[Cite as *State v. Nix*, 2004-Ohio-5502.]

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

STATE OF OHIO,	:	APPEAL NO. C-030696 TRIAL NO. B-0203877
Plaintiff-Appellee,	:	
vs.	:	*O P I N I O N.*
DAMIEN T. NIX,	:	
Defendant-Appellant.	:	

Criminal Appeal From: Hamilton County Court of Common Pleas

Judgment Appealed From Is: Affirmed

Date of Judgment Entry on Appeal: October 15, 2004

Scott M. Heenan, for Plaintiff-Appellee,

Chris McEvilley, for Defendant-Appellant.

GORMAN, Judge.

{¶1} The defendant-appellant, Damien T. Nix, appeals from his conviction, after a trial by jury, of one count of murder and two counts of felonious assault, with each of the three counts accompanied by a separate firearm specification. His conviction came after a previous trial had resulted in a hung jury. The trial court sentenced him to fifteen years to life for the murder, which was made consecutive to two concurrent six-year

prison terms for the two felonious assaults, with an additional mandatory three years on each of the three separate firearms specifications.

{¶2} In his six assignments of error, Nix now argues that (1) the trial court erred by failing to suppress identification testimony; (2) the trial court erred by declaring a state's witness unavailable to testify; (3) he was denied a fair trial due to prosecutorial and police misconduct; (4) he was denied the effective assistance of counsel; (5) his convictions were based upon insufficient evidence; and (6) his convictions were contrary to the manifest weight of the evidence. We find none of the assignments to involve reversible error and thus affirm the trial court.

FACTS

{¶3} On April 20, 2003, at close to midnight, Cincinnati police officers Stephen Fromhold and Daniel Coates responded to a call in the Over-the-Rhine area of the city, in the vicinity of an establishment called "Martin's Club."[1] When they arrived, they discovered a crowd on the street surrounding two gunshot victims, Carlos Villas and

[1] We note that the name of the club as it appears in photographs admitted in evidence is simply "Martin," but the parties refer to it as "Martin's" or "Martin's Club."

Octavia Kelly. Villas was talking on a cellular telephone as he lay on the sidewalk. He had been shot once in the stomach while Kelly had been shot once in the leg. Fromhold testified that Villas, after he told him to get off the phone, identified the man who had shot him as either "Damon" or "Damien," the precise name being difficult to decipher as Villas's voice had begun to fade due to his wound. According to Fromhold, Villas also told him that the person who had shot him lived with his grandmother on Twelfth and Broadway in a second-floor apartment.

{¶4} An emergency medical team called to the scene then intervened to tend to Villas. Fromhold testified that a woman who had been comforting Villas, Ursula Thomas, told him that the shooter had the street nickname "Pooh." Thomas, a long-time friend of Villas's who lived one door down from Martin's Club, would later testify that she had entered the establishment on the night of the shooting at approximately 10:30 p.m. While in the bar she had a conversation with Villas. She also testified that she saw a man sitting at the bar whom she identified as Nix, wearing his hair in cornrows and dressed in a distinctive black-hooded sweatshirt under a construction worker's jacket. She stated that, after noticing Nix because of his hair, which she admired, she paid Nix no further notice, losing track of him.

{¶5} According to Thomas, she immediately discovered that both Villas and Kelly had been shot when she stepped outside the club fifteen minutes later. Approximately seven or eight people were already milling about the victims. She gave Kelly, whom she also described as a long-time friend, her cellular phone to call the police while she tended to Villas. She testified that Villas, fearing that his wound was mortal, told her, "Ursula, if I don't make it, please tell my momma Damien shot me."

{¶6} Kelly, who survived her wound, testified that she arrived at Martin's Club at approximately 8:30 p.m. to shoot pool and dance. At approximately 11:00 p.m., she went outside and had a conversation with an acquaintance. During the conversation, she heard what she thought was a firecracker and experienced a pain in her leg. She heard a second shot as she fell backwards at the foot of the club's door. She testified that she never saw the person or persons who fired the shots, and that she had never met either Villas or Nix.

{¶7} Gina Seaton, who had earlier been playing cards with Villas at an apartment near Martin's Club, testified at the first trial (and, by admission of her previous testimony, at the second trial) that she heard the shots and ran outside to find Villas on the sidewalk, clutching his stomach and exclaiming that he had been shot. She came to his aid and attempted, along with Thomas, to comfort him. According to Seaton, Villas told her, "That nigger shot me, Damien. Damien. Damien shot me." She stated that Villas further identified the person who shot him as "[t]hat nigger we got into it with on Twelfth and Broadway. Darrell's son."

{¶8} Officer Coates testified that while securing the crime scene he interviewed Latonia Stuckey, who reluctantly stepped forward as an eyewitness to the shooting. From Stuckey he developed a description of the shooter as a thin African-American male, age 20 to 23, with gold teeth and braided hair down to the back of his neck, wearing a "dark hoodie-type sweatshirt." Stuckey, who was living with Thomas at the time, later testified that on the night of the shooting she was standing on the street outside her apartment near Martin's Club, leaning on a parking meter and talking on a cellular phone. She stated that Villas, whom she knew as a family friend, was leaning on the meter next

to her. She testified that, while she was talking, a thinly built African-American male with braided hair and gold teeth, wearing a "black hoodie and some blue jeans," came walking down the street. According to Stuckey, the man was wearing the hood over his head. She testified that the man pulled out a black gun, began firing without saying a word, and then ran off. Afterward, she testified, she ran toward Villas, who had been wounded, and called 911. A tape of her call to the 911 operator confirmed her description of the shooter, including the fact that he had braided hair.

{¶9} Stuckey also testified that she was later unable to identify a picture of Nix from a photographic lineup. She was not asked to identify Nix at trial. On cross-examination, she was asked, "Now, you don't recall seeing Damien Nix on the night of April 20, correct?" She replied, "No." Later during cross-examination, referring to Nix, she said, "Like right now, this is the first time I seen that boy." Asked how she was able to say that the person who shot Villas had braided hair if he was wearing a hood, she replied, "Because probably when he ran back up the street the hood fell off." Asked if she was saying in fact that the hood had fallen off, she said, "From right now, I can't like tell you * * *." She then admitted that she did not know how she had seen the suspect wearing braids, but she referred to the 911 tape in which she had said so and then stated that she would not have described him as wearing braids if she had not somehow seen them.

{¶10} Officer Michael L. Williams testified to an incident that had occurred almost a month before the shooting, on March 28, 2002. On that date, Williams was a member of the Violent Crimes Task Force assigned to District 1. He testified that he and his partner, Officer Odaius Leonard, had responded to a shots-fired call in the vicinity of

1200 Broadway. After they arrived, they discovered a small crowd and eventually Nix, who had retreated into a nearby apartment and was acting dazed with a large hematoma on his head. Nix described a fight in which he had been accosted by a man, 5'10" tall and weighing 300 pounds, whom he identified as "Carlos Vega," along with four or five accomplices. Williams stated that Nix had told him that the fight was in retaliation for an earlier shoving match, and that the man he identified as "Carlos Vega" had slammed him to the ground and then fired two rounds from a firearm into the air. According to Williams, there was no sign of "Carlos Vega." Two spent shell casings were recovered from the scene.

