[Cite as *State v. Robinson*, 2017-Ohio-8273.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
WASHINGTON COUNTY

STATE OF OHIO,	:	Case No. 16CA22
Plaintiff-Appellee,	:	
v.	:	DECISION AND JUDGMENT ENTRY
BRANDON M. ROBINSON,	:	**RELEASED: 09/28/17**
Defendant-Appellant.	:	

APPEARANCES:

R. Eric Kibler, Lisbon, Ohio, and Jan R. Mostov, Youngstown, Ohio, for appellant.

Kevin Rings, Washington County Prosecuting Attorney, and Nicole Tipton Coil, Washington County Assistant Prosecuting Attorney, Marietta, Ohio, for appellee.

Harsha, J.

{¶1} A jury convicted Brandon Robinson of complicity in aggravated burglary, complicity in aggravated robbery, and complicity in kidnapping for his involvement in a home invasion that resulted in the theft of money, drugs, and property, as well as the violent assault of one of the residents.

{¶2} Initially Robinson asserts that the trial court erred in overruling his motion to suppress the evidence obtained from a search warrant of his home because the state failed to observe the "knock and announce" rule provided by R.C. 2935.12(A) and relevant constitutional law. The trial court ruled that it would not decide this issue because Robinson's counsel requested more time to research it and "will notify the Court if he wishes to pursue it further." Nothing in the record, including the trial, indicates that Robinson later proclaimed his desire to proceed on the issue. In effect, Robinson waived or abandoned this claim and/or invited any potential error by the trial court in not considering it.

{¶3} And by failing to raise it at the trial level, Robinson forfeited the argument that the evidence should have been suppressed based on state constitutional rights that are broader than federal constitutional rights.

{¶4} Finally, Robinson does not argue and cannot establish plain error where the Supreme Court of the United States has held that the exclusionary rule of the Fourth Amendment does not apply if officers violate the knock and announce rule in the course of executing a valid search warrant. We overrule his first assignment of error.

{¶5} Next Robinson contends that the trial court erred when it denied his motion to strike the testimony of Ohio Bureau of Criminal Investigation ("BCI") forensic scientist Sara DeVine. She testified she compared a DNA profile prepared by another BCI employee, who did not testify, with a DNA profile she herself made. Robinson claims that DeVine's testimony violated his constitutional right to confront the other BCI employee.

{¶6} We disagree because the Confrontation Clause does not prevent one expert from expressing an opinion based upon a DNA profile that was prepared by a nontestifying expert. Here the contested DNA profile was not offered to prove the truth of the matter asserted; rather forensic scientist DeVine referred to it solely for the purpose of explaining the assumptions upon which her opinion rested. Robinson was able to cross-examine DeVine, including the underlying assumptions for her opinion and conclusions. Moreover, DNA profiles are not inherently inculpatory—they are prepared by technicians who generally have no way of knowing whether they will be incriminating or exonerating. The trial court did not violate Robinson's right to confrontation by

denying his motion to strike DeVine's testimony. We overrule Robinson's second assignment of error.

{¶7} Robinson also claims that the trial court abused its discretion when it permitted one of his co-defendants, Nathan Williams, to testify as a court witness instead of as a state witness. We reject Robinson's claim because Williams's testimony was beneficial to ascertaining the truth. And the state represented to the trial court that Williams and another co-defendant might be reluctant to testify as a witness for the state for fear of being labeled a snitch in prison; in addition Williams had given inconsistent statements to the police prior to trial concerning the home invasion. Although it may have been preferable for the trial court to have forced the state to call Williams as its own witness, the trial court did not abuse its broad discretion in making Williams the court's witness. We overrule Robinson's third assignment of error.

{¶8} Finally Robinson argues that the trial court erred by permitting Washington County Sheriff's Detective Scott Smeeks to testify as an expert witness using data from Robinson's cellular telephone to determine the general location of the phone at the time of the home invasion. Robinson's argument is meritless because he invited any error by agreeing to the admission of the detective's testimony at trial. And courts have permitted the admission of similar lay testimony using a defendant's cell phone records to compare the location of cellular towers used by the defendant's phone to the location of the specific crimes. We overrule Robinson's fourth assignment of error and affirm his convictions.

I. FACTS

{¶9} The Washington County Grand Jury returned a joint indictment against Brandon Robinson, Austin Wallace, and Nathan Williams. The indictment charged Robinson with complicity in aggravated burglary, complicity in aggravated robbery, and complicity in kidnapping. Robinson entered a plea of not guilty to the charges.

{¶10} Robinson filed two motions to suppress. In his first motion, he sought to suppress evidence that used his cell phone to track his location because those opinions violated the evidentiary rule on expert testimony. In his second motion he requested the suppression of evidence seized by the Washington County Sheriff's Department in its execution of search warrants of his home and person; he argued the affidavits filed in support of the warrants did not establish probable cause and the officers entered his house by force without knocking or otherwise attempting to gain entry into the home. He cited the Fourth Amendment to the United States Constitution in support of his second motion.

