[Cite as *State v. Heiden*, 2014-Ohio-5651.]

COURT OF APPEALS
MORROW COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO Plaintiff-Appellee -vs- ZACHARY W. HEIDEN Defendant-Appellant	JUDGES: Hon. William B. Hoffman, P.J. Hon. Sheila G. Farmer, J. Hon. Patricia A. Delaney, J. Case No. 14CA0003 O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Morrow County Court of Common Pleas, Case No. 2013CR0046
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	December 15, 2014

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
CHARLES HOWLAND Morrow County Prosecutor K. DAVID HOMER Assistant Prosecutor Counsel of Record 60 East High Street Mt. Gilead, Ohio 43338	GERALD T. SUNBURY 250 Civic Center Drive Suite 600 Columbus, Ohio 43215

Hoffman, P.J.

{¶1} Defendant-appellant Zachary Heiden appeals his conviction and sentence entered by the Morrow County Court of Common Pleas. Plaintiff-appellee is the state of Ohio.

STATEMENT OF THE FACTS AND CASE

{¶2} On February 2, 2013, three men committed aggravated burglary and aggravated robbery at the home of William Scheffer, a known drug dealer. The men wore masks, and were armed with shotguns. The men told Scheffer to get on the floor, ransacked his residence and demanded money and drugs. Scheffer turned over the drugs, including five pounds of high grade marijuana and nearly a pound of hashish.

{¶3} The men left the residence in a Saturn automobile. Scheffer chased the men in his own automobile, catching up with them and rear-ending their automobile. During the chase, one of the occupants pointed a gun at Scheffer as their automobile drove off. Scheffer called 911 from his car.

{¶4} At the scene of the accident, responding officers traced tire tracks believed to be from the Saturn automobile to the home of Gavin and Danna Shadwick. Upon arriving at the Shadwick residence, the officers found the Saturn automobile at issue herein. The Saturn automobile was subsequently determined to belong to the Shadwick's son, Tyler. The officers learned Mrs. Shadwick had given the three men believed to have been involved in the home burglary and robbery herein a ride to Mount Gilead. The individuals involved in the robbery and burglary were then identified as Ryan Beach, Edmund "Skeet" Shaw, and Scott Hines.

{¶5} The officers arrested Tyler Shadwick, Ryan Beach, Skeet Shaw and Scott Hines. All were subsequently prosecuted and convicted. Throughout the proceedings, the officers learned of Appellant's alleged involvement in the planning of the home burglary, robbery and theft. The officers obtained an indictment charging Appellant with counts of conspiracy to commit aggravated robbery, conspiracy to commit aggravated burglary and conspiracy to commit theft of drugs.

{¶6} On November 12, 2013, the case came on for a jury trial in the Morrow County Court of Common Pleas. The jury returned a verdict of guilty on all counts. The trial court sentenced Appellant to ten years each on the two counts of conspiracy to commit aggravated robbery and conspiracy to commit aggravated burglary, and to twelve months on the conspiracy to commit theft of drugs.

{¶7} Appellant appeals assigning as error:

{¶8} "I. THE TRIAL COURT ERRED BY ALLOWING CELL PHONE RECORDS TO BE ADMITTED INTO EVIDENCE WITHOUT BEING PROPERLY AUTHENTICATED IN VIOLATION OF THE HEARSAY RULE AND THE CONFRONTATION CLAUSE.

{¶9} "II. THE TRIAL COURT ERRED BY ADMITTING INCRIMINATING OUT-OF-COURT STATEMENTS BY AN INFORMANT WHO DID NOT TESTIFY AT TRIAL.

{¶10} "III. THE FAILURE OF THE PROSECUTION TO TIMELY PROVIDE DISCOVERY DEPRIVED DEFENDANT-APPELLANT OF A FAIR TRIAL.

{¶11} "IV. THE CONDUCT OF THE PROSECUTION AND THE TRIAL COURT'S REFUSAL TO APPOINT A SPECIAL PROSECUTOR DEPRIVED DEFENDANT-APPELLANT OF A FAIR TRIAL.

{¶12} "V. THE JUDGMENT OF THE TRIAL COURT IS NOT SUPPORTED BY SUFFICIENT, CREDIBLE EVIDENCE.

{¶13} "VI. THE JUDGMENT OF THE TRIAL COURT IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

I and III

{¶14} Appellant's first and third assignments of error raise common and interrelated issues; therefore, we will address the arguments together.

