

**IN THE SUPREME COURT OF OHIO
2011**

STATE OF OHIO,

Plaintiff-Appellee,

-vs-

JAVIER HUMBERTO,

Defendant-Appellant.

Case No. 2011-1340

On Appeal from the
Franklin County Court
of Appeals, Tenth
Appellate District

Court of Appeals
Case No. 10AP-527

MEMORANDUM OF PLAINTIFF-APPELLEE OPPOSING JURISDICTION

RON O'BRIEN 0017245
Franklin County Prosecuting Attorney
SETH L. GILBERT 0072929
Assistant Prosecuting Attorney
(Counsel of Record)
373 South High Street-13th Fl.
Columbus, Ohio 43215
Phone: 614/525-3555
Email: slgilber@franklincountyohio.gov

COUNSEL FOR PLAINTIFF-APPELLEE

JOSEPH L. MAS 0018953
(Counsel of Record)
Attorney at Law
330 South High Street
Columbus, Ohio 43215
614-224-7292

COUNSEL FOR DEFENDANT-APPELLANT

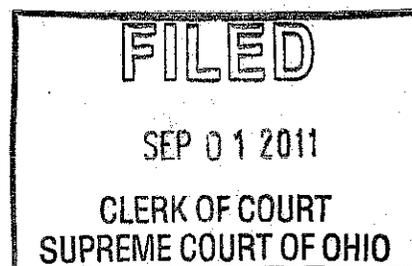


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EXPLANATION OF WHY THIS COURT SHOULD DECLINE JURISDICTION

Neither of defendant Javier Humberto's two propositions of law warrants further review by this Court. Defendant's first proposition of law argues that the trial court improperly allowed gang-related evidence. But, in rejecting these arguments below, the Tenth District applied the well-settled standards regarding the admissibility of evidence in general, and gang-related evidence in particular. Opinion, ¶¶ 30-43. Indeed, this Court has repeatedly addressed the standards under which gang-related evidence is admissible. See, e.g., *State v. Drummond*, 111 Ohio St.3d 14, 2006-Ohio-5084, ¶¶ 70-81; *State v. Bethel*, 110 Ohio St.3d 416, 2006-Ohio-4853, ¶¶ 91-92, 170-77; *State v. Skatzes*, 104 Ohio St.3d 195, 2004-Ohio-6391, ¶¶ 108-14; *State v. Robb* (2000), 88 Ohio St.3d 59, 68-69. Defendant offers no good reason for this Court to yet again address these issues.

Even if this Court were inclined to revisit the standards under which gang-related evidence is admissible, this would be a poor case to do so. As the Tenth District recognized, although the defense filed a motion in limine seeking to exclude the gang-related evidence, the defense failed to object when the evidence was later presented during trial. Opinion, ¶¶ 28-29. This Court's review would therefore be limited to plain-error review. Moreover, the key gang-related testimony that defendant takes issue with was invited by defense questioning, so the invited-error rule applies here as well. In short, any ruling from this Court on defendant's first proposition of law would have minimal impact beyond the narrow facts of this case.

Defendant's second proposition of law is equally unworthy of further review. Defendant argues that the identifications of defendant as the shooter by two witnesses violated due process. But, again, defendant is merely challenging the Tenth District's application of the well-settled due-process standards for admitting identification testimony. Defendant points to new statutory law, R.C. 2933.82, that requires that pre-trial identifications satisfy certain criteria beyond those

required by due process. As the Tenth District recognized, however, these statutory standards do not apply in this case because the identifications at issue pre-dated the effective date of the statute. Opinion, ¶ 50.

In the end, this case presents no questions of such constitutional substance or of such great public interest as would warrant further review by this Court. The State therefore respectfully submits that jurisdiction should be declined.

STATEMENT OF THE CASE AND FACTS

Defendant was indicted in December 2008 on two counts of murder, one count of attempted murder, and one count of felonious assault—all with attached firearm specifications. The case proceeded to jury trial, at which the following evidence was adduced.

