[Cite as *State v. Thomas*, 2012-Ohio-2430.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

WARREN COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NO. CA2010-10-099
	:	O P I N I O N
- vs -		6/4/2012
	:	
BRIAN D. THOMAS,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM FRANKLIN MUNICIPAL COURT
Case No. 10-04-CRB-2094

Steven Runge, 401 South Main Street, P.O. Box 292, Franklin, Ohio 45005, for plaintiff-appellee

Andrea G. Ostrowski, 25 East Central Avenue, Suite 4, Springboro, Ohio 45066, for defendant-appellant

RINGLAND, J.

{¶ 1} Defendant-appellant, Brian D. Thomas, appeals his conviction in the Franklin Municipal Court for a violation of a civil protection order. For the reasons outlined below, we affirm.

{¶ 2} On December 30, 2009, the Warren County Common Pleas Court issued a domestic violence civil protection order against Thomas to remain in effect for one year. The

order named Thomas' minor child and the minor child's mother, Alana Turner, as protected persons. Pursuant to the order, numerous restrictions were placed on Thomas. One restriction prohibited Thomas from interfering or initiating contact with the residence of the protected persons. On April 1, 2010, Thomas and Turner modified the civil protection order through an agreed entry, whereby they agreed to remove their minor child as a protected person. However, the agreement stated that all other restrictions in the civil protection order were to remain in effect.

{¶ 3} On April 14, 2010, a criminal complaint was filed against Thomas for allegedly violating the civil protection order on or about April 13, 2010, in violation of R.C. 2919.27(B), a misdemeanor in the first degree. As a result of this charge, a bench trial was held on July 15, 2010. At trial, the state presented testimony from Turner and Stella Ward, a neighbor and an occasional babysitter for Turner's children. The state also called Officer Michael Back, the officer who responded to the call for the alleged civil protection order violation, as a rebuttal witness.

{¶ 4} Ward initially testified that on April 13, 2010, when she looked out her front door, she saw Thomas walking on the sidewalk near her apartment. In order to see what he was doing, Ward left her apartment and saw that Thomas had stopped in front of Turner's apartment where he proceeded to knock on Turner's door and "try" the door handle. Ward testified that she later observed Thomas in the back of the apartment complex. Ward testified that she told Thomas that Turner was on her way home and that Turner was going to call the police. At some point, Ward called Turner at work to tell her to come home and also observed Thomas drive off in his vehicle. When asked on cross-examination about the time of the incident, Ward testified that she observed Thomas at Turner's apartment in the late morning, sometime around 11:00 a.m. or 11:30 a.m. Similarly, Turner's testimony revealed that while she was at work, sometime between 11:00 a.m. and 11:30 a.m., she received a

call from Ward, who indicated she needed to come home. By the time Turner walked home, Thomas was no longer at her residence. Turner testified that she immediately called the police.

{¶ 5} The defense, in addition to introducing Thomas' testimony, presented testimony from Andy Allbgeyer, an investigator for Warren County Children Services; Diane Ranson, Thomas' neighbor and former coworker; Alicia Jones, Thomas' former girlfriend; and Anneta Kabler, a friend of Thomas who was in contact with him several times a week. Except for the testimony of Allbgeyer, which revealed he thought Ward tried to coach the testimony of the minor child involved during an interview, the remainder of the defense witnesses testified to either seeing Thomas or talking with him on the phone on April 12, 2010, rather than April 13, 2010.

{¶ 6} Ranson testified that she had just been laid off work. As Thomas' neighbor, she noticed that both of Thomas' vehicles had not moved in several days. Ranson also testified that Thomas came to her house on April 12 sometime around 12:10 p.m. or 12:15 p.m. and stayed for approximately two hours. Both the testimony of Jones and Kabler heavily relied on Thomas' cellular telephone records. With the aid of Thomas' cellular telephone records, Jones testified that Thomas called her house at 11:19 a.m. and that she talked with him for eleven minutes. Jones testified that she knew Thomas was home because she could hear street noises and his cat meowing. Also with the aid of Thomas' cellular telephone records, Kabler testified that she talked with Thomas almost continuously from 8:24 a.m. until 11:18 a.m. on April 12.

