's overdose death. *Dalia*, 441 U.S. at 255, 99 S.Ct. 1682 (citing *Warden v. Hayden*, 387 U.S. 294, 307, 87 S.Ct. 1642, 18 L.Ed.2d 782 (1967)). The officer's sworn application stated that when police responded to the report of Darden's overdose, a witness informed officers that he and Darden bought the heroin from Mayhew, who had fled the scene. Gov't's Resp., Ex. B [DE-67-2] at 5–6. After Mayhew was arrested, he disclosed in an interview that he purchased the

heroin from Defendant and provided Defendant's phone number to police. *Id.* In addition to the finding required by § 2703, the Superior Court judge found that probable existed. *Id.* at 10. Third, the order particularly describes the place to be searched and the things to be seized. *Dalia*, 441 U.S. at 255, 99 S.Ct. 1682 (quoting *Stanford v. Texas*, 379 U.S. 476, 485, 85 S.Ct. 506, 13 L.Ed.2d 431 (1965)). The order authorized the search of Defendant's cell phone records for a particular number and the seizure of specific information, including historical CSLI, for a 60-day period beginning January 28, 2015. Gov't's Resp., Ex. B [DE-67-2] at 9–15. Because the April order meets the constitutional requirements for a search warrant, Defendant's Fourth Amendment rights were not violated by the search of his phone records despite the fact that the order was issued under the SCA. See *United States v. Hargett*, No. 5:15-CR-374-D, Hr'g Tr. [DE-153] at 39–45 (E.D.N.C. Aug. 17, 2018) (finding no Fourth Amendment violation where an order to obtain CSLI, issued pursuant to § 2703(d) and N.C. Gen. Stat. §§ 260-264 by a North Carolina Superior Court judge, met the requirements for a warrant); *United States v. Myles*, No. 5:15-CR-172-F-2, 2016 WL 1695076, at \*7-8 (E.D.N.C. Apr. 26, 2016) (concluding orders issued by a North Carolina Superior Court judge under the SCA, Fed. R. Crim. P. 41(d), and N.C. Gen. Stat. §§ 15A-262, 263 "effectively served as a warrant that complied with the three requirements of the Warrant Clause of the Fourth Amendment" as set forth in *Dalia*); *United States v. Wilford*, 961 F.Supp.2d 740, 772-73 (D. Md. 2013) (concluding orders issued under state pen register statute satisfied the Fourth Amendment's warrant requirement), *aff'd*, 689 F. App'x 727, 730 (4th Cir. May 9, 2017); see also *United States v. Sykes*, No. 5:15-CR-184-FL, 2016 WL 8291220, at \*10 (E.D.N.C. August 22, 2016) (finding it immaterial for purposes of probable cause determination whether the applications were for orders as opposed to warrants) (citing *Wilford*, 961 F.Supp.2d at 773), *adopted by* 2016 WL 6882839 (E.D.N.C. Nov. 22, 2016).

Defendant argues in supplemental briefing that the April order cannot operate as a search warrant for two reasons: (1) it fails to comply with technical requirements for search warrants found in N.C. Gen. Stat. § 15-246(1), i.e., it lacks the time and date of issuance above the signature of the issuing officer; and (2) it fails to comply with Fed. R. Crim. P. 41(d), because a state court judge may only issue a search warrant under Fed. R. Crim. P. 41(b) at the request of a federal law enforcement officer or attorney for the government, and the order lacks the necessary contents required by Fed. R. Crim. P. 41(e)(2) related to the execution and return of the warrant.<sup>2</sup> Def.'s Mem. [DE-71] at 7–8.

First, "it is not the province of the Fourth Amendment to enforce state law." *Virginia v. Moore*, 553 U.S. 164, 178, 128 S.Ct. 1598, 170 L.Ed.2d 559, (2008); see *United States v. Queen*, 732 F.Supp. 1342, 1347 (W.D.N.C. 1990) ("[E]very circuit court which has addressed the issue has held that evidence obtained in violation of state law, including state constitutional rights, is nonetheless admissible in a federal prosecution if properly obtained under federal law."). The SCA order in *Hargett*, which the court found sufficient under the Fourth Amendment, also lacked the time of issuance above the judge's signature. No. 5:15-CR-374-D, [DE-120-1] at 1–5. Because the SCA order meets the constitutional warrant requirements of the Fourth Amendment set forth in *Dalia*, the fact that it does not meet a statutory technical requirement under North Carolina law does not require suppression of evidence.