{¶11} The matter proceeded to a hearing on the motions. The parties settled Robinson's first motion by agreeing that testimony about the location of his cell phone during the commission of the crimes would not be offered as expert testimony, but instead as lay testimony, and the court would so instruct the jury. The court then denied the first motion as moot.

{¶12} Upon reviewing the supporting affidavit the trial court determined that probable cause existed for the issuance of the search warrants and denied that part of the second motion. Robinson's counsel requested more time to research the issue claiming a violation of the knock and announce rule. And the court noted that Robinson

"will notify the Court if he wishes to pursue it further." There is nothing additional in the record indicating that Robinson expressed the desire to pursue that issue further.

{¶13} The case then proceeded to a jury trial, which produced the following evidence. In July 2015, James Brookover, Brittany Barnett, and their then three-year-old son lived in a trailer in Vincent, Washington County, Ohio. After Barnett had finished a late shift as an ultrasound technician, she was called back into work around 1:00 a.m. on July 19, and took the family's only vehicle. Brookover fell asleep on a couch with their son and was awakened around 3:00 a.m. as he was being beaten and dragged across the floor by two men covered with masks, so that he could not identify them. The more muscular man was about 5'10" tall and the other man was skinnier and taller. They kept hitting him, demanded he tell them where his money and other "stuff" was, and they duct taped him to restrain him.

{¶14} The intruders had a big assault type rifle with a banana clip but Brookover could not tell if it was real or just an air rifle; and they had a small mallet. They also had a knife that they threatened him with. Brookover hit the taller man in the face with the mallet after he grabbed it away from him, but the two men then subdued Brookover. They stole $300 from his wallet and a tiny bit of heroin he kept in a keychain. They also stole about $1,000 that Barnett had received from a recent paycheck that she had cashed.

{¶15} The taller, skinnier man went outside and threw up on their porch. One of the robbers also left blood in the sink in the master bathroom.

{¶16} The men left and then came back a short time later, this time taking a large screen television, and leaving again shortly thereafter. During the second illegal

entry, the skinnier man called the other man "Austin," and they told Brookover not to talk to or text "Corynne."

{¶17} Brookover sustained a broken arm and cuts and bruises to his face and the rest of his body. The men trashed the entire house, but seemed to concentrate on the master bedroom and bathroom, where Barnett hid her money and valuables. When the assailants left the second time, Brookover took off the duct tape, grabbed his son, and started walking towards his mother's house.

{¶18} Barnett drove back home from work around 3:30 a.m. and found the house empty and in disarray. She then drove towards Brookover's mother's house and spotted him and their son walking along the road. Ultimately, they went back to their home and called the police. According to Brookover and Barnett, the only Austin they knew was Austin Wallace, who fit the description of the muscular assailant and who they knew only through Robinson. They had also met Nathan Williams through Robinson. Robinson also knew that Corynne Peroni owed Brookover and Barnett money.

{¶19} In addition to Barnett's job, she and Brookover sold heroin to a few friends to make enough money to support their own drug habit. Barnett testified that not many people knew that they would have heroin in their house and that Robinson had talked to her a couple days before the home invasion about the money they owed him.

{¶20} Upon the state's request and over Robinson's objection, Nathan Williams testified as a court witness after the court conducted an in camera examination where Williams testified that he would testify truthfully and fully. Williams and Wallace had already been convicted and sentenced upon their guilty pleas to aggravated burglary,

aggravated robbery, and kidnapping in connection with the same incident. Williams testified that on July 18, 2015, Wallace picked him up; they travelled to Robinson's home, where Robinson informed them that he had a friend who had money and drugs and that if they went and stole it, they could split the proceeds. They made masks out of t-shirts and on the way to the victim's residence, they stopped at a gas station convenience store, where Robinson purchased duct tape, so they could tie the victims up during the robbery. Williams testified they drove to the victims' trailer home, where he and Wallace broke in and stole drugs and money. Wallace was armed with a rifle that Williams described as a toy gun. He admitted bleeding in the sink at the residence.

{¶21} Williams also admitted to making contradictory statements to police, including first denying any involvement in the crimes, then stating that Robinson told him and Wallace about someone owing Robinson money and having drugs in their house, but that his memory was blurry about the things that followed thereafter. He later gave a statement that described more circumstances around the home invasion, including that Robinson "pitched the idea" and that they stopped at the gas station on the way to the victims' house.

{¶22} The sheriff's department obtained search warrants for Robinson's home and person (oral swabs for DNA testing) in late July 2015. The special response team for the sheriff's department executed the warrants. They arrived in an armored vehicle, and announced over the vehicle's PA system that they were from the sheriff's office, that they had a search warrant, and that the occupants needed to come out of the house immediately. When ten minutes passed without any response by any occupant, they shot gas into each window of the residence, forcing Robinson out of the house.

The law enforcement officers seized Robinson's iPhone and an Airsoft pellet rifle with an orange tip.