{¶ 7} Thomas testified that his minor child was originally included as a protected person in the civil protection order, but he and Turner later re-established his parenting time through an agreed entry. Initially, Thomas testified to his whereabouts on April 12. Thomas was sure the alleged incident supposedly occurred on a Monday, which would have been

April 12. To account for Thomas' whereabouts, defense counsel walked through Thomas' cellular telephone records for April 12 beginning with the first outgoing text message sent at 6:31 a.m. Thomas testified that he had not driven his red truck since the Friday before the alleged incident and had not driven his black Honda since his birthday in November 2009. He further testified that he had not been to Turner's residence since Christmas 2009. After the state called Officer Back as a rebuttal witness, who testified the incident occurred on April 13, 2010, defense counsel recalled Thomas to the stand to testify to his whereabouts on April 13. Thomas testified that he went to Kabler's residence fairly early, sometime between 9:00 a.m. and 10:00 a.m. and was there until around 4:00 p.m. Defense counsel also went through Thomas' cellular telephone records with Thomas for April 13. However, Thomas' cellular telephone records revealed that he made two calls to Kabler, one to her landline and one to her cellular telephone around 11:45 a.m. on April 13.

{¶ 8} At the conclusion of all the testimony, Thomas was found guilty of violating the civil protection order and subsequently sentenced to one year of probation and 180 days in jail, with 165 days suspended. Thomas was also ordered to pay a $350 fine and court costs.

{¶ 9} Thomas now appeals, and raises four assignments of error for review.

{¶ 10} Assignment of Error No. 1:

{¶ 11} THE TRIAL COURT ERRED WHEN IT ADMITTED INTO EVIDENCE CERTAIN EXHIBITS.

{¶ 12} Thomas argues that two of the state's exhibits should not have been admitted into evidence because they were not properly identified or authenticated. Thomas argues that the statement Turner gave to Officer Back, State's Exhibit No. 2, was not properly authenticated because Turner's testimony regarding the exhibit was developed on redirect examination and was outside the scope of cross-examination. Thomas also asserts that Turner's cellular telephone bill, State's Exhibit No. 3, was not authenticated because there is

no indication in the record that the prosecutor actually showed the exhibit to any witness. However, Thomas forfeited any argument that these exhibits were inadmissible, absent plain error, because he failed to object to the admission of both exhibits. Evid.R. 103; Crim.R. 52(B).

{¶ 13} Pursuant to Crim.R. 52(B), plain error exists where there is an obvious deviation from a legal rule that affected the defendant's substantial rights or influenced the outcome of the proceedings. *State v. Blanda*, 12th Dist. No. CA2010-03-050, 2011-Ohio-411, ¶ 20, citing *State v. Barnes*, 94 Ohio St.3d 21, 27 (2002). Notice of plain error must be taken with utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice. *State v. Bai*, 12th Dist. No. CA2010-05-116, 2011-Ohio-2206, ¶ 117, citing *State v. Long*, 53 Ohio St.2d 91 (1978), paragraph three of the syllabus. Accordingly, an appellate court will not reverse a trial court's decision on plain error grounds unless the outcome of the trial would have been different. *State v. Starks*, 12th Dist. No. CA2010-09-087, 2011-Ohio-2344, ¶ 27.

{¶ 14} In general, the admission of relevant evidence lies within the sound discretion of the trial court. *State v. Sage*, 31 Ohio St.3d 173 (1987), paragraph two of the syllabus. An appellant must "show that the trial court abused its discretion in the admission or exclusion of the evidence in question, and that the appellant has been materially prejudiced thereby." *State v. Martin*, 19 Ohio St.3d 122, 129 (1985). Similarly, "[t]he control of redirect examination is committed to the discretion of the trial judge and a reversal upon that ground can be predicated upon nothing less than a clear abuse thereof." *State v. Wilson*, 30 Ohio St.2d 199, 204 (1972); *State v. Thompson*, 12th Dist. No. CA94-07-147, 1995 WL 295253, *3 (May 15, 1995). "The term 'abuse of discretion' connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (1983).

