[Cite as *State v. Harris*, 2009-Ohio-6804.]

STATE OF OHIO, JEFFERSON COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO,	)	
	)	CASE NO. 08 JE 39
PLAINTIFF-APPELLEE,	)	
	)	
- VS -	)	O P I N I O N
	)	
MICHAEL HARRIS,	)	
	)	
DEFENDANT-APPELLANT.	)	

CHARACTER OF PROCEEDINGS:	Criminal Appeal from Common Pleas Court, Case No. 08CR106.
JUDGMENT:	Affirmed.

APPEARANCES:

For Plaintiff-Appellee:	Attorney Paul Scarsella Jefferson County Special Prosecutor 30 East Broad Street, 14th Floor Columbus, Ohio 43215
For Defendant-Appellant:	Attorney Dennis McNamara 88 East Broad Street, Suite 1350 Columbus, Ohio 43215

JUDGES:
Hon. Joseph J. Vukovich
Hon. Gene Donofrio
Hon. Cheryl L. Waite

Dated: December 21, 2009

VUKOVICH, P.J.

¶{1} Defendant-appellant Michael Harris appeals from his murder conviction entered in the Jefferson County Common Pleas Court. First, he contends that the trial court should have dismissed the indictment due to pre-indictment delay. Second, he argues that the trial court erred in allowing two witnesses to testify as to what the victim told them. Third, he alleges that the trial court erred in permitting a witness to testify as to whether she ever did drugs with appellant. For the following reasons, the judgment of the trial court is affirmed.

STATEMENT OF THE CASE

¶{2} When appellant was in his early-thirties, he conceived a child with seventeen-year-old Jill Howard (the victim). (Tr. 343, 345). The baby was born in 1986. In August of 1986, the victim moved from her sister's house into appellant's house in Steubenville. (Tr. 344, 362).

¶{3} Juliette Harton, a woman who was also pregnant with appellant's child, was upset because appellant broke up with her. In November or December of 1986, Ms. Harton engaged the victim in a physical altercation. (Tr. 322, 325). Not long after that, she threw a brick through the window of appellant's house where the victim was living. (Tr. 326).

¶{4} On December 20 or 21, 1986, the victim arrived at her sister's house at 1:30 a.m. (Tr. 351). The victim had a black eye and bruises on her body. She was wearing a ripped nightgown, and the baby was wrapped only in an adult's coat. (Tr. 352-353). The victim told her sister that appellant had punched her in the eye and on the body. (Tr. 351-353). The victim stayed with her sister for one week and then returned to appellant's house.

¶{5} The victim's friend also noticed the victim's injured eye. (Tr. 374). On January 5, 1987, the victim adamantly expressed to her friend that she was leaving appellant. (Tr. 377). This friend noted that the victim carried a steak knife and a gun in her purse. (Tr. 382).

¶{6} That same day, the victim left appellant's residence to visit some bars just down the street. According to appellant, the victim left the house at 11:30 p.m. on January 5, 1987. (Tr. 231). Around 4:30 a.m. on January 6, 1987, a cab driver

discovered the victim's body in Webster's Alley, a block from appellant's house. (Tr. 185, 201, 254).

¶{7} The victim had been stabbed at least sixty-one times, with the majority of her wounds on the right side of both the front and the back of her body. (Tr. 393). Her lungs had been penetrated from the front and back; her heart had been penetrated several times; and her carotid artery on the right side of her neck had been cut. (Tr. 395-396). Her hands and forearms evidenced defensive wounds, and some fingers had nearly been amputated, suggesting that she grabbed the knife in attempting to defend herself. (Tr. 393, 397, 420).

¶{8} The coroner opined that some of the wounds required a considerable amount of physical strength to perpetrate. (Tr. 401-402). He also concluded that the stabbings had to have taken place somewhere else or in a vehicle because the alley contained only a minimal amount of blood and the victim lost between three and five pints of blood. (Tr. 398, 408). Due to pooling of blood on the victim's underwear (but nowhere lower), it was determined that the victim must have been in a seated position at some time during or soon after the stabbing. (Tr. 399).

¶{9} At 6:00 a.m., police officers approached appellant's residence to inform him of the situation. (Tr. 210). Appellant insisted that he had been home all night with the baby. (Tr. 451). However, it was noticed by two detectives that although the temperature was in the 'teens and although the other vehicles on the street were covered with frost, appellant's vehicle was completely free of frost. (Tr. 227, 451). The vehicle was also not cold to the touch as would be expected. (Tr. 228).

¶{10} Upon obtaining information regarding Ms. Harton's behavior towards the victim, the officers then went to Ms. Harton's residence. She did not answer the door at 8:30 a.m. However, the officers viewed her car. Also suspecting Ms. Harton, the victim's sister had actually searched Ms. Harton's car earlier that morning and found nothing suspicious. (Tr. 366). When officers spoke to Ms. Harton later, she provided two alibi witnesses who had stayed over night at her house. (Tr. 320).

