COURT OF COMMON PLEAS
CLERMONT COUNTY, OHIO

STATE OF OHIO	:	
Plaintiff	:	**CASE NO. 2017 CR 000400**
vs.	:	**Judge McBride**
SHAWN PAUL DREW	:	**DECISION/ENTRY**
Defendant		

Darren Miller, assistant prosecuting attorney for the state of Ohio, 76 S. Riverside Drive, 2nd Floor, Batavia, Ohio 45103.

Mark Tekulve, assistant public defender and counsel for the defendant, Shawn Paul Drew, 302 East Main Street, Batavia, Ohio 45103.

This cause came before the court for a bench trial on December 5, 2017. At the conclusion of the trial, the court took the issues raised in the case under advisement.

The defendant Shawn Paul Drew was indicted on June 29, 2017 on one count of failure to periodically verify his current residence address in violation of R.C. 2950.06(A), a felony of the third degree.

Upon consideration of the record of the proceedings, the evidence presented for the court's consideration, the oral arguments of counsel, and the applicable law, the court now renders this written decision.

FINDINGS OF FACT

The court makes the following findings of fact based upon the testimony of the state's only witness, Corporal Christine Schehr, and the exhibits it found to be admissible, credible, and reliable as presented at trial:

On October 13, 1998, the defendant pled guilty to sexual abuse in the first degree in Case No. 98-CR-00247 in Kenton County, Kentucky.[1] He was sentenced on October 16, 1998 to a prison term of five years, but that sentence was suspended and he was placed on probation.[2] The defendant was notified in the sentencing entry that he had duties to register under KRS Chapter 17.510 relating to registration requirements for adults who have committed sex crimes.[3] The notification warned the defendant that a failure to comply with the statute was a class "A" misdemeanor punishable by a fine of $500 or 12 months in jail or both.[4]

Following the completion of his sentence in Case No. 98-CR-00247, the defendant registered his Cincinnati, Ohio address in Kentucky beginning on April 6, 2004.[5] In his Kentucky Criminal Offender Registry Form, he was notified that his registration requirement would last for ten years and would expire on April 7, 2014.[6] On September 12, 2016, the defendant registered in person with the Clermont County Sheriff's Department that he was moving from Butler County, Ohio to Clermont County,

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[1] State's Ex. 1.
[2] State's Ex. 1.
[3] State's Ex. 2.
[4] State's Ex. 2.
[5] State's Ex. 3.
[6] State's Ex. 3.

Ohio.[7] The registration form the defendant signed on that date indicated he next needed to verify his annual registration on April 12, 2017, or within ten days prior to that date.[8]

Corporal Christine Schehr, of the Clermont County Sheriff's Office, oversees sex offender registration in Clermont County. She began working in that position in 2014. In the course of her duties, Corporal Schehr oversaw the defendant's registration. The defendant claimed to be homeless, and through various text messages the defendant communicated to Corporal Schehr information as to where in Clermont County he was staying during his homelessness. The defendant indicated that in April 2017 he was still residing in Clermont County, but was homeless. According to Corporal Schehr, the defendant needed to verify his residence address at the Clermont County Sheriff's Office by April 12, 2017. However, the defendant did not personally come to the Clermont County Sheriff's Office by April 12, 2017 to register his address.

Corporal Schehr believed the defendant still needed to register annually at the Clermont County Sherriff's office because she believed his original registration period had been tolled and that therefore it extended beyond April 12, 2017. She believed the expiration date had been tolled because the defendant has been incarcerated at various times following his completed sentence in Case No. 98-CR-00247.

At trial, Corporal Schehr did not specifically testify as to the length of various periods that the defendant has been incarcerated. Instead, the state moved to admit State's Exhibit 5, which is a document generated by the OffenderWatch program. State's Exhibit 5 was not certified as a public record. The state tried to elicit testimony

[7] State's Ex. 4.
[8] State's Ex. 4.

from Corporal Schehr to create a foundation for State's Exhibit 5's admission. The court reserved its final ruling on State's Exhibit 5 so that it could further research and consider the issues involved. For the reasons stated in the opinion below, the court finds that State's Exhibit Five is inadmissible, and as such the court has not considered it as evidence.