{¶ 15} "The requirement of authentication or identification 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). This threshold requirement for authentication of evidence is low and does not require conclusive proof of authenticity. *State v. Easter*, 75 Ohio App.3d 22, 25 (4th Dist.1991). Instead, the state must only demonstrate a "reasonable likelihood" that the evidence is authentic. *State v. Bell*, 12th Dist. No. CA2008-05-044, 2009-Ohio-2335, ¶ 30. To authenticate a writing, a witness with knowledge may testify that the "matter is what it is claimed to be." Evid.R. 901(B)(1); *State v. Jackson*, 12th Dist. No. CA2011-01-001, 2011-Ohio-5593, ¶ 15. As to the scope of redirect examination, it is generally limited to matters inquired into by the adverse party on cross-examination. *State v. Corbin*, 12th Dist. No. CA2010-01-001, 2010-Ohio-3819, ¶ 20, citing *Holtz v. Dick*, 42 Ohio St. 23 (1884), syllabus.

{¶ 16} In this case, the following exchange took place during Turner's cross-examination:

> Q. Did you write a report, did you write a statement, a statement based on the incidents that you know had occurred from that day?
>
> A. From April the 13th or 12th, yes I did.
>
> Q. And do you know if it was the 13th or the 12th?
>
> A. Uh.
>
> Q. Do you know which day it was?
>
> A. What it says on the police report.
>
> Q. Well, it says different things, which is why I'm asking. Do you know what date, what day of the week it was?
>
> A. Quite frankly I couldn't tell you exactly the day of the week.

{¶ 17} On redirect, the following exchange took place between the

prosecutor and Turner:

> Q. Okay. Uh, you were asked about a statement that you wrote for the police when this incident happened. Let me show you what's been marked as State's Exhibit "2". Is that the statement that you wrote and gave to Patrolman Back the day this incident happened?
>
> A. Yes sir.
>
> Q. Okay. And what date did you put on?
>
> A. It's April the 13th.

{¶ 18} The above exchange reveals that Turner properly identified and authenticated the statement she gave to Officer Back as a witness with knowledge that the statement offered into evidence by the state was what it appeared to be. Furthermore, the authentication of the statement on redirect was proper because the state merely addressed the implication by defense counsel during Turner's cross-examination that the incident occurred on April 12. We find there was no error, plain or otherwise, in the admission of Turner's statement to Officer Back for lack of authentication.

{¶ 19} Also in his first assignment of error, Thomas challenges the admission of Turner's cellular telephone bill and claims it was not properly authenticated. The use of a cellular telephone bill to prove the truth of matters asserted within its contents constitutes hearsay. *Moore v. Vandemark Co., Inc.*, 12th Dist. No. CA2003-07-063, 2004-Ohio-4313, ¶ 16. While hearsay is generally inadmissible, it may be admitted under one of the numerous exceptions to the hearsay rule. *State v. Sims*, 12th Dist. No. CA2007-11-300, 2009-Ohio-550, ¶ 12, citing *State v. DeMarco*, 31 Ohio St.3d 191, 195 (1987); Evid.R. 802. One such exception under Evid.R. 803 is the "records of regularly conducted activity," more commonly known as the business records exception. Evid.R. 803(6); *State v. Glenn*, 12th Dist. No. CA2009-01-008, 2009-Ohio-6549, ¶ 16. Specifically, telephone records may be admitted under the business records exception. *Glenn* at ¶ 16. However, an authentication

requirement for business records must first be met. *Id.* at ¶ 18. To properly authenticate business records, a witness must "testify as to the regularity and reliability of the business activity involved in the creation of the record" such as an employee of the company with knowledge. *State v. Hirtzinger*, 124 Ohio App.3d 40, 49 (2nd Dist.1997). While firsthand knowledge of the business transaction is not required by the witness providing the foundation, a customer of a cellular telephone service does not possess the requisite knowledge to authenticate his or her bill. *E.g.*, *Moore* at ¶ 18.

{¶ 20} In this case, the state failed to call any employee of the cellular telephone company to testify as to the nature of its billing practices. Instead, the only reference to Turner's cellular telephone bill was during state's redirect examination of Turner, where the following exchange took place:

> Q. All right. And when you called the police did you call them on your apartment phone or did you call on your cell phone?
>
> A. My cell phone.
>
> Q. All right. And you're familiar with your cell phone records, right?
>
> A. Yes.
>
> Q. Did you obtain your cell phone records for me for those days?
>
> A. Yes I did.
>
> Q. And what's your phone number?
>
> A. It's ***-***-****.
>
> Q. All right. And your phone records show that you made a phone call to the Franklin Police Department at 11:01 a.m., would that be correct?
>
> A. Yes that's correct.