{¶23} Washington County Sheriff's Detective Scott Smeeks testified that when he seized the Airsoft rifle, he noticed black specks on the orange tip, which indicated that black tape had been placed over it to make it appear to be a real rifle. He later found black tape rolled up and shoved into the barrel of the rifle; the rifle, including the tape, subsequently went to BCI for testing. The trial court instructed the jury that Detective Smeeks would testify as a non-expert witness on the subject of using cellular towers to locate a cell phone. Smeeks testified that based on the data supplied by Verizon, Robinson's phone was in the general location of the victims' home during the time of the home invasion.

{¶24} BCI Forensic Scientist Sara DeVine testified that she tested the tape that had been shoved into the barrel of the Airsoft rifle and concluded that the DNA profile for the tape included a mixture of the DNA from Robinson and Wallace. She also indicated she would have to test 105,900,000 people to find another person who contributed to that DNA mixture. She concluded that the vomit on the t-shirt found outside the victims' residence included Williams's DNA. On cross-examination DeVine admitted that she relied on the DNA profiles generated from oral swabs of various people, including Robinson, that had been submitted by the sheriff's department. DeVine acknowledged she did not create these profiles herself, but they were developed by another BCI analyst. Robinson moved to strike DeVine's testimony based on a violation of his constitutional right to confrontation, but the trial court denied the motion.

{¶25} The jury returned a verdict finding Robinson guilty of all three complicity charges. The trial court sentenced him to prison and mandatory post-release control.

II. ASSIGNMENTS OF ERROR

{¶26} Robinson assigns the following errors for our review:

1. THE TRIAL COURT ERRED IN OVERRULING DEFENDANT'S MOTION TO SUPPRESS THE EVIDENCE OBTAINED IN EXECUTION OF THE SEARCH WARRANT ON DEFENDANT'S HOME, WHEN THE STATE FAILED TO OBSERVE THE "KNOCK AND ANNOUNCE" RULE AS SPECIFIED IN O.R.C. 2935.12(A) AND RELEVANT CONSTITUTIONAL LAW.

2. THE TRIAL COURT ERRED REVERSIBLY WHEN IT DENIED APPELLANT'S MOTION TO STRIKE THE TESTIMONY OF WITNESS SARA DEVINE, BECAUSE SHE WAS NOT THE SCIENTIST WHO PROFILED THE ORAL SWABS AND THE ABSENCE OF THAT SCIENTIST VIOLATES THE CONFRONTATION CLAUSE.

3. THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION WHEN IT PERMITTED CO-DEFENDANT NATHAN WILLIAMS TO TESIFY AS A COURT WITNESS INSTEAD OF A STATE WITNESS.

4. THE TRIAL COURT ERRED BY PERMITTING DETECTIVE SMEEKS TO TESTIFY AS AN EXPERT WITNESS, WHICH HE WAS NOT, IN THE GUISE OF OFFERING LAY TESTIMONY.

III. LAW AND ANALYSIS

A. Motion to Suppress Evidence Based on Violation of Knock and Announce Rule

{¶27} Robinson asserts that the trial court erred in overruling his motion to suppress the evidence obtained in the search of his home because the state failed to observe the "knock and announce" rule stated in R.C. 2935.12(A) and relevant constitutional law.

{¶28} Appellate review of a trial court's decision on a motion to suppress raises a mixed question of law and fact. *State v. Hobbs*, 133 Ohio St.3d 43, 2012-Ohio-3886, 975 N.E.2d 965, ¶ 6. Because the trial court acts as the trier of fact in suppression hearings and is in the best position to resolve factual issues and evaluate the credibility of witnesses, we must accept the trial court's findings of fact if they are supported by competent, credible evidence. *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, 797 N.E.2d 71, ¶ 8. Accepting these facts as true, we must then "independently determine, without deference to the conclusion of the trial court, whether the facts satisfy the applicable legal standard." *Hobbs* at ¶ 8, citing *Burnside* at ¶ 8.

{¶29} Robinson is correct that his trial counsel raised this issue in one of his motions by moving to suppress "the fruits of said warrants on the grounds that the officers execut[ing] the warrant entered [his] house by force without knocking or otherwise attempting to gain entry into said home."

{¶30} Nevertheless, his claim that the trial court failed to address this contention is not true. In its entry denying Robinson's motions to suppress, the trial court emphasized that "[t]he issue as to the manner of the entry into the Defendant's home was not taken up at this time, as the Defendant requested more time to further research the issue and will notify the Court if he wishes to pursue it further." At no time during the hearing did Robinson's trial counsel state that he wished to proceed on this issue, and there is nothing in the record, including the trial, where Robinson stated that he wished to pursue it further.

{¶31} In effect, by his representation to the court that he wanted more time to research the issue and that he would notify the court if he chose to pursue it, and his

subsequent failure to do so, Robinson abandoned this claim and invited any potential error in not considering it. *See Martin v. Jones*, 2015-Ohio-3168, 41 N.E.3d 123, ¶ 2 (4th Dist.), quoting *State ex rel. Kline v. Carroll*, 96 Ohio St.3d 404, 2002-Ohio-4849, 775 N.E.2d 517, ¶ 27 (" 'Under [the invited-error] doctrine, a party is not entitled to take advantage of an error that he himself invited or induced the court to make.' ").