{¶11} Detective Kimberly Bemmes testified that she was assigned to investigate the March 20, 2002, assault on Nix. She stated that when she was eventually able to make contact with Nix, he told her before hanging up, "I don't want to do shit about this. I'll fucking take care of it myself."

{¶12} Officer Shawn Tarvin testified that he was assigned to investigate the shootings of Villas and Kelly. He testified that, using the name Damien and a possible address on Twelfth and Broadway, he was able to track down the apartment belonging to Loraine Bolden, Nix's grandmother. Tarvin left a message with Bolden for Nix to contact him. Tarvin then obtained a prior mug shot of Nix and presented it in a photographic array of six images to Villas, who was still at the University of Cincinnati Hospital attempting to recover from his wound. Asked if he could identify any of those

pictured as the man who had shot him, Villas picked out Nix's picture and circled, signed, and dated it. Afterward Tarvin obtained a warrant for Nix's arrest.[2]

{¶13} Aware that the police were searching for him, Nix turned himself in on May 7, 2002. Comparing Nix's appearance with the description given to him by witnesses, Tarvin thought there was a significant similarity, although he conceded during cross-examination that Nix had a gold tooth, not "gold teeth," and that his cornrows were not shoulder-length, but at the shoulder.

{¶14} During interrogation, Nix denied any involvement in the shooting of Villas and Kelly. He told police that on the night of the shooting he was at 2148 Kendall Avenue with his mother, Lorine Sorrels, and her boyfriend, Robert Terry, watching the NBA playoffs. He stated that he watched three separate games until the last one concluded at approximately 8:30 p.m., and that he then watched a little more television and then fell asleep around 11 p.m. Although Nix did not testify at trial, both Sorrels and Terry did. Sorrels testified that the father of Nix was Michael Nix, not anyone named Darrel, as indicated by Villas before he died. She stated that, on the date of shooting, Nix was living with her, her mother (Nix's grandmother), Loraine, and Terry on Kendall. She testified that she recalled being at home cooking dinner on April 20, 2002, while Nix and Terry were watching television in separate rooms. She stated that Nix, who was not feeling well, was watching sports on television in the living room and that she did not recall him leaving at any time during the afternoon. According to Sorrels, Nix was asleep

[2] A point must be made regarding Villas's in-hospital identification of Nix obtained by Tarvin. Nix moved to suppress this identification on the grounds that it was unreliable. The motion to suppress was overruled; however, as the prosecution pointed out at the suppression hearing, the question of its reliability was "academic" because Villas had died and there was no way the identification was admissible under any hearsay exception, including that for dying declarations. Nonetheless, as we discuss under the fourth

on the couch of the living room when she went to bed at three or four o'clock in the morning. She described him as being fully dressed in his sleep, which she stated was not unusual.

{¶15} Terry testified that Nix was watching the NBA playoffs on television the night of April 20. He testified that, to his knowledge, Nix was at home the entire day, and that he would see him whenever he walked through the house or went to the living room to take a look at the score of the game. According to Terry, when he went to bed at around 1:30 or 2:00 a.m. he walked through the house, saw Nix asleep on the couch, and switched off the TV. Asked whether the NBA game was on network or cable, he replied that the game must have been on either NBC or ABC because the house did not have cable.

{¶16} Dr. Daniel Lawrence Schultz, a Hamilton County deputy coroner and senior forensic pathologist, testified that Villas later died in the hospital as a result of "acute ischemic colitis with peritonitis due to perforation of branches of superior mesenteric artery due to perforating gunshot wound of the abdomen." Attempting to put the cause in layman's terms, Dr. Schulz stated that the cause of death was "dying bowel due to inadequate vascular supply due to injury vessels due to gunshot wound." He described the manner of death as simply "homicide."

FIRST ASSIGNMENT OF ERROR

{¶17} In his first assignment of error, Nix argues that the trial court should have suppressed the identification testimony of Thomas. Thomas testified during the suppression hearing that she and Stuckey, whom she identified as her cousin, had been

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assignment of error, the identification was divulged through cross-examination and redirect examination of

called to the police-investigation-section offices on May 7, 2002. She testified that Detective Jennifer Lopez (whose last name had been changed to Luke at the time of the second trial) interviewed them separately. After her interview, Lopez walked Thomas out into the squad room where Stuckey was sitting at a table and then left the two alone. While Lopez was gone, Thomas spotted a group of three or four "lineup pictures" lying on the table near Stuckey. She stated that Stuckey further drew her attention to the photographs and said to her, "[L]et's see somebody we know." Thomas described their actions as "typical nosy stuff." She stated that she and Stuckey looked through the photographs until Stuckey came upon one of Nix, stating, "That's the dude right there. That's the dude, Ursula." According to Thomas, she recognized the photograph of Nix as the same man with braided hair whom she had observed in Martin's Club the night of the shooting. She testified that she told Lopez when she returned that she recognized the person in the photograph. According to Thomas, Lopez had returned with another photograph of Nix to show her.

{¶18} Lopez disputed Thomas's recollection that she had returned with a photograph of Nix. She testified that she had left the squad room either to answer the telephone or to retrieve a business card. She stated that before she left the squad room she had put her case folder down on the table (which she also described as a secretary's desk), and that when she came back, Thomas had opened up a manila folder with Nix's picture in it and was pointing to it, stating, "That was the guy in the bar that night."

{¶19} In overruling the motion to suppress, the trial court found that there might have been some state action involved in the identification process "in the sense that the

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Bemmes and Tarvin.

photograph was placed there by somebody for the state." But the trial court also found that there were a number of photographs on the table in addition to that of Nix, and that Thomas had picked out the photograph of Nix on her own volition. The court concluded that the identification process was "probably even better than the typical six-photograph lineup sheet" and was "about as innocent a presentation of a photograph as you can get." The court further found that Thomas had had ample opportunity to examine the features of the young man with braided hair whom she had seen in the bar the night of the shooting, and that her identification of Nix's photograph as that of the same man was not unreliable.

{¶20} Disagreeing with the trial court's characterization of the presentation as "innocent," Nix argues that his photograph was purposefully "left scattered about on a squad room table" in front of Thomas and Stuckey. The reason for its strategic placement, he contends, was to impermissibly suggest to them that he was the man they had both seen the night of the shooting. Such a tactic, he argues, created a substantial likelihood of misidentification.

