

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

STATE OF OHIO,	:	APPEAL NO. C-120673
	:	TRIAL NO. B-1106841
Plaintiff-Appellee,	:	
vs.	:	<i>JUDGMENT ENTRY.</i>
TERRELL MCCURDY,	:	
Defendant-Appellant.	:	

We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court. See S.Ct.R.Rep.Op. 2; App.R. 11.1(E); 1st Dist. Loc.R. 11.1.1.

Defendant-appellant Terrell McCurdy appeals his conviction for felonious assault under R.C. 2903.11(A)(2), with an accompanying firearm specification. We find no merit in his six assignments of error, and we affirm the trial court's judgment.

In his first assignment of error, McCurdy contends that the trial court erred in admitting hearsay evidence. He argues the trial court should not have admitted his cell-phone records into evidence because they were admitted without the benefit of the business records exception and they were, therefore, hearsay. This assignment of error is not well taken.

The state concedes that the admission of the cell-phone records into evidence was error. We agree, although, in our view, the issue was not strictly a hearsay issue. In *State v. Hood*, 135 Ohio St.3d 137, 2012-Ohio-6208, 984 N.E.2d 1057, the Ohio Supreme Court held that a trial court errs in admitting cell-phone records when no foundation is laid by a

custodian of the records or other qualified witness. A police detective who simply obtains the records by warrant or subpoena is not a qualified witness. *Id.* at ¶ 2 and 39-42.

Nevertheless, we hold that the error was harmless beyond a reasonable doubt because the evidence against McCurdy was otherwise overwhelming. *See State v. Bayless*, 48 Ohio St.2d 73, 357 N.E.2d 1035 (1976), paragraph seven of the syllabus, *vacated as to death penalty*, 438 U.S. 911, 95 S.Ct. 3135, 57 L.Ed.2d 1155 (1978); *State v. Williams*, 1st Dist. Hamilton Nos. C-060631 and C-060668, 2007-Ohio-5577, ¶ 39. We overrule McCurdy's first assignment of error.

In his second assignment of error, McCurdy contends that the trial court erred in permitting the state to use misleading demonstrative evidence. He argues that the court should not have allowed the state to use a power-point presentation during its final argument that showed the evidence as pieces of a puzzle that, in the end, formed a photograph of McCurdy. This assignment of error is not well taken.

Our review of the record shows that the power-point presentation was relevant to the evidence presented at trial and that it did not confuse the issues or mislead the jury. *See State v. Palmer*, 80 Ohio St.3d 543, 566, 687 N.E.2d 685 (1997). We cannot hold that the trial court abused its discretion in permitting the state to use the presentation or that its use during the state's closing argument denied McCurdy a fair trial. *See State v. Herring*, 94 Ohio St.3d 246, 255, 762 N.E.2d 940 (2002); *State v. Keenan*, 66 Ohio St.3d 402, 405, 613 N.E.2d 203 (1993); *State v. Thomas*, 1st Dist. Hamilton No. C-120561, 2013-Ohio-5386, ¶ 37. Consequently, we overrule McCurdy's second assignment of error.

In his third assignment of error, McCurdy contends that the trial court erred in denying his motion to suppress the victim's pretrial identification of McCurdy as the person who shot him. First, he contends that the trial court failed to consider that the photo lineup was not conducted in accordance with the procedures set forth in R.C. 2933.83(B). He failed to raise that issue in his motion to suppress, and, therefore, he

waived any error but plain error. *See* Crim.R. 47; *State v. Bates*, 1st Dist. No. C-040698, 2005-Ohio-3394, ¶ 16-18. Further, this court has held that “noncompliance with R.C. 2933.83(B) alone is insufficient to warrant suppression.” *State v. Ruff*, 1st Dist. Hamilton No. C-110250, 2012-Ohio-1910, ¶ 8.

McCurdy also argues that the photo array was suggestive and tainted the victim’s in-trial identification of McCurdy as his assailant. McCurdy has not demonstrated that the photo lineup was unnecessarily suggestive of his guilt or that the identification was unreliable under the circumstances. *See Manson v. Brathwaite*, 432 U.S. 98, 114, 97 S.Ct. 2243, 53 L.Ed.2d 140 (1977); *State v. Ojile*, 1st Dist. Hamilton Nos. C-110677 and C-110678, 2012-Ohio-6015, ¶ 75; *State v. Smith*, 1st Dist. Hamilton Nos. C-080712 and C-090505, 2009-Ohio-6932, ¶ 16. Therefore, we overrule his third assignment of error.

In his fourth assignment of error, McCurdy contends that he was denied the effective assistance of counsel. McCurdy has not demonstrated that his counsel’s representation fell below an objective standard of reasonableness or that, but for counsel’s unprofessional errors, the results of the proceeding would have been otherwise. Therefore, he has failed to meet his burden to show ineffective assistance of counsel. *See Strickland v. Washington*, 466 U.S. 668, 687-689, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Hamblin*, 37 Ohio St.3d 153, 155-156, 524 N.E.2d 476 (1988); *State v. McCrary*, 1st Dist. Hamilton No. C-080860, 2009-Ohio-4390, ¶ 12. We overrule his fourth assignment of error.

In his fifth assignment of error, McCurdy contends that the state’s evidence was insufficient to support his conviction. Our review of the record shows that a rational trier of fact, after viewing the evidence in a light most favorable to the prosecution, could have found that the state proved beyond a reasonable doubt all of the elements of felonious assault under R.C. 2903.11(A)(2) and the accompanying firearm specification. Therefore, the evidence was sufficient to support the conviction. *See State v. Jenks*, 61 Ohio St.3d

259, 574 N.E.2d 492 (1991), paragraph two of the syllabus; *Ojile* at ¶ 48. We overrule McCurdy's fifth assignment of error.

In his sixth assignment of error, McCurdy argues that his conviction was against the manifest weight of the evidence. After reviewing the record, we cannot say that the trier of fact lost its way and created such a manifest miscarriage of justice that we must reverse McCurdy's conviction and order a new trial. Therefore, the conviction was not against the manifest weight of the evidence. See *State v. Thompkins*, 78 Ohio St.3d 380, 387, 678 N.E.2d 541 (1997); *State v. Glenn*, 1st Dist. No. C-030356, 2004-Ohio-1489, ¶ 32. McCurdy primarily argues that his evidence was more credible, but matters as to the credibility of evidence are for the trier of fact to decide. *State v. Bryan*, 101 Ohio St.3d 272, 2004-Ohio-971, 804 N.E.2d 433, ¶ 116; *Ojile* at ¶ 59. Consequently, we overrule McCurdy's sixth assignment of error and affirm his conviction.

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

**HILDEBRANDT, P.J., DINKELACKER and DEWINE, JJ.**

To the clerk:

Enter upon the journal of the court on January 17, 2014  
per order of the court \_\_\_\_\_.  
Presiding Judge