{¶32} Where a defendant makes and subsequently withdraws a motion to suppress containing the same exact arguments he raises on appeal, he knowingly and voluntarily waives those arguments and the appellate court may not consider those abandoned claims. *See U.S. v. Givens*, 647 Fed.Appx. 578, 582 (6th Cir.2016); *State v. Campbell*, 69 Ohio St.3d 38, 44, 630 N.E.2d 339 (1994). By abandoning his claim Robinson waived even plain error. *State v. Hardie*, 4th Dist. Washington No. 14CA24, 2015-Ohio-1611, ¶ 11, citing *State v. Rohrbaugh*, 126 Ohio St.3d 421, 2010-Ohio-3286, 934 N.E.2d 920, ¶ 10 (invited error waives plain error); *Givens* at 582 (withdrawal of a suppression motion waives the ability to challenge any error); *see also United States v. Olano*, 507 U.S. 725, 733, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993), quoting *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S.Ct. 1019, 82 L.Ed.1461 (1938) ("Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the 'intentional relinquishment or abandonment of a known right.' * * *. Mere forfeiture, as opposed to waiver, does not extinguish an 'error' ").

{¶33} Moreover, even if he did not invite error or otherwise waive his claim by failing to pursue his motion on this ground, he still forfeited anything but plain error. At trial he did not argue that the evidence obtained from the search of his residence should have been suppressed based on state constitutional rights that are broader than federal

constitutional rights. In the relevant suppression motion Robinson did not cite the state constitutional provision and only generally cited the Fourth Amendment to the United States Constitution. *See State v. Lawson*, 4th Dist. Highland No. 14CA5, 2015-Ohio-189, ¶ 14, quoting *State v. Knott*, 4th Dist. Athens No. 03CA30, 2004-Ohio-5745, ¶ 9, and citing Evid.R. 103(A)(1) (" 'Because counsel's objection did not apprise the [trial] court of this specific argument, we believe a plain error analysis of the issue is appropriate' "); *see also* Painter and Pollis, *Ohio Appellate Practice*, § 1:36 (2016) ("An objection to the admission of evidence on one ground * * * does not, for purposes of appeal, preserve objections to the evidence on other grounds").

{¶34} Because Robinson does not claim plain error on appeal, we need not address it. *See State v. Quarterman*, 140 Ohio St.3d 464, 2014-Ohio-4034, 19 N.E.3d 900, ¶ 17–20 (appellate court need not consider plain error where appellant fails to timely raise plain-error claim); *State v. Gavin*, 4th Dist. Scioto No. 13CA3592, 2015-Ohio-2996, ¶ 25.

{¶35} More importantly, Robinson cannot establish plain error. To prevail on a claim of plain error he must show that an error occurred, that the error was plain, and that but for the error, the outcome of the trial clearly would have been otherwise. *State v. Mammone*, 139 Ohio St.3d 467, 2014-Ohio-1942, 13 N.E.3d 1051, ¶ 69. Appellate courts take notice of plain error with utmost caution, under exceptional circumstances, and only to prevent a manifest miscarriage of justice. *State v. Obermiller*, 147 Ohio St.3d 175, 2016-Ohio-1594, 63 N.E.3d 93, ¶ 62.

{¶36} The "knock and announce" rule, which is codified in R.C. 2935.12, "directs police officers executing a search warrant at a residence to first knock on the door,

announce their purpose, and identify themselves before they forcibly enter the home." *State v. Oliver*, 112 Ohio St.3d 447, 2007-Ohio-372, 860 N.E.2d 1002, ¶ 9, citing *Wilson v. Arkansas*, 514 U.S. 927, 935-936, 115 S.Ct. 1914, 131 L.Ed.2d 976 (1995). However, in *Hudson v. Michigan*, 547 U.S. 586, 126 S.Ct. 2159, 165 L.Ed.2d 56 (2006), the Supreme Court of the United States held that even if the police violate the knock and announce rule before executing a search warrant, the Fourth Amendment does not require suppression of the evidence in the ensuing search. The Supreme Court concluded that these rules vindicate different interests. The exclusionary rule vindicates the Fourth Amendment's prohibition against the unlawful warrantless search and seizure of evidence, whereas the knock and announce rule vindicates the protection of human life and limb, property, privacy, and dignity. *Id.* at 591-594.

{¶37} Based on *Hudson*, several appellate courts, including this one, have held that the exclusionary rule does not apply to violations of the knock and announce rule. *See State v. Eldridge*, 4th Dist. Scioto No. 11CA3441, 2012-Ohio-3747, ¶ 32, quoting *Hudson* at 594 (" 'What the knock-and-announce rule has never protected, however, is one's interest in preventing the government from seeing or taking evidence described in a warrant. Since the interests that *were* violated in this case have nothing to do with the seizure of the evidence, the exclusionary rule is inapplicable' " [Emphasis sic.]); *see also State v. Gervin*, 3d Dist. Marion No. 9-15-51, 2016-Ohio-5670, fn. 2, and cases cited).