{¶21} We begin our analysis by noting that even an unnecessarily suggestive identification process does not violate a defendant's due-process rights unless it can also be shown that the resulting identification lacked sufficient indicia of reliability. *State v. Brown* (1988), 38 Ohio St.3d 305, 310, 528 N.E.2d 523. The most overtly suggestive process might not be grounds for suppression where the witness had more than ample opportunity to view the suspect, or perhaps already knew the suspect, or had given a prior description that clearly matched the suspect, and was certain in his or her identification. *State v. Waddy* (1992), 63 Ohio St.3d 424, 439, 588 N.E.2d 819. On the other hand, if

the witness had only a rushed or stressful glimpse of the suspect, whom he or she had never seen before, and was only able to describe the suspect generally, and made an equivocal identification, the reliability of the identification is undermined and any suggestiveness in the process may be grounds for suppression. The proper inquiry is one that considers the totality of the circumstances. *Brown*, supra.

{¶22} In reviewing the trial court's decision on a motion to suppress, we are bound by its factual findings unless they are clearly erroneous. See *Ornelas v. United States* (1996), 517 U.S. 690, 699, 116 S.Ct. 1657. But we consider *de novo* the application of the law to the factual findings. Id.

{¶23} Although the state argues that the identification process did not involve any state action, this argument asks us to ignore the trial court's factual finding that state action was involved. We agree with the state, however, that there were no findings and evidence to conclude that the state had acted improperly. The trial court did not find that Lopez left the case folder behind purposefully, to entice the women into viewing the photographs, and her testimony offered no evidence of such an ulterior motive. Thomas's testimony that she and Stuckey were being "nosy" by looking at the photographs, on the other hand, suggests that the idea to view the photographs originated with them. There was certainly no testimony from anyone to indicate that Nix's photograph was suggested or tipped off as that of the suspected shooter. We agree with the trial court that the identification process, if indeed it could be called a process, was not in any way more suggestive than the usual photographic lineup.

{¶24} Nix's first assignment of error is overruled.

SECOND ASSIGNMENT OF ERROR

{¶25} In his second assignment of error, Nix argues that the trial court erred by ruling that the state had established that one of its witnesses, Gina Seaton, was unavailable, thus permitting her testimony from the first trial to be admitted under the hearsay exception set forth in Evid.R. 804(B)(2). That rule allows the use of "former testimony"[3] when the declarant is "unavailable." A witness is unavailable, according to the rule, when he (or she) "is absent from the hearing and the proponent of his [or her] statement has been unable to procure his [or her] attendance * * * by process or other reasonable means." Evid.R. 804(A)(5).

{¶26} Because this rule impinges upon the Confrontation Clause of the Sixth Amendment, the burden is on the proponent of the evidence to establish unavailability. *State v. Keairns* (1984), 9 Ohio St.3d 228, 232, 460 N.E.2d 245, citing *Ohio v. Roberts* (1980), 448 U.S. 56, 75, 100 S.Ct. 2531. As the court in *Keairns* made clear, because of the preference given to face-to-face confrontation, the Confrontation Clause requires that "[a] witness is not considered unavailable unless the prosecution has made reasonable efforts in good faith to secure his presence." 9 Ohio St.3d. at 230, 460 N.E.2d at 245.

{¶27} The court in *Keairns* also imposed a further foundational requirement that had not been previously considered part of the rule. According to the court, "A showing of unavailability under Evid.R. 804 must be based on testimony of witnesses rather than hearsay not under oath unless unavailability is conceded by the party against whom the statement is being offered." Id. at 232, 460 N.E.2d 245. In *Keairns*, the prosecution

[3] "Former testimony" is defined in the rule as testimony provided by the declarant at another proceeding "if the party against whom the testimony is now offered, * * * had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination." Evid.R. 804(B)(1).

offered no sworn testimony, but merely represented to the court what its efforts had been to secure the witness. The court concluded that the prosecution's unsworn representations "clearly did not meet [the rule's foundational] requirement." Id. Additionally, the court found that the mere fact that the prosecution had asked the sheriff to make a "continued search" for the witness lacked sufficient particularity to demonstrate that other reasonable methods had been pursued to find the witness and secure her attendance. Id.

{¶28} In the instant case, in moving the court to allow the former testimony of Seaton to be read to the jury, the prosecutor explained to the court that a subpoena had been left by the sheriff's department for Seaton to appear on the first day of trial, a Monday, and that when she failed to appear by Tuesday, two detectives were dispatched to her residence, spoke to her, and told her to appear on Thursday. When she did not appear by Thursday, the prosecutor represented to the court, he went to the residence personally, along with an investigator, and slipped another subpoena under her door when she did not respond to their knocking. The prosecutor stated that he had sent another detective back to Seaton's residence on the day of his motion, and that when again no one came to the door, the detective had slipped his card under the door with a note for her to contact him.

{¶29} None of the prosecution's representations were made under oath; some were clearly hearsay. The trial court then asked whether Nix's attorney "accept[ed]" the fact that Seaton was unavailable, or whether he wished that the detective, Officer Robert Heinlein, who had spoken to Seaton, be put on the stand. Nix's attorney answered that he did have a question for the detective. Heinlein was called and, under oath, explained that he and Lopez had gone to Seaton's apartment on Wednesday and had finally gotten her to

come to the door after repeated knocking. He stated that Seaton told them that she had a hearing the following day in juvenile court concerning her daughter's rape. According to the detective, he told her that she needed to appear at Nix's trial after the juvenile hearing, and Seaton inquired about the specific courtroom and said, "Okay. See if I can make it." He stated that he did not serve Seaton with a subpoena because he did not have one on him at the time.

{¶30} Nix's attorney did not question Heinlein further. After asking Nix's attorney if he wished to put on any evidence and receiving a negative answer, the trial court ruled that Seaton was unavailable and then indicated its intention to admit a heavily redacted version of her former testimony. The trial court asked Nix's attorney if there was "anything else the defense wanted taken out," and Nix's attorney responded, "No, Judge. I have discussed this with my client. I believe we're okay—." Significantly, at no time did Nix's attorney lodge an objection to the introduction of Seaton's former testimony based upon the state's failure to competently establish that she was unavailable.

{¶31} Viewing the record on this issue, we are convinced that the prosecution did make a reasonable good-faith effort—in fact, several efforts, including a personal attempt by the prosecutor—to secure Seaton's appearance. But it is also apparent to us that the prosecution, apparently unfamiliar with the foundational requirements of *Keairns*, relied almost exclusively on its own unsworn representations to the court to describe those efforts. The only sworn testimony was by Heinlein, whose last-ditch effort at securing Seaton's appearance, without a subpoena, would not alone have been sufficient to sustain the state's burden of establishing unavailability.

{¶32} Also clear, however, is that Nix's attorney at no time voiced disagreement with the court's decision that Seaton was unavailable, challenged the prosecution's representations, or lodged anything remotely approaching an objection. In *State v. Robinson* (July 10, 1998), 7th Dist. No. 94-CA-42, the defense attorney was asked, after the prosecution had made only unsworn representations concerning its effort to secure a witness, whether he had any reason to challenge any of the prosecution's statements. The Seventh Appellate District held that the defense attorney's negative reply could reasonably have been interpreted by the court as a concession that the witness was unavailable. We believe the situation was similar here. Nix's attorney was asked if he accepted the fact that Seaton was unavailable, to which he responded that he wished to question Heinlein. After he did so, he did not voice any challenge to the trial court's ruling that Seaton was unavailable and stated that Nix was "okay" with the redacted version of her former testimony submitted in lieu of her appearance. As in *Robinson*, we hold that the trial court and the prosecutor could have reasonably inferred from what Nix's attorney had said, and had not said, that a concession was made regarding the efforts made by the prosecution to locate Seaton.

