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## **EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST**

This cause presents two issues of public interest or great general interest. The first pertains as to whether it constitutes Plain Error for a trial court to permit improper, prejudicial, and inflammatory “Gang Testimony” by a law enforcement officer when the Defendant is not charged with a crime relating to membership in, or participation with, a criminal gang. The second relates as to whether identification testimony based on a photo array that is unduly suggestive, or where it is clear that the investigating officer expects the witness to identify the accused, should be suppressed as such a suggestion, can lead a witness to make a mistaken identification and will then be predisposed to adhere to this identification in subsequent testimony at trial.

In the instant case, Detective James Sandford, of the Columbus Police Department, gave testimony at trial regarding a specific, predominately Latino, gang identified as “MS-13” or *La Mara Salvatrucha*. At no point in the trial is Appellant Javier Humberto identified by anyone as belonging to said gang, displaying tattoos or other “markers” of “MS-13,” or self-referencing as a member. Nevertheless, over the objection of trial counsel advanced *in Limine* (Tr. Vol III of VI, pp.27-28), fifty-four (54) pages of testimony relating to “MS-13” is given by Detective Sandford and heard by the jury. (Tr. Vol V pp 5-56). Appellant submits that the primary reason such detailed evidence was advanced by the prosecution was to prejudice the jury relative to Appellant, and strongly suggest “guilt by association.” Gang testimony, Appellant submits is sufficiently problematic without it being allowed in the absence of gang-related charges. In a more common instance, law enforcement not only files the gang-related charges, but

then acts as its own expert witness confirming the allegation that it advanced in the first place. In the instant case, no gang-related charges are advanced against the Defendant, but detailed testimony about the notoriety of gangs is permitted anyway.

The court in the instant case further failed in allowing the gang-related “expert” testimony to stray into inflammatory and prejudicial territory. The court should have anticipated the provocative nature of the evidence (as Defense counsel predicted in his Motion in Limine), and considered the hearsay and relevancy issues discussed in *Daubert v. Merrell Dow Pharmaceuticals*, 509 US 579 (1993), hereinafter cited as “*Daubert*.” In *Daubert*, the U.S. Supreme Court established the role that the trial court must play in determining when expert testimony can be presented to a jury.

Trial counsel admittedly failed to renew its objection as advanced by him and overruled by the court, *in Limine*, during the evidentiary portion of the trial. This oversight required the Tenth District Court of Appeals to consider the trial court’s alleged error as Plain Error, *State v. Maurer* (1984) 15 Ohio St. 3d 239, 259; *State v. Drummond*, 111 Ohio St. 3d 14, 2006-Ohio-5084 (challenging gang-related evidence); *State v. Hartman*, 93 Ohio St. 3d 274, 2001-Ohio-1580.

The Tenth District Court of Appeals correctly cites Crim R. 52(B) for the proposition that “[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.” This notice, however, is limited by three elements: (1) “there must be an error, i.e., a deviation from a legal rule,” (2) the error must be plain, so that it constitutes “an ‘obvious’ defect in the trial proceedings,” and (3) the error must have affected “substantial rights” such that “the trial

court's error must have affected the outcome of the trial." Tenth District decision, p.13, citing *State v. Barnes*, 94 Ohio St. 3d 21, 27, 2002-Ohio-68.

Appellant submits, as is more fully enumerated in his argument below, that notwithstanding the more demanding standard imposed by the Plain Error rule, the "Gang testimony" was so inflammatory and prejudicial as to meet the challenge. It is of great public and general interest that law enforcement and the prosecution not be permitted to enhance its case by presenting testimony whose primary and essential purpose is to prejudice the jury.

A second issue of public interest or great general interest is that identification testimony based on a photo array that is unduly suggestive, or where it is clear that the investigating officer expects the witness to identify the accused, should be suppressed as such a suggestion, can lead a witness to make a mistaken identification and will then be predisposed to adhere to this identification in subsequent testimony at trial.

A hearing was held outside of the presence of the jury on the second day of trial, to determine "specifically, procedures for how show-ups or line-ups were conducted or how photographs of the defendant were shown to any witnesses," and rule on the Suppression request pursuant to *Moore v. Illinois*, 434 U.S. 220 (1977), (Tr. III of VI, p.3)

The procedure used in the photo identification of Appellant Humberto was described as a "photo array." (Tr. III of VI, p. 5) This is a series of six photographs that, according to the investigating detective, "...best match the subject of the photo array,"

which are hand-selected by the investigating officer after a number of similar photos are chosen by a computer program. (Tr. III of VI, p. 7). The six-photo array is then shown to the witness as a “black and white” copy. (Tr. III of VI, p. 9).

The instant case reflects the pitfalls identified by *Moore v. Illinois*, supra, where a witness, examining a limited number of photographs, side-by-side, identifies the person more closely resembling the suspect, and then protects that choice in subsequent identifications. “Persons who conduct the identification procedure may suggest, intentionally or unintentionally, that they expect the witness to identify the accused. Such a suggestion, coming from a police officer or prosecutor, can lead a witness to make a mistaken identification. The witness then will be predisposed to adhere to this identification in subsequent testimony at trial.” *Moore v. Illinois*, supra, at pp 224, 225.

To help address these unreliable practices, the last session of the Ohio General Assembly passed SB 77, now in effect as RC §2933.83, as a safeguard against unduly suggestive practices that may lead to the identification of an innocent suspect. The practice advanced in the instant case is called “simultaneous array.” This is the common practice for photo lineups to present to the eyewitness all photographs or lineup members at one time. (Tr. III of VI, p. 9) This is to be distinguished from a “sequential” procedure (as suggested by RC §2933.83), where folders are used without the side-by-side comparison of one image next to the other. In this manner, Appellant submits, an eyewitness would be less disposed to compare photographs with each other to determine which one most closely resembles the suspect relative to others, and then “protect” his decision through the trial process.

Since the effective date of SB-77 was July 6, 2010, well over a year after the showing of the simultaneous photo array to Mr. Pyfrom, Appellant cannot advance the argument that the investigating detective failed to follow the procedure directed by SB-77. However, this court may consider if the procedures followed avoid the pitfalls of “unduly suggestive practices” cited by *Moore v. Illinois*, supra. Appellant submits that these new SB-77 procedures were not enacted in a vacuum, but were passed in order to improve on the former procedures which may have been suggestive of a given outcome. It is of great public and general interest that identification procedures used by law enforcement do not “stack the deck” against a given suspect. If a defendant has been convicted, at least in part, through the use of procedures that public policy has placed into question, such procedures should receive adequate scrutiny by the trial court, which scrutiny was absent in the instant case.

## STATEMENT OF THE CASE AND FACTS

On November 15, 2008, at a nightclub by the name of “El Gato Negro,” in Columbus, Ohio, an altercation broke out involving a man by the name of Ramon Ramos and a man later identified as Martin Rivera, also known as “Momia.” (Tr. II of VI, p 63) The bar’s management directs the participants to leave the bar, and the altercation continues in the parking lot (Tr. III of VI, pp 36 -44; Tr. IV of VI, pp 25, 26). It is dark in the parking lot as the time is approximately 11:00 PM, but the general area is illuminated by street as well as parking lot lights (Tr. II of VI, pp 77, 83, 84). At some point during this quarrel, a man appeared wielding a handgun and began to shoot, hitting a man by the name of Ramon Ramos, and a woman by the name of Angel Devilbiss. (Tr. III of VI, p 45, 46). Ramon Ramos died the next day at Grant Hospital, but Ms. Devilbiss survived (Tr. VI of VI, p 7). There was no testimony or other evidence offered at trial indicating that Appellant, Javier G. Humberto, was involved in the altercation, either inside or outside the nightclub.

