STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 19, 2009
v	No. 282601 Calhoun Circuit Court
TERRANCE DEDRICK BOLDEN, Defendant-Appellant.	LC No. 2007-002945-FC

Before: K. F. Kelly, P.J., and Cavanagh and Beckering, JJ.

PER CURIAM.

Defendant appeals as of right his jury convictions for armed robbery, MCL 750.529; felon in possession of a firearm, MCL 750.224f; and two counts of possession of a firearm during the commission of a felony, MCL 750.227b, stemming from the robbery of a Kentucky Fried Chicken (KFC). We affirm.

Defendant first argues that the admission of eyewitness Devon Jones' testimonial hearsay statements to Officer Clark violated his constitutional right to confront the witnesses against him. We review an unpreserved claim for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 764; 597 NW2d 130 (1999). Under the plain error rule, three requirements must be met: 1) error must have occurred, 2) the error was plain, and 3) the error was outcome determinative. *Id*. at 763. Once a defendant establishes these three requirements, the appellate court may reverse only when the plain error resulted in the conviction of an actually innocent defendant or when an error seriously affected the fairness, integrity or public reputation of judicial proceedings independent of the defendant's innocence. *Id*.

Both the United States and Michigan constitutions guarantee a criminal defendant the right to confront the witnesses against him. US Const, Am VI; Const 1963, art 1, § 20. To preserve this right, testimonial hearsay is inadmissible against a criminal defendant unless the declarant was unavailable at trial and the defendant had a prior opportunity to cross examine the declarant. *Crawford v Washington*, 541 US 36, 124 S Ct 1354; 158 L Ed 2d 177 (2004); *People v Lonsby*, 268 Mich App 375, 377; 707 NW2d 610 (2005). Here, there was no evidence to show that Jones was unavailable to testify and defendant did not have an opportunity to cross examine

him. Therefore, if Jones' statements are testimonial hearsay, they are barred under the Confrontation Clause.

> Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution. [*Davis v Washington*, 547 US 813, 822; 126 S Ct 2266; 165 L Ed 2d 224 (2006); see, also, *People v Jambor (On Remand)*, 273 Mich App 477, 487; 729 NW2d 569 (2007).]

We conclude that Jones' statements were testimonial hearsay. Jones made the statements after the robbery had already occurred in response to police investigation in order "to establish or prove past events potentially relevant to later criminal prosecution." *Davis*, *supra* at 822. An objective witness would reasonably believe that his statements would be used at a later trial. See *Jambor*, *supra* at 487. And, the statements were used to prove the truth of the matter asserted. See MRE 801(C). To prove that defendant was the robber, Officer Clark testified that the three eyewitnesses, including Jones, gave him the same description of the robber and that all three eyewitnesses identified defendant as the robber at the show-up. Further, during closing argument, the prosecution used Jones' statements to bolster the identification of another eyewitness.

Despite the fact that defendant's constitutional right to confront the witnesses against him was plainly violated, the error does not warrant reversal because it was not outcome determinative. Other evidence strongly supported defendant's conviction. Eyewitnesses Jennifer Nay and Tricia Kilbourn provided substantially similar descriptions of the robber. Both Nay and Kilbourn positively identified defendant by physical appearance and by voice. In addition, a tracking dog tracked the robber's scent to the middle of 22nd Street, within 30 yards of the residence located at 128 S. 22nd Street, where defendant was found. A black male in clothing matching Nay and Kilbourn's description of the robber was seen meeting two other black males in front of the residence and then disappearing behind it. Minutes later, defendant was found inside the house with clothing matching descriptions of the robber and the black male seen disappearing behind the house. Defendant was also found with a black ski mask, the KFC deposit bag and deposit slip, his grandmother's gun which matched Nay and Kilbourn's description of the robber's gun, and about one third of the night deposit money from KFC.