{¶ 21} While there is no indication in the record that the prosecutor actually handed

Turner her cellular telephone bill during this exchange, it is irrelevant as Turner was not qualified as the cellular telephone customer to authenticate the bill. Consequently, we conclude that Turner's cellular telephone bill should not have been admitted because it was not properly authenticated. However, our inquiry does not end here as we must decide whether such error amounted to plain error.

{¶ 22} During redirect, Turner stated her cellular telephone number and the time she called the Franklin Police Department as indicated on the bill, which was 11:01 a.m. Earlier during cross-examination, Turner testified that she arrived home between 11:00 a.m. and 11:30 a.m. and immediately called the police. This testimony coincides with the time shown on Turner's bill that a call was made from her cellular telephone number to the police department. Because Turner testified to the same information that was included in the cellular telephone bill, the information was cumulative. We cannot say Thomas was prejudiced by the bill's admission. Consequently, the trial court's admission of Turner's cellular telephone bill does not amount to plain error.

{¶ 23} Thomas' first assignment of error is overruled.

{¶ 24} Assignment of Error No. 2:

{¶ 25} THE TRIAL COURT ERRED IN FINDING [THOMAS] GUILTY SINCE THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT A CONVICTION.

{¶ 26} Thomas alleges that there was insufficient evidence to support his conviction for violating a civil protection order. Thomas specifically argues that the state failed to present evidence that he was served with the ex-parte civil protection order, and as a result, he was unable to recklessly violate the order. We disagree.

{¶ 27} Whether the evidence presented is legally sufficient to sustain a verdict is a question of law. *State v. Coleman*, 12th Dist. No. CA2010-12-329, 2011-Ohio-4564, ¶ 7; *State v. Thompkins*, 78 Ohio St.3d 380, 386 (1997). In reviewing the sufficiency of the

evidence to support a conviction, the appellate court is "to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt." *State v. Brown*, 12th Dist. No. CA2006-10-120, 2007-Ohio-5787, ¶ 10, quoting *State v. Jenks*, 61 Ohio St.3d 259, 273 (1991). Proof beyond a reasonable doubt is "proof of such character that an ordinary person would be willing to rely and act upon it in the most important of the person's own affairs." R.C. 2901.05(E). While a review of the sufficiency of the evidence and a review of the manifest weight of the evidence are separate and legally distinct concepts, this court's determination that appellant's conviction was supported by the manifest weight of the evidence necessarily supports a finding of sufficiency. *State v. Rigdon*, 12th Dist. No. CA2006-05-064, 2007-Ohio-2843, ¶ 34.

{¶ 28} Thomas was convicted of violating R.C. 2919.27, which provides that "[n]o person shall recklessly violate the terms" of any "protection order issued or consent agreement approved pursuant to section * * * 3113.31 of the Revised Code." As Thomas states in his brief, "[a]bsent proper service or actual notice of the prohibited behavior, appellant cannot be held criminally liable for disobedience of the order's terms." *Toledo v. Lyphout*, 6th Dist. No. L-08-1406, 2009-Ohio-4596, ¶ 33; Civ.R. 65(D).

{¶ 29} In this case, Thomas contends that he was never properly served with the ex-parte civil protection order because the police department return on the bottom of the request/notice to serve was blank on the ex-parte temporary protection order admitted as State's Exhibit No. 1. Nevertheless, on the last page of State's Exhibit No. 1, in the clerk's precipae, there is a notation that the ex-parte civil protection order was hand-delivered with the server's initials. Furthermore, an agreed entry was entered into evidence whereby Thomas and Turner agreed to remove their minor child from the order. The agreed entry also stated that "[a]ll other restrictions and orders listed in the Ex-Parte Civil Protection Order

shall remain in effect until further notice or hearing." In fact, at trial, Thomas acknowledged that a civil protection order was issued in December and testified extensively to the modification of the civil protection order through the agreed entry.

