

NO. COA14-646

NORTH CAROLINA COURT OF APPEALS

Filed: 2 December 2014

STATE OF NORTH CAROLINA

v.

Rowan County

No. 13 CRS 53450, 13 CRS 2785

DERRICK GARDNER

Appeal by defendant from judgments entered 12 January 2014 by Judge Ronald E. Spivey in Rowan County Superior Court. Heard in the Court of Appeals 22 October 2014.

Attorney General Roy Cooper, by Assistant Attorney General Laura Edwards Parker, for the State.

Leslie Rawls for defendant.

ELMORE, Judge.

On 1 July 2013, defendant was indicted for failure to register as a sex offender (N.C. Gen. Stat. § 14-208.11) and for sex offender residential restriction violation based upon his alleged decision to reside residing within 1,000 feet of a child care center (N.C. Gen. Stat. § 14-208.16). On 23 September 2013, defendant was also indicted for habitual felon status. Prior to trial, defendant filed a motion *in limine* to exclude GPS data obtained from defendant's satellite-based monitoring

system. On 16 January 2014, defendant was found guilty of both charges. He subsequently admitted his habitual felon status. Defendant was sentenced as a prior record level IV offender with 12 prior record level points in the presumptive range to a minimum of 88 months and maximum of 118 months imprisonment.

On appeal, defendant contends that he was denied his right to confront and cross-examine the witnesses against him and denied his right to be free from unreasonable searches and seizures. After careful consideration, we conclude that defendant received a trial free from error.

I. Background

The facts of this case are undisputed: On 21 March 2012, defendant was released from the North Carolina Department of Corrections into the custody of probation officer Josh Barrier (Barrier). Barrier provided defendant with a copy of the post-release conditions. As required, defendant registered his post-release address with the sheriff's department at 930 N. Church Street in Salisbury, his mother's residence. Defendant was assigned a curfew of 6:00 p.m. to 6:00 a.m. as part of his supervision. Barrier informed defendant he was confined to his residence during those hours.

Barrier conducted visual curfew checks of defendant two to three times per week to insure defendant's compliance. Defendant was arrested three times for curfew violations, and he was sent to prison for thirty to sixty days on each occasion. As a result of multiple curfew violations, defendant was placed on electronic monitoring on 25 September 2012. The monitoring device tracked defendant's whereabouts and monitored whether he abided by the curfew restrictions and whether he stayed out of exclusion zones.

At trial, the State called Barrier to testify concerning the operation of the electronic monitoring device worn by defendant and the data produced by that device. Barrier explained that the ankle bracelet used GPS and cell phone towers to pinpoint the location of an offender in real time. He stated that the system is monitored twenty-four hours a day and employs the same GPS satellite technology used in phones and cars for navigation. The system logs information including the specific time an offender enters an inclusion zone, which is generally his home address, or when he enters an exclusion zone, which is a prohibited area. Barrier testified that the information transmitted by the bracelet is stored in a secure database and constitutes an accurate and reliable source of information.

On 28 December 2012, defendant asked Barrier if he could move to his girlfriend's residence in Salisbury. Barrier informed defendant that moving to that location would violate the sex offender registry laws as her home was located a block from the Rowan Medical Child Development Center. As an alternative residence, Barrier located a church-run program in Spencer where defendant was permitted to live for free provided he attend church services. Defendant agreed. Defendant registered the church's address with the sheriff's department in early 2013. However, defendant resided at the church for only a month before he was asked to leave due to his continued rule violations. He changed his address back to 930 North Church Street.

On 6 June 2013, Barrier was notified by the electronic monitoring system that defendant had failed to enter his inclusion zone the night before. Barrier reviewed the electronic records and determined that between 15 May 2013 and 6 June 2013, defendant had spent each night at his girlfriend's residence, 900 Holmes Street in Salisbury. Barrier compiled a report based on the electronic data which was admitted into evidence to illustrate defendant's whereabouts during the requisite time periods.

The defense presented the following evidence at trial: Dorothy Gardner, defendant's mother, testified that defendant lived with her from 15 May to 6 June 2013. Cynthia Houston, defendant's girlfriend, testified that defendant did not reside with her during the requisite time period. Defendant now appeals from his conviction.

II. Analysis

A. Confrontation Clause

Defendant first argues the admission of the GPS tracking reports violated his rights under the Sixth Amendment's Confrontation Clause in light of *Crawford v. Washington*, 541 U.S. 36, 158 L. Ed. 2d 177 (2004). We disagree and hold that the GPS tracking evidence was properly admitted as a business record.

We review defendant's Confrontation Clause challenge *de novo*. *State v. Ortiz-Zape*, ___ N.C. App. ___, ___, 743 S.E.2d 156, 162 (2013) *cert. denied*, ___ U.S. ___, ___, 189 L. Ed. 2d 208 (2014). The Confrontation Clause of the Sixth Amendment provides: "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." *Crawford*, 541 U.S. at 42, 158 L. Ed. 2d at 187.