STANDARD OF REVIEW

In a criminal case, it is the state's burden to prove the defendant's guilt beyond a reasonable doubt.[9] R.C. 2901.05(E) describes reasonable doubt as follows:

> "'Reasonable doubt' is present when the [trier of fact], after * * * carefully consider[ing] and compar[ing] all the evidence, cannot say they are firmly convinced of the truth of the charge. It is a doubt based on reason and common sense. Reasonable doubt is not mere possible doubt, because everything relating to human affairs or depending on moral evidence is open to some possible or imaginary doubt. '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."

In a criminal case, "[i]t is axiomatic that the state must prove each and every element of an offense * * *."[10]

LEGAL ANALYSIS

As a pre-Adam Walsh Act sex offender, R.C. 2950.04(A) required the defendant to register his address with the sheriff's office. Pursuant to R.C. 2950.06(A):

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[9] R.C. 2901.05(A).

[10] *State v. Jones*, 91 Ohio St. 3d 335, 347, 744 N.E.2d 1163 (2001). *See State v. Brown*, 12th Dist. Warren No. CA2006-10-120, 2007-Ohio-5787, ¶ 29 ("The state has a duty to present evidence, beyond a reasonable doubt, as to each and every element of the crime as set forth in the indictment.")

> "An offender * * * who is required to register a residence address pursuant to division (A)(2), (3), or (4) of section 2950.04 * * * of the Revised Code shall periodically verify the offender's * * * current residence address * * * in accordance with this section. The frequency of verification shall be determined in accordance with division (B) of this section, and the manner of verification shall be determined in accordance with division (C) of this section."

Pursuant to R.C. 2950.06(B), which governs the frequency of registration, the defendant was required to register his address annually from the date of his initial registration.[11] To register, R.C. 2950.06(C) required the defendant to personally appear before the sheriff or a designee of the sheriff to complete the address verification.

The defendant's annual registration date is April 12th of each year. The defendant did not appear at the Clermont County Sheriff's Office to register on his annual date of April 12th in 2017. The parties disagree as to when the defendant's duty to annually register his address ends. The defendant argues that this duty ended in 2014, which was ten years after his initial registration duties began (once he completed his sentence in Case No. 98-CR-00247). By contrast, the state argues that the defendant's required registration period has been extended by a tolling provision in R.C. 2050.07(D).

R.C. 2950.07(D) provides:

> "(D) The duty of an offender or delinquent child to register under this chapter is tolled for any period during which the offender or delinquent child is returned to confinement in a secure facility for any reason or imprisoned for an offense when the confinement in a secure facility or imprisonment occurs subsequent to the date determined pursuant to division (A) of this section. The offender's or delinquent

[11] The current version of R.C. 2950.06(B)(4) states that sex offenders who were required to register under R.C. 2950.04 before January 1, 2008 are required to continue registering pursuant to that prior duty to register. As a sexually oriented offender (*See* State's Ex. 4), under former R.C. 2950.06 the defendant was required to register annually.

> child's duty to register under this chapter resumes upon the offender's or delinquent child's release from confinement in a secure facility or imprisonment."[12]

The defendant argues, *inter alia*, that the tolling provision is inapplicable to him because it was enacted after he was sentenced for his sex offense and he was not given notice of it at the time of sentencing. The state's position is that the defendant's sex offender registration requirements were tolled by R.C. 2950.07(D) to April 26, 2019, and because the defendant did not register his address by April 12, 2017, he is guilty of violating R.C. 2950.06.