{¶33} The result in *Robinson*, and our holding here, is lent further support by the Ohio Supreme Court's decision in *State v. Smith* (1990), 49 Ohio St.3d 137, 551 N.E.2d 190. In *Smith*, the prosecution did not call witnesses to the stand to establish its efforts to secure a witness's appearance, but relied, rather, on its own unsworn representations. Id. at 145, 551 N.E.2d 190. Defense counsel, though not expressly conceding unavailability, did concede that the witness, a deputy coroner, was on vacation in the Bahamas. Id. The court of appeals reversed the trial court's determination that such an exchange (none of

which was made under oath) was sufficient to establish unavailability. Id. at 144, 551 N.E.2d 190. The Ohio Supreme Court, however, without even addressing the foundational requirements of *Keairns*, held simply that the trial court did not err in holding the witness unavailable. The result in *Smith* strongly indicates that the foundational requirements of *Keairns* are not to be strictly applied unless made an issue by events at trial.

{¶34} Nix's second assignment of error is overruled.

THIRD ASSIGNMENT OF ERROR

{¶35} In his third assignment of error, Nix argues that the prosecutor engaged in prejudicial misconduct by deliberately soliciting improper testimony from Detective Lopez. Specifically, he argues that the prosecutor solicited from Lopez improper hearsay testimony concerning the broadcast times of the NBA playoff games televised on the night of the shooting, as well as hearsay testimony concerning whether the residence on Kendall Avenue, where Nix claimed he was watching the games, had the necessary cable hookup to receive the broadcasts. Further, he argues that the prosecutor solicited from Lopez testimony concerning the prosecution of Nix's brother for retaliation against Seaton, the witness who did not to appear at the second trial. Although all of Nix's objections to questions concerning the prosecution of his brother were sustained, Nix argues that the prejudicial effect of such damaging inquiry upon the jury could not have been cured.

{¶36} The state responds, and we agree, that Nix's attorney in fact solicited much of the hearsay testimony concerning the broadcast schedule of the NBA playoff games during cross-examination of Lopez. Nix's attorney asked Lopez to tell him what

she had done to verify the broadcast schedule of the NBA playoff games. In response to this open-ended question, Lopez described her contacts with the various network and cable stations. At one point, Nix's attorney asked Lopez what the various stations had told her concerning the times that the games were over, thus directly inviting a hearsay response. Upon redirect, the prosecutor then followed up, asking Lopez if he understood her correctly to say that the games were only on cable TV. She replied, "Correct." The prosecution then asked if the cable company had told her that there was no cable service at 2148 Kendall, to which she replied, without any objection from Nix, that she had been told that there had been no service for the two-year period of their records. Then, on recross-examination, Nix's attorney questioned Lopez on whether she was aware that some of the games might have been broadcast on network TV or been available by satellite dish. Lopez responded that she was "not a TV expert."

{¶37} In sum, Nix's own attorney solicited the hearsay testimony from Lopez, and therefore any error in its admission was invited error. Further, since Nix's attorney did not object to any of Lopez's hearsay responses (which he could have hardly done, having solicited them), any error in their admission, in order to be cognizable on appeal, would have to be plain error. See Evid.R. 103(A); see, also, Crim.R. 52(A): *State v. Sutorius* (1997), 122 Ohio App.3d 1, 701 N.E.2d 1. Plain error is that which affects a substantial right of the defendant. Id. Given that Nix's attorney sought the information provided in Lopez's testimony, even asking what others had told her, we conclude that Nix was not deprived of any substantial right on the basis of prosecutorial misconduct, but merely given answers to the questions posed by his attorney.

{¶38} We do discern some merit, however, in Nix's argument concerning the state's questioning of Lopez about his brother. The prosecutor asked Lopez if she had participated "in the prosecution of Michael Nix for retaliation, a charge of retaliation against Gina Seaton." Lopez responded, "Yes, I did," and there was a belated objection by Nix's attorney, who asked for a sidebar conference. Unfortunately, the discussion that followed between the parties and the trial court was conducted off the record. We must presume, however, that there was some debate regarding the relevancy and potentially prejudicial nature of questions concerning the prosecution of Nix's brother for what sounded like witness tampering. After the discussion, the trial court sustained Nix's objection to the question. The prosecution, however, did not abandon the subject, but seemed more determined to pursue it, asking immediately afterward, "Officer, were you present at the resolution of the case against Michael Nix?" Lopez answered that she was. The prosecution then asked if Michael Nix had been convicted, to which Nix's attorney objected before Lopez could answer. The objection was sustained. Undaunted, the prosecution then asked Lopez whether Michael Nix had gone to the penitentiary. Before she could answer, Nix's attorney objected again, and again the objection was sustained. At this point, the prosecution asked Lopez if she had contacted Seaton and informed her of the second trial, to which Lopez responded affirmatively, and then the prosecution abandoned the line of questioning.

{¶39} Nix argues that, notwithstanding that the trial court sustained all his objections to the questioning, "the message was clear" to the jury that Michael Nix had been prosecuted and perhaps found guilty of something akin to witness tampering. He argues that the prosecution's dogged pursuit of objectionable questions concerning his

brother's prosecution crossed the line into prosecutorial misconduct and deprived him of his right to a fair trial.

{¶40} We agree with Nix that the prosecution's pursuit of the line of questioning could be interpreted as an improper attempt to expose the jury to information that was both immaterial and potentially highly prejudicial to Nix's defense. The questioning clearly posed the risk that the jury might infer Nix's guilt from the efforts of his brother to harass or intimidate Seaton. As has been often noted, although prosecutors are expected to prosecute with vigor, and thus may strike hard blows, they are "not at liberty to strike foul ones." *Berger v. United States (*1935), 295 U.S. 78, 88, 55 S.Ct. 629. Furthermore, the Ohio Supreme Court has recognized that any resort by the prosecution to the "thoroughly discredited" doctrine of guilt by association, even if substantiated, is "gravely improper" and violates a fundamental principle of American jurisprudence. *State v. Keenan* (1993), 66 Ohio St.3d 402, 406, 613 N.E.2d 203. The general rule is that "[a]ttempts by persons other than the accused to bribe [or intimidate] witnesses * * * are evidence against the accused when, but only when, it is proven that he was connected with such attempts. Acts and statements of third persons, not known or authorized by him, are inadmissible." *Mefford v. State* (1920), 13 Ohio App. 106, 107, quoted in *State v. Walker* (1978), 55 Ohio St.2d 208, 378 N.E.2d 1049.