The man doing the shooting is driven away from the scene, accompanied by Martin Rivera (Momia) and according to an unidentified witness, dropped a baseball cap on the ground (Tr. II of VI, pp 53, 59). Additional evidence found by the police on the scene includes seven (7) bullet casings of the same caliber as the bullets that struck Ramon Ramos and Angel Devilbiss (Tr. II of VI, pp 93, 94).

The weapon used in the shooting comes into the possession of the police, wrapped in a blue bandana, and delivered by a paid informant by the name of Dawn Bemiller. She does not identify Appellant Humberto as the man who gave her the gun, but says the gun was delivered to her by a man identified by her as “Vaca.”(Tr. IV of VI, pp. 5 - 9)

Appellant Humberto's connection with the shooting arose out of the investigation by Detective Robert Wachalec, of the Columbus Division of Police, when the alias of "Colima" appears "at some point" in the investigation (Tr. III of VI, p 13). A photograph of an occupant of a car at a traffic stop identified as "Colima" is included in a photo array and shown to a number of individuals, one of whom identifies him as Javier Humberto. (Tr. III of VI, pp 6,10, 12)

Initially, only one witness says he is certain of the identity of the man in the photo array as the shooter, and that is Edward Pyfrom, the bouncer at the nightclub. At the time of trial Mr. Pyfrom is serving time in prison on an unrelated matter, and admits to having received consideration for his testimony against Mr. Humberto. (Tr. IV of VI, pp 46-50)

Another witness, Wilmer Ramos (brother of Ramon Ramos and husband of Angel Devilbiss), fails to conclusively identify Mr. Humberto beyond "70% sure" that Appellant was involved in the altercation inside the bar, and that that he selected Appellant from the photo array after "...he, (the detective) asked me is *this* the person who shot at you." *Emphasis added.* (Tr. III of IV, p. 72) The victim that was wounded, Angel Devilbiss, states that she never saw the man who fired the gun (Tr. III of VI, pp. 146, 146, 152).

Wilson Guillen, another witness to the shooting never told the police at the time of the original investigation that he could identify the shooter. (Tr. III of IV, p. 106) But, after meeting with prosecutors on the day of trial, admits that all he can suddenly identify the Appellant (sitting at counsel's table). Mr. Guillen then proceeds to also admit that he has changed his story from the time of the original investigation regarding a hat that "fell off the suspect's head" (Tr. III of IV, p. 109), this being the same hat that failed to

produce DNA evidence connecting it to Appellant.

Appellant, Javier Humberto, was subsequently arrested, and on December 29, 2008, was indicted by the Franklin County Grand Jury for two counts of Murder in violation of RC § 2903.02, one count of Attempted Murder in violation of RC § 2903.02, and one count of Felonious Assault in violation of RC § 2903.11, all said counts were supplemented with Firearm Specifications. The Murder counts were unclassified felonies, the Attempted Murder a felony of the first degree, and the Felonious Assault a felony of the second degree (R. 2). Mr. Humberto was arraigned on December 31, 2008, submitting a general plea of Not Guilty to all counts.

Appellant's trial began on April 20, 2009. On April 28, 2009, the trial jury convicted Defendant-Appellant of all counts together with all firearm specifications (Tr. VI of VI, pp 171, 172) (R. 160,161,162,163,165,166,167,168). On that same date, a sentencing hearing was held pursuant to RC § 2929.19, and the court sentenced Defendant-Appellant to a term of fifteen (15) years to life each as to the murder counts one and two (merged for sentencing) and four (4) years each as to counts three (3) and four (4), the Attempted Murder and Felonious Assault counts (also merged for sentencing), to run consecutive with each other. The sentence also included an additional mandatory six (6) years' incarceration for two separate firearm specifications on counts one and three. The total sentence imposed being twenty-five (25) years to life (Tr. VI of VI, pp 186,187) (R.182).

The trial court filed its Final Judgment Entry on May 12, 2010 (R. 176). On June 3, 2010 Appellant perfected a timely appeal, and on June 24, 2011, The Franklin County Court of Appeals overruled Defendant's three (3) assignments of error.

## ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

*Proposition of Law No. 1* The introduction of testimony regarding gang culture when the Defendant is not charged with a crime relating to membership in, or participation with, a criminal gang, is improper and prejudicial, and violates his rights as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the U.S. Constitution, as well as Article I, Sections 2, 10, and 16 of the Constitution of the State of Ohio, and constitutes Plain Error by the Trial Court

Detective James Sandford, of the Columbus Police Department, gave testimony at trial regarding a specific, predominately Latino, gang identified as “MS-13” or *La Mara Salvatrucha*. At no point in the trial is Appellant Javier Humberto identified by anyone as belonging to said gang, displaying tattoos or other “markers” of “MS-13,” or self-referencing as a member. Nevertheless, over the objection of trial counsel (Tr. Vol III of VI, pp.27-28), fifty-four (54) pages of testimony relating to “MS-13” is given by Detective Sandford and heard by the jury. (Tr. Vol V pp 5-56). Appellant submits that the primary reason such detailed evidence was advanced by the prosecution was to prejudice the jury relative to Appellant, and strongly suggest “guilt by association.”

Detective Sandford was testifying as an expert. In testifying as an expert relative to “gangs” his testimony is governed by the general guidelines relating to expert witnesses cited in *Daubert v. Merrell Dow Pharmaceuticals*, 509 US 579 (1993), hereinafter cited as “*Daubert*.” *Daubert*, supra, established the rule that when faced with a proffer of expert testimony, the trial court must make a two-pronged inquiry.

[T]he trial judge must determine at the outset, pursuant to Rule 104(a), whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue. This entails a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid, and of whether that reasoning or methodology properly can be applied to the facts in issue.

*Daubert*, supra, at pp 592-593

Therefore, the U.S. Supreme Court suggests that in order for expert testimony to be permitted, the testimony must be first of all, “scientific,” and secondly that it be of assistance to the trier of fact.

When Detective Sandford was permitted to testify at length, not just about matters of personal knowledge, but about the alleged particular notoriety of “MS-13,” the trial court abdicated its role as gatekeeper. Detective Sandford’s testimony regarding his attendance at conferences and his years as an officer studying “gangs” is of questionable value, and only reflect his activities as a police officer and does not make him an expert in the field. If not offered within the context of qualification, then his extensive testimony as to gangs is prejudicial and irrelevant to the case at bar.

The court should have anticipated the provocative nature of the evidence (as Defense counsel predicted), and considered the hearsay and relevancy issues also discussed in *Daubert* at p. 595:

Throughout, a judge assessing a proffer of expert scientific testimony under Rule 702 should also be mindful of other applicable rules...Rule 403 permits the exclusion of relevant evidence "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. . . ." Because of this risk, the judge in weighing possible prejudice against probative force under Rule 403 of the present rules exercises more control over experts than over lay witnesses." *Weinstein*, 138 F. R. D., at 632

In weighing possible prejudice against the legitimate interest in support of the prosecution’s case, the court should have prevented or at least controlled the testimony.

An example of how prejudicial and inflammatory the testimony is likely to have been perceived by the jury may be found on Tr. V of VI, p 42:

DETECTIVE SANDFORD: ...MS-13 members across the world have been involved in countless homicides and felonious assaults, shooting people. They're known for their tendency toward violence, using machetes to chop people's hands and fingers and heads off...