Moreover, defense counsel removed any bolstering effect Jones' alleged identification statement might have had by eliciting from Officer Clark on cross examination that Jones did not identify defendant as the robber, but merely said that defendant's clothes were similar to the robber's clothes. Given the other evidence implicating defendant as the robber and given that defense counsel negated the effect of Officer Clark's testimony via cross examination, Jones' testimonial hearsay was not outcome determinative. There is no plain error requiring reversal. See *Carines*, *supra*.

Next, defendant argues that he was denied his due process right to present a defense by the legal preclusion of an instruction on the offense of accessory after the fact. We disagree.

In *People v Cornell*, 466 Mich 335; 646 NW2d 127 (2002), overruled in part on other grounds *People v Mendoza*, 468 Mich 527; 664 NW2d 685 (2003), our Supreme Court held that MCL 768.32(1) allows a jury to convict a defendant of an offense inferior to the charged offense if the inferior offense is (1) a lesser offense necessarily included within the charged offense, (2) the charged offense requires the jury to find a disputed factual element that is not part of the lesser included offense, and (3) a rational view of the evidence would support the lesser offense. *Id*. at 357. The trial court, in this case, properly refused to instruct the jury on the offense of accessory after the fact because it is not a necessarily included lesser offense of armed robbery. See *Cornell*, *supra* at 355 (statute precludes consideration of any other offenses that are not necessarily included lesser offenses); see, also, *People v Nyx*, 479 Mich 112, 118 n 18; 734 NW2d 548 (2007) (defining necessarily included lesser offense).

This legal preclusion did not violate defendant's constitutional right to present a defense. "'The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations.'" *People v Peals*, 476 Mich 636, 666; 720 NW2d 196 (2006), quoting *Chambers v Mississippi*, 410 US 284, 294; 93 S Ct 1038; 35 L Ed 2d 297 (1973). Defendant was accused of armed robbery. Defendant was free to, and in fact did, cross examine the prosecution's witnesses and present proofs to the jury in order to defend himself against that accusation. The legal preclusion of an accessory after the fact instruction did not violate defendant's right to present a defense because defendant was not accused of being an accessory after the fact.

Further, defendant had no right to be charged as an accessory after the fact to the armed robbery. Although a defendant has the right to notice of the charged offense and has the right to defend himself against the charged offense, it is the prosecution that has "the right to select the charge and avoid verdicts on extraneous lesser offenses preferred by the defendant." *People v Perry*, 460 Mich 55, 63; 594 NW2d 477 (1999). The prosecution chose to charge defendant with armed robbery. Defendant had the right to defend against that charge but had no right to select the charge of accessory after the fact. The offense of accessory after the fact is not a necessarily included lesser offense of armed robbery. Our Supreme Court's decision in *Cornell* and its application to the facts of this case did not violate defendant's constitutional right to present a defense. We are bound by the principle of stare decisis to follow *Cornell*'s holding. *People v Hall*, 249 Mich App 262, 270; 643 NW2d 253 (2002).

Finally, defendant argues that he has a due process right to post-conviction DNA testing of the foreign hair found inside the ski mask. We disagree.

"Absent a showing of suppression of evidence, intentional misconduct, or bad faith, the prosecutor and the police are not required to test evidence to accord a defendant due process." *People v Coy*, 258 Mich App 1, 21-22; 669 NW2d 831 (2003). Defendant does not allege, and the record does not show, that the prosecution or the police suppressed evidence, engaged in intentional misconduct, or otherwise acted in bad faith. Defendant has not established a right to post-conviction DNA testing. Although defendant had the right to ask the trial court to require

testing of the evidence, MCR 6.201(A)(6), absent such a request, the prosecution had no duty to test the evidence. See *Coy*, *supra* at 21-22. We reject defendant's claim that his misidentification defense was strong and, thus, due process demands the testing. Defendant's defense was not strong when compared with the overwhelming evidence of his guilt.

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Mark J. Cavanagh
/s/ Jane M. Beckering