This Court has previously held that GPS tracking evidence and simultaneously prepared reports are admissible under the business records exception to the hearsay rule. *State v. Jackson*, ___ N.C. App. ___, ___, 748 S.E.2d 50, 55 (2013). "Hearsay" is defined in the North Carolina Rules of Evidence as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." N.C. Gen. Stat. § 8C-1, Rule 801(c) (2013). Although generally inadmissible at trial, hearsay may be allowed by statute or the North Carolina Rules of Evidence. N.C. Gen. Stat. § 8C-1, Rule 802 (2013). N.C. Gen. Stat. § 8C-1, Rule 803(6) establishes an exception to the general exclusion of hearsay evidence as applied to business records. A business record includes:

A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association,

profession, occupation, and calling of every kind, whether or not conducted for profit.

N.C. Gen. Stat. § 8C-1, Rule 803(6) (2013). When a business record is stored electronically, it is still admissible if

(1) the computerized entries were made in the regular course of business, (2) at or near the time of the transaction involved, and (3) a proper foundation for such evidence is laid by testimony of a witness who is familiar with the computerized records and the methods under which they were made so as to satisfy the court that the methods, the sources of information, and the time of preparation render such evidence trustworthy.

State v. Crawley, 217 N.C. App. 509, 516 , 719 S.E.2d 632, 637(2011) (quoting *State v. Springer*, 283 N.C. 627, 636, 197 S.E.2d 530, 536 (1973)), *rev. denied*, 365 N.C. 553, 722 S.E.2d 607 (2012). The electronic business records need not be authenticated by the person who made them. *Id.* at 516, 719 S.E.2d at 637-38.

Defendant argues that the facts of this case are distinguishable from the Eighth Circuit decision *United States v. Brooks*, 715 F.3d 1069 (8th Cir. 2013). We disagree with defendant. Instead, we find *Brooks* both on point and persuasive. In *Brooks*, the Eighth Circuit determined that a

business record under Rule 803(6), while generally non-testimonial in nature, may occasionally be testimonial and "run afoul" of the Confrontation Clause if the business record was created for the purpose of establishing or proving some fact at trial. *Brooks*, 715 F.3d at 1079. Put another way, a business record is testimonial "when the circumstances objectively indicate that . . . the primary purpose of [an] interrogation is to establish or prove past events potentially relevant to later criminal prosecution." *Davis v. Washington*, 547 U.S. 813, 822, 165 L. Ed. 2d 224, 237 (2006). On appeal, defendant contends that the GPS data and report offered into evidence at trial was generated solely "for the purposes of criminal prosecution." Therefore, he argues that the GPS evidence was testimonial in nature and subject to the Confrontation Clause.

As in *Brooks*, the GPS evidence admitted in this case was not generated purely for the purpose of establishing some fact at trial. Instead, it was generated to monitor defendant's compliance with his post-release supervision conditions. The GPS evidence was only pertinent at trial because defendant was alleged to have violated his post-release conditions. We hold that the GPS report was non-testimonial and its admission did not violate defendant's Confrontation Clause rights. See *id.*

To clarify, the tracking data from the electronic monitoring device worn by defendant constitutes a data compilation. The State's exhibit 1, which consisted of Barrier's report compiling the data gathered from defendant's electronic monitoring device, is "merely an extraction of that data produced for trial." *Jackson*, ___ N.C. App. at ___, 748 S.E.2d at 55. It is well established that "[t]rustworthiness is the foundation of the business records exception." *State v. Miller*, 80 N.C. App. 425, 429, 342 S.E.2d 553, 556 (1986). On appeal, defendant does not dispute the trustworthiness of exhibit 1, meaning he does not dispute that the report was made or recorded in the regular course of business at or near the time of the incident. We hold that the tracking data at issue, which was gathered for the purpose of monitoring defendant's compliance with his post-release supervision, constitutes a reliable source of information. Barrier's testimony further established a sufficient foundation of trustworthiness for the tracking evidence to be admitted as a business record. See *Jackson*, *supra*. Accordingly, we overrule defendant's argument.

B. Unreasonable Search and Seizure

Defendant argues that the data obtained from the GPS device violated his constitutional rights because the trial court previously ordered that the device be removed. We disagree.

"In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context." N.C. R. App. P. 10(a)(1). It is well settled that constitutional issues not raised and passed upon at trial will not ordinarily be considered for the first time on appeal. *State v. Benson*, 323 N.C. 318, 322, 372 S.E.2d 517, 519 (1988). Because there is no evidence in the record that defendant raised this issue at trial and because there is no evidence in the record that the trial court did, in fact, order defendant's tracking device removed, we decline to address this issue.

In sum, we hold that the trial court did not err in admitting the GPS tracking evidence because such evidence was non-testimonial in nature and fell within the business records exception to the hearsay rule. Accordingly, we hold that defendant received a trial free from error.

No error.

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Judges BRYANT and ERVIN concur.