{¶15} Appellant challenges the trial court's ruling on the State's introduction of cell phone records. The State introduced cell phone records in paper format bound in notebooks at trial. The State had previously produced the records in disc format to defense counsel during discovery. Appellant's counsel objected to the change in format.

{¶16} Appellant further objected to the admission of the cell phone records alleging Douglas Cutler, the employee of Verizon, did not qualify as a records custodian; rather, he was merely an account representative. The prosecution asserted the business records were not testimonial pursuant to *Crawford v. Washington* (2004), 5411 U.S. 36 and were properly admitted under *State v. Hood*, 2012-Ohio-6208.

{¶17} In *Crawford,* the court suggested business records are “by their nature” nontestimonial. *Id.* at 56, 124 S.Ct. 1354, 158 L.Ed.2d 177. In *State v. Craig,* 110 Ohio St.3d 306, 2006-Ohio-4571, 853 N.E.2d 621, this court stated business records “are not ‘testimonial in nature because they are prepared in the ordinary course of regularly conducted business and are 'by their nature' not prepared for litigation.’ ” *Id*. at ¶ 82, quoting *People v. Durio,* 7 Misc.3d 729, 734, 794 N.Y.S.2d 863 (2005). Whether a

business record meets a hearsay exception is immaterial in regard to the Confrontation Clause; it is the nontestimonial character of the record that removes it from the purview of the Confrontation Clause:

> Business and public records are generally admissible absent confrontation not because they qualify under an exception to the hearsay rules, but because—having been created for the administration of an entity's affairs and not for the purpose of establishing or proving some fact at trial—they are not testimonial.

{¶18} *Melendez–Diaz v. Massachusetts,* 557 U.S. 305, 324, 129 S.Ct. 2527, 174 L.Ed.2d 314 (2009).

{¶19} In *State v. Hood,* 135 Ohio St.3d 137, 146-147, 2012-Ohio-6238, the Ohio Supreme Court held,

> But the regularly conducted business activity of cell-phone companies is not the production of evidence for use at trial. The fact that records are used in a trial does not mean that the information contained in them was produced for that purpose. Even when cell-phone companies, in response to a subpoena, prepare types of records that are not normally prepared for their customers, those records still contain information that cell-phone companies keep in the ordinary course of their business. ***
>
> Because cell-phone records are generally business records that are not prepared for litigation and are thus not testimonial, the Confrontation Clause does not affect their admissibility. But in this case, there is no

assurance that the records at issue are business records. Evid.R. 803(6) governs the admission of business records:

"To qualify for admission under Rule 803(6), a business record must manifest four essential elements: (i) the record must be one regularly recorded in a regularly conducted activity; (ii) it must have been entered by a person with knowledge of the act, event or condition; (iii) it must have been recorded at or near the time of the transaction; and (iv) a foundation must be laid by the 'custodian' of the record or by some 'other qualified witness'." *State v. Davis,* 116 Ohio St.3d 404, 2008-Ohio-2, 880 N.E.2d 31, ¶ 171, quoting Weissenberger, Ohio Evidence Treatise 600, Section 803.73 (2007).

Here, there was simply no foundation laid by a custodian of the record or by any other qualified witness. Detective Veverka was not a custodian of the records. He did not prepare or keep the phone records as part of a regularly conducted business activity. Nor was he an "other qualified witness" under the rule. A "qualified witness" for this purpose would be someone with "enough familiarity with the record-keeping system of the business in question to explain how the record came into existence in the ordinary course of business." 5 McLaughlin, *Weinstein's Federal Evidence,* Section 803.08[8][a] (2d Ed.2009); *United States v. Lauersen,* 348 F.3d 329, 342 (2d Cir.2003). * * *

Thus, the cell-phone records in this case were not authenticated as business records, and that fact affects their status in regard to the

> Confrontation Clause. If the records had been authenticated, we could be sure that they were not testimonial, that is, that they were not prepared for use at trial. Without knowing that they were prepared in the ordinary course of a business, among the other requirements of Evid.R. 803(6), we cannot determine that they are nontestimonial. We thus find that the admission of the records in this case was constitutional error.

{¶20} *Hood*, supra, at 146-147.

{¶21} At trial herein, Douglas Cutler testified he is the Custodian of Records representing Verizon Wireless providing records produced in the normal course of business. Tr. at 169, Line 17-19. He testified Verizon keeps billing records in the normal course of business. Tr. at p. 171.