{¶38} In light of *Hudson* Robinson does not suggest that Fourth Amendment precedent warrants application of the exclusionary rule. Instead, he argues on appeal for the first time that he is entitled to exclusion of the evidence based on the broader

protections of the similarly worded search and seizure provision of Article I, Section 14 of the Ohio Constitution. Robinson cites no appellate court decision that has adopted that proposition. In fact, the Supreme Court of Ohio has heard oral argument in a pending case that raises this issue in *State v. Bembry*, 145 Ohio St.3d 1470, 2016-Ohio-3028, 49 N.E.3d 1313. Robinson cannot establish plain error under these circumstances.

{¶39} Therefore, because Robinson waived, invited and/or forfeited any error by effectively withdrawing his motion to suppress on this issue, we overrule his first assignment of error.

B. Motion to Strike Forensic Testimony of Sara DeVine

{¶40} In his second assignment of error Robinson contends that the trial court erred when it denied his motion to strike the testimony of BCI forensic scientist Sara DeVine. She testified she was not the scientist who tested the oral swabs used to produce Robinson's known DNA profile. Robinson claims the absence of that scientist violates the Confrontation Clause.

{¶41} DeVine testified that she performed DNA analysis on two items of evidence, including a piece of black electrical tape shoved into the barrel of an Airsoft pellet rifle. After comparing the DNA obtained from the tape with the DNA profiles of known individuals made by another BCI forensic scientist, she concluded that the DNA on the tape contained a mixture that included Robinson and co-defendant Austin Wallace as potential contributors. The scientist who produced the known DNA profiles did not testify and was not shown to be unavailable to testify. Robinson moved to strike

DeVine's testimony because it violated his constitutional right to confront the BCI employee who made the DNA profile from the Robinson's oral swabs submitted.

{¶42} The determination of a motion to strike based upon evidentiary rules is normally within a court's discretion. *State ex rel. Dawson v. Bloom-Carroll Local School Dist.*, 131 Ohio St.3d 10, 2011-Ohio-6009, 959 N.E.2d 524, ¶ 23. Consequently, absent an abuse of discretion an appellate court will not disturb a trial court's ruling on a motion to strike. *State ex rel. Mora v. Wilkinson*, 105 Ohio St.3d 272, 2005-Ohio-1509, 824 N.E.2d 1000, ¶ 10. " '[A]buse of discretion' [is] an 'unreasonable, arbitrary, or unconscionable use of discretion, or * * * a view or action that no conscientious judge could honestly have taken.' " *State v. Kirkland*, 140 Ohio St.3d 73, 2014-Ohio-1966, 15 N.E.3d 818, ¶ 67, quoting *State v. Brady*, 119 Ohio St.3d 375, 2008-Ohio-4493, 894 N.E.2d 671, ¶ 23.

{¶43} However, the Sixth Amendment to the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right * * * to be confronted with the witnesses against him * * *." Thus we review the constitutional challenge on a de novo basis. *State v. Nguyeri*, 4th Dist. Athens No. 12CA14, 2013-Ohio-3170, ¶44.

{¶44} The Supreme Court of the United States has held that under this Confrontation Clause, "testimonial statements" made outside of court by a witness who does not testify at trial may be admitted at trial only when the declarant is unavailable and the defendant has had a prior opportunity to cross-examine the witness. *See Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). Testimonial statements implicated by the Confrontation Clause include statements made under circumstances that would lead an objective witness reasonably to believe

that the statement would be available for use at a later trial. *Id.* at 52; *State v. Smith*, 2016-Ohio-5062, 70 N.E.3d 150, ¶ 89 (4th Dist.).

{¶45} In *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 129 S.Ct. 2527, 174 L.Ed.2d 314 (2009), the United States Supreme Court held that state forensic laboratory certificates of analysis, which concluded a white powdery substance seized as evidence was cocaine, were functionally identical to live, in-court testimony. Thus, they had been admitted at trial in violation of the defendant's right to confrontation.

{¶46} Similarly, in *Bullcoming v. New Mexico*, 564 U.S. 647, 131 S.Ct. 2705, 180 L.Ed.2d 610 (2011), the United States Supreme Court held that the defendant, who was convicted of aggravated driving while intoxicated, had a right to confront the forensic laboratory analyst who certified in a lab report that the defendant's blood-alcohol concentration was above the legal limit. Therefore, testimony of a surrogate analyst who was familiar with the lab's testing procedures, but had not personally performed or observed the test on defendant's blood sample, was insufficient to avoid the confrontation violation.

