

**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**

STATE OF OHIO,	:	APPEAL NO. C-170530
	:	TRIAL NO. B-1401406
Plaintiff-Appellee,	:	
	:	<i>JUDGMENT ENTRY.</i>
vs.	:	
BRANDON THOMAS,	:	
	:	
Defendant-Appellant.	:	

We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court. *See* Rep.Op.R. 3.1; App.R. 11.1(E); 1st Dist. Loc.R. 11.1.1.

Following a bench trial, defendant-appellant Brandon Thomas was found guilty of nine criminal counts relating to the murders of Adam Bostic and Betty Thomas.¹ The trial court sentenced Thomas to two consecutive life sentences. Thomas now appeals, asserting three assignments of error.

In his first assignment of error, Thomas argues that the trial court abused its discretion by admitting into evidence text messages between cellular phone numbers 513-476-2878 and 502-386-8840 that had not been properly authenticated. Thomas contends that the text messages were not authenticated as

¹ Thomas was found guilty of two counts of aggravated murder with a firearm specification, in violation of R.C. 2903.01(A), two counts of aggravated murder with a firearm specification, in violation of R.C. 2903.01(B), two counts of felony murder with a firearm specification, in violation of R.C. 2903.02(B), one count of aggravated robbery with a firearm specification, in violation of R.C. 2911.01(A)(1), one count of aggravated burglary with a firearm specification, in violation of R.C. 2911.11(A)(2), and one count of having a weapon while under disability, in violation of R.C. 2923.13(A)(2).

having been sent or received by him. “The trial court has broad discretion in the admission of evidence, and unless it has clearly abused its discretion and the defendant has been materially prejudiced thereby, an appellate court should not disturb the decision of the trial court.” *State v. Beck*, 2016-Ohio-8122, 75 N.E.3d 899, ¶ 27 (1st Dist.), citing *State v. Issa*, 93 Ohio St.3d 49, 64, 752 N.E.2d 904 (2001).

“The requirement of authentication * * * as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.” Evid.R. 901(A); see *State v. Huge*, 1st Dist. Hamilton No. C-120388, 2013-Ohio-2160, ¶ 26. “The burden for authentication under this rule is not great, and only requires a prima facie showing.” *Huge* at ¶ 27, citing *State v. Wright*, 1st Dist. Hamilton No. C-080437, 2009-Ohio-5474, ¶ 47.

During his testimony, Anthony Bostic, the brother of the victim, Adam Bostic, discussed text messages exchanged between Thomas and him. He identified Thomas as the sender of the messages from the phone number 513-476-2878, as he had frequently received text messages from Thomas via that phone number and was familiar with it. On the night of the murders, Anthony received messages from Thomas, which seemingly told him to check on his brother. Anthony then called Thomas, who explained that after an apparent home invasion at Adam and Betty’s house, Thomas believed that Adam was dead. Additionally, an employee of Cincinnati Bell, Kathy Smith, testified to the call and text message records retrieved from 513-476-2878. That phone number was associated with a prepaid phone registered to a “Johnny King.” Prior to and during the time the crimes were committed, several messages were exchanged between 513-476-2878 and 502-386-8840, the phone number of an unknown conspirator with a Louisville area code.

We find that Anthony's testimony regarding his communication with Thomas via the phone number 513-476-2878, together with Smith's testimony connecting the phone's number with the text messages, was sufficient to authenticate the messages under Evid.R. 901. *See Huge* at ¶ 29; *State v. Hinkston*, 1st Dist. Hamilton No. C-140448, 2015-Ohio-3851, ¶ 15. The testimony showed that the records were from a cellular phone used by Thomas. Thomas's argument alleging a lack of proof that he had actually exchanged messages with the Louisville phone number concerns the weight of the evidence, rather than authentication. *See Huge* at ¶ 29. The text messages were properly authenticated, and the trial court did not err in admitting them. Accordingly, we overrule Thomas's first assignment of error.

In his second assignment of error, Thomas contends that he was denied the effective assistance of counsel guaranteed under the Sixth Amendment to the United States Constitution when his trial counsel failed to timely object to testimony regarding cell tower evidence and failed to seek leave of court to retain an expert witness. To establish ineffective assistance of counsel, the defendant must demonstrate that he was prejudiced by counsel's deficient performance. *See Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Bradley*, 42 Ohio St.3d 136, 143, 538 N.E.2d 373 (1989).