In the instant case, the practical and unavoidable effect of such testimony was to leave the jury with the impression that Detective Sandford was talking about the Appellant. Otherwise, the testimony would clearly be irrelevant, and Defendant's objection to its introduction should have been sustained.

Trial counsel admittedly failed to renew its objection as advanced by him and overruled by the court, *in Limine*, during the evidentiary portion of the trial. This oversight required the Tenth District Court of Appeals to consider the trial court's alleged error as Plain Error.

The Tenth District Court of Appeals correctly cites Crim R. 52(B) for the proposition that "[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." This notice, however, is limited by three elements: (1) "there must be an error, i.e., a deviation from a legal rule," (2) the error must be plain, so that it constitutes "an 'obvious' defect in the trial proceedings," and (3) the error must have affected "substantial rights" such that "the trial court's error must have affected the outcome of the trial." Tenth District decision herein, p.13, citing *State v. Barnes*, 94 Ohio St. 3d 21, 27, 2002-Ohio-68.

Appellant submits that notwithstanding the more demanding standard imposed by  
the Plain Error rule, the "Gang testimony" was so inflammatory and prejudicial as to rise to the challenge. There was a (1) Deviation from the Ohio Rules of Evidence Rule 403(A) which states: " Although relevant, evidence is not admissible if its probative

value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or of misleading the jury;" (2) The error was obvious in that to a reasonable mind the testimony was intended to color the Defendant culpable as a gang member, and was unnecessary to place him or others at the scene of the crime, and; (3) The outcome of the trial can reasonably have been affected by the intensity of the misplaced gang testimony.

The issue in this case was whether Javier Humberto was identified by physical evidence or credible and reliable testimony as the murderer of Martin Rivera. By allowing the wide-ranging and prejudicial testimony of Detective Sandford, the trial court deprived Appellant of his right to a fair trial in violation of the Fifth, Sixth and Fourteenth Amendments of the United States Constitution, and Article I, §§ 2, 10 and 16 of the Ohio Constitution.

*Proposition of Law No. II* Identification testimony based on a photo array that is unduly suggestive, or where it is clear that the investigating officer expects the witness to identify the accused, should be suppressed as such a suggestion, coming from a police officer or prosecutor, can lead a witness to make a mistaken identification and will then be predisposed to adhere to this identification in subsequent testimony at trial

A hearing was held outside of the presence of the jury on the second day of trial, to determine "specifically, procedures for how show-ups or line-ups were conducted or how photographs of the defendant were shown to any witnesses," and rule on the Suppression request pursuant to *Moore v. Illinois*, 434 U.S. 220 (1977), (Tr. III of VI, p.3) The Motion was denied after testimony from Detective Robert Wachalec revealed the photo array procedure presented to the witness Edward Pyfrom, at that time identified

by the alias “James Johnson.” (Tr. III of VI, p. 25)

The procedure used in the photo identification of Appellant Humberto was described as a “photo array.” (Tr. III of VI, p. 5) This is a series of six photographs that, according to Detective Wachalec, “...best match the subject of the photo array,” which are hand-selected by the investigating officer after a number of similar photos are chosen by a computer program. (Tr. III of VI, p. 7). The six-photo array is then shown to the witness as a “black and white” copy. (Tr. III of VI, p. 9).

The instant case reflects the pitfalls identified by *Moore v. Illinois*, supra, where a witness, examining a limited number of photographs, side-by-side, identifies the person more closely resembling the suspect, and then protects that choice in subsequent identifications.

“Persons who conduct the identification procedure may suggest, intentionally or unintentionally, that they expect the witness to identify the accused. Such a suggestion, coming from a police officer or prosecutor, can lead a witness to make a mistaken identification. The witness then will be predisposed to adhere to this identification in subsequent testimony at trial.” *Moore v. Illinois*, supra, at pp 224, 225.

In fact, there is at least some indication that in the instant case, the investigating officers went well beyond unintentional suggestion when witness Wilmer Ramos admitted on the stand that “Well, to tell you the truth, he (the detective) asked me is *this* the person who shot at you.” *Emphasis added.* (Tr. III of IV, p. 72)

To help address these unreliable practices, the current session of the Ohio General Assembly passed SB 77, now in effect as RC §2933.83, as a safeguard against undue

suggestive practices that may lead to the identification of an innocent suspect. SB-77 states in part, that a “blind administrator” must conduct the lineup; that it must be live whenever possible; and that the witness must be told that suspect may not be in the lineup.

Since the effective date of SB-77 was July 6, 2010, well over a year after the showing of the simultaneous photo array to Mr. Pyfrom, Appellant cannot advance the argument that Detective Wachalec failed to follow the procedure directed by SB-77. However, this court may consider if the procedures followed avoid the pitfalls of “unduly suggestive practices” cited by *Moore v. Illinois*, supra. Appellant submits that these new SB-77 procedures were not enacted in a vacuum, but were passed in order to improve on the former procedures which may have been suggestive of a given outcome.

The practice advanced in the instant case is called “simultaneous array.” This is the common practice for photo lineups to present to the eyewitness all photographs or lineup members at one time. (Tr. III of VI, p. 9) This is to be distinguished from a “sequential” procedure (as suggested by RC §2933.83), where folders are used without the side-by-side comparison of one image next to the other. In this manner, Appellant submits, an eyewitness would be less disposed to compare photographs with each other to determine which one most closely resembles the suspect relative to others, and then “protect” his decision through the trial process. In *United State v. Wade*, 373 U.S. 218, the Court suggests that influence or improper suggestion should be avoided, stating at pp.228, 229:

A major factor contributing to the high incidence of miscarriage of justice from mistaken identification has been the degree of suggestion inherent in

the manner in which the prosecution presents the suspect to witnesses for pretrial identification. A commentator has observed that [t]he influence of improper suggestion upon identifying witnesses probably accounts for more miscarriages of justice than any other single factor -- perhaps it is responsible for more such errors than all other factors combined.

In the instant case, the only witness who conclusively identified Appellant as the shooter was Edward Pyfrom, the bouncer at "El Gato Negro," (Tr IV of VI, p 41). Mr. Pyfrom was serving a sentence for an unrelated offense at the time of Appellant's trial, but admitted to having agreed to a plea deal after agreeing to testify against Mr. Humberto (Tr. IV of VI, pp 46-50). Appellant submits that the simultaneous array procedure used when interviewing Mr. Pyfrom combined with his motivation in providing effective testimony at the time of trial, brings into question the reliability of his testimony, and Appellant's request for suppression should have been sustained.

#### CONCLUSION

For the reasons set forth above, this case involves a felony, and matters of public and great general interest. The Appellant requests that this court grant jurisdiction and allow this case so that the issues presented in this case will be reviewed on the merits.

Respectfully Submitted,

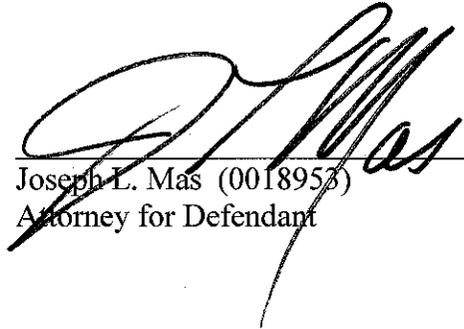


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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true copy of the foregoing was made by hand-delivery to Seth L. Gilbert, Franklin County Prosecuting Attorney's Office, 373 S. High Street, 13<sup>th</sup> Floor, Columbus, Ohio 43215, on this the 5<sup>th</sup> day of August, 2011.