{¶47} However, in its most recent case, the United States Supreme Court held that the Confrontation Clause did not bar an expert from expressing an opinion based on a DNA profile that the testifying expert had not prepared. *Williams v. Illinois*, 567 U.S. 50, 132 S.Ct. 2221, 183 L.Ed.2d 89 (2012). In *Williams* an outside diagnostic laboratory prepared a DNA profile from vaginal swabs taken from a sexual assault victim. The state's expert opined that the DNA profile in the outside report matched the defendant's DNA profile in a state "known" database. The report from the outside laboratory, which contained the DNA profile from the vaginal swabs, was not introduced

into evidence. Nor was it shown that the scientist from the outside lab was "unavailable."

{¶48} The plurality opinion in *Williams* held that "this form of expert testimony does not violate the Confrontation Clause because that provision has no application to out-of-court statements that are not offered to prove the truth of the matter asserted." *Id.*, 132 S.Ct. at 2228; *State v. Keck*, 137 Ohio St.3d 550, 2013-Ohio-5160, 1 N.E.3d 403, ¶ 13. "When an expert testifies for the prosecution in a criminal case, the defendant has the opportunity to cross-examine the expert about any statements that are offered for their truth. Out-of-court statements that are related by the expert solely for the purpose of explaining the assumptions on which that opinion rests are not offered for their truth and thus fall outside the scope of the Confrontation Clause." *Williams*, 132 S.Ct. at 2228; *Keck* at ¶ 13.

{¶49} The lead opinion in *Williams* concluded in the alternative, that even if the outside laboratory report had been admitted into evidence, "there would be no Confrontation Clause violation, because the report was produced before any suspect was identified, was not sought for the purpose of obtaining evidence to be used against the defendant, and was not inherently inculpatory. *Id.* For the final reason, the court explained:

> The situation in which the Cellmark technicians found themselves was by no means unique. When lab technicians are asked to work on the production of a DNA profile, they often have no idea what the consequences of their work will be. In some cases, a DNA profile may provide powerful incriminating evidence against a person who is identified either before or after the profile is completed. But in others, the primary effect of the profile is to exonerate a suspect who has been charged or is under investigation. The technicians who prepare a DNA profile generally have no way of knowing whether it will turn out to be incriminating or exonerating—or both.

Williams, 132 S.Ct. at 2244.

{¶50} Justice Thomas provided a concurring opinion in *Williams*, 567 U.S. 50, 132 S.Ct. 2221, at 2255, 183 L.Ed.2d 89 (Thomas, J., concurring), which agreed with the four-Justice plurality's conclusion that there was no confrontation violation, but for the reason that the outside laboratory's statements lacked the requisite formality and solemnity to be considered testimonial for purposes of the Confrontation Clause.

{¶51} We readily acknowledge that the interpretation of the United States Supreme Court precedent concerning the applicability of the Confrontation Clause to DNA analysis and related documents presents a difficult question. Under varying circumstances, "[c]ourts have been almost evenly divided in their opinions as to whether DNA reports—showing the DNA profiles of samples taken from the crime scene and/or whether those profiles match those of the criminal defendant—constitute 'testimonial evidence' so as to trigger the protections of the Confrontation Clause." *See generally* Annotation, *Application of Crawford Confrontation Clause Rule to DNA Analysis and Related Documents*, 17 A.L.R.7th Art. 3, Section 2 (2016).

{¶52} However, we conclude that this case is closer to the facts in *Williams* than it is to the facts in either *Bullcoming* or *Melendez-Diaz*. Like the expert testimony in *Williams*, DeVine provided the testimony and report linking the sample DNA evidence to the known DNA profile of the defendant. Like the outside laboratory report containing the DNA profile from the victim's vaginal swabs in *Williams*, the DNA profile of Robinson's mouth swabs was not admitted into evidence, but was used by the state expert as an assumption upon which her report and conclusion was based. And like the state expert who performed the DNA comparison in *Williams*, Devine's opinion was

subject to cross-examination concerning the underlying assumptions for her opinions and conclusions. Finally, like the outside laboratory technicians in *Williams*, the BCI analyst who performed the DNA profile of Robinson's mouth swabs here would not have necessarily known what the consequences of the work would be—whether it would lead to incriminating or exonerating evidence. And unlike the test results in either *Bullcoming* or *Melendez-Diaz*, the report of the DNA profile was not introduced into evidence as the dispositive fact of the crimes involved, i.e., to prove the substance was cocaine in a cocaine trafficking case, or to establish that the defendant's blood alcohol content was above the legal limit in an aggravated DUI case.

{¶53} Therefore, we conclude the trial court did not violate Robinson's constitutional right to confrontation by denying his motion to strike DeVine's testimony. We overrule Robinson's second assignment of error.

C. Calling Co-Defendant Nathan Williams as a Court Witness

{¶54} In his third assignment of error Robinson claims that the trial court abused its discretion when it permitted one of the co-defendants, Nathan Williams, to testify as a court witness instead of as a state witness.