{¶41} We assume that the prosecution was aware of the general inadmissibility of such evidence. There is, however, a serious impediment to drawing any conclusion that the prosecution acted improperly. We do not know what was said during the off-the-record sidebar conference following the prosecutor's first question on this subject, and

therefore we do not know what, if any, limitations the trial court placed on the prosecution concerning the subject.[4]

{¶42} Furthermore, when the inquiry is examined closely, another possible motive for the questioning may be discerned—that the prosecution sought to introduce the subject not to suggest that Nix was guilty because his brother acted as he did, but to offer an explanation for Seaton's absence at the second trial. Indeed, without an explanation for Seaton's absence, it is quite possible that the jury may have interpreted her unavailability as a recantation of her earlier testimony. Had the jury been allowed such an inference, Nix may have indirectly reaped the benefit of what might have been his brother's successful effort to keep Seaton away from the second trial. Although it is unclear from the record why Seaton chose not to respond to the multiple subpoenas to appear at the second trial (at least on the Monday through Wednesday before the Thursday juvenile hearing concerning her daughter's rape), the prosecution had some cause to believe that her failure to make any contact, even a telephone call, was related to whatever methods Michael Nix may have used to intimidate her. If this were the case, it would not necessarily have been improper for the prosecution to seek to suggest to the jury this theory of her absence. That this was the purpose of the prosecution's questioning—and not to plant the seeds of guilt by association—is bolstered by the final question posed by the prosecution, in which Lopez was asked if she had not informed Seaton of the second trial. Viewed in this context, the questioning concerning Michael Nix's efforts at witness intimidation could have been a legitimate effort by the

[4] Though the trial court sustained objections to the questions that followed the sidebar, the court did not take the prosecution to task, and therefore we can only assume that the prosecution did not flagrantly violate any instruction by the court not to ask such questions.

prosecution to offer some explanation for its inability to produce one of its primary witnesses.[5]

{¶43} In sum, the record before us does not necessarily lead to the conclusion that the prosecution intended a foul blow. It strikes us that the only argument left to Nix is that even if the prosecution only intended to explain Seaton's absence, the unavoidable byproduct of such questioning was that the jury learned of Michael Nix's conduct and that this information tainted its perception of him. This argument lacks force, however, because the trial court sustained *all* of Nix's objections to the questions. If Nix felt that more was necessary to protect his rights, it was incumbent on his attorney to ask that the trial court strike the questions and instruct the jurors not to consider them in their deliberations.

{¶44} Nix also argues that the prosecution made improper remarks during closing argument. Although Nix does not specifically identify the remarks of which he complains, they appear to be those that commented upon the hearsay testimony concerning the broadcast of the NBA games on the night of the shooting. As we have held that the testimony was solicited by Nix, and was therefore legitimately part of the record, the prosecution could properly have commented upon it to attack Nix's alibi. Having reviewed the prosecution's entire closing argument, we do not discern any remarks that would support a reversal based upon prosecutorial misconduct.

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[5] Admittedly, however, even this explanation for the prosecution's questioning has its troubling aspects. The prosecution could have also sought to explain Seaton's absence to the jury, if it felt the need, by noting the juvenile proceeding involving her daughter. It is, on the other hand, entirely possible that the prosecution felt that the situation involving her daughter did not entirely explain Seaton's unwillingness to cooperate in the second trial.

{¶45} Finally, we note that Nix refers in this assignment to both prosecutorial *and police* misconduct. It is unclear to us, however, what police conduct he is referring to separate from that involving the prosecution.

{¶46} Nix's third assignment of error is overruled.

FOURTH ASSIGNMENT OF ERROR

{¶47} In his fourth assignment of error, Nix argues that he was denied the effective assistance of trial counsel. He identifies two grounds for this proposition: first, that his trial counsel was ineffective by soliciting the hearsay testimony that was the subject of his third assignment of error, and, second, that his trial counsel was ineffective by soliciting hearsay testimony concerning an identification made of him by Villas in the hospital. We address each in turn.

{¶48} As for the hearsay testimony from Lopez regarding the broadcast schedule of the NBA games, Nix concedes for the purpose of this assignment that his own attorney solicited the testimony. He now argues that, by doing so, his attorney "put into doubt [his] alibi solely based on hearsay."

{¶49} Initially, we must note our disagreement with Nix regarding the relative importance of Lopez's hearsay testimony regarding the broadcast schedule of the NBA games on April 20. His own witness, Terry, testified that the home on Kendall Avenue did not have cable television, and therefore, logically, what games Nix was watching had to have been on one of the networks. Although Lopez testified that she believed that NBA games were only available on cable that night, she readily admitted, when asked about a network or satellite source for the broadcasts, that she was no "TV expert." This hardly appears to be the type of testimony that would necessarily have sunk Nix's alibi

that he was at home on Kendall Avenue, watching television on the couch in the living room until he fell asleep at around eleven o'clock.

{¶50} With regard to the identification of Nix by Villas at the hospital after he had been shown a photographic array by Tarvin, this identification was the subject of a motion to suppress that had been overruled.[6] But because Villas eventually died from his wound, the identification became impossible to admit under any hearsay exception, and the prosecution (abiding by the trial court's ruling in the first trial) did not seek to introduce it. It was, as will be recalled, not the first time Villas had identified Nix as the man who had shot him: while lying on the sidewalk outside Martin's Club, suffering from his wound, he had told several people that the person who had shot him was named Damien, and he further identified Damien as the same person with whom he had been involved in an earlier altercation.

{¶51} Despite the trial court's ruling that Villas's identification of Nix in the hospital was not admissible, the subject surfaced twice during the second trial. The subject first arose during cross-examination of Bemmes. Bemmes, as will be recalled, was the detective who was assigned to investigate the March 20, 2002, altercation in which Villas had assaulted Nix, and who was rebuffed by Nix when she sought to enlist his cooperation. According to Bemmes, Nix told her, "I don't want to do shit about this. I'll fucking take care of it myself."

{¶52} Cross-examining Bemmes, Nix's attorney successfully got her to concede that many victims had made similar threats of exacting their own retribution and yet had not acted upon them, and that when Nix had made the comment to her, she did not

[6] See fn. 2, supra.

anticipate that Nix would actually engage in a revenge shooting. In an apparent attempt to bring home to the jury that Bemmes had no independent knowledge that Nix had ever acted upon his threat, Nix's attorney elicited from her several responses indicating that the only way she knew that Nix had been implicated in the murder of Villas was through what she had learned from her fellow officers, what she described as "office talk." Nix's attorney seized upon this comment, accusing her of testifying to merely "office gossip." Bemmes, defending herself, stated, "Sir, he was positively identified." Nix's attorney then asked, "Well, who did that?" Bemmes responded that the source of her information was Tarvin, who, she indicated, had shown Villas a photographic lineup.

{¶53} Tarvin testified after Bemmes. He explained that before Nix had been developed as a suspect, he had gone to the hospital to interview Villas with a photographic lineup that included another young man from the neighborhood named Damien ("Damien Canady"), but that no charges were brought as a result. He then explained that, having obtained more information from Villas, and having made contact with Nix's grandmother, he put together another photographic lineup that included a photograph of Nix and went back to the hospital to see Villas. Following an objection by Nix's attorney (as noted, the trial court had ruled the identification inadmissible during the first trial), Tarvin omitted any reference to a positive identification, testifying only that after his conversation with Villas he went directly to the district station and filed charges against Nix.