{¶ 30} When viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found that Thomas was properly served or, at the very least, had actual knowledge of the contents of the civil protection order beyond a reasonable doubt. Consequently, Thomas was able to "recklessly" violate the civil protection order. Additionally, as discussed in the next assignment of error, Thomas' conviction was not against the manifest weight of the evidence, and therefore, there is necessarily sufficient evidence regarding the remainder of the elements to violate the civil protection order.

{¶ 31} Thomas' second assignment of error is overruled.

{¶ 32} Assignment of Error No. 3:

{¶ 33} [THOMAS'] CONVICTION IS NOT SUPPORTED BY THE MANIFEST WEIGHT OF THE EVIDENCE.

{¶ 34} Thomas argues that because the trial court believed Ward's testimony, the sole eyewitness, the trial court lost its way and a manifest miscarriage of justice occurred. Thomas contends that Ward's testimony was not credible because there were multiple inconsistencies in her testimony and the prosecutor attacked her "mental ability" by attempting to characterize her as a 19-year-old female who is not "overly educated." We disagree.

{¶ 35} A manifest weight challenge 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. Clements*, 12th Dist. No. CA2009-11-277, 2010-Ohio-4801, ¶ 19. A court considering whether a conviction is against the manifest weight of the evidence must review the entire record, weigh the evidence and all reasonable inferences, and consider the

credibility of the witnesses. *State v. Hancock*, 108 Ohio St.3d 57, 2006-Ohio-160, ¶ 39; *State v. James*, 12th Dist. No. CA2003-05-009, 2004-Ohio-1861, ¶ 9. However, while appellate review includes the responsibility to consider the credibility of witnesses and weight given to the evidence, these issues are primarily matters for the trier of fact to decide because it is in the best position to judge the credibility of the witnesses and the weight to be given the evidence. *State v. DeHass*, 10 Ohio St.2d 230 (1967), paragraph one of the syllabus; *State v. Gesell*, 12th Dist. No. CA2005-08-367, 2006-Ohio-3621, ¶ 34. Therefore, the question upon review is whether in resolving conflicts in the evidence, the trier of fact clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed. *State v. Good*, 12th Dist. No. CA2007-03-082, 2008-Ohio-4502, ¶ 25.

{¶ 36} Ward's alleged inconsistencies within her own testimony included how she knew Turner was at work, whether she actually saw Thomas get into his car, the timing of when she called Turner, and whether Thomas verbally responded to her. At one point, Ward testified that Turner ran home because she did not have a vehicle at that time. Yet she also testified that she knew Turner was at work because she did not see Turner's car. Ward testified that Thomas "got back in his car I don't know where he went but he got back in his car." [sic.] Later, Ward testified that she did not see him get into his car. However, she stated: "I seen [sic.] him drive off but I didn't see him get in the car. I just seen [sic.] the car pull off." At one point, Ward testified that after she called Turner, she observed Thomas drive off in his vehicle. At another point, Ward testified that she did not call Turner until she thought Thomas had left. On direct examination, Ward testified that Thomas did not speak to her. On cross-examination, Ward testified that she heard Thomas threaten to kill Turner.

{¶ 37} There were also several alleged inconsistencies between Turner's testimony and Ward's testimony. Turner testified that she walked home and it was approximately a 15 to 20 minute walk. Ward testified that Turner ran home and arrived approximately five

minutes after Ward called Turner at work. Turner testified that she did not know why she needed to come home immediately until after she reached home. Ward testified that she told Turner she needed to come home immediately because Thomas was at her apartment.

{¶ 38} While some of these statements could be construed as inconsistencies, Ward was clear that sometime between 11:00 a.m. and 11:30 a.m. she saw Thomas outside of Turner's apartment knocking on the door and jiggling the handle. Ward was also clear that she observed him at the backside of the apartment, and called Turner at work to have her come home. Turner came home and called the police. The only evidence presented by Thomas regarding his whereabouts on April 13, 2010 was his own testimony that he spent all day at a friend's house between 9:00 a.m. or 10:00 a.m. and 4:15 p.m. In spite of Thomas' claim, there was evidence that Thomas called this friend's landline and cellular telephone at approximately 11:45 a.m.