¶{11} That evening, appellant gave consent to search his house and car. In searching the house, a small spot of blood was found on appellant's leather jacket, which was later found to be consistent with that of the victim. (Tr. 575, 581, 624). In searching the car, what appeared to be a stab mark was found in the upper right portion of the vinyl seat extending into the foam beneath it. (Tr. 560-561). The

following areas inside and outside of appellant's car tested positive for blood upon being treated with luminal: the inside of the passenger windshield; the inside of the passenger door on the front, back, and lower edges and on the black upholstery; the lower, upper, and seat portions of the passenger seat; the carpet on the floor of the passenger side and the molding along the edge of the carpet; masking tape on the gear shift; various spots on the outside of the passenger door; the plastic edge on the backseat; the lower right driver's seat; the rear window; the outside on the lower edge of the hatchback; the bumper; and above the door handle on the outside. (Tr. 554-562, 582-583).

¶{12} A forensic pathologist, who reviewed the file (because the coroner was no longer available) suggested that since the wound to the carotid artery could have produced a column of blood, appellant's vehicle would have either contained more blood or it still would have been wet from cleaning when the car was searched. (Tr. 529-530). However, it was noted that the victim's sweater was saturated in blood and she had also been wearing a heavy jacket. (Tr. 536, 577). It was also pointed out that the seats and floor mats were plastic. (Tr. 535). Moreover, although the amount of blood remaining was not large, it was said that the areas of smearing were large, which could suggest that someone had tried to clean a large amount of blood. (TR. 573).

¶{13} At that time, DNA identification testing was not used. Rather, a forensic scientist tested the blood type and the genetic markers. For instance, the victim had type A blood (found in 27% of black population) with the PGM-2 marker (found in 3.8% of the black population). (Tr. 568, 580). Not all of the samples were sufficient for testing as a large amount of blood from each sample was needed for this type of testing. (Tr. 583). The spots of blood that could be typed contained different markers but were said to be consistent with that of the victim. However, they were also commonly found in the black population in the following rates: 1 in 1,250 individuals for the tape around the gearshift; 1 in 172 individuals for the blood on door; 1 in 100 for the blood on appellant's jacket. (Tr. 569-570, 580-581).

¶{14} Appellant was arrested on January 16, 1987. After a preliminary hearing, he was ordered bound over to the grand jury. However, the prosecutor declined to present evidence to the grand jury which had convened as scheduled on February 13, 1987. Thus, appellant was discharged.

¶{15} In 2008, the victim's friend gave a statement to police that on the night of the murder, the victim was adamant about leaving appellant, providing state of mind and motive which was previously lacking. She also confirmed the victim's sister's statement that the victim said appellant previously gave her a black eye.

¶{16} Around this same time, DNA identification testing was performed on the samples during a cold case review. This testing narrowed down the chance that the blood samples were from anyone other than the victim. Specifically, the blood was consistent with the victim's and only occurred in the population in the following frequencies: 1 in 528,500 for the blood on appellant's jacket; 1 in 140,900 for the partial profile found on the tape from the gearshift; 1 in 15.75 trillion for blood extracted from a carpet swatch. (Tr. 624, 626).

¶{17} In March 2008, a special prosecutor was appointed from the Ohio Attorney General's Office. This was due to a conflict of interest since one of the assistant prosecutors had represented appellant when he was arrested in 1987.

¶{18} On July 2, 2008, appellant was indicted for aggravated murder and murder. (The state dismissed the aggravated murder charge during trial). On August 22, 2008, appellant filed a motion to dismiss due to the pre-indictment delay. A hearing was held on the motion. It was suggested that the test for pre-indictment delay does not require cold cases to be expeditiously reopened upon the invention of each new technology. *State v. Luck* (1984), 15 Ohio St.3d 150, 158 (unjustifiable is characterized by police ceasing an active investigation through negligence or error in judgment and then, after a long delay, commencing prosecution upon the same evidence that was available to it at the time that its active investigation was ceased).

¶{19} On October 16, 2008, the trial court overruled the motion finding no substantial prejudice to the defense. The court alternatively held that there was some justification for the delay in that the blood had recently been subjected to a DNA identification test which produced a much greater statistical chance that the blood belonged to the victim.

¶{20} The case was then tried to a jury. On November 13, 2008, appellant was found guilty of murder. He was sentenced to fifteen years to life in prison. Appellant filed timely notice of appeal.

ASSIGNMENT OF ERROR NUMBER ONE

¶{21} Appellant's first assignment of error provides:

¶{22} "THE TRIAL COURT ERRED WHEN IT OVERRULED APPELLANT'S MOTION TO DISMISS THE INDICTMENT."