On the evening of November 15, 2008, brothers Wilmer and Ramon Ramos, their cousin Wilson Guillen, and Wilmer's girlfriend Angel Devilbiss all went to a bar on Lockbourne Road called El Gato Negro ("The Black Cat"). The purpose of going to the bar was to pick up Wilson's brother, who had called Wilson earlier that night saying that he was having trouble with members of the MS-13 gang.

Shortly after the group arrived at the bar, someone inside the bar "was kind of fixing his attention" on Wilmer and Ramon. This made Wilmer uncomfortable, so he and Angel went outside to smoke a cigarette. Meanwhile, inside the bar, another man known as "Momia" started arguing with Ramon. Wilmer knew Momia from the soccer fields and the disco. Wilson said that Momia and his associates tried to start fights during soccer games by boasting that "they were the gang and they were the one who has the powers and all that kind of stuff."

Wilmer stepped inside the bar and heard Momia suggest to Ramon that they take "take this outside"—i.e., they fight. As Ramon turned to walk outside, one of Momia's associates hit Ramon over the head with a pool cue. Wilmer retaliated by throwing a pool ball. He then

grabbed Ramon, and the two exited the bar. Momia and his associates followed them outside, and Momia again challenged Ramon to a fight in the parking lot. An unidentified man tried to intervene, but Momia and his associates made quick work of him—according to Angel, they “[b]eat him really bad.”

At this point, someone emerged from a nearby Chevy Blazer, walked toward the crowd that had gathered outside the bar, and started shooting. After firing several shots, the shooter and Momia got into the Blazer and left the scene. Ramon was shot in the head and eventually died from his gunshot wounds. Angel was also hit, suffering multiple gunshot wounds, the most serious being to her hand.

Around noon the day after the shooting, a man known as “Vaca” gave his roommate Dawn Bemiller a gun and told her to get rid of it. What Vaca apparently did not know was that Bemiller was a paid confidential informant for Gang Detective James Sandford and was responsible for gathering information about MS-13. Although Bemiller did not know whether Vaca was in MS-13, she stated that he “had affiliation” with MS-13 members. Specifically, Bemiller had seen Vaca with a man known as “Monkey,” who was the head of the gang’s Columbus chapter. She had also seen Vaca with Momia.

Bemiller arranged to meet Sandford at a gas station, where she turned over the gun. Later testing showed that the gun fired the seven shell casings that police had recovered from the scene, as well as the spent bullet fragment recovered from Ramon’s body.

In December 2008, Sandford arrested defendant for the shooting (Sandford had learned that the shooter went by “Colima,” which was defendant’s street name). Sandford asked defendant if he knew certain documented MS-13 members, including Vaca and Monkey. Defendant denied knowing any of these individuals, even though Sandford showed him

photographs proving that he and Vaca were both passengers in a van that was stopped for a traffic violation a year earlier. Also, Vaca and Monkey were among the contacts saved in the cell phone defendant was carrying when he was arrested (Monkey appeared in the phone as "Mono"). Defendant, however, continued to insist that he did not know these individuals and told Sandford that his phone "had some sort of electronic problems."

The day after defendant was arrested, Edward Pyfrom—a bouncer at the bar who was outside at the time of the shooting and got a clear look at the shooter—was shown a photo array and identified defendant as the shooter. (In order to keep his identity secret from MS-13 members, Pyfrom signed the photo-array form with the false name that he had given police the night of the shooting. Pyfrom testified that defendant had been in the bar a few times, and that he had kicked defendant out of the bar a week or two before the shooting for violating the bar's dress code. Pyfrom identified defendant at trial as well. Pyfrom testified in exchange for a sentencing recommendations by the State in unrelated cases that were pending against him.

In January 2009, both Wilmer and Angel identified defendant from photo arrays. Wilmer wrote (in Spanish) on the photo-array form that defendant was staring at him and Ramon in the bar and that defendant was the shooter. Wilmer testified to a similar effect at trial and added that he was "70 percent sure" that defendant was the person who hit Ramon with the pool cue. Angel remembered seeing defendant inside the bar before the shooting and said that he "just kept looking at us." But Angel's back was turned at the time of the shooting, so she could not identify the shooter.