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Joseph L. Mas (0018953)  
Attorney for Defendant

IN THE COURT OF APPEALS OF OHIO  
TENTH APPELLATE DISTRICT

FILED  
COURT OF APPEALS  
FRANKLIN CO. OHIO

2011 JUN 23 PM 12:39

CLERK OF COURTS

State of Ohio, :  
 :  
 Plaintiff-Appellee, :  
 :  
 v. : No. 10AP-527  
 : (C.P.C. No. 08CR-12-8935)  
 Javier G. Humberto, : (REGULAR CALENDAR)  
 :  
 Defendant-Appellant. :

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D E C I S I O N

Rendered on June 23, 2011

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*Ron O'Brien*, Prosecuting Attorney, and *Seth L. Gilbert*, for appellee.

*Joseph L. Mas*, for appellant.

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APPEAL from the Franklin County Court of Common Pleas.

PER CURIAM.

{¶1} Defendant-appellant, Javier G. Humberto, appeals from a judgment of the Franklin County Court of Common Pleas finding him guilty, pursuant to jury verdict, of two counts of murder in violation of R.C. 2903.02, one count of attempted murder in violation of R.C. 2923.02 as it relates to R.C. 2903.02, and one count of felonious assault in violation of R.C. 2903.11, all with firearm specifications pursuant to R.C. 2941.145. Because (1) legally sufficient evidence and the manifest weight of the evidence support

defendant's convictions, (2) the trial court did not commit plain error in allowing gang-related testimony into evidence, and (3) the trial court did not err in allowing pretrial identifications of defendant into evidence, we affirm.

### **I. Facts and Procedural History**

{¶2} The state indicted defendant on December 29, 2008 on (1) two counts of murder, one for purposely causing the death of Ramon Ramos, and the other for causing the death of Ramon Ramos as a proximate result of committing or attempting to commit felonious assault, (2) one count of attempting to purposely cause the death of Angel Devilbiss, and (3) one count of felonious assault for knowingly causing serious physical harm or attempting to cause physical harm by means of a deadly weapon to Angel Devilbiss. The charges arose from a shooting incident that occurred on November 15, 2008 at a bar called "El Gato Negro," located in Columbus, Ohio.

{¶3} According to the state's evidence, Ramon Ramos, his brother Wilmer Ramos, Wilmer's wife Angel Devilbiss and the Ramos' cousin, Wilson Guillen, went to El Gato Negro around 10:30 p.m. to pick up Guillen's brother, who was having problems with some members of a gang known as MS-13. When the group arrived at the bar, they noticed a man they did not know who was staring at them in such a way as to make them uncomfortable. An individual, whose street name was "Momia" and was known to the Ramos group from the soccer fields where he had attempted to initiate fights with them, began to joust verbally with Ramon shortly after the Ramos group arrived. Momia suggested the men take the fight outside and, as Ramon turned to walk outside, another individual from Momia's group hit Ramon over the head with a pool stick. In retaliation,

Wilmer picked up one of the pool balls and threw it at Momia and his group. The bouncer from the bar, Edward Pyfrom, intervened and forced everyone outside.

{¶4} With Momia behind them, the Ramos group began walking to their cars to leave. When an unidentified man tried to intervene, Momia and his group assaulted the man. At that point, another man came from a car, walked towards the Ramos group, and with arms outstretched shot a gun at them. After firing several shots, the shooter and Momia got into the same car and fled the scene. The man with the gun shot Angel Devilbiss' ring finger, thumb, tailbone, and stomach, as well as Ramon's head, upper abdomen, and hip; Ramon died from the multiple gunshot wounds he sustained. Wilmer and Wilson both testified the man who fired the shots was the same individual who was staring at the Ramos group when they first entered the bar.

{¶5} Shortly after the shooting, police arrived to collect information from the scene. Pyfrom described the suspect to the police as a 5'6" Hispanic male weighing between 160 to 185 pounds, Wilson gave one of the officers a baseball hat that he said fell off an individual who was involved with the shooting, and police recovered seven spent shell casings from the scene of the incident. On the day after the shooting, a confidential informant working for police turned in to Detective Sandford of the Columbus Division of Police a recovered firearm she believed was connected to a homicide. Ballistics testing revealed the firearm the confidential informant recovered was the same firearm used at the shooting. DNA testing on the baseball hat indicated defendant had not worn the hat. Through several interviews, detectives identified an individual using the street name "Colima" as the primary suspect in the case; they subsequently discovered defendant was Colima.

{¶6} Defendant presented no evidence in his defense, and the jury returned verdicts finding him guilty of all counts charged in the indictment. The court imposed on defendant a prison term of 15 years to life on the two counts of murder, noting they merged for purposes of sentencing. The court further imposed a prison term of four years on the attempted murder and felonious assault convictions, again merging them for purposes of sentencing. The court ordered the sentences to be served consecutively and further imposed six years imprisonment on the two separate firearm specifications, for a total sentence of 25 years to life.

## II. Assignments of Error

{¶7} Defendant appeals, assigning the following errors:

### FIRST ASSIGNMENT OF ERROR

THE TRIAL COURT ERRED AND DEPRIVED APPELLANT OF DUE PROCESS OF LAW AS GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE ONE SECTION TEN OF THE OHIO CONSTITUTION BY FINDING HIM GUILTY OF MURDER, ATTEMPTED MURDER, AND FELONIOUS ASSAULT AS THOSE VERDICTS WERE NOT SUPPORTED BY SUFFICIENT EVIDENCE AND WERE ALSO AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

### SECOND ASSIGNMENT OF ERROR

THE TRIAL COURT ERRED IN PERMITTING THE STATE TO INTRODUCE IMPROPER AND PREJUDICIAL TESTIMONY REGARDING GANG CULTURE, THEREBY VIOLATING APPELLANT'S RIGHTS AS GUARANTEED BY THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION AND ARTICLE I, SECTIONS 2, 10 AND 16 OF THE OHIO CONSTITUTION.

### THIRD ASSIGNMENT OF ERROR

THE TRIAL COURT ERRED IN HOLDING TO REVEAL [SIC] THE IDENTITY AND PROMISES MADE TO ANY CONFIDENTIAL INFORMANT AND MOTION TO SUPPRESS IDENTIFICATION TESTIMONY AND TO REVEAL (1) ANY IDENTIFICATION PROCEDURES WHERE PHOTOGRAPHS OF DEFENDANT WERE SHOWN TO ANY WITNESSES, AND (2) PROCEDURES FOR HOW SHOW-UPS AND LINEUPS WERE CONDUCTED OF THE DEFENDANT, AND (3) TO IDENTIFY ANY PROCEDURES WHERE WITNESSES WERE ASKED TO DESCRIBE ANY SUSPECTS TO THE OFFENSE.

#### III. First Assignment of Error -- Sufficiency & Manifest Weight

{¶8} Defendant's first assignment of error challenges the sufficiency and manifest weight of the evidence. Defendant contends the evidence connecting him to the murder "was imprecise, circumstantial, and mainly supported by the unreliable testimony of Edward Pyfrom." (Appellant's brief, 2.) Defendant does not dispute that someone fired several shots outside El Gato Negro, seriously injuring Angel Devilbiss and killing Ramon. The issue is the identity of the perpetrator of the offenses.