R.C. 2950.07(D) is a tolling provision that extends a sex offender's registration obligations.[13] R.C. 2950.07(D) was codified in 1998 H.B. 65, which became effective on March 31, 1999.[14] Ohio courts that have reviewed this issue found that the tolling provision is retroactive, and therefore it applies to sex offenders who committed sex offenses prior to the enactment of R.C. 2950.07(D).[15] Additionally, it is unnecessary for a court to provide prior notification to a sex offender of the possibility of having his or her registration requirements tolled.[16]

The state's case relies on the tolling statute, which necessarily requires the state to prove that it applies to the defendant's case. To do so, the state must show that the defendant was confined or imprisoned for a time sufficient to toll his registration requirements beyond April 12, 2017, when he failed to appear at the sheriff's office.

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[12] (Emphasis added.) R.C. 2950.07(D).
[13] *State v. Harris*, 2014-Ohio-2203, 11 N.E.3d 1237, ¶ 8 (2d Dist.).
[14] *State v. Hudson*, 2013-Ohio-657, 986 N.E.2d 1128, ¶ 10 (3d Dist.)
[15] *See* id. at ¶¶ 42-43; *State v. Hancock*, 2d Dist. Montgomery No. 24653, 2012-Ohio-1435, ¶ 10.
[16] *State v. Cundiff*, 10th Dist. Franklin No. 10AP-672, 2011-Ohio-4949, ¶ 23.

To prove this essential element, the state submitted State's Exhibit 5, which is an OffenderWatch record that lists time periods during which the defendant has been held in an institution. The OffenderWatch record indicates that the defendant's expiration date for his sex offender registration requirements is April 26, 2019. It lists start and end dates for the periods during which the defendant has been held in an institution. There are 26 separate entries, which cover a number of different institutions: Clermont County Jail, Hamilton County Justice Center, DRC Correctional Reception Center, DRC Warren Correctional Institution, Clermont County Sheriff's Office, London Correctional Institution, Kenton County Detention Center, and Eastern Kentucky Correctional (the last part of this institution's name is cut-off in the exhibit). These various periods of confinement occurred between October 27, 1998 and November 29, 2017. For each period listed, the address of the institution holding the defendant is listed. Most periods also have an offense associated with the incarceration listed, although five do not.

Corporal Schehr testified that the OffenderWatch record is a business record of the Clermont County Sheriff's Office. She accessed the OffenderWatch computer program at the Clermont County Sheriff's Office on November 29, 2017 in order to generate a report, and then she used the print command to print a screen shot of it, which is State's Exhibit 5. The OffenderWatch program is used by sheriff's departments in Ohio to track sex offender registration. The program is also used nationwide by other states. Corporal Schehr testified that OffenderWatch is provided by the Ohio Attorney General's Office, which contracts with Watch Systems, a private company in Louisiana, which creates and maintains the program.

The periods of incarceration for sex offenders listed in the program is inputted by various law enforcement sources. In Clermont County, Corporal Schehr testified that the offenders' incarceration information can be updated by someone in the Clermont County Jail, by prison records staff, or by her. Generally, other incarceration information can be inputted by other sheriff's deputies or any other records staff that has OffenderWatch access. Any county or prison holding a sex offender can input an offender's incarceration information into OffenderWatch. As to the defendant's OffenderWatch records, Corporal Schehr inputted most of his periods of incarceration in State's Exhibit 5. She believes Hamilton County, Butler County, and various other prisons may have inputted some of his incarceration information too. Corporal Schehr could not say which entries were entered by which agency, or which entries she made.

The sources Corporal Schehr used to input the defendant's incarceration information into OffenderWatch were LEADS, the jail in-house program, and Law Enforcement Gateway, which is the Ohio Attorney General's storehouse of computerized records. From these sources she found various booking information and incarceration information and inputted it into OffenderWatch. She did not testify to the sources that other agencies may use when inputting confinement information into OffenderWatch.

The defense objected to the admission of State's Exhibit 5 on the basis that it is hearsay. The state contends it is admissible under Evid.R. 803 as a business record and/or a public record. The court indicated that it believed State's Exhibit 5 was likely inadmissible, but would withhold its ruling on Exhibit 5 until it could further research and review the issue. The court asked the state if it had any other evidence it would like to

present concerning the defendant's periods of incarceration, to which the state answered that it did not.