{¶22} Cutler further testified,

> Q. And how did you get involved in this case?
>
> A. I'm the custodian of the records representing the company providing our records that are produced in the normal course of business.
>
> Q. All right. And you work for Verizon. What business is that company?
>
> A. It is a cell wireless industry.
>
> Q. All right. And does Verizon keep business records in the regular course of business?
>
> A. We do. We keep billing records every day of the year.
>
> Q. So that involves keeping track of individual customer's accounts?
>
> A. That is correct.

Q. Okay. And did you get a subpoena to provide some business records in this case?

A. We did, yes.

Q. And what were you asked to provide?

A. Provide the call records, the text message records and any details therein for the time period in question at the end of January to the beginning of February 2013.

Q. All right. And do you recall, you may not know this now that I think about it, who it was that originally sent that request in?

A. I do not. I apologize.

Q. Okay. Safe to say it is somebody here from the Morrow County area regarding this case, right?

A. That's correct.

Q. And the records were provided; is that right?

A. Correct.

Q. And did you bring copies of those today?

A. Yes, that's what is in front of me.

MR. HOMER: Judge, I have these marked 49-A and 49-B and we had originally marked exhibits in order of sequence and we are taking this witness out of sequence, but since he was here we thought we would do this. I'll show these to counsel.

MR. LEBER: Are these the same that were provided in discovery?

MR. HOMER: These are everything that is on the disc.

MR. LEBER: Your Honor - -

THE COURT: Yes.

MR. LEBER: - - I haven't see the items here before. I can review them. Could take a couple of hours.

THE COURT: You haven't seen these before you are saying?

MR. LEBER: I haven't seen them in this form. I was provided some discs and so I have not seen them in this form as it stands. They essentially - - they are essentially just confetti from the sky.

* * *

MR. LEBER: That's really not the question. The issue is that these are not in the same form as they were provided to me before. So in order for me to confirm that what we have here is what is provided in one of these discs, I would need to confirm that because the format is completely different.

THE COURT: Okay.

MR. HOWLAND: May I approach, your Honor? May we all approach just for a moment?

THE COURT: I think - - it is not necessary. What I'm going to do is allow them to go forward with the witness and ruling on the admissibility would not likely take place at this moment. Everybody will have an opportunity to examine them if there are any discrepancies. I'll give everybody an opportunity to recall the witness if necessary.

* * *

Q. And how does that work in that general sense?

A. The subpoena is generally sent to our national headquarters, which is in Bedminster, New Jersey. Being from the State of Ohio and from Columbus, they ask me to represent the company, provide the records and in the form that I have provided today. On occasion we do send a disc or electronic or E-mail with the contained information. We were requested to produce records for any phone number for a specific time frame specified in the subpoena.

Q. All right. So you would have supplied a disc and this is the paper information that would be contained on the disc?

A. That's correct.

Q. That's representing the two volumes here?

A. That's correct.

Q. Okay. What would our first exception be?

A. I was just looking for that, the subscriber.

Q. Yeah, I believe you were requested information on several phone numbers; is that correct?

A. That's correct. We received several subpoenas for this case.

{¶23} Tr. at 171-173

{¶24} Cutler provided the raw data, but was not asked to interpret the information. The disc had been provided in discovery to defense counsel, and was merely printed out in notebook form for trial for juror ease. The trial court admitted the exhibits, reserving defense counsel's objection should he prove discrepancies in the evidence, which he did not. Further, each witness presented at trial testified to the cell

phone records attributed to them relative to the times and circumstances as inquired in their direct examination.

{¶25} Based on the record as set forth above, we find the trial court did not err in admitting the cell phone records at trial.

{¶26} The first assignment of error is overruled.

II.

{¶27} In the second assignment of error, Appellant maintains the trial court erred in allowing the State to introduce statements by an informant who did not testify at trial.

{¶28} Specifically, Appellant cites the following testimony introduced at trial pertaining to statements made by Amber Feltner,

> Q. Was Amber Feltner charged in regards to this case?
>
> A. Yes.
>
> Q. And was she charged as a - - how do you know about that - -
>
> A. I think that - -
>
> Q. - -- what she was charged with?
>
> A. As I recall it was complicity. I don't know. I don't remember what her specific charge was. There is a lot of players involved with this and I don't remember who was charged with it when it all shook out. I think she had a complicity charge.
>
> Q. All right. Complicity to what?
>
> A. If I had to guess I would say to the ag robbery. I don't know.
>
> MR. LEBER: Enter an objection. I withdraw my objection.
>
> THE COURT: Okay.