{¶9} Whether evidence is legally sufficient to sustain a verdict is a question of law. *State v. Thompkins* (1997), 78 Ohio St.3d 380, 386. Sufficiency is a test of adequacy. *Id.* The evidence is construed in the light most favorable to the prosecution to determine whether a rational trier of fact could have found the essential elements of the offense proven beyond a reasonable doubt. *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus; *State v. Conley* (Dec. 16, 1993), 10th Dist. No. 93AP-387. When reviewing the sufficiency of the evidence the court does not weigh the credibility of the witnesses. *State v. Yarbrough*, 95 Ohio St.3d 227, 2002-Ohio-2126, ¶79.

{¶10} Although no weapon or forensic evidence tied defendant to the shooting, Wilmer, Wilson, and Pyfrom all were present at the scene, saw the shooter and identified defendant as the shooter. " 'Eyewitness identification testimony is sufficient to support a conviction.' " *State v. Coleman* (Nov. 21, 2000), 10th Dist. No. 99AP-1387, quoting *State v. Atris* (May 17, 1994), 10th Dist. No. 93APA11-1547. Construing the evidence in the light most favorable to the state, sufficient evidence identifies the shooter and supports the jury's verdicts.

{¶11} The manifest weight of the evidence is both "quantitatively and qualitatively different" than the sufficiency of the evidence. *Thompkins* at 386. When presented with a manifest weight argument, we engage in a limited weighing of evidence to determine whether sufficient competent, credible evidence permits reasonable minds to find guilt beyond a reasonable doubt. *Conley, supra; Thompkins* at 387 (noting that "[w]hen a court of appeals reverses a judgment of a trial court on the basis that the verdict is against the weight of the evidence, the appellate court sits as a 'thirteenth juror' and disagrees with the factfinder's resolution of the conflicting testimony"). In the manifest weight analysis the appellate court considers the credibility of the witnesses and determines whether 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." *Id.*, quoting *State v. Martin* (1983), 20 Ohio App.3d 172, 175. Determinations of credibility and weight of the testimony remain within the province of the trier of fact. *State v. DeHass* (1967), 10 Ohio St.2d 230, paragraph one of the syllabus. The jury may take note of any inconsistencies and resolve them accordingly, "believ[ing] all, part, or none of a witness's testimony." *State v. Raver*, 10th Dist. No. 02AP-604, 2003-Ohio-958, ¶21, citing *State v. Antill* (1964), 176 Ohio St. 61, 67.

{¶12} In reviewing the "manifest weight of the evidence, this court frequently has held that, even where discrepancies exist, eyewitness identification testimony alone is sufficient to support a conviction so long as a reasonable juror could find the eyewitness testimony to be credible." *State v. Jordan*, 10th Dist. No. 04AP-827, 2005-Ohio-3790, ¶14. Accordingly, the issue under defendant's first assignment of error resolves to whether a reasonable juror could have found the testimony of the eyewitnesses to be credible. In that regard, the state relied on the testimony of three witnesses, Wilmer, Wilson, and Pyfrom.

{¶13} Wilmer stated that after the fight between Ramon and Momia spilled out into the parking lot, "someone came out shooting." (Tr. Vol. III, 45.) According to Wilmer, the man came from among the cars, walked toward Wilmer's group, and held the gun with both hands with his arms out straight. Wilmer said he focused during the shooting "on the guy who was shooting at us," and he "could see well" since "[t]here was overhead light from one of the posts there on the corner and it was near where we were." (Tr. Vol. III, 77-78.) Wilmer testified Momia did not commit the shooting, as he was still kicking the man who tried to intervene when the shooting first began.

{¶14} Although Wilmer was emotional and refused to speak to police on the night of the incident, he spoke with police the next day and identified a photograph of Momia. In January 2009, Wilmer identified defendant as the shooter from a photo array, writing in Spanish on the front of the photo array that defendant was the man who had been looking at him and his brother "seriously like if he had something to do with us. And in reality, that's when he started shooting on me and my wife." (Tr. Vol. III, 54.) Despite cross-examination suggesting Wilmer was less than certain of his pick, when the photo array

originally was presented to him, Wilmer confirmed at trial that defendant's photo, picked in the array, was a photo of the person who shot his wife and brother. Wilmer identified defendant, sitting in the courtroom, was the same man who shot at his group on November 15, 2008. (Tr. Vol. III, 54.)

{¶15} The second of the three pivotal witnesses, Wilson stated the shooter was inside the bar before the incident, giving him and his cousins bad looks. Wilson testified that, as the fight spilled out into the parking lot, the shooter came from the back of a car and walked directly towards his group, holding his arms out straight. Wilson said that although he did not get a "really good" look at the shooter's face, he "saw his face" and identified defendant in the courtroom as the shooter. Defendant notes Wilson did not identify defendant to police when he spoke with them on the night of the incident; instead he first identified defendant as the shooter in the courtroom. Wilson explained he felt no need to call police to tell them he could identify the shooter, because he saw defendant's picture in the newspaper and concluded the police already had him in jail.

{¶16} Pyfrom, the third eyewitness and the bouncer, testified the lighting outside El Gato Negro was "real good. It's not that bright, but you can still see everything as it come on. You can see the cars, the tags, the license plates and everything as they park there." (Tr. Vol. IV, 28.) Pyfrom stated he had seen defendant in the bar a couple of times before the incident and specifically recalled kicking defendant out of the bar for violating ~~the dress code approximately one to two weeks prior to the night of the incident.~~ Pyfrom, however, also testified defendant did not come into the bar on the night of the shooting. Pyfrom was just outside the front entrance of the bar when the shooting occurred, was able to get a clear look at the shooter, and actually saw the fire and smoke come out of

the gun. He said the shooter walked towards the group with his arms straight out, "[s]hooting in to the crowd that was right there." (Tr. Vol. IV, 33.) Because Pyfrom told police on the night of the incident he would be able to identify the suspect, detectives showed Pyfrom a photo array on December 20, 2008. With no difficulty, Pyfrom identified defendant as the shooter both in the photo array and subsequently in the courtroom.

{¶17} Defendant contends a reasonable juror could not believe Pyfrom's testimony because Pyfrom received a sentencing benefit from the state on an unrelated crime. Pyfrom informed the jury he had two prior felony convictions, was arrested in June of 2009 for carrying a concealed weapon, was on probation for a 2005 possession of cocaine conviction, and was under indictment for possession of drugs and tampering with evidence. Pyfrom, however, testified he had no agreement with the state either when he told officers on the night of the incident he could identify the shooter or when he identified defendant from the photo array a month later.

{¶18} Not until January 13, 2010 did Pyfrom enter into a "Defendant's Agreement" with the state, agreeing "to testify truthfully, completely, and accurately" regarding the events of November 15, 2008. In return, Pyfrom received a 12-month sentence on the carrying a concealed weapon charge and his probation under the 2005 case was terminated for time served. The state reserved the right to reinstate the original charges if Pyfrom testified falsely. Defendant on cross-examination asked Pyfrom if he would have testified had the state not offered him any sentencing benefit, and he responded, "I'd still be here." (Tr. Vol. IV, 78.)