Second, the asserted violations of Rule 41(d) and (e) were technical in nature rather than constitutional. See *United States v. Ritter*, 752 F.2d 435, 440 (9th Cir. 1985) (concluding that a search conducted pursuant to a telephonic search warrant authorized by a state, rather than a federal, magistrate was a technical violation of Rule 41 and did not require suppression of evidence absent prejudice or deliberate disregard of the rule); *Wilford*, 961 F.Supp.2d at 773 (finding orders signed by a state court judge authorizing the "pinging" of a cell phone satisfied the Fourth Amendment's warrant requirement and recognizing that "there is no inherent impropriety in the Government's reliance on a warrant issued by a state judge, even in a criminal case eventually prosecuted in federal court.") (citing *United States v. Claridy*, 601 F.3d 276, 281–82 (4th Cir. 2010)); *United States v. Nesbitt*, No. 2:08-CR-1153-DCN, 2010 WL 297689, at \*3 n.4 (D.S.C. Jan. 19, 2010) (concluding that violation of Fed. R. Crim. P. 41(e)(2)(A) was non-constitutional and did not warrant suppression) (citing *United States v. Davis*, 313 F. App'x 672, 2009 WL 489998, at \*2 (4th Cir. Feb. 27, 2009)). A non-constitutional violation of Fed. R. Crim. P. 41 results in suppression "only when the defendant is prejudiced by the violation ... or when there is evidence of intentional and deliberate disregard of a provision in the Rule." *United States v. Deichert*, 232 F.Supp.3d 772, 782 (E.D.N.C. 2017) (rejecting defendant's contention that issuance of a search warrant by a magistrate judge sitting in the wrong district in violation of Rule 41 required suppression

because the violation was non-constitutional, not intentional or reckless, and did not prejudice defendant's case). The SCA order in *Hargett*, which the court found sufficient under the Fourth Amendment, also suffered from the deficiencies asserted here. No. 5:15-CR-374-D, [DE-120-1] at 1–5 Defendant has not argued prejudice and there is no reason to believe a federal magistrate judge would not have issued a warrant on the same showing. Further, nothing before the court indicates an intentional violation of Rule 41. Accordingly, no Fourth Amendment violation occurred and the motion to suppress should be denied.

### 3. The good faith exception to the exclusionary rule applies

\*5 Even if the April order failed to meet the warrant requirements, the good faith exception to the exclusionary rule should apply. Evidence obtained in violation of the Fourth Amendment is generally precluded from use in a criminal proceeding against the individual whose rights were violated. *United States v. Thomas*, 908 F.3d 68, 72 (4th Cir. 2018) (citing *United States v. Kimble*, 855 F.3d 604, 610 (4th Cir. 2017)). In *United States v. Leon*, 468 U.S. 897, 921, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984), the Court recognized a "good faith exception" to the exclusionary rule, whereby "evidence obtained by an officer who acts in objectively reasonable reliance on a search warrant will not be suppressed, even if the warrant is later deemed invalid." *Thomas*, 908 F.3d at 72 (citing *Leon*, 468 U.S. at 922, 104 S.Ct. 3405). The good faith exception was later extended to an officer's reliance on a statute authorizing warrantless administrative searches, *Illinois v. Krull*, 480 U.S. 340, 349–50, 107 S.Ct. 1160, 94 L.Ed.2d 364 (1987), and an officer's reliance on binding appellate precedent, *Davis v. United States*, 564 U.S. 229, 232, 131 S.Ct. 2419, 180 L.Ed.2d 285 (2011).

Here, the officer relied upon a North Carolina Superior Court order issued under the SCA and related provisions of North Carolina law. [DE-67-2] at 9. In the case of *United States v. Chavez*, the Fourth Circuit applied the good faith exception where investigators "reasonably relied on court orders and the Stored Communications Act in obtaining the cell site records." 894 F.3d 593, 608 (4th Cir.), *cert. denied*, — U.S. —, 139 S.Ct. 278, 202 L.Ed.2d 184 (2018). The *Chavez* court reasoned that although *Carpenter* was controlling going forward, it had no effect on Chavez's case, explaining that the exclusionary rule's "sole purpose ... is to deter future Fourth Amendment violations." *Id.* (quoting *Davis*, 564 U.S. 236–37).