¶{23} Appellant argues that the trial court should have granted his motion to dismiss due to more than twenty-one years of pre-indictment delay which violated his due process rights. A defendant's due process rights are not violated by pre-indictment delay unless the defendant shows that he was substantially prejudiced and the state fails to show a justifiable reason for the delay. *State v. Whiting* (1998), 84 Ohio St.3d 215, 217; *State v. Luck* (1984), 15 Ohio St.3d 150, 154, 158. See, also, *United States v. Lovasco* (1977), 431 U.S. 307; *United States v. Marion* (1971), 404 U.S. 307. As such, in absence of substantial prejudice, unjustifiable delay is not reversible.

¶{24} We thus begin with an evaluation of prejudice. The examples of prejudice listed by the defendant must constitute actual or substantial prejudice and cannot merely be "somewhat prejudicial". *State v. Walls*, 96 Ohio St.3d 437, 2002-Ohio-5059, ¶56; *Luck*, 15 Ohio St.3d at 153-154. In order to determine whether the prejudice is actual or substantial, the alleged prejudice must be viewed in light of the evidence existing against the defendant. *Luck*, 15 Ohio St.3d at 154. Appellant alleges approximately nine prejudicial factors.

¶{25} First, appellant complains that his vehicle is no longer available. Although this vehicle was alleged to be the crime scene, appellant does not actually explain how the lack of the vehicle prejudices his defense. Notably, this car was returned to appellant after the search and seizure, and he did not specify when or how he disposed of it in order to show that it was unavailable and that its unavailability was due to the extended delay. Moreover, the vehicle was thoroughly photographed to portray the spots which the luminal showed to be smeared with blood. The stab hole in the vinyl seat was saved as was the foam beneath the hole. A portion of carpet was maintained as was the bloody tape around the gearshift. Testimony acknowledged that no area of the car was saturated with blood, which is all appellant suggests as a defense to the theory that the murder was committed in his car. Furthermore, in a great many cases, the crime scene is effectively gone within days (such as those occurring outside). The fact that the crime scene has been washed clean or no longer exists is not prejudicial or attributable to delay.

¶{26} Second, appellant complains that the vehicle of Juliette Harton was not retained. As aforementioned, besides appellant, she was the other initial suspect due to prior altercations with the victim. Appellant's former attorney testified that he witnessed that the seat of Ms. Harton's vehicle had slice marks in it and that this caused him to argue to police that if they were suspecting appellant due to the stab mark in his car, then they should also suspect Ms. Harton on this basis. Unlike appellant's car that morning, Ms. Harton's car was completely covered in frost. The victim's sister broke into Ms. Harton's car the morning of the murder and reported nothing unusual. In addition, Ms. Harton provided an alibi. Finally, her car was not seized by police. Thus, the fact that her vehicle is no longer available is not attributable to the delay in indicting appellant but rather is attributable to the fact that the police did not search or seize the vehicle of Ms. Harton.

¶{27} Third, appellant notes that the victim's aunt is deceased. However, there is no indication as to what kind of information she could have provided. As such, any prejudice is merely speculative. See *State v. Christman* (May 2, 1999), 7th Dist. No. 786 (fact that appellant's mother had died during eleven-year delay is not prejudicial), citing *Marion*, 404 U.S. at 326 (defendant cannot rely solely on the possibility of prejudice inherent in any extended delay that memories will dim, witnesses will become inaccessible, and evidence will be lost).

¶{28} Fourth, appellant emphasizes that the victim's best friend and cousin, Sherrie Zimmerman, is deceased. He believes her presence was important because the victim met this cousin at a bar prior to the murder. However, any benefit to his defense is merely speculative as he does not establish what the cousin would have provided in terms of a defense. It appears that her statement was available in discovery. Yet, appellant reveals nothing to establish that what she knew would have assisted his defense. See *Marion*, 404 U.S. at 326. In fact, the state established at the motion hearing, that this witness stated that in the hours before the murder, the victim received a telephone call telling her to come home. (09/18/08 Mot. Hrg. 48). This would have hurt more than helped appellant's defense. Thus, appellant has not established actual prejudice as a result of this person's death.

¶{29} Fifth, appellant points out that Ed Parker, Ms. Harton's alibi witness, is deceased. Ms. Harton testified that Ed Parker and his nephew stayed at her house on the night of the murder, as she explained to police in 1987. There is no indication that

the nephew was unavailable. Moreover, there is no indication that Mr. Parker's testimony would have benefited the defense as he was Ms. Harton's alibi. As such, appellant's argument here is mere speculation. We also note that there is no indication when these witnesses died in order to establish that they would have been available if the delay were shorter.