Here, Thomas's trial counsel objected to the admission of a map of a cell tower near the crime scene, claiming that Kathy Smith's earlier testimony concerning the cell tower was inadmissible expert testimony. The trial court overruled the objection, explaining that Smith's testimony pertained to the authentication of records for which she was a custodian and her description of cell towers concerned how the data in the records was produced. Several Ohio courts, including this court, have intimated that testimony concerning cell phone records and the location of cell

towers constitutes lay opinion testimony that does not require expert training. *See State v. Simmons*, 2014-Ohio-3695, 19 N.E.3d 517, ¶ 89-97 (1st Dist.); *State v. Perry*, 11th Dist. Lake No. 2011-L-125, 2012-Ohio-4888, ¶ 65; *State v. Wilson*, 8th Dist. Cuyahoga No. 104333, 2017-Ohio-2980, ¶ 30. Nevertheless, Thomas’s trial counsel cross-examined Smith on her testimony regarding the records. During cross-examination, Smith conceded that based on the records, she had no way of knowing who bought the phone or who was using the phone, only that one phone number communicated with another in a particular location. The record demonstrates that Thomas’s trial counsel advanced the argument that even with call and text message records, it was impossible to determine exactly who was using the phone without further investigation, which was not done in this case.

Thomas also attacks his trial counsel’s performance based on his failure to call a cell-site engineer as an expert witness. However, “[i]t is often pointed out defense counsel’s decision not to engage its own expert can be considered tactical since the potential expert may uncover evidence further inculcating the defendant.” (Internal citations omitted.) *State v. Telego*, 7th Dist. Mahoning No. 16 MA 0171, 2018-Ohio-254, ¶ 33; *see Simmons* at ¶ 96. Additionally, “the failure to call an expert and instead rely on cross-examination does not constitute ineffective assistance of counsel.” *State v. Hunter*, 131 Ohio St.3d 67, 2011-Ohio-6524, 960 N.E.2d 955, ¶ 66; *see Simmons* at ¶ 98-99. Furthermore, the argument that a defense expert was necessary to impeach the testimony of the state’s witness can be considered “purely speculative” where there is no indication in the record who the defense expert should have been or what they would have said. *Hunter* at ¶ 66; *Simmons* at ¶ 99. Thomas did not demonstrate that an expert would have aided in his defense.

Finally, even if we found his trial counsel's performance lacking, Thomas cannot show that he was prejudiced. If the cell tower testimony had been excluded, there was sufficient evidence from which the trial court could have concluded that Thomas had committed the crimes, including Anthony's testimony, the remainder of Smith's testimony, and the content and timing of Thomas's text messages to and from the Louisville phone number. Therefore, we overrule Thomas's second assignment of error.

In his third assignment of error, Thomas challenges the sufficiency of the evidence used to convict him. Thomas's argument centers on his perceived weaknesses in the state's case having no direct physical evidence tying him to the murders. In a challenge to the sufficiency of the evidence, the question is whether after reviewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found all the essential elements of the crime beyond a reasonable doubt. *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph two of the syllabus. Both circumstantial and direct evidence possess the same probative value and are subject to the same standard of proof. *Id.*, paragraph one of the syllabus. Further, in some cases, circumstantial evidence may be more certain, satisfying and persuasive. *State v. Lott*, 51 Ohio St.3d 160, 167, 555 N.E.2d 293 (1990).

Thomas argues that the state did not prove that he had physical possession of the prepaid phone associated with the phone number 513-476-2878 prior to, during or after the murders, and argued at trial that passing around a so-called "burner phone" was common. Additionally, Thomas argues that the fingerprints and DNA recovered on the appliance cords used to bind Adam's and Betty's hands would have been expected, as Thomas was temporarily living with them in their home. Further, the gun used to murder Adam and Betty was never recovered.

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However, Anthony Bostic's testimony revealed that he communicated with Thomas via the 513-476-2878 phone number about the death of his brother on the night of the murders. This testimony was corroborated by cell phone records, which contained the timing and content of text messages sent between Thomas and a Louisville phone number. The content of these messages indicated that someone with intimate knowledge of Adam and Betty's household was planning to coordinate a violent robbery. After viewing this evidence in the light most favorable to the state, we hold that the state provided sufficient evidence to support the convictions for aggravated murder, aggravated robbery, aggravated burglary, and having a weapon while under a disability. We overrule Thomas's third assignment of error.

The judgment of the trial court is affirmed.

A certified copy of this judgment entry shall constitute the mandate, which shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

CUNNINGHAM, P.J., ZAYAS and MILLER, JJ.

To the clerk:

Enter upon the journal of the court on September 28, 2018

per order of the court _____.
Presiding Judge