The trial court enjoys broad discretion in ruling on evidentiary issues.[17] Generally hearsay statements are inadmissible.[18] Hearsay is defined 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."[19]

However, a hearsay statement can be admissible if it satisfies one of the exceptions to the hearsay prohibition, which are enumerated in Evid.R. 803.[20] Evid.R. 803 provides:

> "The following are not excluded by the hearsay rule, even though the declarant is available as a witness: * * *
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> **(6) Records of Regularly Conducted Activity.** A memorandum, report, record, or data compilation, in any form, of acts, events, or conditions, 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 or as provided by Rule 901(B)(10), 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. * * *

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[17] *State v. Papusha*, 12th Dist. Preble No. CA2006-11-025, 2007-Ohio-3966, ¶ 10, citing *State v. Graham*, 58 Ohio St.2d 350, 352 (1979).

[18] *See* Evid.R. 802: "Hearsay is not admissible except as otherwise provided by the Constitution of the United States, by the Constitution of the State of Ohio, by statute enacted by the General Assembly not in conflict with a rule of the Supreme Court of Ohio, by these rules, or by other rules prescribed by the Supreme Court of Ohio." *See Motorists Mut. Ins. Co. v. Roberts*, 12th Dist. Warren No. CA2013-09-089, 2014-Ohio-1893, ¶ 13, citing Evid.R. 801(C) ("Generally, out-of-court statements offered to prove the truth of the matter asserted are inadmissible hearsay.").

[19] Evid.R. 801(C).

[20] *State v. Mohn*, 12th Dist. Warren No. CA2008-06-073, 2009-Ohio-437, ¶ 24.

> **(8) Public Records and Reports.** Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (a) the activities of the office or agency, or (b) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel, unless offered by defendant, unless the sources of information or other circumstances indicate lack of trustworthiness."[21]

To begin with Evid.R. 803(6), quoted above, it provides an exception to the general prohibition of hearsay for certain business records.[22] In order for business records to be admissible, "business records must be authenticated by evidence sufficient to support a finding that the matter in question is what its proponent claims.[23] Evid.R. 803(6) governs the authentication of business records.[24]

Although the witness is not required to have firsthand knowledge of the transaction, the witness "must demonstrate he is sufficiently familiar with the operation of the business and the record's preparation, maintenance, and retrieval such that he can reasonably testify as to the basis of the knowledge."[25] The witness must have "a working knowledge of the specific recordkeeping system that produced the document."[26]

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[21] Evid.R. 803(6) and (8).
[22] *Motorists Mut. Ins. Co.*, 2014-Ohio-1893 at ¶ 13.
[23] *Midfirst Bank v. Wallace*, 12th Dist. Warren No. CA2013-12-122, 2014-Ohio-4525, ¶ 10, citing Evid.R. 901.
[24] *Midfirst Bank*, 2014-Ohio-4525 at ¶ 10, citing Evid.R. 901(B)(10).
[25] *Motorists Mut. Ins. Co.*, 2014-Ohio-1893 at ¶ 13, citing *State v. Glenn*, 12th Dist. Butler No. CA2009-01-008, 2009-Ohio-6549, ¶ 19. *See State v. Corley*, 12th Dist. Maddison No. CA94-04-015, 1995 WL 22698, *3 (Jan. 23, 1995), citing *State v. Verona*, 47 Ohio App.3d 146, 148 (9th Dist. 1988) ("The information contained in a business record is admissible under Evid.R. 803(6) if the authenticating witness testifies that he is familiar with the operation of the business and with the circumstances of the record's preparation, maintenance, and retrieval, that the record is what it purports to be, and that the record was prepared in the ordinary course of business.").
[26] *State v. Davis*, 62 Ohio St.3d 326, 342, 581 N.E.2d 1362 (1991).