Wilson testified that defendant was giving "bad looks" to him, Wilmer, and Ramon while they were inside the bar. At trial, Wilson identified defendant as the shooter.

The jury found defendant guilty on all counts. After merging the appropriate counts, the trial court sentenced defendant to a total of 25 years to life in prison. Defendant appealed, and the Tenth District affirmed. Defendant now seeks discretionary review.

ARGUMENT

Response to First Proposition of Law: The denial of a motion in limine does not preserve a claimed error for review in the absence of a contemporaneous objection at trial. An appellate court need not review a trial court's decision on a motion in limine unless the claimed error is preserved by objection on the record when the issue is actually reached and the context is developed at trial.

Defendant's first proposition of law claims that the trial court erred in allowing Sandford to provide gang-related testimony. Defendant argues that Sandford's gang-related testimony (1) did not satisfy the expert-witness criteria set forth in Evid.R. 702, and (2) was unfairly prejudicial under Evid.R. 403(A).

As a general matter, the admission of evidence lies within the broad discretion of the trial court, and a reviewing court should not disturb evidentiary decisions in the absence of an abuse of discretion that has created material prejudice. *State v. Conway*, 109 Ohio St.3d 412, 2006-Ohio-2815, ¶ 62, citing *State v. Issa* (2001), 93 Ohio St.3d 49, 64. The term abuse of discretion connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable. *State v. Adams* (1980), 62 Ohio St.2d 151, 157. But defendant failed to preserve his arguments for appeal, thereby forfeiting all but plain error. And defendant cannot show plain error.

I. DEFENDANT FAILED TO PRESERVE HIS ARGUMENTS FOR APPEAL, THEREBY FORFEITING ALL BUT PLAIN ERROR.

Part-way through the trial, the defense requested to exclude any reference to MS-13. Defense counsel described this request as a "motion in limine." The trial court denied the motion, saying that the gang evidence was "part of the story." Accordingly, the trial court stated

that “reasonable references to MS-13 that aren’t inflammatory or intentionally trying to paint the defendant as a gang member and therefore as a murderer have to be allowed in order to just tell the story of what happened in this event.”

Four days later, the State called Sandford to the stand. Sandford testified about his gang-related training and experience, and he provided general information about MS-13. He further explained his use of Bemiller as a confidential informant to gather information about MS-13 and the circumstances behind Bemiller turning over the gun. Next, he testified about how he came to arrest defendant and that defendant denied knowing Vaca and other documented MS-13 members.

While the defense objected to a few specific questions during Sandford’s direct examination, it never argued that Sandford’s testimony was inadmissible under Evid.R. 702. Nor did the defense ever renew its broad claim that any reference to MS-13 was unfairly prejudicial. Indeed, even before Sandford testified, gangs in general—and MS-13 in particular—had been a frequent topic of testimony elicited by both the State and the defense.

Given these circumstances, defendant failed to preserve his arguments for appeal. Neither in its motion in limine nor at any other point during the trial did the defense challenge the admissibility of Sandford’s testimony under Evid.R. 702. *Drummond*, ¶¶ 115, 117. As for defendant’s Evid.R. 403(A) claim, the defense was required to timely object when the testimony was actually presented at trial. “[T]he denial of a motion *in limine* does not preserve a claimed error for review in the absence of a contemporaneous objection at trial.” *State v. Hancock*, 108 Ohio St.3d 57, 2006-Ohio-160, ¶ 59, quoting *State v. Hill* (1996), 75 Ohio St.3d 195, 203. “An appellate court need not review the propriety of a [decision on a motion in limine] unless the claimed error is preserved by objection * * * on the record when the issue is actually reached and

the context is developed at trial.” *State v. Grubb* (1986), 28 Ohio St.3d 199, 203. Defendant has therefore forfeited all but plain error. Crim.R. 52(B).