By: MR. HOMER:

Q. And through the course of your investigation, did you have an opportunity to talk to this person?

A. Yes.

Q. All right. And what did you learn from this investigation that you had not received information of prior to talking with her?

A. The day after the home invasion, I was called to the Mount Gilead Police Department by Detective Bill Foley. I was told that Amber Feltner was there and she wished to give information about what had happened. She told us that Skeet Shaw and Ryan Beach had been in contact with her. They were trying to get her to sell some marijuana for $250 an ounce that had been taken from this home invasion. That was the first thing that she told us.

Q. All right. And based on that, what did you do?

A. We tried to place a series of controlled phone calls where it would have been on a recorder, so she is talking and we can hear and record the conversation, but they were going straight to voicemail. We were not able to get through to Ryan Beach.

Q. All right. Other than Beach, did you have Feltner make any other phone calls?

A. I don't - - I don't think so, not that I recall.

Q. All right. And after you did the controlled phone call, what did you do?

A. Amber Feltner did tell us that she was aware of how this had became set up of who, who was responsible for the planning. I can say it that way.

Q. And who is mainly responsible for this?

A. Amber Feltner is the one who provided us with the name of Zach Heiden. From talking to Pauline Scheffer I don't think we had a last name at that point.

Q. All right. Is that the first point that you heard the name of Heiden?

A. I believe so.

Q. Okay. And did that ring any bells, did you have a recollection of that?

A. I did not. I have not dealt with Mr. Heiden.

Q. And then what did you do?

A. I would have to refer to my report to see what else happened that day.

Q. All right.

{¶29} Tr. at 760-762.

{¶30} At trial, Edmund "Skeet" Shaw testified to his involvement in the planning of the robbery. Scott Hines also testified he planned and implemented an aggravated robbery with Skeet Shaw and Ryan Beach. He testified Tyler Shadwick drove an automobile he owned in the commission of the crime. Ryan Beach testified as to the aggravated robbery and his involvement in the planning and commission along with

Shaw, Hines and Shadwick. Both Ryan Beach and Skeet Shaw testified to Amber's involvement following the aggravated robbery and prior to their arrest in encouraging them to delete names and numbers from their phones. See, Tr. at 329-364; 760-762. Tyler Shadwick testified Amber Feltner was his spouse at the time of the incident. He testified she worked as a confidential informant, and was trying to gain information from the planning and implementation of the crime. He testified he believed Ryan Beach received his information from Appellant.

{¶31} The testimony presented at trial and the cell phone records presented as evidence connect Appellant to the coconspirators involved in the aggravated robbery. The evidence presented at trial sufficiently indicates Amber Feltoner was a conspirator in the events to which Appellant is alleged to have been a coconspirator. The record indicates a number of individuals were involved in the commission of the offense including Amber Feltner. Accordingly, we find the trial court did not err in ruling the statements presented at trial were admissible as statements as a coconspirator.

{¶32} The second assignment of error is overruled.

IV.

{¶33} Appellant's fourth assignment of error asserts the conduct of the prosecutor at trial herein, in addition to the trial court's refusal to appoint a special prosecutor in the proceedings, deprived him of a fair and impartial trial. We disagree.

{¶34} Appellant filed a motion for a special prosecutor with the trial court on December 31, 2013. The motion asserts a confrontation occurred between defense counsel and the prosecutor outside the presence of the jury and outside the courtroom setting or proceedings.

{¶35} The trial court summarily dismissed the matter. Defense counsel did not move for a mistrial, and the matter proceeded as scheduled. The argument between the prosecutor and defense counsel did not have any effect on the outcome of the trial or its proceedings. Accordingly, the fourth assignment of error is overruled.

V. and VI.

{¶36} Appellant's fifth and sixth assignments of error raise common and interrelated issues; therefore, we will address the arguments together.

{¶37} Appellant maintains his convictions were against the manifest weight and sufficiency of the evidence. On review for sufficiency, a reviewing court is to examine the evidence at trial to determine whether such evidence, if believed, would support a conviction. *State v. Jenks* (1991), 61 Ohio St.3d 259. "The relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt." *Jenks* at paragraph two of the syllabus, following *Jackson v. Virginia* (1979), 443 U.S. 307. On review for manifest weight, a reviewing court is to examine the entire record, weigh the evidence and all reasonable inferences, consider the credibility of witnesses and determine "whether in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered." *State v. Martin* (1983), 20 Ohio App.3d 172, 175. See also, *State v. Thompkins,* 78 Ohio St.3d 380, 1997–Ohio–52. The granting of a new trial "should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction." *Martin* at 175.