{¶54} During cross-examination of Tarvin, Nix's attorney, alluding to his previous cross-examination of Bemmes, returned to the subject of office gossip, apparently in an effort to suggest to the jury that Tarvin's focus on Nix was purely the

result of loose talk. Counsel asked Tarvin, "Now it's not Cincinnati Police Division policy to come and provide this Court with office gossip, is it?" Tarvin asked for clarification, and Nix's attorney then explained that he was referring to "what is being said at the water cooler." Tarvin replied that it depended upon the accuracy of what was being said.

{¶55} The prosecution then conducted redirect examination, asking Tarvin directly whether the information he had given Bemmes was that he had a positive identification of Nix as the man who had shot Villas. Tarvin replied affirmatively, and Nix's defense counsel objected. The trial court then listened to arguments from both parties and eventually, after deliberating on the issue overnight, decided that Nix's attorney had opened the door to testimony regarding the positive hospital identification by suggesting that the police had investigated Nix purely on the basis of office gossip. The trial court ruled that the question and answer could stand.

{¶56} Nix's attorney then asked to recross-examine Tarvin. His questioning again strongly implied that Tarvin's examination had prematurely focused on Nix after his discussion with Villas in the hospital. Tarvin naturally responded that the reason his examination focused on Nix was that Villas had identified Nix from a photographic lineup. Nix's attorney moved that Tarvin's answer be stricken, but the trial court overruled the motion consistent with its earlier ruling that defense counsel had opened the door to the in-hospital identification.

{¶57} The interplay did not end there. The prosecution then asked to re-examine Tarvin. During its re-examination, the prosecution proceeded to solicit from Tarvin testimony concerning both of his interviews with Villas in the hospital, including both

photographic lineups. When Nix's attorney objected, the prosecution responded that the questioning was permissible under Evid.R. 806.[7] The trial court overruled the objection without explanation. Tarvin then testified, at length, concerning what Villas had told him in the hospital. Tarvin testified that Villas had told him about his previous altercation with the same person named Damien who had shot him that night. Tarvin also stated that Villas had said that the suspect was not in the first photographic lineup, but that he had provided an additional description of the shooter as a slender African-American male, in braids, who lived in the area of Twelfth and Broadway, and who stayed with his grandmother, Loraine Bolden. Tarvin was also allowed to testify (over further objection from defense counsel) that when he went back to the hospital with a photographic array that included Nix, Villas had pointed to the picture of Nix and said, "That's the guy that shot me."

{¶58} Reviewing all of this, we are convinced that Nix's attorney attempted a calculated strategy of portraying the police investigation as a rush to judgment, in other words one that focused prematurely on Nix to the exclusion of all other suspects. As part of this strategy, the defense several times brought up the subject of another man at the scene who had broken his leg running away after the police were called. (The man never interested the police as a suspect given the evidence pointing to Nix.) The decision to adopt such a strategy was certainly not unreasonable, and it may have been effective, but it clearly had unintended and unwanted consequences when Nix's attorney unwisely went

[7] Evid.R. 806(A) provides that "[w]hen a hearsay statement, or a statement defined in Evid.R. 801(D)(2), (c), (d), or (e), has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence that would be admissible for those purposes if the declarant had testified as a witness. Section (B) provides that "[e]vidence of a statement or conduct by the declarant

so far as to suggest that the police decision to charge Nix was the product of mere "loose talk" or "office gossip." Obviously, it was not, as defense counsel must have known. Once the defense engaged in such an exaggerated conceit, the trial court ruled, the prosecution was permitted to introduce otherwise inadmissible evidence of the positive identification of Nix by Villas at the hospital in order to show that Tarvin was not just engaging in random speculation when he told Bemmes that Nix was a suspect.

{¶59} In determining whether Nix's attorney's failure to grasp the possible negative consequences of his questioning constituted ineffective counsel, we must "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland v. Washington* (1984), 466 U.S. 668, 690, 104 S.Ct. 2052. As the Ohio Supreme Court has stated, it is error to judge counsel by "the best available practice" because the constitution does not guarantee a perfect trial, but, rather, only a trial in which it cannot be said that defense counsel failed in a substantial duty to his or her client. *State v. Lytle* (1976), 48 Ohio St.2d 391, 396, 358 N.E.2d 623. And even if defense counsel was so remiss, the defendant is still not entitled to a new trial unless it can be said that counsel's deficient performance prejudiced the defendant. *Strickland*, supra, at 694, 104 S.Ct. 2052; *State v. Bradley* (1989), 42 Ohio St.3d 136, 538 N.E.2d 373. To establish the necessary prejudice, the defendant must demonstrate that counsel's lapse "so undermined the proper functioning of the adversarial process that the trial could not have reliably produced a just result." *State v. Powell* (1993), 90 Ohio App.3d 260, 266, 629 N.E.2d 13, citing *Lockhart v. Fretwell* (1993), 506 U.S. 364, 113 S.Ct. 838.

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at any time, inconsistent with the declarant's hearsay statement, is not subject to any requirement that the

{¶60} Under this standard, it clearly cannot be said that defense counsel is constitutionally ineffective whenever he or she inadvertently opens the door to otherwise inadmissible testimony. The concern here, however, is how damaging was the testimony, and therefore how substantial the error in allowing for its admission.

{¶61} The fact that Villas picked Nix's picture out of a photographic lineup was undoubtedly significant. But this case was unique in that there was a tremendous amount of evidence properly adduced identifying Nix as the suspect either directly or circumstantially, before the jury ever heard of the photographic lineup in the hospital. In hearsay that was deemed admissible under Evid.R. 804(B)(2) as a dying declaration, Villas, as he lay bleeding on the sidewalk outside Martin's Club, identified the man who had shot him to several people as the person named Damien, whose grandmother named Loraine lived on Twelfth and Broadway, and with whom he had had a previous altercation. These statements described Nix just as much as his later selection of Nix's picture from a lineup. Both Seaton and Thomas heard this description from Villas's lips directly after he was shot, and before, it would appear, he had any opportunity or motive to fabricate. Stuckey also testified that she saw the shooter, and she gave a description to the 911 operator that closely matched the description Thomas had given of Nix inside Martin's Club before the shooting. Nix, when he was taken into custody, closely resembled the description that everyone had given of the suspect, with the only difference perhaps being that he had one gold tooth as opposed to the "gold teeth" described by Lucky.

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declarant may have been afforded an opportunity to deny or explain."

