

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

STATE OF OHIO,	:	APPEAL NO. C-080153
	:	TRIAL NO. B-0700102
Plaintiff-Appellee,	:	
vs.	:	<i>JUDGMENT ENTRY.</i>
	:	
PHILLIP HARRIS,	:	
	:	
Defendant-Appellant.	:	

We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court.¹

Following a bench trial, defendant-appellant Phillip Harris was convicted of aggravated murder and accompanying firearm specifications. He now appeals.

Richard Muhammad was with Angel Ferguson and two others in a hotel room when Ferguson called Harris to buy some drugs from him. David Sparks drove Harris to the hotel in Harris’s mother’s car.

When Harris arrived at the hotel room, he saw Muhammad and demanded to know where his money was. Muhammad refused to pay him because Harris had wrecked his wife’s car. Then Harris told Muhammad that he would be right back.

Harris left the room and gave his car keys to Sparks. Harris told Sparks that the “dude in here tripping about his car,” and he instructed Sparks to park his mother’s car near the hotel door and to wait there. According to Sparks, Harris had said that someone owed him \$50 and that he might rough the person up.

¹ See S.Ct.R.Rep.Op. 3(A), App.R. 11.1(E), and Loc.R. 12.

Harris returned to the hotel room. When he entered the room, he was wearing a mask. Another man, Derryck Henson, walked in behind Harris. Harris told Henson, “That’s him, fuck him up.” Henson pulled out a gun and shot Muhammad three times in the torso, killing him.

Harris and the shooter ran out of the hotel and jumped into Harris’s mother’s car, and Sparks drove off with them.

Ferguson called Harris to ask him why they had shot Muhammad, and Harris asked her whether he was dead. When Ferguson responded that she did not know, Harris repeatedly told her, “You don’t know nothing.”

In his first assignment of error, Harris argues that the trial court erred by denying his motion to suppress his statement to police.

The evidence at the suppression hearing indicated that, at the time of his statement to police, Harris was 20 years old and had had prior criminal experience. At the interview, Harris told the officers that he could read and write and that he understood his *Miranda*² rights. There was no evidence of threats, coercion, promises, or physical abuse by the police. The interview lasted only a few hours. At no point did Harris ask for an attorney. Under these circumstances, we cannot conclude that the trial court erred in its determination that Harris had voluntarily waived his rights and made a statement.³

In his second assignment of error, Harris argues that the trial court erred by admitting certain hearsay testimony in violation of his right to confront the witnesses against him. First, Harris contends that the court should not have allowed Muhammad’s wife to testify about statements made by Muhammad hours before his death. Next, Harris argues that the court should not have allowed the state to use a pretrial deposition of an eyewitness to the murder.

² *Miranda v. Arizona* (1966), 384 U.S. 436, 444, 86 S.Ct. 1602.

³ See *State v. Edwards* (1976), 49 Ohio St.2d 31, 358 N.E.2d 1051, paragraph two of the syllabus; *State v. Green*, 90 Ohio St.3d 352, 2000-Ohio-182, 738 N.E.2d 1208.

At trial, Muhammad’s wife, Sharon, testified that she had had lunch with her husband about 12 hours before his murder. Sharon said that, during their 25-minute lunch, her husband’s phone had rung repeatedly. After answering and speaking on the phone, her husband had a troubled look on his face. He told Sharon to write down some information. “He told me if something happened to him, that a gentleman named Phillip, his mother worked at the Dukester’s, they call her Mama T. And if anything happened to him, tell the police that - - just that, and I asked him what was wrong, and that’s all he told me.”