{¶55} Under Evid.R. 614(A), "[t]he court may, on its own motion or at the suggestion of a party, call witnesses, and all parties are entitled to cross-examine witnesses thus called." "The trial court's decision to call a witness under Evid.R. 614(A) is within the trial court's discretion and will not be reversed absent an abuse of discretion." *See, e.g., State v. Beaver*, 3d Dist. Union No. 14-13-15, 2014-Ohio-4995, ¶ 49.

{¶56} In *State v. Adams*, 62 Ohio St.2d 151, at 156-157, 404 N.E.2d 144 (1980), the Supreme Court of Ohio observed that it was "not in total disagreement with the general rule formulated by the Court of Appeals" that " 'because of the great potential for prejudice, absent special circumstances which should be placed in the record, the general rule must be that the court should not call a witness.' " The risks of prejudice include the jury awarding more deference and credibility to court witnesses than party witnesses and an abandonment by the trial court of impartiality. *Id.* at fn. 8. Nevertheless, a trial court does not abuse its discretion in calling an individual as a court's witness when the testimony would be beneficial to ascertaining the truth of the matter and there is some indication that the witness's trial testimony will contradict a prior statement made to law enforcement officers. *See State v. Tracey*, 5th Dist. Muskingum No. CT2015-0040, 2016-Ohio-5255, ¶ 38, citing *State v. Arnold*, 189 Ohio App.3d 507, 2010-Ohio-5379, 939 N.E.2d 218, ¶ 44 (2d Dist.).

{¶57} Robinson does not argue on appeal that Williams's testimony was not beneficial to the jury's truth-finding responsibility. Williams was a co-defendant in the case, a participant in the home invasion that led to the criminal charges against Robinson, and his testimony provided a link between Robinson and the crimes.

{¶58} Nor does Robinson suggest that Williams did not provide inconsistent statements to law enforcement concerning both his and Robinson's involvement in the home invasion—in fact he admits on appeal that Williams gave "several different versions previously." Under these circumstances, a belief on the part of the state that it was not certain how Williams would testify at trial was justified.

{¶59} Moreover, the state represented to the trial court that Williams may be reluctant to testify against Robinson as a state's witness, as opposed to testifying as a court witness, because he would then be more likely to be labeled a snitch in prison. *See Beaver*, 2014-Ohio-4995, at ¶ 48, citing *State v. Renner*, 2d Dist. Montgomery No. 25514, 2013-Ohio-5463, ¶ 23 ("The purpose of calling a witness as a court's witness is to allow for a proper determination in a case where a witness is reluctant or unwilling to testify, or there is some indication that the witness's trial testimony will contradict a prior statement to police").

{¶60} Although we may not have reached the same conclusion as the trial court, under these circumstances we find that the court did not abuse its broad discretion in deciding to call Williams as a court witness. *State v. Felts*, 2016-Ohio-2755, 52 N.E.3d 1223, ¶ 29 (4th Dist.), citing *State v. Darmond*, 135 Ohio St.3d 343, 2013-Ohio-966, 986 N.E.2d 971, ¶ 34 (abuse of discretion "review is deferential and does not permit an appellate court to simply substitute its judgment for that of the trial court").

{¶61} Nor is there any evidence of prejudice to Robinson from having Williams testify as a court witness as opposed to a state witness. There is no evidence that the jury accorded Williams's testimony more deference and credibility merely because he was called as a court witness. In fact, he was wearing an orange prison jumpsuit and shackles when he testified. There is also no evidence that Robinson was prejudiced by the state being able to ask leading questions of Williams and to impeach him. *See Beaver* at ¶ 52 (defendant "did not provide any argument relative to how he was prejudiced by the State being permitted to ask [the court witness] leading questions, and we decline to make an argument for him on appeal"). Finally, in *Adams*, 62 Ohio St.2d

at 158, 404 N.E.2d 144, the Supreme Court of Ohio emphasized in finding no reversible error in the trial court's calling of a witness, "[t]he court's examination was short, and it consisted of non-leading questions." Here, the trial court merely informed the jury that Williams had entered a guilty plea to the crimes alleged in the indictment against him and had been sentenced to prison, and did not ask any questions of him, instead allowing the parties to cross-examine him.

{¶62} Because the trial court did not abuse its discretion in calling Williams as a court witness, we overrule Robinson's third assignment of error.

D. Lay Testimony of Detective Scott Smeeks

{¶63} In his fourth assignment of error Robinson argues that the trial court erred by permitting Detective Smeeks to testify as an expert witness to determine the general location of Robinson's cell phone during the time of the home invasion.

{¶64} In one of his motions to suppress Robinson objected to any evidence related to "the tracking of the Defendant on the grounds that such 'opinions' or scientific testing, violate the requirements of Rule 752 [sic] of the Ohio Rules of Evidence." The trial court denied the motion as moot after the parties reached an agreement that testimony about the location of Robinson's cell phone during the home invasion would be offered as lay testimony instead of as expert testimony and the jury would be instructed accordingly.