Defendant points to no binding precedent at the time the April order issued holding that obtaining CSLI from a cell service provider was a Fourth Amendment search; in fact, the Fourth Circuit in 2016 held that "the government does not violate the Fourth Amendment when it obtains historical CSLI from a service provider without a warrant." *United States v. Graham*, 824 F.3d 421, 425 (4th Cir. 2016) (en banc), *abrogated by Carpenter*, 138 S.Ct. at 2217; *see also Myles*, 2016 WL 1695076, at \*9 (applying good faith exception to CSLI evidence obtained pursuant to an SCA order and noting that "at the time the pen/trap orders were signed, no Fourth Circuit precedent existed regarding historical or real-time CSLI – just conflicting district court decisions on the subject."). Likewise, within months of the April order being issued, the North Carolina Court of Appeals affirmed the use of a state court order to obtain CSLI pursuant to the SCA and, alternatively, held that even if a search warrant was required the good faith exception would apply. *Perry*, 243 N.C. App. 156, 167 & 175–76, 776 S.E.2d 528, 536 & 541–42.

Finally, Defendant has proffered no evidence that the officer was dishonest or reckless in applying for the order or that he lacked an objectively reasonable belief that probable cause existed. Because the officer's reliance on the SCA, North Carolina law, and a state court order was objectively reasonable, suppression of the evidence would not serve the exclusionary rule's purpose of deterring Fourth Amendment violations. *See Chavez*, 894 F.3d at 608 ("[W]hen investigators 'act with an objectively reasonable good-faith belief that their conduct is lawful,' the exclusionary rule will not apply," and "[o]bjectively reasonable good faith includes 'searches conducted in reasonable reliance on subsequently invalidated statutes.'") (quoting *Davis*, 564 U.S. at 238–39, 131 S.Ct. 2419); *see also Hargett*, No. 5:15-CR-374-D, Hr'g Tr. [DE-153] at 45–46 (applying the good faith exception to the exclusionary rule where officers obtained CSLI in reliance on an order issued by a North Carolina Superior Court judge under the SCA). Accordingly, the good faith exception to the exclusionary rule applies and the motion to suppress should be denied.

### IV. CONCLUSION

\*6 For the reasons stated herein, it is RECOMMENDED that the Defendant's motion to suppress [DE-56] be DENIED.

IT IS DIRECTED that a copy of this Memorandum and Recommendation be served on each of the parties or, if represented, their counsel. Each party shall have until **January 3, 2018** to file written objections to the Memorandum and Recommendation. The presiding district

judge must conduct his or her own review (that is, make a de novo determination) of those portions of the Memorandum and Recommendation to which objection is properly made and may accept, reject, or modify the determinations in the Memorandum and Recommendation; receive further evidence; or return the matter to the magistrate judge with instructions. See, e.g., 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b)(3); Local Civ. R. 1.1 (permitting modification of deadlines specified in local rules), 72.4(b). Any response to objections shall be filed by within 14 days of the filing of the objections.

If a party does not file written objections to the Memorandum and Recommendation by the foregoing deadline, the party will be giving up the right to review of the Memorandum and Recommendation by the presiding district judge as described above, and the presiding district judge may enter an order or judgment based on the Memorandum and Recommendation without such review. In addition, the party's failure to file written objections by the foregoing deadline will bar the party from appealing to the Court of Appeals from an order or judgment of the presiding district judge based on the Memorandum and Recommendation. See *Wright v. Collins*, 766 F.2d 841, 846-47 (4th Cir. 1985).

Submitted, this the 20th day of December, 2018.

#### All Citations

Slip Copy, 2018 WL 7051095

#### Footnotes

- 1 In the official hearing transcript, Sergeant Pawluk's name is spelled "Pollock." [DE-73]. The court elects to use the spelling "Pawluk," as it is contained in the February search warrant, the April Pen Register Order, and the Government's filings. Additionally, Sergeant Pawluk was promoted to his present rank of sergeant in 2018. Hr'g Tr. [DE-73] at 4:11. Because he was a detective when he conducted the investigation in 2015, the court will refer to him as Detective Pawluk for ease of reference when discussing the investigation.
- 2 The warrant must command the officer to:
  - (i) execute the warrant within a specified time no longer than 14 days;
  - (ii) execute the warrant during the daytime, unless the judge for good cause expressly authorizes execution at another time; and
  - (iii) return the warrant to the magistrate judge designated in the warrant.Fed. R. Civ. P. 41(e)(2).