In *Crawford v. Washington*,⁴ the United States Supreme Court held that the Confrontation Clause bars the admission of testimonial statements of a witness who does not appear at trial, unless the witness is unavailable to testify and the defendant has had a prior opportunity for cross-examination. While the Court declined to formulate what constitutes “testimonial” hearsay, it drew a distinction between those witnesses who bear testimony for purposes of the Confrontation Clause and those witnesses who do not: “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.”⁵

Since *Crawford*, the Supreme Court has not yet determined whether testimonial hearsay would include out-of-court statements made by a victim-decedent in the context of a purely private conversation. In a recent decision, however, the Court noted in dicta that “[s]tatements to friends and neighbors about abuse and intimidation” were not testimonial for purposes of the Confrontation Clause.⁶

In the wake of *Crawford*, the Ohio Supreme Court has held that “[f]or Confrontation Clause purposes, a testimonial statement includes one made ‘under

⁴ (2004), 541 U.S. 36, 124 S.Ct. 1354.

⁵ Id. at 51.

⁶ *Giles v. California* (2008), ___ U.S. ___, 128 S.Ct. 2678 at 2692-2693.

circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.’ ”⁷ This standard places a difficult burden on the trial court to distinguish between those statements made to “friends and neighbors”—or in this case, family members—that are state-of-mind expressions of fear, and those that are designed to be preserved in the memory of the receiver for production in the case of a later prosecution or trial.

In the present case, the statements by Muhammad to his wife were arguably testimonial. But even if the trial court erred in admitting the statements, a constitutional violation can be harmless error if it did not, beyond a reasonable doubt, contribute to the conviction.⁸ Despite Harris’s claims to the contrary, the evidence against him was overwhelming. Under the circumstances, we hold that the admission of Muhammad’s statements to his wife did not contribute to Harris’s conviction. So any error was harmless.

With respect to the introduction of the pretrial deposition testimony of eyewitness Angel Ferguson, we find no Confrontation Clause violation. The state made a sufficient showing that its efforts to locate her and to secure her presence at trial were unsuccessful.⁹ Moreover, the record indicates that Harris’s counsel had fully anticipated and agreed that the deposition testimony would be used at trial. Harris was present with counsel at Ferguson’s deposition, and counsel had fully and effectively cross-examined her. So no *Crawford* violation occurred.

Accordingly, we overrule the second assignment of error.

In his third assignment of error, Harris argues that his convictions were against the manifest weight of the evidence and were not supported by sufficient evidence. We disagree.

⁷ *State v. Stahl*, 111 Ohio St.3d 186, 2006-Ohio-5482, 855 N.E.2d 834, paragraph one of the syllabus.

⁸ *State v. Robinson*, 1st Dist. No. C-060434, 2007-Ohio-2388.

⁹ See *State v. Tolbert* (May 7, 1999), 1st Dist. No. C-980622.

To find Harris guilty of aggravated murder in violation of R.C. 2903.01(A), the state had to prove that he had purposely, and with prior calculation and design, caused the death of Richard Muhammad.

Following our review of the record, we hold that the state produced sufficient evidence of aggravated murder. The trier of fact could have reasonably found that three close-range shots to the body evinced a purpose to kill,¹⁰ and that Harris had formulated a plan to kill Muhammad in retaliation for Muhammad's refusal to pay him.¹¹ Moreover, our review of the record does not persuade us that the trial court clearly lost its way and created a manifest miscarriage of justice in finding Harris guilty of the offense and the firearm specifications. Accordingly, we overrule the third assignment of error.

Therefore, we affirm the trial court's judgment.

A certified copy of this judgment entry is the mandate, which shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

HILDEBRANDT, P.J., HENDON and WINKLER, JJ.

RALPH WINKLER, retired, from the First Appellate District, sitting by assignment.

To the Clerk:

Enter upon the Journal of the Court on November 12, 2008

per order of the Court _____
Presiding Judge

¹⁰ See *State v. Treesh*, 90 Ohio St.3d 460, 485, 2001-Ohio-4, 739 N.E.2d 749.

¹¹ See *State v. Conway*, 108 Ohio St.3d 214, 2006-Ohio-791, 842 N.E.2d 996, at ¶43.