To qualify for admission under Evid.R. 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."[27]

However, "[e]ven after the above elements are met, a business record may be excluded from evidence if 'the source of information or the method or circumstances of preparation indicate lack of trustworthiness.'"[28]

The Twelfth District Court of Appeals recently examined whether NPLEx records fell within the business records exception to hearsay in *State v. Rowley*, 12th Dist. Clinton No. CA2016-10-019, 2017-Ohio-5850. The National Precursor Log Exchange ("NPLEx"), is a database monitored by law enforcement and pharmacies to keep track of pseudoephedrine purchases, the main ingredient used to manufacture methamphetamine.[29] At issue in *Rowley* was whether a sufficient foundation under Evid.R. 803(6) had been established for the admission of the NPLEx records based on the testimony of a pharmacist.[30] The pharmacist testified that the NPLEx system is a system for record keeping that every pharmacist in Ohio must use to record purchases of products containing pseudoephedrine.[31] The pharmacist explained how the system worked, that it generates reports for every pharmacy, and that he had extensive

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[27] *Midfirst Bank v. Wallace*, 2014-Ohio-4525 at ¶ 11, quoting *Cent Mtge. Co. v. Bonner*, 12th Dist. No. CA2012-10-204, 2013-Ohio-3876, ¶ 14.
[28] *Motorists Mut. Ins. Co.*, 2014-Ohio-1893 at ¶ 13, quoting *Glenn*, 2009-Ohio-6549 at ¶ 17.
[29] *State v. Rowley*, 12th Dist. Clinton No. CA2016-10-019, 2017-Ohio-5850, ¶ 6.
[30] Id. at ¶ 13.
[31] Id.

experience with it because it was part of his working day.[32] When a person attempts to purchase a product containing pseudoephedrine, the person must present a government issued photo identification card, which the pharmacist at the pharmacy then scans into the NPLEx system.[33]

The defendant argued that the court errantly admitted the NPLEx records under Evid.R. 803(6) because the pharmacist was only familiar with Walmart's policies and procedures, but not the record keeping policies of other pharmacies included in the NPLEx records.[34] Upon considering the requirements for Evid.R. 803(6), the appellate court rejected the defendant's argument because the pharmacist testified that pharmacies selling pseudoephedrine products "must follow the exact procedures described by Ohio law."[35]

The case of *State v. Messer*, 12th Dist. Clermont No. CA2004-03-020, 2005-Ohio-2501, concerned the admission of a jail booking sheet under Evid.R. 803(6). The defendant argued that it should have been excluded as hearsay because it was not properly authenticated.[36] The appellate court explained that the witness testifying about the business record must demonstrate sufficient familiarity with the "circumstances of the preparation, maintenance, and retrieval of the record" in order to be able to testify that the record was created in the ordinary course of business.[37] The appellate court ultimately found that there was adequate testimony from a supervising officer of the

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[32] Id. at ¶ 7.
[33] Id.
[34] Id. at ¶ 13.
[35] Id. at ¶ 22.
[36] *State v. Messer*, 12th Dist. Clermont No. CA2004-03-020, 2005-Ohio-2501, ¶ 17.
[37] Id., citing *Corley*, 1995 WL 22698.

county jail to authenticate the jail booking sheet under Evid.R. 803(6).[38] The officer had testified that he was familiar with the jail's recordkeeping system through daily use, and he provided "an extensive illustration of the regular booking procedures by which prisoners' information is recorded immediately upon arrival."[39]

In examining the present case, the circumstances here are quite distinguishable from *State v. Rowley*. As discussed, in *Rowley*, Evid.R. 803(6) was satisfied even though the pharmacist-witness could only testify to the recordkeeping procedures of his pharmacy, Walmart, because he also testified that all Ohio pharmacies must use the same procedures under Ohio law.[40] Here, Corporal Schehr did not testify as to the procedures of other law enforcement agencies, such as prisons and jails, some of which are outside Ohio, for recordkeeping practices regarding OffenderWatch. Nor did she testify that all agencies must follow the same procedures, e.g. by law or some other widely accepted policy. Instead, her testimony indicates that not all law enforcement agencies follow the same procedures. Corporal Schehr testified that she entered some incarceration periods in State's Exhibit 5 that occurred at different jails or prisons. This means that not all jails and prisons are using a standard recordkeeping practice with respect to entering incarceration times on OffenderWatch because Corporal Schehr was the person inputting the incarceration periods, not the actual institutions that confined the defendant.