II. DEFENDANT CANNOT SHOW PLAIN ERROR.

A. The Trial Court Committed No Plain Error Under Evid.R. 702.

Defendant cannot show plain error. In challenging the admissibility of Sandford’s testimony under Evid.R. 702, defendant mostly argues that Sandford’s testimony did not satisfy *Daubert*. In *Daubert*, the Court held that the Federal Rules of Evidence require trial courts to act as a “gatekeeper” by ensuring that all scientific expert testimony is not only relevant, but also reliable. *Daubert*, 509 U.S. at 589-90. The Court identified several factors for courts to consider in assessing the reliability of scientific evidence. Among them are whether the theory or technique has been tested; whether it has been subject to peer review and publication; whether there is a known potential error rate; and whether the theory has gained general acceptance within a particular scientific community. *Id.* at 592-94.

But not all expert testimony is “scientific.” Evid.R. 702(C) allows expert testimony to be based on “scientific, technical, *or other specialized information.*” (Emphasis added) When expert testimony is based on non-scientific information, the trial court in assessing reliability may, at its discretion, consider the *Daubert* factors to the extent relevant. *Drummond*, at ¶ 118, citing *Kumho Tire Company, Ltd. v. Carmichael* (1999), 526 U.S. 137, 148.

Recognizing that gang testimony is non-scientific in nature, this Court has held that the *Daubert* factors do not apply to gang-related testimony. *Drummond*, at ¶ 119. “[U]nlike scientific testimony, expert testimony about gangs depends heavily on the expert’s knowledge and experience rather than on the expert’s methodology and theory.” *Id.*, citing *United States v. Hankey* (C.A. 9, 2000), 203 F.3d 1160, 1169.

Because there was no reliability-based objection, the trial court was not required to hold a hearing to assess the reliability of Sandford's gang-related testimony. *Drummond*, at ¶ 119. Nonetheless, defendant fails to show plain error, because nothing in Sandford's testimony raises any reliability questions. Sandford testified that he joined the gang unit in 1996, has extensive training and experience on gangs, and has trained other law enforcement officers on gang-related matters. His particular area of interest is MS-13 and other Latino gangs. Sandford's gang-related testimony sufficiently reliable, as it was based on his "knowledge and experience." *Id.* at ¶ 120.

To the extent defendant claims that Sandford was not qualified as an expert, defendant fails to show plain error here as well. Sandford possessed the "specialized knowledge, skill, experience, training, or education regarding the subject matter of the testimony." Evid.R. 702(B). That Sandford acquired this knowledge through his activities as a police officer makes his testimony no less reliable and him no less qualified to be an expert on gangs. *Drummond*, at ¶ 116.

B. The Trial Court Committed No Plain Error Under Evid.R. 403(A).

Nor did Sandford's gang-related testimony amount to plain error under Evid.R. 403(A). Importantly, defendant acknowledges that Sandford's testimony explaining how he acquired the murder weapon and his interrogation of defendant regarding his connection to Vaca and other MS-13 members was "clearly proper." The only specific testimony that defendant identifies as being unfairly prejudicial is Sandford's testimony (in response to a question by the trial court) that "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 * * *."

Not only did the defense not object to this testimony, but the trial court's question was prompted by the *defense* asking Sandford whether "it would be fair to say" that "MS-13 is a relatively dangerous gang?" Sandford's testimony in this regard flowed directly from the defense's question, and "[a] party will not be permitted to take advantage of an error which he himself invited or induced." *State v. Bey* (1999), 85 Ohio St.3d 487, 493, quoting *Hal Artz Lincoln-Mercury, Inc. v. Ford Motor Co.* (1986), 28 Ohio St.3d 20, paragraph one of the syllabus. For this reason alone, defendant fails to show any plain error.