{¶38} Appellant was convicted of conspiracy to commit aggravated robbery, aggravated burglary and theft of drugs, in violation of R.C. 2923.01, which reads,

> (A) No person, with purpose to commit or to promote or facilitate the commission of aggravated murder, murder, kidnapping, abduction, compelling prostitution, promoting prostitution, trafficking in persons, aggravated arson, arson, aggravated robbery, robbery, aggravated burglary, burglary, trespassing in a habitation when a person is present or likely to be present, engaging in a pattern of corrupt activity, corrupting another with drugs, a felony drug trafficking, manufacturing, processing, or possession offense, theft of drugs, or illegal processing of drug documents, the commission of a felony offense of unauthorized use of a vehicle, illegally transmitting multiple commercial electronic mail Code, or the commission of a violation of any provision of Chapter 3734. of the Revised Code, other than section 3734.18 of the Revised Code, that relates to hazardous wastes, shall do either of the following:
>
> (1) With another person or persons, plan or aid in planning the commission of any of the specified offenses;
>
> (2) Agree with another person or persons that one or more of them will engage in conduct that facilitates the commission of any of the specified offenses.
>
> (B) No person shall be convicted of conspiracy unless a substantial overt act in furtherance of the conspiracy is alleged and proved to have been done by the accused or a person with whom the accused conspired, subsequent to the accused's entrance into the conspiracy. For purposes of this section, an overt act

is substantial when it is of a character that manifests a purpose on the part of the actor that the object of the conspiracy should be completed.

(C) When the offender knows or has reasonable cause to believe that a person with whom the offender conspires also has conspired or is conspiring with another to commit the same offense, the offender is guilty of conspiring with that other person, even though the other person's identity may be unknown to the offender.

{¶39} Aggravated robbery is defined at R.C. 2911.01 as,

No person, in attempting or committing a theft offense, as defined in section 2913.01 of the Revised Code, or in fleeing immediately after the attempt or offense, shall do any of the following:

Have a deadly weapon on or about the offender's person or under the offender's control and either display the weapon, brandish it, indicate that the offender possesses it, or use it;

Have a dangerous ordnance on or about the offender's person or under the offender's control;

Inflict, or attempt to inflict, serious physical harm on another.

{¶40} Aggravated burglary is defined at R.C. 2911.11,

(A) No person, by force, stealth, or deception, shall trespass in an occupied structure or in a separately secured or separately occupied portion of an occupied structure, when another person other than an accomplice of the offender is present, with purpose to commit in the

structure or in the separately secured or separately occupied portion of the structure any criminal offense, if any of the following apply:

(1) The offender inflicts, or attempts or threatens to inflict physical harm on another;

(2) The offender has a deadly weapon or dangerous ordnance on or about the offender's person or under the offender's control.

{¶41} R.C. § 2911.11

{¶42} Finally, theft of drugs is defined at R.C. 2913.02,

(A) No person, with purpose to deprive the owner of property or services, shall knowingly obtain or exert control over either the property or services in any of the following ways:

(1) Without the consent of the owner or person authorized to give consent;

(2) Beyond the scope of the express or implied consent of the owner or person authorized to give consent;

(3) By deception;

(4) By threat;

(5) By intimidation.

(B)(1) Whoever violates this section is guilty of theft.

***

(6) If the property stolen is any dangerous drug, a violation of this section is theft of drugs, a felony of the fourth degree, or, if the offender

previously has been convicted of a felony drug abuse offense, a felony of the third degree.

{¶43} Upon review of the evidence as noted supra and all the testimony presented at trial, we find Appellant's convictions are not against the manifest weight and sufficiency of the evidence. The cell phone records introduced at trial connect Appellant with the coconspirators, as does the testimony presented by the witnesses.

{¶44} The fifth and sixth assignments of error are overruled.

{¶45} Appellant's convictions for conspiracy to commit aggravated burglary, aggravated robbery and theft of drugs in the Morrow County Court of Common Pleas are affirmed.

By: Hoffman, P.J.

Farmer, J. and

Delaney, J. concur