Moreover, the information entered into the NPLEx record system was entered, as required by Ohio law, at or near the time of the transaction. The pharmacist explained that, when a person attempts to purchase a product containing pseudoephedrine, the

[38] *Messer*, 2005-Ohio-2501 at ¶ 24.
[39] Id. at ¶ 24.
[40] *Rowley*, 2017-Ohio-5850 at ¶ 22.

person must present a government issued photo identification card, which the pharmacist scans into the NPLEx system.[41] In contrast, based upon Corporal Schehr's testimony, it is clear that not all confinement periods are entered at or near the time of the defendant's confinement. This is so because Corporal Schehr testified that she had to enter incarceration periods for "most" of the defendant's confinement periods. Most of the defendant's confinement periods occurred prior to 2014, when Corporal Schehr first began her role as supervising sex offenders. Because 18 of the confinement periods occurred before 2014, that means that she was inputting confinement periods that occurred well before they were entered into OffenderWatch.

Furthermore, the fact *Rowley* involved uniform recordkeeping procedures for all pharmacies to follow in maintaining NPLEx records would have given the court assurance as to the reliability of the records at issue. Here, there are no assurances as to how other law enforcement agencies were maintaining their records and inputting data, and there are reasons to believe that they were not uniform and reliable in their methods because not all of the agencies were making incarceration entries, and even Corporal Schehr, who did make entries, admittedly made entries that were remote in time from the defendant's incarceration. Therefore this case is distinguishable from *Rowley*.

When comparing this case to *State v. Messer*, the jail booking records case, discussed earlier, it is evident that the state failed to elicit sufficient testimony from Corporal Schehr to apply the business records exception. In *Messer*, the officer testified "to the regular booking procedures by which prisoners' information is recorded

[41] Id. at ¶ 7.

immediately upon arrival."[42] By sharp contrast in this case, Corporal Schehr did not testify as to the regular procedures for entering a sex offender's confinement information into OffenderWatch. She testified that she sometimes enters the defendant's time in confinement as it occurs and sometimes she records past confinement periods. Sometimes other institutions have inputted the defendant's confinement as it occurs at their institutions, and sometimes they have not. In sum, unlike *Messer*, in the case at bar it is unclear what the preparation and maintenance procedures are for OffenderWatch records.[43]

Setting aside *Rowley* and *Messer*, this case does not satisfy the requirements for a business record to be admitted under Evid.R. 803(6) because multiple essential elements are missing.[44] As explained above, to be admissible under Evid.R. 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."[45]

Here, not all of the entries in State's Exhibit 5 were entered by "a person with knowledge of the act," since Corporal Schehr testified she inputted confinement periods that occurred in other jails or prisons outside Clermont County. Most entries were not recorded at or near the time of transaction, for the reasons explained when comparing this case to *Rowley* and *Messer*. And, as described above, Corporal Schehr did not lay

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[42] *Messer*, 2005-Ohio-2501 at ¶ 24.
[43] Id. at ¶ 22.
[44] *Midfirst Bank*, 2014-Ohio-4525 at ¶ 11, quoting *Cent Mtge. Co.*, 2013-Ohio-3876 at ¶ 14.
[45] Id.

an adequate foundation as a records custodian. Therefore Exhibit 5 has not satisfied Evid.R. 803(6).

Even if the above elements were met, the court would still find Exhibit 5 inadmissible because "the source of information or the method or circumstances of preparation indicate lack of trustworthiness."[46] The court is not confident in the trustworthiness of the OffenderWatch records because there is no standard procedure for various institutions to input confinement periods, not all institutions have been consistent in inputting confinement periods, many entries were made long after the confinement period ended, and many entries were made by someone who was not at the institution of confinement.