In any event, Sandford's gang-related testimony was admissible under Evid.R. 403(A). As the trial court observed, the gang evidence was "part of the story." Wilmer, Ramon, Wilson, and Angel went to the bar because Wilson's brother was having trouble with MS-13 members. Momia's gang membership was an apparent source of conflict between him and Wilmer, Ramon, and Wilson. Momia and the shooter left the scene in the same vehicle. After the shooting, Pyfrom gave police a false name to keep his identity secret from MS-13 members. Vaca—a documented MS-13 member—attempted to dispose of the murder weapon by giving it to Bemiller, who was a paid confidential informant responsible for gathering information about MS-13. When defendant was arrested, he denied knowing Vaca and Monkey—another documented MS-13 member—even though they were both saved as contacts in defendant's cell phone, and even though defendant and Vaca had been photographed together in the same vehicle a year earlier.

As a result, one cannot tell the story of the murder of Ramon Ramos and the attempted murder of Angel Devilbiss without mentioning and providing some background on MS-13. The gang evidence was an integral part of the story in that it helped to "make the actions of the participants understandable to the jurors." *Drummond*, at ¶ 76, quoting *Skatzes*, at ¶ 113.

On the other side of the Evid.R. 403(A) balance, Sandford's gang-related testimony was not unfairly prejudicial. As defendant notes, there was no evidence that defendant himself is a member of MS-13. So the gang evidence was not used to prove that defendant acted in conformance with any particular character trait. C.f. *State v. Bethel*, 110 Ohio St.3d 416, 2006-Ohio-4853, ¶ 174.

In this respect, the defense actually used the gang evidence to its advantage. During closing argument, the defense emphasized the lack of any evidence that defendant belonged to MS-13 and argued that the reason he lied about knowing MS-13 members was that the gang was responsible for the shooting:

Why would he be lying about knowing these people? Nobody wants to identify someone in a killing. Nobody wants to get involved, especially if they're an MS-13 member. You heard Detective Sandford, they machete people to death. Oh, yeah, I know these guys, but by the time they interviewed him, everybody knew about the killing. Why did he deny knowing him? You don't want to get involved. It had nothing to do with you.

The defense pursued a similar tactic in cross-examining Pyfrom, suggesting that someone in MS-13 was the shooter, and that Pyfrom identified defendant from the photo array to stay in good graces with the gang. This strategy was on full display when defense counsel asked Pyfrom: "Well, if an MS-13 member shot and killed somebody in front of you and you saw it but then you blame somebody else, you wouldn't have to worry about MS-13; would you agree with that?" Indeed, the defense's "MS-13 did it" theory explains why the defense asked Sandford during cross-examination whether MS-13 is a "relatively dangerous gang."

All told, the probative value of Sandford's gang-related testimony was not "substantially outweighed by the danger of unfair prejudice[.]" Evid.R. 403(A). The trial court committed no

plain error under either Evid.R. 702 or Evid.R. 403(A). Defendant's first proposition of law warrants no further review.

Response to Second Proposition of Law: Convictions based on eyewitness identification at trial following a pretrial identification by photograph will be set aside on that ground only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification.

Defendant's second proposition of law claims that the trial court erred in overruling defendant's motion to suppress identification. When the trial court held the hearing on the motion, the only issue the parties litigated was the admissibility of Pyfrom's identification of defendant as the shooter. Defendant now argues that both Pyfrom's and Wilmer's identifications violate due process.

"[C]onvictions based on eyewitness identification at trial following a pretrial identification by photograph will be set aside on that ground only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." *Simmons v. United States* (1968), 390 U.S. 377, 387. Pyfrom's and Wilmer's identifications satisfy due-process standards of admissibility.

I. THE IDENTIFICATION PROCEDURES WERE NOT IMPERMISSIBLY SUGGESTIVE.

At the motion hearing, Detective Robert Wachalec testified that he created the photo array shown to Pyfrom (who at the time was using an alias) by using a computer program to select photographs of individuals with features similar to defendant's. When Wachalec showed the photo array to Pyfrom, he read the standard language advising Pyfrom that the suspect may or not may not appear in the array and that he was not required to select any of the photographs.