{¶62} In sum, although other defense counsel may have handled cross-examination more adroitly and avoided opening the door to Villas's in-hospital identification, we cannot say that the effect of such testimony was to "so undermine[] the proper functioning of the adversarial process that the trial could not have reliably produced a just result." *State v. Powell* (1993), 90 Ohio App.3d 260, 266, 629 N.E.2d 13, citing *Lockhart v. Fretwell* (1993), 506 U.S. 364, 113 S.Ct. 838. To the contrary, we hold that, given the abundance of evidence identifying Nix in this case, it is extremely unlikely that the impact on the jury of learning that Villas later picked Nix's picture out of a lineup—after he had earlier identified him in an equally convincing manner—was anything but minimal.

{¶63} Finally, we note that we do not believe that Nix's attorney can be said to have opened the door to all the evidence that the trial court finally admitted concerning Tarvin's in-hospital interviews with Villas. On its last redirect examination of Tarvin, the prosecution proceeded to ask Tarvin previously undisclosed details of both interviews, soliciting further hearsay from Villas. Although the prosecution cited Evid.R. 806 as the basis for admitting such hearsay, the applicability of this particular rule is far from clear. What is clear, though, is that Nix's attorney vigorously objected to the additional questioning, and that although his objections were perfunctorily sustained by the trial court, his performance in this regard cannot be faulted.[8]

{¶64} Nix's fourth assignment of error is overruled.

[8] It should be noted that the trial court's willingness, finally, to allow the prosecution on redirect examination to ask Tarvin about the details of his first and second in-hospital interviews with Villas has not been assigned as error on appeal. See our discussion, infra, regarding possible Confrontation Clause issues.

FIFTH AND SIXTH ASSIGNMENTS OF ERROR

{¶65} In his fifth and sixth assignments of error, Nix challenges the weight and sufficiency of the evidence underlying his convictions. He acknowledges in this regard that the weight of the evidence and the credibility of the witnesses were primarily issues for the jury as the trier of fact. *State v. DeHass* (1967), 10 Ohio St.2d 230, 227 N.E.2d 212. Nonetheless, citing the lack of physical evidence linking him to the crime, he argues that his conviction was based upon "hearsay and facts not in evidence." Further, he argues that Thomas's testimony should not have been entitled to any weight given what he perceives to be numerous discrediting inconsistencies. We disagree.

{¶66} As the Ohio Supreme Court has observed, " 'sufficiency' is a term of art meaning that legal standard which is applied to determine whether the case may go to the jury or whether the evidence is legally sufficient to support the jury verdict as a matter of law." *State v. Thompkins* (1997), 78 Ohio St.3d 380, 386-387, 678 N.E.2d 541. Stated more succinctly by Justice Cook in her separate concurrence in *Thompkins*, "On review for sufficiency, courts are to assess not whether the state's evidence is to be believed, but whether, if believed, the evidence against the defendant would support a conviction." Id. at 390, 678 N.E.2d 541 (Cook, J., concurring).

{¶67} As this court has previously noted, "the test of sufficiency is concerned not with what evidence the state failed to produce, but with that which it did." *State v. Paramore* (Sept. 19, 1997), 1st Dist. No. C-960799. In *Paramore*, we rejected an argument similar to Nix's that the lack of physical evidence undercut the sufficiency of the state's case, which relied on witness testimony. As we pointed out, there is no rule of law that a witness's testimony be corroborated by physical evidence such as fingerprints,

for example, or the weapon allegedly used by the accused. We hold that this record contains more than sufficient evidence in the form of witness testimony, including that of the murder victim, to sustain the charges against Nix.

{¶68} A challenge to the weight of the evidence, on the other hand, entitles the reviewing court to review the evidence as a "thirteenth juror" and assess the credibility of the witnesses, disagreeing with the fact finder if so disposed. *Thompkins*, supra, at 387, 678 N.E.2d 541. Even given this role, however, a reviewing court cannot reverse a conviction unless it concludes that the jury with whom it may disagree clearly lost its way or committed a manifest miscarriage of justice. Id. The power to order a new trial is discretionary, and it is to be exercised in the " 'exceptional case in which the evidence weighs heavily against the conviction.' " Id., quoting *State v. Martin* (1983), 20 Ohio App.3d 172, 175, 485 N.E.2d 717.

{¶69} Having thoroughly reviewed the record, we can find no basis to conclude that the jury lost its way in this case. As we have discussed, there was a large—indeed overwhelming—amount of evidence identifying Nix as the person who had shot both Villas and Kelly. While there may have been some inconsistencies in some of the witnesses' testimony, these inconsistencies were not significantly discrediting. Immediately after the shooting, Villas, Thomas, Seaton, and Stuckey all came forward—Stuckey reluctantly—and gave the police statements implicating or identifying Nix. It strikes us as extremely unlikely, given the exigencies of the situation, that all these witnesses would have had the means or motive to falsify as part of some quickly improvised scheme to finger Nix for a crime he did not commit. Indeed, no reasonable person could have failed to conclude that Villas was referring to Nix on the sidewalk

outside Martin's Club as he described the man who had shot him as the same Damien whose grandmother lived on Twelfth and Broadway, and with whom he had been previously involved in an altercation. This being so, one would have to believe that Villas, as he lay bleeding from a serious bullet wound to the stomach, immediately concocted a scheme to conceal the real identity of the man who had shot him in order to implicate Nix, and that he then convinced all the other witnesses to join him in his duplicity.

{¶70} Concededly, Nix never confessed to the crime and presented a plausible alibi. Nix did not testify, however, and thus his alibi was presented only through (1) his statement to the police, taken after a period of several days within which he could have fabricated, and (2) his mother and her live-in boyfriend. Because she was Nix's mother, Sorrels's testimony may have struck the jury as suspect. Terry, who was also personally close to Nix, was impeached on the basis of previous crimes involving falsehood or dishonesty. Even if they did not consider the closeness of their relationship to Nix discrediting, the jurors were free to reject all or part of the testimony of Sorrels and Terry—or to conclude that it did not preclude a finding that, unbeknownst to them, Nix had left the house for a period of time to commit the crimes alleged.

{¶71} In sum, we hold that the record contains sufficient evidence to convict Nix as charged, and that the jury did not lose its way or commit a manifest miscarriage of justice in assessing the evidence against him.

CONFRONTATION CLAUSE ISSUE

{¶72} We raise *sua sponte* a Confrontation Clause issue because of its potential importance in this case. Villas's statements implicating Nix, which he gave to police and

others while on the sidewalk in front of Martin's Club directly after he was shot, were of critical importance to the prosecution. Although we do not have the record of the first trial before us, Villas's statements were apparently deemed admissible under Evid.R. 804(B)(2), which provides a hearsay exception in homicide prosecutions for statements made by the victim-declarant while under a belief of impending death. Such statements, or dying declarations, must concern the cause or the circumstance of the declarant's expected death. The rationale for the exception is that such statements are inherently reliable because the declarant, believing he or she is about to die, will be motivated to tell the truth for fear of punishment in the hereafter. Lilly, An Introduction to the Law of Evidence (1978), Section 77, 261; see, also, *Commonwealth v. Brown* (1957), 388 Pa. 613, 616-617. Such statements are admitted, also, out of simple necessity, since a homicide victim is often the only witness to his murder or the only person to understand its circumstance.