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### Historical Precision Location Information

The results provided are AT&T's best estimate of the location of the target number. Please exercise caution in using these records for investigative purposes as location data is sourced from various databases which may cause location results to be less than exact.



Run Date: 08/25/2017  
Run Time: 13:24:46  
Usage For: (509)398-2495

Item	IMSI/Phone Number	Connection Date	Connection Time (GMT)	Longitude	Latitude	Location Accuracy
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914	5093982495	2016-12-22	11:08:13	-119.769408	47.163267	Location accuracy likely better than 10000 meters
915	5093982495	2016-12-22	10:56:28	-119.769291	47.11815	Location accuracy unknown
916	5093982495	2016-12-22	10:47:37	-119.769408	47.163267	Location accuracy likely better than 10000 meters
917	5093982495	2016-12-22	09:36:34	-119.952198	46.943325	Location accuracy likely better than 25 meters
918	5093982495	2016-12-22	09:33:01	-119.952198	46.943325	Location accuracy likely better than 25 meters
919	5093982495	2016-12-22	09:32:27	-119.962917	46.951515	Location accuracy likely better than 50 meters
920	5093982495	2016-12-22	09:32:04	-119.963061	46.954755	Location accuracy likely better than 50 meters
921	5093982495	2016-12-22	09:31:46	-119.963061	46.954755	Location accuracy likely better than 50 meters
922	5093982495	2016-12-22	09:31:45	-119.952198	46.943325	Location accuracy likely better than 25 meters
923	5093982495	2016-12-22	09:31:18	-119.963061	46.954755	Location accuracy likely better than 50 meters
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925	5093982495	2016-12-22	09:25:06	-119.960955	47.000502	Location accuracy unknown
926	5093982495	2016-12-22	09:24:17	-119.898585	47.05668	Location accuracy likely better than 50 meters
927	5093982495	2016-12-22	09:24:17	-119.769408	47.163267	Location accuracy likely better than 10000 meters
928	5093982495	2016-12-22	09:23:21	-119.88585	47.064537	Location accuracy likely better than 50 meters
929	5093982495	2016-12-22	09:23:21	-119.88585	47.064537	Location accuracy likely better than 50 meters
930	5093982495	2016-12-22	08:58:41	-119.769399	47.163294	Location accuracy likely better than 10000 meters
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938	5093982495	2016-12-22	08:24:33	-119.953521	47.03094	Location accuracy likely better than 50 meters
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944	5093982495	2016-12-22	07:27:47	-119.828313	47.104488	Location accuracy likely better than 50 meters
945	5093982495	2016-12-22	07:27:40	-119.828313	47.104488	Location accuracy likely better than 50 meters
946	5093982495	2016-12-22	07:27:39	-119.769291	47.11815	Location accuracy unknown
947	5093982495	2016-12-22	07:27:17	-119.828313	47.104488	Location accuracy likely better than 50 meters
948	5093982495	2016-12-22	07:27:17	-119.828313	47.104488	Location accuracy likely better than 50 meters
949	5093982495	2016-12-22	07:27:17	-119.828313	47.104488	Location accuracy likely better than 50 meters
950	5093982495	2016-12-22	07:26:24	-119.828169	47.104524	Location accuracy likely better than 50 meters