{¶19} Defendant's cross-examination of the three eyewitnesses may have presented the jury with reasons to question their testimony. The jury, however, had

"superior, first-hand perspective in judging the demeanor and credibility of the witnesses." *State v. Mickens*, 10th Dist. No. 08AP-626, 2009-Ohio-1973, ¶30, discretionary appeal not allowed, 122 Ohio St.3d 1506, 2009-Ohio-4233; *DeHass* at paragraph one of the syllabus. It was free to assess their credibility, including Pyfrom's credibility in light of the consideration he received from the state for testifying for the prosecution, and determine whether their testimony was credible. *State v. Jennings*, 10th Dist. No. 09AP-70, 2009-Ohio-6840, ¶56, discretionary appeal not allowed, 125 Ohio St.3d 1416, 2010-Ohio-1893, citing *State v. Bliss*, 10th Dist. No. 04AP-216, 2005-Ohio-3987, ¶26 (concluding the jury was free to assess the witnesses' credibility where the details of a witnesses' plea agreement were revealed); *State v. Covington*, 10th Dist. No. 02AP-245, 2002-Ohio-7037, ¶28. Nothing in their testimony removed that prerogative from the jury.

{¶20} Defendant next contends the testimony of the three eyewitnesses is not credible because of differences regarding what the shooter wore. Wilson testified Momia, not the shooter, wore a black hat; Wilmer told police the shooter had on a black ball cap. Wilmer testified at trial the shooter wore a white sweatshirt with possibly some black streaks and a hood; Wilson testified the shooter wore a black and white sweater, like a winter coat, with a hood. Pyfrom testified the shooter was wearing all black. Sergeant Eggleston testified that although the scene was a well-lit night time scene, colors in particular "are hard to distinguish at night." (Tr. Vol. II, 83-84, 141.)

{¶21} ~~The discrepancies in the testimony concerning what the shooter wore~~ render neither the witnesses' testimony incredible nor the verdicts against the manifest weight of the evidence. Three different eyewitnesses identified defendant as the shooter and corroborated the other witnesses' testimony in some aspects. *State v. Monford*, 10th

Dist. No. 09AP-274, 2010-Ohio-4732, ¶1113 (noting the "eyewitness testimony of the various witnesses corroborated one another" and the jury could have concluded "it would be highly unlikely to find that all of the witnesses were not credible"). Any discrepancies were for the jury to resolve in determining which witnesses were credible.

{¶22} Defendant may contend the darkness impaired the ability of the three witnesses to identify defendant and rendered their testimony unbelievable, but the witnesses and the police officers testified visibility was good. Moreover, Wilmer and Wilson saw defendant in the bar earlier that evening, and Pyfrom had seen defendant in the bar a couple of times before the incident, both factors that raise the level of reliability. *Id.* at ¶1113.

{¶23} In the end, the jury found Wilmer, Wilson, and Pyfrom credible despite the discrepancies in their testimony and the benefit Pyfrom received in exchange for his testimony. Given that all three witnesses independently identified defendant as the shooter, a reasonable juror could have found the eyewitnesses' testimony credible. Engaging in the limited weighing of the evidence we are permitted, we cannot say the jury clearly lost its way and created such a manifest miscarriage of justice as to warrant reversal.

{¶24} Because sufficient evidence and the manifest weight of the evidence support defendant's convictions, we overrule defendant's first assignment of error.

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#### **IV. Second Assignment of Error – Gang-Related Evidence**

{¶25} Defendant's second assignment of error argues the gang-related evidence adduced at trial unfairly prejudiced him, allowing the jury to infer guilt through his alleged association with gang members. A trial court has broad discretion concerning the

admission of evidence; in the absence of an abuse of discretion that materially prejudices a defendant, a reviewing court generally will not reverse an evidentiary ruling. *State v. Issa*, 93 Ohio St.3d 49, 64, 2001-Ohio-1290, cert. denied (2002), 535 U.S. 974, 122 S.Ct. 1445.

{¶26} Defendant initially questions the trial court's allowing Detective Sandford to testify as an expert regarding gang-related activity. Defendant contends that, even if Sandford properly was qualified to testify as an expert witness, the trial court abdicated its role as the "gatekeeper" of evidence when it allowed Detective Sandford to testify regarding MS-13 without first applying the factors set forth in *Daubert v. Merrell Dow Pharmaceuticals, Inc.* (1993), 509 U.S. 579, 113 S.Ct. 2786. Defendant further alleges the trial court erred by allowing portions of Detective Sandford's testimony into evidence, as they were irrelevant and prejudicial.

{¶27} A witness may testify as an expert when the testimony relates to matters beyond the knowledge lay persons hold, he or she possesses specialized knowledge, skill, experience, training, or education regarding the subject matter of the testimony, and the testimony is based on reliable information. Evid.R. 702(A). As to whether the trial court erred in permitting Sandford to so testify, defendant's argument is problematic for two reasons: defendant failed to timely object and *Daubert* does not apply here.

{¶28} Although defendant filed a pretrial motion in limine "to prevent any reference whatsoever to MS-13," the trial court denied the motion. Because defendant failed to object during trial to the testimony he contends should have been precluded under the motion in limine, he forfeited all but plain error. *State v. Maurer* (1984), 15 Ohio St.3d 239, 259 (noting "[f]ailure to object to evidence at the trial constitutes a waiver of

any challenge, regardless of the disposition made for a preliminary motion in limine"); *State v. Drummond*, 111 Ohio St.3d 14, 2006-Ohio-5084, ¶115, citing Crim.R. 52(B); *State v. Hartman*, 93 Ohio St.3d 274, 286, 2001-Ohio-1580 (stating defense "counsel never objected or challenged his qualifications to testify" and thus "waived all but plain error").

{¶29} Pursuant to Crim.R. 52(B), "[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." This rule places three limitations on a reviewing court's decision to correct an error despite the absence of a timely objection at trial: (1) "there must be an error, i.e., a deviation from a legal rule," (2) the error must be plain, so that it constitutes "an 'obvious' defect in the trial proceedings," and (3) the error must have affected "substantial rights" such that "the trial court's error must have affected the outcome of the trial." *State v. Barnes*, 94 Ohio St.3d 21, 27, 2002-Ohio-68 (internal citations omitted). The decision to correct a plain error is discretionary and should be made " 'with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice.' " *Id.*, quoting *State v. Long* (1978), 53 Ohio St.2d 91, paragraph three of the syllabus.

{¶30} Moreover, defendant's contention regarding *Daubert* is misplaced. In *Daubert* the United States Supreme Court held that, under the Federal Rules of Evidence, "the trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable." *Daubert* at 589, 113 S.Ct. at 2795. To that end, the court announced a non-exhaustive list of factors the trial court may consider to determine the reliability of an expert's testimony, including whether the theory or technique was tested and subject to peer review, the known or potential rate of error, and

whether the theory or technique is generally accepted within the scientific community. *Id.* at 593-95, 113 S.Ct. at 2796-97. The same court later recognized that although the trial judge's gate-keeping obligation applies to all expert testimony, the court should consider the *Daubert* factors only to the extent relevant to a particular expert's expertise. *Kumho Tire Co. Ltd. v. Carmichael* (1999), 526 U.S. 137, 147-49, 119 S.Ct. 1167, 1174-75.

{¶31} The Supreme Court of Ohio refused to apply the *Daubert* factors to gang-related testimony. *Drummond* at ¶119, citing *United States v. Hankey* (C.A.9, 2000), 203 F.3d 1160, 1169 (noting the Ninth Circuit Court of Appeals "recognized that unlike scientific testimony, expert testimony about gangs depends heavily on the expert's knowledge and experience rather than on the expert's methodology and theory"). In addressing *Drummond's* contentions about expert testimony on gangs, the court noted the detective had been a member of the Youngstown Police Department's gang unit for several years and gained knowledge and experience "through investigating gang activity in the Youngstown area." *Id.* at ¶116. The detective thus showed "he possessed specialized knowledge about gang symbols, cultures, and traditions beyond that of the trier of fact." *Id.* The court determined the trial court did not commit plain error in permitting the detective to testify as an expert.