In addition to claiming that the OffenderWatch record constitutes a business record, the state also argues that it qualifies under the public records hearsay exception in Evid.R. 803(8). Evid.R. 803(8) creates an exception to the hearsay prohibition for the following public records:

> "Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (a) the activities of the office or agency, or (b) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel, unless offered by defendant, unless the sources of information or other circumstances indicate lack of trustworthiness."

The public records exception is more stringent than the business records exception.[47] As with business records, public records must also be authenticated through use of witness testimony. Under Evid.R. 901(A), an exhibit is authenticated

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[46] *Motorists Mut. Ins. Co.*, 2014-Ohio-1893 at ¶ 13.
[47] *State v. Martin*, 2d Dist. Montgomery No. 20383, 2005-Ohio-209, ¶ 25.

when the record establishes that it "is what the proponent claims."[48] Public records can be certified, in which case there is no need for extrinsic evidence authenticating the record.[49] Evid.R. 902(4) allows for certified copies of public records, when the records are "* * * certified as correct by the custodian or other person authorized to make the certification * * *."[50]

In *State v. Martin*, 2d Dist. Montgomery No. 20383, 2005-Ohio-209, the appellate court had to determine whether jail records were admissible under Evid.R. 803(8), the public records exception. There, the state did not have the jail records certified for trial.[51] The appellate court explained that "* * * to be admissible [as a public record], the record must satisfy the self-authentication requirements of Evid.R. 902; that it is a domestic public document under seal, or one bearing the signature of a public officer who prepared the document if another officer under whose seal it was prepared certifies 'that the signer has the official capacity and the signature is genuine.'"[52] Because the jail records had not been certified in accordance with Evid.R. 902, the appellate court found that it had been error for the trial court to admit them into evidence under Evid.R. 803(8).[53]

When a public record is not certified, so as to satisfy Evid.R. 902 as a self-authenticating public record, then it must satisfy the authentication requirements of

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[48] Evid.R. 901(A).
[49] Evid.R. 902.
[50] Evid.R. 902(4).
[51] *Martin*, 2005-Ohio-209 at ¶ 25.
[52] Id. at ¶ 24.
[53] Id. at ¶ 25.

Evid.R. 901. In the case of jail booking records, courts examines whether the testifying witness possessed knowledge of the internal record maintenance system.[54]

In *State v. Papusha*, 12th Dist. Preble No. CA2006-11-025, 2007-Ohio-3966, the Twelfth District Court of Appeals had to determine whether an officer adequately authenticated Law Enforcement Automated Data System ("LEADS") records so as to allow the admission of the LEADS records under Evid.R. 803(8)(a). The court found that the records qualified as the activities of the office or agency. In finding that the law enforcement officer-witness adequately authenticated the LEADS report, the appellate court noted that his testimony included, *inter alia*, "how the system works, what procedures agencies are required to follow, and the nature of the LEADS training he obtained."[55] In light of this testimony, the appellate court found that the trial court properly admitted the report into evidence under Evid.R. 803(a).

In turning to the instant case, the OffenderWatch records are not certified and therefore are not self-authenticating under Evid.R. 902. As such, Corporal Schehr must have provided testimony authenticating the records. Although she testified as to her personal internal record maintenance system, she did not testify as to the standards that other confinement institutions use for the record maintenance system.[56]

Additionally, Evid.R. 803(8)(a) only applies to reports of the "activities of the office or agency," and Corporal Schehr is not with the Ohio Attorney General's Office, which is the state agency that contracts for OffenderWatch, nor is she with Watch Systems, the private company in Louisiana that creates and maintains the program.

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[54] *State v. Galloway*, 5th Dist. Richland No. 2003-CA-0096, 2004-Ohio-2273, ¶ 39, quoting *State v. Davis*, 62 Ohio St.3d 326, 581 N.E.2d 1362 (1991).
[55] *Papusha*, 2007-Ohio-3966 at ¶ 15.
[56] *Galloway*, 2004-Ohio-2273 at ¶ 39, quoting *Davis*, 62 Ohio St.3d 326.

