STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 17, 2006
v	No. 255426 Oakland Circuit Court
PABLO BONILLA, Defendant-Appellant.	LC No. 2003-190700-FC

Before: Cavanagh, P.J., and Cooper and Donofrio, JJ.

COOPER, J. (*concurring in part and dissenting in part*).

I respectfully disagree with the majority's analysis with regard to the hearsay statements improperly elicited by the prosecutor implicating defendant in the charged offenses.

At trial, the court permitted the prosecutor to elicit testimony regarding the background of the events that led to the arrest of defendant and his codefendants, Cory Hudson and Ricardo Arias. However, the prosecutor did not limit his inquiry to the allowable generic information. The prosecutor purposefully elicited hearsay testimony from Officer Jeremy Pittman regarding the suspects' names and physical descriptions. The source of this information was not revealed at trial. Outside the hearing of the jury, Officer Pittman testified that he learned this information from a confidential informant who had assisted in numerous prior investigations. This testimony was clearly beyond the scope of the trial court's ruling. The purposeful elicitation of this hearsay testimony at trial apparently even surprised the witness. When answering the prosecutor's inquiry, Officer Pittman hesitated before stating, "I – I had suspects. I had first names. I had a first name of Cory, I had a first name of Pablo, and I had a first name of Ricky. And I had physical descriptions of each suspect." The prosecutor then continued to elicit testimony regarding those physical descriptions.

I. Preservation

Contrary to the majority opinion, I believe that defendant's challenge based on the violation of his Sixth Amendment right to confront the witnesses against him was, in fact, preserved. Defendant's evidentiary objection was sufficient to preserve his challenge on this

ground as the United States Supreme Court had yet to render its opinion in *Crawford v Washington*[1] at the time the defendant was convicted.

The majority notes, with little further analysis, that "an objection on the basis of the Rules of Evidence will not necessarily preserve for appeal a Confrontation Clause objection."[2] However, the majority uses this single line from *People v Bauder* out of context. In this case, I believe that defendant's hearsay objection *necessarily* had that desired result. In *Bauder*, the prosecution sought to elicit testimony from several witnesses regarding statements the murder victim had allegedly made prior to her death. Although defense counsel "opposed" the admission of those statements based on the defendant's inability to confront the declarant, counsel noted that the statements could potentially fall within an exception to the hearsay rule.[3] This Court found that counsel's statement preserved the defendant's Confrontation Clause challenge for appellate review. Although the current defendant did not raise a challenge based on the Confrontation Clause on the record until his motion for a new trial, this case is distinguishable from *Bauder* in a significant way. Mr. Bauder's trial began after *Crawford* was decided, enabling his defense counsel to raise a more specific challenge on that ground. *Crawford* was not decided until six days *after* the current defendant was convicted. Accordingly, this case is more akin to this Court's opinion in *People v Lonsby*.[4]

In *Lonsby*, the defendant failed to challenge the admission of testimonial hearsay evidence based on the Confrontation Clause until his second motion for a new trial.[5] Recognizing that the defendant potentially forfeited his challenge on this ground,[6] this Court distinguished the facts before it from *People v Carines*.[7] Prior to the Michigan Supreme Court's decision in *Carines*, it was well established that constitutional issues should be treated as preserved when subsequent rulings were applied retroactively or when the defendant's delay in raising an issue was "due to a subsequent development in the law, 'rather than . . . any dilatory practice on the part of'" the parties.[8]

> *Carines* did not address, and thus did not answer, the question before us. That is, unlike the instant case, the defendant in *Carines* failed to raise a specific objection that was clearly available to him. Here, defendant did not have the benefit of the *Crawford* ruling and thus, a specific objection would likely have been futile. And, because the United States Supreme Court has held that overruling decisions involving constitutional questions must be applied retrospectively to cases

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[1] *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004).

[2] *People v Bauder*, ___ Mich App ___; ___ NW2d ___ (2005) (emphasis added), slip op at 2.

[3] *Id.*

[4] *People v Lonsby*, ___ Mich App ___; ___ NW2d ___ (2005).

[5] *Id.* at 3-4.

[6] *Id.* at 4-5.

[7] *People v Carines*, 460 Mich 750; 597 NW2d 130 (1999).

[8] *Lonsby*, *supra* at 11.

> pending on appeal, the defendant here clearly has the benefit of raising an issue "preserved" by operation of law.[9]

This Court noted that "fundamental fairness would dictate that . . . defendant should be afforded review . . . as though the matter were fully preserved to prevent the dilution of the very constitutional right solidified by the change in law."[10]

The facts in this case are identical to those in *Lonsby*. Any objection to the challenged testimony in the current case would likely have been futile without the benefit of the *Crawford* decision. It is fundamentally unfair to deny defendant full appellate review of his Confrontation Clause challenge when the United States Supreme Court did not issue *Crawford*, which partially abrogated the prior "indicia of reliability" standard of *Ohio v Roberts*,[11] until his trial had concluded. As in *Lonsby*, the situation before us is distinguishable from *Carines*. This specific objection was not available to the defendant at the time of his trial and, therefore, the plain error standard is inapplicable.

II. Testimonial Hearsay

Furthermore, the names and physical descriptions of the suspects of this criminal investigation were clearly inadmissible testimonial hearsay. The trial court properly allowed the prosecutor to present "background information" to place the relevant evidence regarding defendant's arrest into context. However, the names and descriptions of the suspects were unnecessary for that purpose. The prosecutor clearly elicited this testimony to prove the truth of the matter asserted—to show that the codefendants were the same individuals previously identified as mid-level cocaine suppliers. The prosecutor may have labeled this information "background," but that designation is disingenuous.