¶{30} Sixth, appellant notes that the coroner, Dr. Eicher, was no longer available to testify. The state notes that appellant requested that the coroner's testimony from the preliminary hearing be read to the jury. Appellant states that his prior attorney did not have the same incentive to cross-examine at the preliminary hearing. However, the coroner's testimony was descriptive of the wounds and explained his opinions that the injuries were not sustained in the alley, that there was likely substantial external bleeding, that the victim was sitting for some of the attack, and that the attack took a considerable amount of physical strength. None of these conclusions were attacked by the defense. Additionally, the coroner's report and the photographs were reviewed by a forensic pathologist, who was available at trial for cross-examination. Upon reading the coroner's report that three to five pints of blood were missing, the forensic pathologist even opined that the small amount of blood in the car and the fact that the car's interior was not wet suggested that the murder did not take place in the vehicle. Actual or substantial prejudice has not been demonstrated by the coroner's lack of availability.

¶{31} Seventh, appellant points out that one of the detectives was no longer available to testify. The state once again responds that appellant requested that his testimony from the preliminary hearing be read to the jury. This detective's testimony merely reiterated that of the other detectives. The only real addition was that some officers noticed a brown Oldsmobile drive slowly past the crime scene during the investigation. (Tr. 438). The importance of this fact is not as clear cut as appellant makes it: passing vehicles often slow down and gape at large conglomerations of police officers. Furthermore, there was nothing further presented on the topic by the defense to show that the detective's testimony at trial would have assisted appellant's defense. In fact, the passing car was not even witnessed by this detective. Thus, this detective's unavailability was not shown to be the reason for a lack of further evidence on this topic. There was no indication that his unavailability was substantially prejudicial to the defense. See *Marion*, 404 U.S. at 326 (possibility of prejudice

inherent in any extended delay such as when a witness becomes inaccessible is not sufficient prejudice).

¶{32} Eighth, appellant complains that he could not benefit from the investigation conducted by Attorney Bruzzese who represented him upon his arrest in 1987. At the motion hearing, this attorney testified that appellant's file had been discarded either in 2000 or 2004 during clearings of his file room. (09/19/08 Tr. 65). He explained that the file contained his notes on interviews of appellant and various witnesses. Id. at 61. The attorney testified that he looked in Ms. Harton's vehicle and noticed cuts in the seat similar to those in appellant's car which the police had focused on. Id. at 68. He noted that the police had received an anonymous tip that a woman had been attacked in the alley behind the library. He disclosed that he went to the library and took a scraping of a dried substance that was reddish brown. Id. at 65. Because appellant was never indicted, he never had this tested, and the vial containing the scraping was discarded with the file.

¶{33} There is no indication that retention of this file would have assisted appellant's defense. Attorney Bruzzese was still available to testify, and he did so at the motion hearing. *However, appellant did not call him to testify at trial to his observations regarding Ms. Harton's car or the substance behind the library*. The anonymous tip, concerning the library and a claimed pool of blood, was related to the jury by another detective. (Tr. 253). As aforementioned, the unavailable detective's testimony at the preliminary hearing was read to the jury at trial as requested by appellant. This detective related that he searched behind the library and that a pool of red liquid was obviously transmission fluid, noting that he touched and smelled it. (Tr. 442-443).

¶{34} Moreover, even if the victim had been killed at the library, this would have been more helpful to the state's case and would not have proven that appellant was not guilty. That is, if appellant killed her behind the library and then put her body in his car, this would help explain why his car and the alley did not contain more blood from the multiple stabbings and from the possibly spurting carotid artery wound, which was the focus of the defense. In any event, the composition of the dried substance scraped by the attorney, who admitted his "untrained eye" in blood identification, constitutes mere speculation. See *Marion*, 404 U.S. at 326 (defendant cannot rely solely on the possibility of prejudice resulting where evidence is lost; rather, he must

show actual prejudice). Likewise, the amount of assistance that the attorney's notes from unidentified interviews could have provided is speculative as well.

¶{35} Ninth, appellant states that a report of a vehicle in the area where the body was found can no longer be investigated. That is, the cab driver who found the body in Webster's Alley testified that he noticed a car parked on Fifth Street and that this car was gone by the time he came back with the police. (Tr. 190). As appellant complains, the cab driver's 1987 statement on the details of the vehicle did not refresh his memory at trial as defense counsel attempted to do. (Tr. 189). However, defense counsel did not attempt to have the witness read the prior statement as a past recollection recorded under Evid.R. 803(5), which would not have required successful refreshment. We also note that Fifth Street runs parallel with the alley, there were many bars in the area, and one could not see the alley from Fifth Street. (Tr. 191, 208). Thus, the car was not actually at the scene. In addition, there is no indication that the cab driver's statement was not investigated at the time by police. Actual or substantial prejudice in the form of an inability to investigate the identity of this vehicle was not established as being caused by the delay.