{¶32} Similarly here, Detective Sandford testified he had been a member of the gang unit within the Columbus Division of Police Strategic Response Bureau since 1996, minus a four-year break where he worked in the narcotics bureau as a liaison between the narcotics bureau and the gang unit. Sandford stated he received basic gang instruction in the police academy and encountered many gang members in his first eight years as a patrol officer on the near-east side of Columbus. Sandford said that,

since joining the gang unit in 1996, he has received specific gang training through attending numerous conferences "both locally and nationwide \* \* \* where there [was] further instruction on local gangs, on regional gangs, and on national gangs and what the recent trends are." (Tr. Vol. V, 9; State's Exhibit S-1 – S-10.)

{¶33} Sandford further stated he specializes in Latino gang activity in Columbus and teaches other law enforcement officers about Latino gangs in Columbus and central Ohio. According to Sandford, he has investigated specifically MS-13, also known as La Mara Salvatrucha, and explained its identifiers, such as tattoos, clothing, colors, and signs that indicate membership in MS-13. Sandford stated he documented the first MS-13 member in Columbus in 1998 and since then has documented over 50 MS-13 members in the city.

{¶34} The testimony demonstrated Sandford possessed specialized knowledge about MS-13 beyond the trier of fact and was qualified to testify as an expert about MS-13 and gang-related matters. *Drummond* at ¶116. The trial court did not commit plain error in allowing Sandford to testify as an expert.

{¶35} Defendant lastly contends the gang testimony was irrelevant, prejudicial and inflammatory. " 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Evid.R. 401. "In general, a trial court has discretion to determine whether evidence is relevant, and whether relevant evidence should be excluded." *State v. Peterson*, 10th Dist. No. 07AP-303, 2008-Ohio-2838, ¶36, discretionary appeal not allowed, 120 Ohio St.3d 1418, 2008-Ohio-6166, citing *State v. Johnson*, 9th Dist. No. 22688, 2006-Ohio-1313, ¶23. "Gang affiliation

can be relevant in cases in which the interrelationship between people is a central issue." *Drummond* at ¶112, citing *United States v. Thomas* (C.A.7, 1996), 86 F.3d 647, 652. Gang evidence also may be relevant when it is necessary to "provide[] the jury with crucial background information in considering the evidence." *Id.*

{¶36} In allowing Sandford to testify regarding MS-13, the court stated MS-13 was "part of the story" in this case. (Tr. Vol. III, 27.) The testimony supports the court's rationale El Gato Negro was an establishment MS-13 members frequented. On the night of the incident, the Ramos party went to El Gato Negro to pick up Wilson's brother who was having problems with MS-13 members. Wilson testified he felt the situation was an emergency that needed immediate attention because his brother was alone. According to Wilson, Momia, who started the altercation, consistently tried to fight with Wilson and his cousins. Momia and his group would "say that they were the gang and they were the one who has the powers." (Tr. Vol. III, 92.)

{¶37} Further evidence surrounding the incident implicated MS-13. The confidential informant, who turned the murder weapon over to Sandford, worked for the police gathering information about MS-13. She lived with several known MS-13 members over the years, and a documented MS-13 member gave the informant the gun and told her to get rid of it.

{¶38} Pyfrom's testimony relevant to his identifying defendant also referenced MS-13. According to Pyfrom, he gave police the false name "James Johnson" both on the night of the incident and when he picked defendant out of the photo array because he knew MS-13 was dangerous and did not want anyone to find him. Pyfrom agreed that "if a member of MS-13 figured out that, you know, [he was] fingering one of their

guys, they could retaliate against" him. (Tr. Vol. IV, 52.) Sandford testified that, after being given defendant's street name, he was able to come up with defendant's actual name by showing photographs of MS-13 contacts and associates to people they interviewed.

{¶39} The evidence pertaining to MS-13 thus was relevant to explain the relationship among the parties and to provide necessary background information regarding why the Ramos group went to El Gato Negro, how the police obtained the murder weapon, why Pyfrom initially used a false name, and how the police came to identify defendant as a suspect.

{¶40} Relying on Evid.R. 403(A), defendant nonetheless asserts the trial court should have anticipated the "provactive nature of the evidence" and excluded the testimony because the unfair prejudice of the gang-related testimony substantially outweighed any relevancy or probative value the testimony may have had. (Appellant's brief, 9-10.) To exclude evidence pursuant to Evid.R. 403(A), the "probative value must be minimal and the prejudice great." *State v. Morales* (1987), 32 Ohio St.3d 252, 258, cert. denied (1988), 484 U.S. 1047, 108 S.Ct. 785.

{¶41} Defendant does not challenge Sandford's gang-related testimony as it pertained to how he obtained the murder weapon or his interrogation of defendant, stating Sandford's "testimony as to those events [was] clearly proper." (Appellant's brief, 10.) Defendant instead claims Sandford's MS-13 testimony went well beyond what was necessary, specifically pointing to a portion of the detective's testimony where he stated "MS-13 members across the world have been involved in countless homicides and

felonious assaults, shooting people. They're known for their tendency toward violence, using machetes to chop people's hands and fingers and heads off." (Tr. Vol. V., 42.)

{¶42} The statement, however, arose out of defendant's cross-examining Sandford. Exploring defendant's theory that an MS-13 member committed the murder but witnesses identified defendant, who allegedly was not an MS-13 member, out of fear of retaliation, defendant asked Sandford if it would be "fair to say that at least in your opinion, Detective, MS-13 is a relatively dangerous gang?" (Tr. Vol. V, 41-42.) The detective responded "Overall, yes," causing the court to inquire what the detective meant by "overall." (Tr. Vol. V. 42.) Sandford responded with the statement defendant contests. Where defendant created the circumstances causing the statement to which defendant objects, plain error is not evident. See *State v. Bogovich*, 10th Dist. No. 07AP-774, 2008-Ohio-3100, ¶10 (explaining invited error precludes a claim of reversible plain error).

{¶43} In the final analysis, the MS-13 related testimony was relevant in providing the jury with background information concerning the individuals involved in the case and police methods for solving the murder. As defendant acknowledges, such testimony was properly admitted. Because defendant elicited what arguably was the most prejudicial and inflammatory statement regarding MS-13, the trial court did not commit plain error in allowing the testimony into evidence. Moreover, considering the three ~~separate eyewitnesses who identified defendant as the shooter, we cannot say the~~ jury's verdict would have been otherwise absent the MS-13 related testimony to which defendant objects.

{¶44} Defendant's second assignment of error is overruled.

### V. Third Assignment of Error – Pretrial Identifications

{¶45} Defendant's third assignment of error challenges the trial court's decision to admit Wilmer's and Pyfrom's pretrial identification of defendant from a photo array. Prior to trial, defendant filed a motion seeking to suppress identification testimony, to reveal the identification procedures used, and to identify the confidential informant. The motion sought to suppress "all identifications," claiming they not only were conducted out of the presence of counsel but were "so suggestive and conducive" as to increase the likelihood of "irreparable mistaken identification as to violate due process." (R. 68-69.) Although the motion appeared to seek to suppress all identifications, at the suppression hearing the prosecution stated it was its "understanding the only photo array we're dealing with is the one that was shown to Edward Pyfrom." (Tr. Vol. III, 3.) Defendant did not dispute the prosecution's understanding, so the entire suppression hearing centered solely on Pyfrom's identification. Because defendant received pertinent information regarding the confidential informant, it was not an issue in the trial court and is not on appeal. (R. 71; Tr. Vol. III, 3-30.)