{¶65} At trial Detective Smeeks testified about the location of Robinson's cell phone based on data he received from Robinson's service provider, Verizon. As the parties had agreed, the trial court instructed the jury that Detective Smeeks was "not an expert, and his testimony should not be considered as expert testimony" on the subject

of using cell towers to find the location of a cell phone." By agreeing to the introduction of this lay testimony, Robinson invited any error. *See State v. Hardie*, 4th Dist. Washington No. 14CA24, 2015-Ohio-1611 ¶11, quoting *State v. Neyland*, 139 Ohio St.3d 353, 2014-Ohio-1914, 12 N.E.3d 1112, ¶243 ("Under the invited error doctrine, a party is not entitled to take advantage of an error that he himself invited or induced the trial court to make").

{¶66} Moreover, the premise of his assigned error is incorrect—the trial court did not permit Detective Smeeks to testify as an expert; it expressly advised the jury that the detective's testimony concerning the location of Robinson's cell phone constituted lay testimony instead of expert testimony. Ohio precedent holds that "testimony concerning a defendant's cell phone records and the location of cellular towers used by a defendant's phone in relation to locations relevant to the crime constitutes lay opinion testimony that does not require 'specialized knowledge, skill, experience, training, or education' regarding cellular networks." *State v. Wilson*, 8th Dist. Cuyahoga No. 104333, 2017-Ohio-2980, ¶ 30, quoting Evid.R. 702(B); *see also State v. Daniel*, 8th Dist. Cuyahoga No. 102358, 2016-Ohio-5231, ¶ 69.

{¶67} We overrule Robinson's fourth assignment of error.

IV. CONCLUSION

{¶68} Having overruled Robinson's assignments of error, we affirm the judgment of the trial court.

JUDGMENT AFFIRMED.

Hoover, J., concurring in judgment and opinion in part, and concurring in judgment only in part, with opinion:

{¶69} I concur in the judgment and opinion of the lead opinion as to Assignments of Error Two, Three, and Four. However, I concur in the judgment only as to Assignment of Error One. I write separately only to note my disagreement with the holdings of the majority opinion in *Hudson v. Michigan*, 547 U.S. 586, 126 S.Ct. 2159, 165 L.E.2d 56 (2006).

{¶70} The lead opinion relies upon *Hudson*, *Id.* at 591-594, for the proposition that "even if the police violate the knock and announce rule before executing a search warrant, the Fourth Amendment does not require suppression of the evidence in the ensuing search."

{¶71} However, I disagree with the findings enunciated by the majority in *Hudson*. I note that *Hudson* was decided 5-4 by the Court. Furthermore, I find the dissenting opinion to be more compelling. Justice Breyer states in his dissenting opinion, which was joined by Justices Stevens, Souter, and Ginsburg:

> * * * [T]he Court destroys the strongest legal incentive to comply with the Constitution's knock-and-announce requirement. And the Court does so without significant support in precedent. At least I can find no such support in the many Fourth Amendment cases the Court has decided in the near century since it first set forth the exclusionary principle in *Weeks v. United States,* 232 U.S. 383, 34 S.Ct. 341, 58 L.Ed. 652 (1914). See Appendix, *infra*.
>
> Today's opinion is thus doubly troubling. It represents a significant departure from the Court's precedents. And it weakens, perhaps destroys,

> much of the practical value of the Constitution's knock-and-announce protection.

Hudson at 605.

{¶72} Although I take issue with the *Hudson* majority opinion, I recognize that we are bound by and must follow the decisions of the United States Supreme Court. Therefore, while I disagree with the majority opinion in *Hudson*, and thus the lead opinion's reliance upon it, I nonetheless reluctantly concur with the lead opinion's resolution of Assignment of Error One.

{¶73} Otherwise, I concur in the judgment and opinion with respect to Assignments of Error Two, Three, and Four.

JUDGMENT ENTRY

It is ordered that the JUDGMENT IS AFFIRMED and that Appellant shall pay the costs.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Washington County Court of Common Pleas to carry this judgment into execution.

IF A STAY OF EXECUTION OF SENTENCE AND RELEASE UPON BAIL HAS BEEN PREVIOUSLY GRANTED BY THE TRIAL COURT OR THIS COURT, it is temporarily continued for a period not to exceed sixty days upon the bail previously posted. The purpose of a continued stay is to allow Appellant to file with the Supreme Court of Ohio an application for a stay during the pendency of proceedings in that court. If a stay is continued by this entry, it will terminate at the earlier of the expiration of the sixty day period, or the failure of the Appellant to file a notice of appeal with the Supreme Court of Ohio in the forty-five day appeal period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Supreme Court of Ohio. Additionally, if the Supreme Court of Ohio dismisses the appeal prior to expiration of sixty days, the stay will terminate as of the date of such dismissal.

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

Hoover, J.: Concurs in Judgment and Opinion as to Assignments of Error II, III, and IV; Concurs in Judgment Only as to Assignment of Error I with opinion.
McFarland, J.: Concurs in Judgment Only.

For the Court

BY: _____
William H. Harsha, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.