¶{36} Accordingly, none of the allegations of prejudice were established to be of material and actual assistance to the defense. This is distinguishable from *Luck* where the deceased witness was said to have actually been present at the murder and would allegedly have exonerated the defendant or mitigated the actions of the defendant. See *State v. Luck* (1984), 15 Ohio St.3d 150. Here, the factors listed by appellant either entailed speculative prejudice, were not prejudicial at all, or were merely somewhat as opposed to substantially prejudicial.

¶{37} This is especially so when viewed in light of the evidence offered at trial against appellant such as: the victim's intention to leave him for good; her recent black eye which caused her to move out of his house for a week; the fact that she usually carried a knife in her purse which was missing combined with the fact that the method of death was stabbing and the fact that she had a gun in her purse when she was killed, which all suggested the killer was someone she knew; appellant's car had no frost and was not cold to the touch at 6:00 a.m. even though it was eighteen or nineteen degrees, all other cars had frost on them, and appellant claimed that he had not been out all night; blood (visible by way of luminal) was found to have been smeared on the seats, the door, the windshield and even the outside of appellant's car

in an apparent attempt to clean a large amount of blood; spots of this blood matched the victim; and, appellant claimed the blood was the result of a car accident, which was contradicted by the sister's statement that she spoke to the victim every day and would have known if she had been in an accident that caused her to bleed and the friend's statement that she also frequently spoke to the victim who had never mentioned such an event. See id. at 154 (prejudicial factors balanced against other evidence to determine if actual prejudice was suffered at trial).

¶{38} For all of these reasons, we conclude that the first prong of the pre-indictment delay test was not satisfied. Thus, we need not proceed to determine whether the state met its burden of establishing a justifiable reason for the delay. This assignment of error is overruled.

ASSIGNMENT OF ERROR NUMBER TWO

¶{39} Appellant's second assignment of error alleges:

¶{40} "THE TRIAL COURT ERRED WHEN IT PERMITTED OVER OBJECTION TWO WITNESSES TO TESTIFY THAT THE DECEDENT TOLD THEM THAT APPELLANT HAD ASSAULTED HER."

¶{41} Appellant contends that the testimony of the victim's sister and the victim's friend about what the victim told them constituted a violation of his Confrontation Clause rights. In the alternative, he contends that this testimony constituted inadmissible hearsay.

¶{42} Specifically, the victim's sister testified that the victim, who had been living with appellant since August 6, 1986, unexpectedly arrived at her house with the baby on December 20 or 21, 1986 around 1:30 a.m. The baby was wrapped only in an adult's coat. The victim was wearing her nightgown, which had been ripped. The victim suffered a black eye and bruises on her body. The victim told her sister that appellant had punched her in the eye and on the body. (Tr. 351-353).

¶{43} Next, the victim's best friend testified that when she asked the victim how she received a black eye, the victim responded that appellant did it. (Tr. 375). She also testified that just prior to the murder the victim was adamant about leaving appellant. (Tr. 377).

¶{44} The Sixth Amendment's Confrontation Clause only applies to testimonial statements and does not apply to nontestimonial statements. *State v. Siler*, 116 Ohio St.3d 39, 2007-Ohio-5637, ¶21. If a statement is testimonial, then the Confrontation

Clause requires a showing of both the declarant's unavailability and the defendant's opportunity to have previously cross-examined the declarant. Id. If the statement is nontestimonial, it is merely subject to the regular admissibility requirements of the hearsay rules. See id.

¶{45} In order to determine whether a statement to a *non*-law enforcement person is testimonial, the "objective witness" test applies. *Siler*, 116 Ohio St.3d 39 at ¶26-27; *State v. Stahl*, 111 Ohio St.3d 186, 2006-Ohio-5482, ¶25, 36, citing *Crawford v. Washington* (2004), 541 U.S. 36. This test requires the court to determine whether an objective witness would have reasonably believed that her statement would be available for use at a later trial. *Stahl*, 111 Ohio St.3d 186 at ¶36. The focus is on the expectation of the declarant at the time the statement is made, and the intent of the questioner is irrelevant unless it could affect a reasonable declarant's expectations. Id. (statements of a rape victim to a nurse were nontestimonial, even though they were made during an examination in a unit of the hospital specializing in collection of forensic evidence).

¶{46} In a recent case, we stated that if the *Stahl* rape victim's statements to a nurse (trained in forensic recovery who was working at a special forensic hospital unit and who had her patients sign an acknowledgment that evidence would be provided to police) were not testimonial, then neither would be a person's statements to her concerned friend regarding the cause of an injury. *State v. Peeples*, 7th Dist. No. 07MA212, 2009-Ohio-1198, ¶30, citing *Stahl*, 111 Ohio St.3d 186. See, also, *State v. Menton*, 7th Dist. No. 07MA70, 2009-Ohio-4640, ¶26-27. Various Ohio appellate courts have also found that statements about the cause of an injury or about the reason for emotional upset made to a friend are not testimonial. See, e.g., *State v. Cook*, 8th Dist. No. 87265, 2007-Ohio-625, ¶17 (victim's statement to daughter that defendant put his finger in her vagina is not testimonial as it was to explain why she was upset); *State v. Myers*, 2d Dist. No. 2006CA2, 2006-Ohio-6125, ¶10-11 (testimony of witness that her friend had told her the defendant was driving around her house does not contain a testimonial statement).