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# ZETIX video 17-1-00058-5

0:09:27



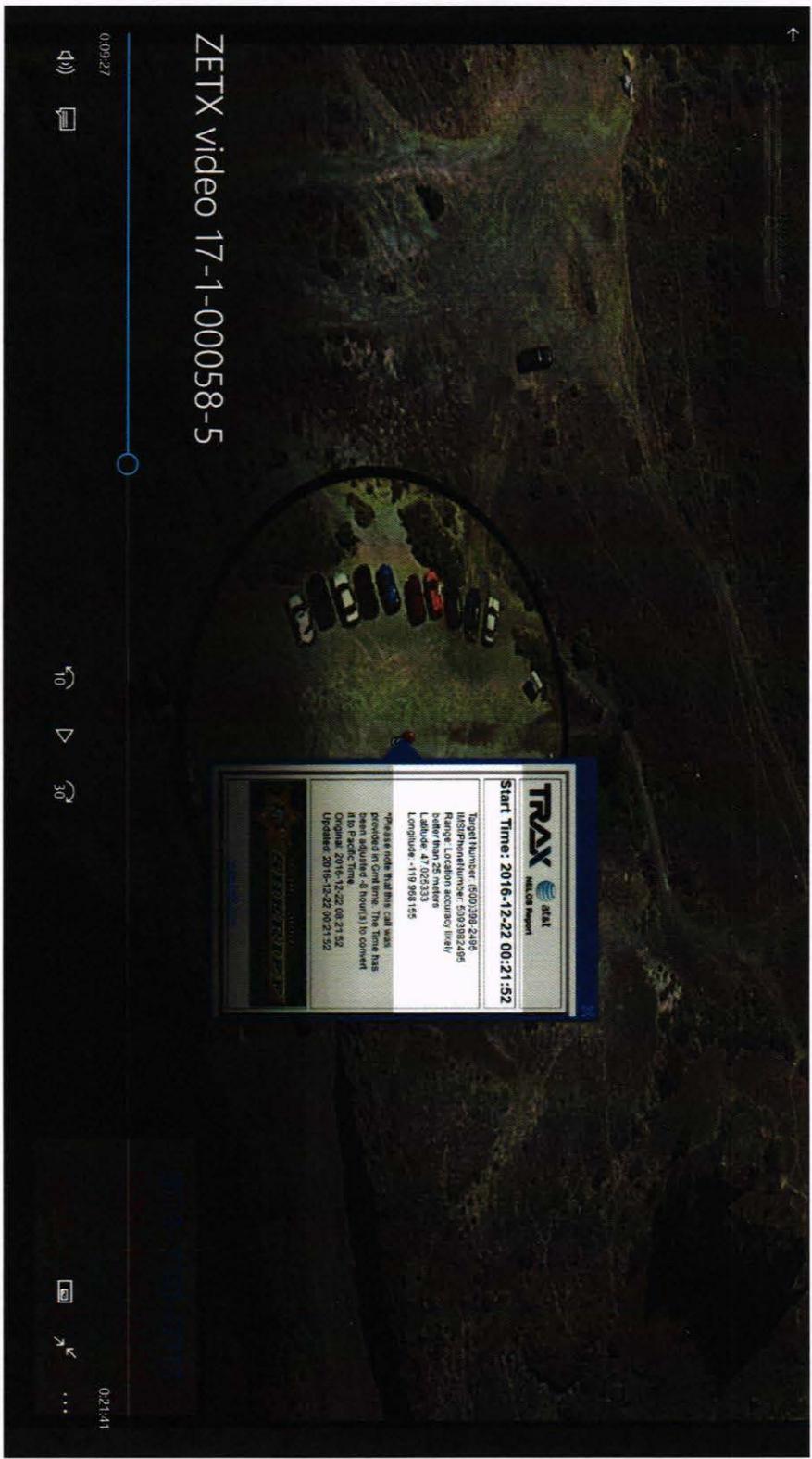
02:14:1

**TRAX** at&t  
MILCO Report

**Start Time: 2016-12-22 00:21:52**

Target Number: (503)308-2485  
Missed Number: (503)308-2485  
Range: Location accuracy likely  
Sector: 125 meters  
Elevation: 200 meters  
Longitude: -119.983155

\*Please note that this call was  
provided in Cent time. The Time has  
been adjusted 4 hours to convert  
to local time.  
Original: 2016-12-22 08:21:52  
Updated: 2016-12-22 00:21:52



CERTIFICATE OF SERVICE

On this day I served a copy of the Brief of Respondent in this matter by e-mail on the following parties, receipt confirmed, pursuant to the parties' agreement:

Dennis W. Morgan  
[nodblspk@rcabletv.com](mailto:nodblspk@rcabletv.com)

Dated: March 16, 2020.

  
Kaye Burns

**GRANT COUNTY PROSECUTOR'S OFFICE**

**March 26, 2020 - 2:32 PM**

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