{¶73} In *Crawford v. Washington* (2004), ___ U.S. ___, 124 S.Ct. 1354, the United States Supreme Court substantially altered prior case law, including the seminal case of *Ohio v. Roberts*, supra, that had generally permitted under the Confrontation Clause hearsay exceptions based upon unavailability provided that the statements bore significant indicia of reliability. After a exhaustive historical analysis of common-law antecedents, including the trial of Sir Walter Raleigh, the Court concluded that the Confrontation Clause, as intended by the Founding Fathers, was specifically designed to prohibit the state's use of "testimonial" statements by the unavailable declarant when those "testimonial" statements were obtained as the result of *ex parte* examinations without the opportunity for cross-examination by the defendant. 124 S.Ct. at 1359-1370.

When the hearsay is "testimonial" in nature—i.e., the result of official examination—the Court held that such hearsay is inadmissible, regardless of its reliability and regardless of the declarant's unavailability, unless the defendant has had a prior opportunity to cross-examine.[9] Id.

{¶74} Significant for the purposes of this case, the Supreme Court also substantially broadened the definition of what constituted "testimonial" hearsay. While "testimony" normally connotes statements given under oath in a formal proceeding, see Black's Law Dictionary (5 Ed.1979), 1324, the Court in *Crawford* concluded that police interrogations resembled examinations by justices of the peace in early England, notwithstanding the absence of an oath. Id. at 1364. The Court thus held that "interrogations by law enforcement officers fall squarely within that class" of statements considered "testimonial" for purposes of the Confrontation Clause. Id. at 1365. The Court made clear, however, that it was using "interrogation" in "its colloquial, rather than any technical legal sense," and it noted that police interrogation could take many forms and not all would result in "testimonial" statements by the interrogated. Id. at fn. 4. But because the declarant's hearsay statements to the police in *Crawford* were "in response to structured police questioning" arising out of two interviews in which the declarant was in police custody and herself a suspect (and were also, according to the Court, in response to leading questions by the police detectives), the Court reasoned that her statements resulting from the interrogation were testimonial and hence inadmissible—notwithstanding their reliability—when the declarant later became unavailable under the state's rule of marital privilege. Id. at 1372.

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[9] *Crawford* does not appear to affect the continuing viability of *Roberts* with respect to nontestimonial

{¶75} As applied to the instant case, *Crawford* would not appear to bar the admission of Villa's dying declarations to the police and others outside of Martin's Club, immediately after he was shot, for two reasons. First, it is extremely doubtful that even if *Crawford's* expanded definition of a "testimonial" statement as one made under police interrogation is applied, Villa's declarations to Fromhold, the first officer on the scene, would rise to the level of what could even remotely be called interrogation. Villas was not a suspect in his own shooting, he was not under police custody, and his statements were not the product of any form of structured questioning. In our view, Villas's statements to Fromhold, even if solicited by questioning, were not testimonial under the analysis in *Crawford*. Of course, Villas's statements to Thomas, Seaton, and Stuckey do not even come close to being "testimonial" since they were not the result of any official examination. Second, the Court in *Crawford* separately addressed the subject of dying declarations in a footnote. Id. at 1367, fn. 6. In keeping with its historical analysis, the Court observed that the exception was a "general rule of criminal hearsay law and, according to one cited authority, was the only recognized criminal hearsay exception at common law." Id. at 1367, fn. 6, citing F. Heller, The Sixth Amendment (1951) 105. Given its historical antecedents, the Court allowed for the possibility that the exception was *sui generis* and that even testimonial dying declarations were admissible under the Confrontation Clause. Id. Finally, the Court stated that, because the issue was not directly before it, "[w]e need not decide in this case whether the Sixth Amendment incorporates an exception for testimonial dying declarations." Id.

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hearsay.

{¶76} In sum, we do not believe that the admission of Villas's dying declarations (those he made on the sidewalk outside Martin's Club) in this case created either preserved or plain error under *Crawford* since they did not, in our view, constitute testimonial hearsay, and because the Court in *Crawford* has left unanswered the question whether its analysis applies to testimonial dying declarations.

{¶77} A closer question is presented under *Crawford* by Villas's in-hospital statements to Tarvin. As will be recalled, these statements were not proffered as dying declarations, but came in partly as a result of defense counsel opening the door to their admission (see our discussion under the fourth assignment of error), and partly because, apparently, the trial court accepted the prosecution's argument that they were somehow admissible under Evid.R. 806 (a ruling that, if it occurred, has not been assigned as error). Even with these statements, however, it is not clear that they constitute "testimonial" evidence under *Crawford.* When questioned by Tarvin in the hospital, Villas was not a suspect in any crime, and he was certainly not under any form of custody that would have led to *Miranda* warnings and the type of "structured questioning" sufficient to be called a police "interrogation" even, we think, in the colloquial sense of the word adopted in *Crawford*. Therefore, we are not convinced that the statements constituted "testimonial" hearsay as contemplated by the Confrontation Clause. But we do note that some courts have taken a very broad view of *Crawford*, observing that the Supreme Court's rationale suggests that the determinative factor of "whether a declarant bears testimony is the declarant's expectation that his or her statements may later be used at a trial." *United States v. Saget* (C.A.2, 2004), 377 F.3d 223, 228-229. If this were the test, then Villas's statements to Tarvin during both in-hospital interviews would be testimonial under

Crawford, as certainly Villas must have known that his statements may have been used in any subsequent trial of the man who had shot him. The problem with such a broad definition, as we see it, is that it would render "testimonial" anything said to a police officer involved in investigating a crime.

{¶78} Still, even if *Crawford* were held to be applicable to Villas's in-hospital statements, it is well settled that violations of Confrontation Clause, even if preserved for appellate review, are subject to harmless-error review, and as one court has noted, "*Crawford* does not suggest otherwise." *United States v. McClain* (C.A.2, 2004), 377 F.3d 219, 222. Under such a review, a new trial is not necessary "as long as the government can show beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." Id., citing cases. Of course, if the alleged error is not preserved by objection, the doctrine of plain error also requires a finding of prejudice. See *State v. Sutorius*, supra. As we have previously determined under the fourth, fifth, and sixth assignments of error, the evidence of Nix's guilt in the immediate aftermath of the shooting was overwhelming—unless one is to assume that the instant Villas was shot everyone at the scene (including a mortally wounded Villas) hatched an elaborate plot to falsely implicate Nix. We deem the possibility of this so small that we are convinced beyond any reasonable doubt that the jury would have convicted him without any testimony regarding what Villas later said to Tarvin at the hospital.

{¶79} In sum, we do not find any reversible error, preserved or otherwise, based on the Confrontation Clause in the record before us.

CONCLUSION

{¶80} In conclusion, we hold that the record before us does not present any reversible error. All six of Nix's assignments of error are therefore overruled, and the judgment of the trial court affirmed.

Judgment affirmed.

WINKLER, P.J., and **HILDEBRANDT, J.**, concur.

Please Note:

The court has placed of record its own entry in this case on the date of the release of this Opinion.