¶{47} Moreover, the Supreme Court in *Stahl* favorably cited a federal case holding that a private conversation to a friend is not made under circumstances leading an objective person to reasonably believe that the statement will be available for use at a later trial. *Peeples*, 7th Dist. No. 07MA212 at ¶32, citing *Horton v. Allen*

(C.A. 1, 2004), 370 F.3d 75, 84. See, also, *Davis*, 541 U.S. 813, citing *Crawford*, 541 U.S. 36 ("An accuser who makes a formal statement to government officers bears testimony *in a sense that a person who makes a casual remark to an acquaintance does not*") (emphasis added).

¶{48} Here, the testimony of the victim's sister dealt with statements the victim made to her sister in order to explain an unexpected situation. That is, the victim explained to her sister why she had arrived at her house in the middle of the night in December with a baby wrapped only in an adult's jacket. The victim was explaining why the nightgown, which she had previously borrowed from her sister, was ripped. She was explaining why she had a black eye and why she needed to stay with her sister for a while. The victim was very close to her sister; she lived with her for some years and spoke to her every day after she moved out. The statements made by the victim to her sister are not testimonial as an *objective witness* would not have reasonably believed such statements to a sister would be available for later use at her own murder trial. See *Stahl*, 111 Ohio St.3d 186 at ¶36. Thus, there is no Confrontation Clause issue regarding the victim's statements to her sister.

¶{49} Similarly, the victim's statements to her best friend prior to her murder were not testimonial. There is no indication that the victim reasonably believed the sharing of confidences regarding her black eye and her wish to leave appellant would be available for later use at trial. Notably, she did not file a police report against appellant for assaulting her weeks before her murder. She was merely confiding her situation to her friend. As such, there is no Confrontation Clause issue regarding the victim's statements to her friend.

¶{50} As aforementioned, there can still be a hearsay issue even if there is no confrontation issue. Thus, we move to address whether the disputed testimony constituted inadmissible hearsay. It is well established that the admission or exclusion of evidence rests within the sound discretion of the trial court. *State v. Robb* (2000), 88 Ohio St.3d 59, 68.

¶{51} First, we note that the portions of the sister's testimony describing the victim, her injuries and the circumstances of her late night arrival and week-long stay did not constitute hearsay as these statements were based upon what the sister actually perceived. See *State v. Braden*, 98 Ohio St.3d 354, 2003-Ohio-1325, ¶100. The same concept applies to the victim's friend's observation that the victim had a

black eye. See id. As to the cause of the injuries and the friend's disclosure that the victim was adamant about leaving appellant, various hearsay exceptions were discussed on this topic at trial: state of mind, present sense impression and excited utterance.

¶{52} The state of mind exception allows hearsay testimony on statements concerning:

¶{53} "A statement of the declarant's then existing state of mind, emotion, sensation or physical condition (such as intent, plan, motive, design, mental feeling, pain and bodily health) but not including a statement of memory or belief to prove the fact remembered * * *". Evid.R. 803(3).

¶{54} This exception can be used to show the declarant's state of mind and to whom that state of mind applies. *State v. Miller*, 96 Ohio St.3d 384, 2002-Ohio 4931, ¶45-47 (witness can testify that victim was fearful of her husband). Thus, any statements by the victim describing her injuries, voicing her pain or expressing fear of appellant were admissible. See, e.g., *Braden*, 98 Ohio St.3d 354 at ¶100 (victim's statements expressing that she was fearful and terrified). In addition, the victim's "adamant" statement to her friend that she was leaving appellant is admissible under this exception as it shows intent or plan. See *State v. Leonard*, 104 Ohio St.3d 54, 2004-Ohio-6235, ¶100 (victim's statement that she intended to end relationship with defendant was admissible under this exception).

¶{55} However, this rule cannot be used to expose why the declarant held a particular state of mind or who the victim identified as causing her injury as these further facts would deal with memories or beliefs to prove the statement of mind or physical condition. See *Leonard*, 104 Ohio St.3d 54 at ¶101 (cannot testify why victim was going to end relationship); *State v. Apanovitch* (1987), 33 Ohio St.3d 19, 21 (cannot testify victim said she was afraid of defendant because he threatened her). As such, in evaluating the statements by two witnesses that the victim said that appellant hit her, we move to the next hearsay exception mentioned at trial.