{¶ 39} Thomas further asserts that Ward's testimony was not credible because some of the questions asked by the prosecutor seemed to attack her credibility. However, the trier of fact heard the testimony of Ward and chose to find her credible. The trial court specifically stated the following regarding Ward's credibility:

> I thought the primary witness for the State, Ms. Ward, was very credible. I watched the way she testified. I saw her correct the prosecutor on a number of occasions as to where she was standing, where he was et cetera and I thought her testimony was very credible. I didn't see any flaws in it. I see a lot of witnesses and I thought that her testimony was not only accurate, I don't know if it was accurate but certainly was credible.

{¶ 40} As it is primarily the task of the trier of fact to judge the credibility of the witnesses, we cannot say the trial court clearly lost its way or that a manifest miscarriage of justice occurred when it believed Ward's testimony and other corroborating evidence presented by the state supporting Thomas' conviction, rather than Thomas' testimony at trial.

{¶ 41} Accordingly, Thomas' third assignment of error is overruled.

{¶ 42} Assignment of Error No. 4:

{¶ 43} [THOMAS] WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL.

{¶ 44} Thomas argues that he was denied effective assistance of counsel because defense counsel failed to make objections that were in his best interest. Thomas specifically asserts that defense counsel was defective by not objecting to (1) the admittance of State's Exhibits Nos. 2 and 3 when they were not properly identified or authenticated, (2) leading questions posed by the prosecutor, (3) a witness using a document to refresh his recollection when he did not indicate his memory was exhausted or nearly exhausted, and (4) the state's questioning of Thomas regarding a prior conviction. Thomas further contends that defense counsel was ineffective because counsel elicited prejudicial testimony from Ward. Finally, Thomas asserts that defense counsel was ineffective because the witnesses called to testify on his behalf testified to his whereabouts on April 12, 2010, rather than April 13, 2010. We disagree.

{¶ 45} To demonstrate ineffective assistance of counsel, a two-prong test is employed. First, a defendant must establish that counsel's representation fell below an objective standard of reasonableness, and second, that the defendant was prejudiced as a result of counsel's deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052 (1984); *State v. Bradley*, 42 Ohio St.3d 136, 141-142 (1989); *State v. Bradford*, 12th Dist. No. CA2010-04-032, 2010-Ohio-6429, ¶ 97. While the appropriate test has two prongs, "there is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one." *Strickland* at 697.

{¶ 46} Under the first prong, reversal "requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the

Sixth Amendment." *Strickland* at 687; *State v. Hand*, 107 Ohio St.3d 378, 2006-Ohio-18, ¶ 199. There is "a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland* at 689. There is also a presumption that the challenged action may be "sound trial strategy" that the defendant must overcome. *State v. Leggett*, 12th Dist. No. CA2000-10-089, 2001 WL 1079023, *1 (Sept. 17, 2001). Under the second prong, the defendant has the burden to show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland* at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id*.

{¶ 47} Thomas contends that defense counsel was ineffective for failing to object on numerous occasions. However, failing to object alone is not enough to render counsel ineffective. *State v. Conway*, 109 Ohio St.3d 412, 2006-Ohio-2815, ¶ 103; *State v. Byrd*, 12th Dist. No. CA2008-10-124, 2009-Ohio-1722, ¶ 29. Furthermore, "debatable trial tactics do not establish ineffective assistance of counsel." *Conway* at ¶ 101.

{¶ 48} Thomas first asserts that defense counsel was ineffective for failing to object to the admission of State's Exhibit No. 2, Turner's statement she gave to Officer Back, and State's Exhibit No. 3, Turner's cellular telephone records, because they were not properly identified or authenticated. As stated in Thomas' first assignment of error, there was no error in the admission of State's Exhibit No. 2 for lack of identification or authentication. We cannot say defense counsel was ineffective for failing to object. Also as stated in Thomas' first assignment of error, State's Exhibit No. 3 was improperly admitted because it was not properly authenticated. However, its admission did not amount to plain error as to alter the outcome of the trial. Furthermore, since defense counsel wished to admit Thomas' cellular telephone records that were not properly authenticated in an attempt to show he had an alibi, the failure to object to Turner's cellular telephone records can be seen as a trial strategy.