Given this evidence, the trial court correctly found that the photo array was not impermissibly suggestive. There is no evidence that Wachalec did or said anything to draw

undue attention to defendant's photograph. Nor is there anything impermissibly suggestive about the photo array itself. The other photographs in the array "show[ed] no significant variations in hair length, complexion, age, features, or dress." *State v. Murphy* (2001), 91 Ohio St.3d 516, 534.

Relying on Wilmer's trial testimony that Wachalec asked him, "is this the person who shot at you?" defendant also argues that the identification procedure used with Wilmer was impermissibly suggestive. But because the defense did not raise this issue at the motion hearing or object to Wilmer's identification testimony at trial, defendant has forfeited all but plain error.

Defendant cannot show plain error. Even if Wilmer's "is this the person who shot at you?" testimony is taken literally (after all, he was testifying through a interpreter), the more likely explanation is that Wilmer identified defendant as the shooter before Wachalec asked the question, and that the purpose of Wachalec's question was simply to confirm Wilmer's identification.

Recently-enacted R.C. 2933.83(B)—which requires police to use "blind" or "blinded" administrators for any photo or live lineup—does not benefit defendant. As defendant recognizes, the statute does not apply to this case at all, because Wachalec showed the photo arrays to Pyfrom and Wilmer long before the statute's July 6, 2010, effective date. R.C. 2933.83(C). Moreover, as a matter of due process, a "failure to present the photo array using the double blind and sequential methods does not make the identification procedure unnecessarily suggestive." *State v. Monford*, 190 Ohio App.3d 35, 2010-Ohio-4732, ¶ 51; see, also, *id.* at ¶ 53, accepted for review on other grounds, *02/02/2011 Case Announcements*, 2011-Ohio-376.

In short, due process does not prohibit police from using traditional "six pack" photo arrays. Indeed, the simultaneous-presentation method "could be a very fair way to proceed," and

that the sequential-presentation method has its own potential pitfalls in that “an issue would likely arise as to the defendant’s order in the sequential array.” *Id.* at ¶ 54, citing *United States v. Lawrence* (C.A. 3, 2003), 349 F.3d 109, 115.

II. PYFROM’S AND WILMER’S IDENTIFICATIONS WERE RELIABLE.

That the photo arrays shown to Pyfrom and Wilmer were not impermissibly suggestive alone defeats defendant’s claim that due process required suppressing their identifications. But defendant also fails to show that their identifications were unreliable under the circumstances. *Neil v. Biggers* (1972), 409 U.S. 188, 199.

To start, both Pyfrom and Wilmer were close to the shooting and had a clear look at the shooter. Moreover, Pyfrom had seen defendant in the bar a few times before and had kicked him out of the bar a week or two before the shooting. And Wilmer testified that defendant was staring at him and Ramon in the bar before the shooting and may have hit Ramon on the head with a pool cue. That Pyfrom and Wilmer saw defendant before the shooting weighs heavily in favor of reliability. *State v. Barnett* (1990), 67 Ohio App.3d 760, 768.

In the end, the trial court properly refused to suppress Pyfrom’s identification and committed no plain error in allowing Wilmer’s identification. Defendant’s second proposition of law warrants no further review.

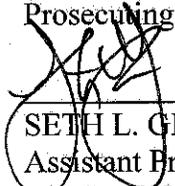
CONCLUSION

For the foregoing reasons, the State respectfully submits that this appeal does presents no questions of such constitutional substance or of such great public interest as would warrant further review by this Court. The State therefore respectfully submits that jurisdiction should be declined.

Respectfully submitted,

RON O'BRIEN 0017245

Prosecuting Attorney



SETH L. GILBERT 0072929

Assistant Prosecuting Attorney

373 South High Street-13th Fl.

Columbus, Ohio 43215

614/525-3555

slgilber@franklincountyohio.gov

Counsel for Plaintiff-Appellee

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was sent by regular U.S. Mail, this day,

September 1st, 2011, to JOSEPH L. MAS, 330 South High Street, Columbus, Ohio

43215; Counsel for Defendant-Appellant.



SETH L. GILBERT 0072929
Assistant Prosecuting Attorney