¶{56} The exception for the present sense impression allows testimony on "[a] statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter unless circumstances indicate lack of trustworthiness." Evid.R. 803(1). The victim's statement to her friend was not alleged to have been made immediately after she received a black eye. The

victim's statements to her sister may have been soon after but do not appear to have been immediately after the assault as the victim had to travel to her sister's after getting a ride from appellant's brother. Thus, we proceed to address the next exception, which does not require immediacy.

¶{57} The excited utterance hearsay exception allows testimony on "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." Evid.R. 803(2). To be admissible under Evid.R. 803(2), a statement must concern an occurrence observed by the declarant that was startling enough to produce a nervous excitement in the declarant and must be made before there was time for such excitement to lose domination over her reflective faculties. *State v. Huertas* (1990), 51 Ohio St.3d 22, 31 (affirming finding that a statement made forty-five minutes after the event but while the declarant was still agitated and in serious pain and had not calmed down to be an excited utterance). See, also, *Cook*, 8th Dist. No. 87265 at ¶20-21 (still under excitement even though incident occurred in early morning and daughter was told at lunch time).

¶{58} It is not disputed that it is a startling event for an eighteen-year-old girl to have the man she lives with, who is the father of her baby, punch her in the eye, rip her nightgown and leave bruises on her body. This event would certainly produce nervous excitement. The question is whether it was unreasonable for the trial court to determine that she was still under the influence of this nervous excitement at the time of her statement.

¶{59} We note that there was no contemporaneous objection to the foundation laid for admission of these statements as excited utterances. Defense counsel objected to the contents of the statement ahead of time: in chambers prior to trial, halfway through trial, and just prior to the sister's testimony on her observations. (Tr. 161, 307, 350-351). However, he did not object at a pertinent point during the disputed testimony. That is, there was no objection to the foundation that was laid. The objections were made prior to the witness even stating her observations. Had an objection been lodged at the proper time, a better description of the victim's emotional state may have been portrayed.

¶{60} In any event, the victim's sister's testimony established that appellant's brother brought the victim to her house around 1:30 a.m., just as the sister was

arriving home from her late-night work shift. The sister saw the victim's black eye, ripped nightgown and bruised body. She related that the baby was wrapped only in an adult's coat. She answered that the beating happened that same day.

¶{61} She did not describe her sister's excitement or condition at the moment she made the statement that appellant punched her. However, as there is no indication otherwise and there was no specific and time-appropriate objection to foundation, it can be reasonably inferred given the time of night, the state of the victim's, and the baby's dress that the incident had just occurred and that the injured sister was still under the nervous excitement of this startling event.

¶{62} Notably, the question that elicited the victim's story was the sister asking why she would bring the baby out in the cold like that. This all suggests that the act of leaving appellant's house was an emergency situation done in response to the assault. The fact that appellant's brother was leaving, the victim was in a ripped nightgown, and the baby was still wrapped in an adult's coat shows that the victim had just arrived after leaving appellant. As there was no indication that the statements to the sister were the product of reflective thought, the trial court did not abuse its discretion in admitting the victim's statement to her sister that night.

¶{63} As for the victim's statement to her friend that appellant gave her the black eye, this was not an excited utterance as it was made a long time after the assault, and the victim was no longer startled or under nervous excitement. As aforementioned, contrary to the state's position, this type of explanation would not fall under the state of mind exception as it does not merely describe the injury but assigns how the injury occurred and who inflicted it, which are memories of a past act rather than descriptions of a physical condition. However, given that the victim had already told her sister that appellant not only gave her a black eye but also punched her body, the friend's testimony on the source of the black eye is harmless. As such, this assignment of error is overruled.

ASSIGNMENT OF ERROR NUMBER THREE

¶{64} Appellant's third and final assignment of error contends:

¶{65} "THE TRIAL COURT ERRED WHEN IT PERMITTED OVER OBJECTION A WITNESS TO TESTIFY THAT APPELLANT HAD USED ILLEGAL DRUGS."

¶{66} As aforementioned, Juliette Harton was a suspect investigated by police after the murder due to information that she engaged in a physical fight with the victim in November or December 1986 and then threw a brick through the victim's window in the month before her death. (Tr. 322, 325, 326). She testified that she had three children by appellant and that she had been involved with him before and after his relationship with the victim, for a total of fifteen years. (Tr. 318-319). She stated that at the time of the murder, she was seven months pregnant and was upset that appellant had left her. (Tr. 319). She noted that on the weekend of the murder she had houseguests, Mr. Parker and his nephew, and did not leave the house on the evening the victim was killed. (Tr. 320, 323).