{¶ 49} Secondly, Thomas argues that defense counsel was deficient for failing to object to leading questions. Thomas asserts that the following three questions are examples of improper leading questions: "Is that the statement that you wrote and gave to Patrolman Back the day this incident happened?," "When you called the police, you didn't call the police until you got home, correct?," and "And your phone records show that you made a phone call to the Franklin Police Department at 11:01 a.m., would that be correct?" All three questions occurred during re-direct examination of Turner.

{¶ 50} "[A] leading question is 'one that suggests to the witness the answer desired by the examiner.'" *State v. Penwell*, 12th Dist. No. CA2010-08-019, 2011-Ohio-2100, ¶ 21, quoting *State v. Diar*, 120 Ohio St.3d 460, 2008-Ohio-6266, ¶ 149. According to Evid.R. 611(C), "leading questions should not be used on the direct examination of a witness except as may be necessary to develop the witness' testimony." *Penwell* at ¶ 21. The exception stated in the rule "is quite broad and places the limits upon the use of leading questions on direct examination within the sound judicial discretion of the trial court." *State v. Lewis*, 4 Ohio App.3d 275, 278 (3rd Dist.1982). *See e.g., State v. Smith*, 80 Ohio St.3d 89, 110 (1997). In addition, if the prosecutor already elicited the evidence from the witness on direct examination without the use of leading questions or the defendant elicited the evidence on cross-examination, then the use of leading questions to review the testimony on re-direct examination is permissible. *State v. Stragisher*, 7th Dist. No. 03 CO 13, 2004-Ohio-6797, ¶ 89; *City of Columbus v. Lipsey*, 10th Dist. Nos. 90AP-543, 544, 1991 WL 34918, *3 (Mar. 12, 1991). Moreover, it is not improper to use leading questions to direct one's attention to events or matters on which testimony was already generated. *State v. D'Ambrosia*, 67 Ohio St.3d 185, 190 (1993).

{¶ 51} The first question merely directed Turner to the document that was inquired into by defense counsel during Turner's cross-examination. The second question only

summarized Turner's previous testimony, that she did in fact call the police after she was home. The third question suggests an answer as it states a specific time Turner called the police. However, Turner previously stated that this incident occurred sometime between 11:00 a.m. and 11:30 a.m. and that she called the police immediately after she reached home. Because of Turner's previous testimony, the third leading question contained cumulative information, and thus would not have affected the outcome of the trial. Taken together, we cannot say that there was a reasonable probability that the outcome of the trial would have been different had the prosecutor not asked the above leading questions.

{¶ 52} Thirdly, Thomas argues that he was prejudiced when defense counsel failed to object to the prosecutor handing Officer Back a police report to refresh his memory when the officer did not ask to refer to the document. A party may refresh the recollection of a witness under Evid.R. 612 by showing him a prior writing. *State v. Miller*, 12th Dist. No. CA2009-04-106, 2010-Ohio-1722, ¶ 10. This rule permits a party to review the prior statement to refresh his memory after his memory has been exhausted or nearly exhausted. *State v. Curtis*, 12th Dist. No. CA2009-01-004, 2009-Ohio-6740, ¶ 42. Once his recollection has been revived, the witness may then continue with his testimony. *Miller* at ¶ 10, quoting *Dayton v. Combs*, 94 Ohio App.3d 291, 298 (2nd Dist.1993). The writing "merely serves as a memory jogging device" and "is not admitted into evidence unless admission is requested by the adverse party, and in any event has no substantive evidentiary significance." *State v. Gunn*, 2nd Dist. No. CA16617, 1998 WL 453845, *10 (Aug. 7, 1998), citing *Combs* at 298.

{¶ 53} In this case, the record does not show Officer Back exhausted his memory prior to the prosecutor stating, "Now I want to see if I can refresh your memory," and handing Officer Back the police report. The prosecutor then elicited the date and time of the alleged incident from Officer Back. However, if defense counsel had objected to the prosecutor failing to ask Officer Back a question regarding the date and time of the incident prior to

handing the report to the officer to refresh his memory, then the prosecutor would have done so. If Officer Back had recalled the date and time, then the report would not have been needed. But, if Officer Back needed to refresh his recollection, then utilizing the report was a proper way to do so. Regardless, Officer Back would have testified to the date and time of the incident. Furthermore, defense counsel had an opportunity to cross-examine Officer Back regarding his testimony. On cross-examination, Officer Back stated that charges were filed against Thomas on April 13, the same day he had responded to the call. In light of the foregoing, we cannot say there is a reasonable probability that the outcome of the trial would have been different had defense counsel objected to Officer Back using the report to refresh his recollection.