Furthermore, State's Exhibit 5 is a compilation of information from multiple offices or agencies, and Corporal Schehr only works for the Clermont County Sheriff's Office. In addition to including information from the Clermont County Jail and Clermont County Sheriff's Office, the report also contains entries from the Hamilton County Justice Center, DRC Correctional Reception Center, DRC Warren Correctional Institution, London Correctional Institution, Kenton County Detention Center, and Eastern Kentucky Correctional. For these reasons, it is an improper characterization of State's Exhibit 5 to deem it a record setting forth the Clermont County Sheriff Office's activities.

Notwithstanding that issue, when comparing this case to *State v. Papusha*, discussed above, it is evident that Corporal Schehr's testimony was inadequate to authenticate the OffenderWatch records as public records under Evid.R. 803(8)(a). In *Papusha*, the testifying officer authenticated the LEADS records by testifying to "how the system works, what procedures agencies are required to follow, and the nature of the LEADS training he obtained."[57] In this case, Corporal Schehr explained how OffenderWatch generally works by indicating that it generates reports and individual institutions have to input confinement information. However, she did not attest to what, if any, procedures law enforcement agencies are required to follow in entering confinement information, nor did she explain the extent of her training using OffenderWatch. For the above reasons, the court finds that Evid.R. 803(8)(a) is inapplicable to State's Exhibit 5.

The state also asserted that Evid.R. 803(8)(b) covers the OffenderWatch records, which applies to "* * * matters observed pursuant to duty imposed by law as to which matters there is a duty to report * * *." Although the state argued that the

[57] *Papusha*, 2007-Ohio-3966 at ¶ 15.

Clermont County Sherriff's Office had a duty to submit incarceration information to OffenderWatch, Corporal Schehr did not testify to any such duty, and the state did not identify what law imposes a duty upon the Clermont County Sheriff's office and other law enforcement agencies to enter information in OffenderWatch. Moreover, public records are not admissible under Evid.R. 803(8)(b) in criminal cases "* * * unless offered by defendant, * * *" which is not the case here. As such, Evid.R. 803(8)(b) is inapplicable as well.

Accordingly, State's Exhibit 5, the defendant's confinement records from OffenderWatch, is hearsay and is not admissible evidence. The court notes that this case is limited to its facts. As such, it is possible that OffenderWatch records could be admissible in other cases if the witness testifies to the aspects that were lacking in this case or if the state has the record certified as a public record.

Without State's Exhibit 5, the state does not have other evidence demonstrating how long the defendant has been in confinement for purposes of determining whether his sexual offender registration requirements have been tolled under R.C. 2950.07(D).[58] Because the state cannot prove beyond a reasonable doubt that the defendant's annual sex offender registration requirements were extended beyond April 12, 2017, the state cannot meet its burden of proving each and every element of the charge of failing to periodically verify current address.

[58] State's Exhibit 4 notes the dates of several convictions and releases, but it is unclear from that exhibit whether the defendant was actually in confinement during any of those periods. In fact, the conviction date listed for the defendant's underlying sex offense case is listed as August 31, 1998, but he was not convicted in that case until October 16, 1998. *See* State's Ex. 1.

CONCLUSION

The court finds that the state has not proven beyond a reasonable doubt the defendant's guilt on the charge of periodic verification of address. The defendant is therefore acquitted of the charge of failure to periodically verify current address, in violation of R.C. 2950.06, a felony of the third degree.

IT IS SO ORDERED.

DATED: 1-12-2018

Judge Jerry R. McBride

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was sent on this 12th day of January 2018 by e-mail to Darren Miller, Assistant Prosecuting Attorney for the State of Ohio, at dmiller@clermontcountyohio.gov, and to Mark Tekulve, Attorney for the Defendant, at tekulvelaw@fuse.net. A copy has also been mailed to the Clermont County Public Defender's Office at publicdefender@clermontcountyohio.gov.

Judicial Assistant to Judge McBride