In *People v Wilkens*,[12] the prosecutor was permitted to elicit testimony to explain the investigating officer's actions leading to the defendant's arrest. The officer specifically testified regarding the detailed description of the suspect that he received from a confidential informant.[13] While the Michigan Supreme Court never resolved whether this testimony was hearsay, it did find that the challenged evidence was inadmissible for the stated purpose. "Even if this evidence could be said to have had some marginal relevance as 'background' to the police officer's narrative, the testimony could have been limited to the statement that the police officer was responding to a tip."[14] The Court then found the prejudicial effect of this evidence outweighed

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[9] *Id.* at 12.

[10] *Id.* After conducting this extensive analysis, this Court declined to determine whether the harmless or plain error standard applied, as the challenged error required reversal under either standard. *Id.*

[11] *Ohio v Roberts*, 448 US 56; 100 S Ct 2531; 65 L Ed 2d 597 (1980).

[12] *People v Wilkens*, 408 Mich 69; 288 NW2d 583 (1980).

[13] *Id.* at 71.

[14] *Id.* at 73.

any probative value for the same reasons that this evidence could have been classified as hearsay. "The testimony . . . provided the jury with the content of an unsworn statement of an informant who was not produced at trial. This statement pointed to the defendant's guilt of the crime charged," i.e., pointed to the truth of the matter asserted.[15] The challenged evidence in the current case was also clearly unnecessary to place Officer Pittman's testimony in context. The unsworn statements of an unnamed informant also directly pointed to defendant's guilt of the charged offense—the informant identified defendant by name as a cocaine supplier. It is specious to assert that these statements were not hearsay.

The informant's statements to Officer Pittman were also clearly testimonial in nature and defendant was given no opportunity to confront his unnamed accuser. In *Crawford*, the United States Supreme Court found that testimonial hearsay statements of witnesses against the accused who are unavailable to testify at trial are inadmissible when the defendant had no prior opportunity for cross-examination.[16] While the *Crawford* Court "[left] for another day any effort to spell out a comprehensive definition of 'testimonial,'"[17] it did provide some guidance in making this determination. At a minimum, testimonial hearsay applies to "prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations."[18] The *Crawford* Court recognized that testimonial statements also include "pretrial statements that the declarant would reasonably expect to be used in a prosecutorial manner, and 'statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.'"[19]

Relying on this language in *Crawford*, the Sixth Circuit Court of Appeals specifically found in *United States v Cromer*[20] that statements made by a confidential informant implicating a defendant in criminal activity are testimonial in nature.[21] A confidential informant voluntarily shares information with the police and, therefore, clearly "intends to bear testimony against the accused."[22]

> Tips provided by confidential informants are knowingly and purposely made to authorities, accuse someone of a crime, and often are used against the accused at trial. The very fact that the informant is confidential—i.e., that not even his identity is disclosed to the defendant[—]heightens the dangers involved in allowing a declarant to bear testimony without confrontation. The allowance of

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[15] *Id.* at 74.

[16] *Crawford, supra* at 61-62, 68-69.

[17] *Id.* at 68.

[18] *Id.*

[19] *Lonyo, supra* at 9, quoting *Crawford, supra* at 51-52.

[20] *United States v Cromer*, 389 F3d 662 (CA 6, 2004).

[21] *Id.* at 675. See also *United States v Pugh*, 405 F3d 390, 398-399 (CA 6, 2005).

[22] *Cromer, supra* at 675.

> anonymous accusations of crime without any opportunity for cross-examination would make a mockery of the Confrontation Clause. . . .[23]

A confidential informant who repeatedly shares information with law enforcement must reasonably expect that his statements, although not made under oath, will be used prosecutorially.[24] The informant in the instant case had assisted in 20 to 30 prior investigations resulting in innumerable arrests and convictions. Based on this experience, he or she obviously would have expected this information to be available at trial. Accordingly, the trial court improperly allowed the prosecutor to question Officer Pittman regarding the confidential informant's specific identification of defendant and his codefendants.

III. Harmless Error

Although the prosecutor went beyond the court's instruction and elicited testimony regarding the suspects' names and descriptions, the admission of this evidence was harmless in light of the overwhelming evidence presented against defendant. In determining whether an evidentiary error is harmless, we must "'conduct a thorough examination of the record' in order to evaluate whether it is clear, beyond a reasonable doubt, that the jury verdict would have been the same absent the error."[25] While the informant's statements themselves were inadmissible, the subsequent observations of the police officers were not.[26] Officers witnessed the codefendants traveling from a suspected drug house toward the city of Pontiac in two vehicles. When a marked police unit pulled one vehicle over, the other vehicle made a U-turn and drove away at a high rate of speed while weaving in and out of traffic. Officers found Mr. Hudson sitting on a package containing one kilogram of cocaine. Forensic scientists subsequently discovered fingerprints belonging to both defendant and Mr. Arias on the tape used to seal that package. In light of this evidence, the admission of the informant's description of the suspects was harmless beyond a reasonable doubt. Accordingly, while I cannot agree with the analysis of my colleagues, I must concur that we are bound to affirm defendant's convictions.

/s/ Jessica R. Cooper

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[23] *Id.*

[24] See *Crawford*, *supra* at 51.

[25] *People v Shepherd*, 472 Mich 343, 348; 697 NW2d 144 (2005).

[26] The informant's hearsay statements could properly be considered in determining whether defendant's arrest was supported by probable cause. See MCL 750.653(b); *People v Echavarria*, 233 Mich App 356, 366-367; 592 NW2d 737 (1999). As the trial court properly determined at the evidentiary hearing that there was probable cause to support the codefendants' arrests, the officers' subsequent observations and the evidence seized were clearly admissible.