¶{67} On cross-examination, the defense elicited that Ms. Harton had struggles with substance abuse throughout her adult life. It was pointed out that a fairly recent interview with police had to be canceled because she had used crack and drank alcohol. (Tr. 324). Defense counsel had Ms. Harton testify about appellant claiming that the victim once had a bloody nose in the car when she hit her head on the dashboard after a car accident. The state repeatedly objected on the grounds that an admission of a defendant can only be offered by the opponent. The court erroneously overruled the state's objections.

¶{68} On redirect, the state immediately asked Ms. Harton if she ever did drugs with appellant. (Tr. 333). Defense counsel objected, and the state claimed that the defense opened the door. (Tr. 333-334). Defense counsel replied that he only sought to determine whether she had a clear mind. The court allowed the question, asking "you're not going to go too far; are you?" The state responded in the negative and again asked Ms. Harton if she ever used drugs with appellant. Ms Harton responded affirmatively. (Tr. 334).

¶{69} Appellant now urges that this was improper other acts evidence. The state responds that the court limited the questioning and that any error was harmless.

¶{70} As aforementioned, it is well established that the admission or exclusion of evidence rests within the sound discretion of the trial court. *Robb*, 88 Ohio St.3d at 68. Thus, absent an abuse of discretion, an appellate court will not disturb a ruling by a trial court as to the admissibility of evidence. *State v. Martin* (1985), 19 Ohio St.3d 122, 129. An abuse of discretion connotes more than an error of law or judgment; it

implies that the court's attitude was unreasonable, arbitrary, or unconscionable. *State v. Adams* (1980), 62 Ohio St.2d 151, 157.

¶{71} Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to prove conformity therewith; it may, however, be introduced to prove motive, opportunity, intent, preparation, plan, knowledge, identity, and absence of mistake or accident. Evid.R. 404(B). See, also, R.C. 2945.59. The standard for admitting such evidence is strict. *State v. Broom* (1988), 40 Ohio St.3d 277, 281-282.

¶{72} First, we note that the Supreme Court has held that evidence of prior drug use or of a prior crack cocaine purchase, even if it was irrelevant and even though it portrayed the defendant in a negative light, was of minor significance compared to the gravity of a murder case. *State v. Craig*, 110 Ohio St.3d 306, 2006-Ohio-4571, ¶61. Although this analysis occurred in a plain error setting, it still constitutes a holding that irrelevant evidence of prior drug use can be of minor significance. Notably, the case before us involved a murder that took place more than twenty years before trial. However, there was no indication of when the drug use with Ms. Harton occurred or what drug was used. As Ms. Harton disclosed, she dated appellant for many years *after* the murder.

¶{73} Notably, an error may not be predicated on a ruling which admits or excludes evidence unless a substantial right is affected. Evid.R. 103(A)(1). The statement that appellant used an unnamed drug with Ms. Harton at some unknown time in the past twenty-some years did not create reversible prejudice in this murder case. Besides the fact that past drug use is of minor significance in the general murder case, there is compelling testimony against appellant.

¶{74} For instance, the victim's blood was smeared (after an incomplete attempted cleaning of the vehicle) in multiple places inside appellant's car, and the victim's sister and friend insist that she was never in any car accident. There was also blood on the outside of the vehicle and on appellant's jacket. Moreover, appellant claimed that he did not use his car that nineteen-degree morning but it was the only car on the street which was not frosted or even cold to the touch. There are also the compelling inferences to be drawn from the testimony that the victim was about to leave appellant for good, that the victim carried a steak knife in her purse which was missing, and that she carried a firearm which did not end up protecting her from being

stabbed sixty-one times in a location within blocks of the residence she shared with appellant whom she had left at home while she went out to bars.

¶{75} We also point out that there is no indication that the state was trying to prove appellant's character to show conformity therewith. Prior drug use is not a prior murder or a prior stabbing or even a prior act of violence. Thus, the issue can be seen as more of a question of relevance under Evid.R. 402. In fact, the trial court could also have seen the objection as being made under Evid.R. 403(A), which provides that evidence is not admissible if the probative value of the evidence is substantially outweighed by the danger of unfair prejudice or the danger of confusing or misleading the jury.

¶{76} This reveals the additional problem that although an objection was entered to the state's question, the specific grounds of the objection were not voiced to the trial court. Evid.R. 103(A)(1) (error may not be predicated on ruling which admits or excludes evidence unless a timely objection appears on the record, stating specifically the ground of the objection, if the specific ground was not apparent from the context). Defense counsel focused on an argument that he did not open the door to the testimony, suggesting that he believed that the topic was not proper *for redirect* rather than suggesting that it was barred by some evidentiary rule. Considering this and the fact that the objection could reasonably be seen as an objection related to a rule other than Evid.R. 404(B), the issue may not have been properly preserved. Either way, this assignment of error is overruled.

¶{77} For the foregoing reasons, the judgment of the trial court is hereby affirmed.

Donofrio, J., concurs.
Waite, J., concurs.