{¶46} "[A]ppellate review of a trial court's decision regarding a motion to suppress evidence involves mixed questions of law and fact." *State v. Vest*, 4th Dist. No. 00CA2576, 2001-Ohio-2394. Thus, an appellate court's standard of review of the trial court's decision granting the motion to suppress is two-fold. *State v. Reedy*, 10th Dist. No. 05AP-501, 2006-Ohio-1212, ¶15, citing *State v. Lloyd* (1998), 126 Ohio App.3d 95, 100-01. Because the trial court is in the best position to weigh the credibility of the witnesses, we must uphold the trial court's findings of fact if competent, credible evidence supports them. *Id.*, citing *State v. Klein* (1991), 73 Ohio App.3d 486, 488. We nonetheless must

independently determine, as a matter of law, whether the facts meet the applicable legal standard. *Id.*, citing *State v. Claytor* (1993), 85 Ohio App.3d 623, 627.

{¶47} A defendant's right to due process prohibits the use of identification procedures that are so impermissibly suggestive as to give rise to a substantial likelihood of misidentification. *Neil v. Biggers* (1972), 409 U.S. 188, 198, 93 S.Ct. 375, 382. "[R]eliability is the linchpin in determining the admissibility of identification testimony." *Manson v. Brathwaite* (1977), 432 U.S. 98, 114, 97 S.Ct. 2243, 2253. A trial court considering whether to admit identification evidence must utilize a two-step analysis. Initially, the court must consider whether the procedure was impermissibly suggestive. Secondly, the court must consider whether, despite the procedure's suggestiveness, the identification was reliable. *State v. Sharp*, 10th Dist. No. 09AP-408, 2009-Ohio-6847, ¶14 (citations omitted).

{¶48} When assessing the reliability of a pretrial identification, the court must consider the totality of the circumstances, including the following factors: the opportunity of the witness to view the criminal at the time of the crime, the witness's degree of attention, the accuracy of his or her prior description of the criminal, the level of certainty demonstrated at the identification, and the time between the crime and the identification. *Biggers*, 409 U.S. at 199, 93 S.Ct. at 382. Defendant carries the burden "of proving both an identification procedure was impermissibly suggestive and the identification was unreliable." *Sharp* at ¶14.

{¶49} Within those parameters, defendant particularly takes issue with the method the detective utilized in presenting defendant's photograph to Wilmer and Pyfrom. Detective Wachalec, the lead detective investigating the murder, presented both

witnesses with a "simultaneous array" consisting of six photographs, side-by-side, also known as a "six pack." Defendant contends such a procedure is unduly suggestive and the witnesses should have been shown the photographs one at a time. Defendant further contends the detective should have presented the pictures through a "double-blind method," where a neutral officer, who lacks knowledge of the targeted suspect, shows the photo array to the witness. Contrary to defendant's contentions, the "failure to present the photo array using the double-blind and sequential methods does not make the identification procedure unduly suggestive." *Monford* at ¶¶51, 54, citing *United States v. Lawrence* (C.A.3, 2003), 349 F.3d 109, 115 (noting that "showing all of the photographs at once using the 'six pack' method could also be a very fair way to proceed").

{¶50} In response to *Monford*, defendant cites newly enacted R.C. 2933.83 and urges that we conclude the "six pack" or simultaneous array method is unduly suggestive. Although R.C. 2933.83, enacted pursuant to S.B. 77, instructs law enforcement agencies to use the double-blind method and shows a clear preference for the sequential method, it became effective July 6, 2010, well after the pretrial identifications and trial here. Accordingly, R.C. 2933.83 does not control the identification procedures law enforcement utilized in defendant's case.

A. Pyfrom's identification – photo array

{¶51} At the motion to suppress hearing, Wachalec testified he used a computer program to generate the lineup, entering criteria "such as facial hair, length of hair, type of hair and other descriptors." (Tr. Vol. III, 7.) The program generated a series of photographs based on the entered criteria. Wachalec then went through the computer-generated photos and picked "out ones that best match[ed] the subject of the photo

array." (Tr. Vol. III, 7.) The five selected photos all depict Latino males with short hair and similar facial features who appear to be around the same age. All the photos in the array were in black and white. Wachalec testified the procedure he used to develop the photo array was a long-standing procedure in the police department.

{¶52} When Wachalec showed Pyfrom the array, he informed him the pictures were in no particular order of importance, the suspect may or may not be included among the photographs, and Pyfrom was not required to select any photograph. The detective further testified he never told Pyfrom he was to pick defendant. On the night of the incident, Pyfrom told officers he could identify the shooter, and the detective said Pyfrom had no problem in choosing defendant out of the photo array.

{¶53} Given that evidence, the trial court properly refused to suppress Pyfrom's pretrial identification of defendant, as nothing about the identification procedure was impermissibly suggestive. Accordingly, we need not address whether the identification was unreliable under the totality of the circumstances.

#### B. Wilmer's identification – photo array

{¶54} The suppression hearing only addressed Pyfrom's pretrial identification of defendant, so we do not address Wilmer's identification in the context of defendant's motion to suppress. Instead we review defendant's contention that the testimony improperly was admitted into evidence. Defendant did not object to Wilmer's in-court testimony regarding his pretrial identification of defendant, so defendant forfeited all but plain error. *State v. Smith*, 80 Ohio St.3d 89, 115, 1997-Ohio-355, cert. denied (1998), 523 U.S. 1125, 118 S.Ct. 1811.

{¶55} Defendant argues the pretrial identification procedure regarding the photo array shown to Wilmer was unduly suggestive because Wilmer testified, "[w]ell, to tell you the truth, [the detective] asked me is this the person who shot at you." (Tr. Vol. III, 72.) The transcript, however, is unclear whether Wachalec made the statement to Wilmer before or after Wilmer identified defendant from the array. Aside from the simultaneous array method and the above statement, defendant does not challenge any other aspect of Wilmer's pretrial identification. Whether or not either element reveals error, any error does not rise to the level of plain error in view of the two other witnesses who testified defendant was the shooter. Accordingly, we overrule defendant's third assignment of error.

#### **VI. Disposition**

{¶56} Having overruled defendant's three assignments of error, we affirm the judgment of the Franklin County Court of Common Pleas.

*Judgment affirmed.*

BRYANT, P.J., SADLER and DORRIAN, JJ., concur.

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IN THE COURT OF APPEALS OF OHIO  
TENTH APPELLATE DISTRICT

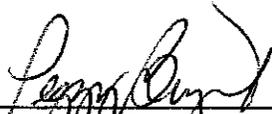
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COURT OF APPEALS  
FRANKLIN COUNTY, OHIO

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State of Ohio, :  
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 Plaintiff-Appellee, :  
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 v. : No. 10AP-527  
 : (C.P.C. No. 08CR-12-8935)  
 Javier G. Humberto, : (REGULAR CALENDAR)  
 :  
 Defendant-Appellant. :

JUDGMENT ENTRY

For the reasons stated in the decision of this court rendered herein on June 23, 2011, and having overruled defendant's three assignments of error, it is the judgment and order of this court that the judgment of the Franklin County Court of Common Pleas is affirmed. Costs assessed to defendant.

  
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Judge Peggy Bryant, P.J.

  
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Judge Lisa L. Sadler

  
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Judge Julia L. Dorrian