{¶ 54} Fourthly, Thomas asserts defense counsel was deficient for failing to object to the prosecutor's questioning regarding his conviction for driving with expired license tags. Thomas contends that the line of questioning was improper under Evid.R. 609, because Thomas' conviction for driving with expired tags neither involved dishonesty nor a false statement. However, "by presenting evidence of a defendant's good character, a defense attorney 'opens the door' to cross-examination of such character witnesses regarding relevant specific instances of appellant's past conduct." *State v. Ogletree*, 8th Dist. No. 84446, 2004-Ohio-6297, ¶ 45; Evid.R. 405(A). "Such instances can include appellant's prior criminal convictions." *Ogletree* at ¶ 45. In this situation, the prosecutor is not limited to the type of convictions described in Evid.R. 609. *State v. Eldridge*, 12th Dist. No. CA2002-10-021, 2003-Ohio-7002, ¶ 43.

{¶ 55} Thomas testified on direct examination that the license plate tags on his black Honda were expired and the last time he drove the black Honda was in November 2009. By making these statements, Thomas asserted that he was a law-abiding citizen who would not drive his vehicle when he had expired license plate tags. Consequently, Thomas opened the

door for the prosecutor to rebut his testimony and impeach him with specific instances of conduct, including prior criminal convictions. *See State v. Washington*, 7th Dist. No. 08-MA-5, 2009-Ohio-2893; *State v. Woodard*, 11th Dist. No. 2009-A-0047, 2010-Ohio-2949; *State v. Jones*, 5th Dist. No. CA-8680, 1992 WL 28698 (Feb. 10, 1992). On cross-examination, the prosecutor asked Thomas to explain why it appeared he was convicted of driving with expired tags in January 2010. Thomas responded by saying that this particular instance was the only time he drove his vehicle with expired license plate tags. Because Thomas opened the door to this line of questioning, we cannot say defense counsel committed error by failing to object or that there was a reasonable probability that the outcome of the trial would have been different had defense counsel objected.

{¶ 56} In addition to the argument that defense counsel was ineffective for failing to object, Thomas asserts that defense counsel was ineffective by eliciting prejudicial testimony from Ward. While it is true defense counsel elicited testimony from Ward on cross-examination that she heard Thomas threaten to kill Turner, the civil protection order prohibited Thomas from interfering or initiating contact with the residence of the protected persons. Without this testimony, Thomas still would have been found guilty of interfering with Turner's residence. Consequently, we cannot say there is a reasonable probability the outcome of the trial would have been different absent testimony about the threat.

{¶ 57} Finally, Thomas contends that defense counsel was ineffective because the witnesses called to testify on his behalf testified to his whereabouts on April 12, 2010, rather than April 13, 2010. However, Ranson's testimony regarding Thomas' cars not moving for several days could easily apply to either April 12 or April 13. Both the testimony of Jones and Kabler relied heavily on Thomas' cellular telephone records, documenting conversations they had with Thomas on April 12. While defense counsel was unable to question Jones and Kabler regarding Thomas' whereabouts on April 13, defense counsel was able to question

Thomas regarding his whereabouts on April 13 and utilized his cellular telephone records for April 13. However, Thomas' cellular telephone records actually discredited his alibi. While Thomas asserted that he was with Kabler all day on April 13, his cellular telephone records revealed that he called Kabler twice on April 13 during the time he was supposedly at her residence. Consequently, we cannot say that there is a reasonable probability that the outcome of the trial would have been different had the defense witnesses testified as to their contact with Thomas on April 13, as opposed to April 12. Furthermore, because Thomas' cellular telephone records plausibly provided him with an alibi for April 12, but not April 13, defense counsel focusing on April 12 could be seen as a trial strategy.

{¶ 58} In light of the foregoing, we cannot say Thomas was denied effective assistance of counsel. Accordingly, Thomas' fourth assignment of error is overruled.

{¶ 59} Judgment affirmed.

HENDRICKSON, P.J., and PIPER, J., concur.