STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 17, 2011
v	No. 290131 Saginaw Circuit Court
DEONTAE TRAVOHN DAVIS, Defendant-Appellant.	LC No. 08-030280-FC

ON REMAND

Before: FORT HOOD, P.J., and BORRELLO and STEPHENS, JJ.

PER CURIAM.

This Court previously issued an unpublished opinion in this case, affirming defendant's convictions and sentences for one count of conspiracy to commit first-degree premeditated murder, MCL 750.157a; MCL 750.316, seven counts of attempted murder, MCL 750.91, one count of placing offensive or injurious substances in or near real or personal property, MCL 750.209(1)(b), one count of conspiracy to commit arson of a dwelling house, MCL 750.157a; MCL 750.72, and one count of arson of a dwelling house, MCL 750.72. *People v Davis*, unpublished opinion per curiam of the Court of Appeals, issued June 22, 2010 (Docket No. 290131). Defendant sought leave to appeal with our Supreme Court, and our Supreme Court remanded to this Court "for consideration of an issue raised by the defendant but not addressed in that court's opinion: whether the circuit court erroneously allowed the statement of the defendant's co-defendant, Caprice Mack, to be introduced into evidence through the preliminary examination testimony of Travis Crowley." *People v Davis*, ___ Mich ___; 790 NW2d 401 (2010). For the reasons set forth in this opinion, we affirm.

I. FACTS

The facts of this case were articulated in this Court's previous opinion:

> This case arises from events that occurred on December 10, 2007, in Saginaw, Michigan. According to the testimony of witnesses, including that of Darell Hewitt, who agreed to testify "truthfully and completely . . . about the events that occurred December 10th, 2007," he, defendant, Caprice Mack, Dquan Favorite, Arnell Johnson, Jeremy Williamson and Deshawn Christopher were drinking and playing games at a house on Sanford Street when Tonya Wilson's

car was burned. Travis Crowley testified that his girlfriend, April Johnson, called him and told him that her mom's car "got blew up." Crowley said that Mack got on the phone and told him that "some boys had blew up Tonya['s] car, so . . . they said that they was gonna take care of it."

According to Hewitt, after Wilson's car burned, defendant and Favorite discussed retaliating against persons at a duplex located at 1622 Farwell Street in Saginaw because they thought Ronell Hinley had burned the car. Hewitt said that the group planned "to set the [Farwell] car on fire" and "to shoot anybody that come [sic] out of the house." Hewitt testified, however, that there was no agreement to set fire to the house or to kill anyone.

The evidence indicated that defendant, Hewitt, Favorite, Mack, Johnson and Williamson went to the house at Farwell to set the car on fire, but they failed to successfully do so. The men returned to the house on Sanford and then defendant, Hewitt, Favorite, Mack and Christopher made a second trip to the Farwell house. Defendant and Mack went into the garage with containers of gasoline and then ran out. This time, the car in the Farwell house garage was set on fire. There was evidence that Hewitt and Favorite had guns and that as the fire at the Farwell house spread from the garage to the house, people began to leave the house, and Hewitt and Favorite shot at the people as they left.

Defendant, Favorite, and Mack, who were all tried together, moved for a directed verdict on all counts. Defendant argued that Hewitt's testimony, in a light most favorable to the prosecutor, showed that there was a plan to burn a car in the Farwell house's garage. Defendant argued that this was insufficient to support a charge of attempted murder or conspiracy to commit first-degree murder. The trial court, concluding that the combination of starting a house on fire at 2:00 a.m. and shooting at people as they exited the house "establish[ed] evidence of attempt to murder," denied the motion for directed verdict as to all three defendants. On July 2, 2009, defendant moved for a new trial on the basis of newly discovered evidence, the evidence being an affidavit, purportedly from Hewitt, wherein Hewitt claims that he lied at trial to save himself, and that defendant "is innocent of all charges." The trial court denied the motion without an evidentiary hearing, and this appeal ensued. [*Davis*, unpublished opinion, pp 1-2 (footnotes omitted).]

The issue on remand concerns Mack's statement to Crowley during their telephone conversation, and the admission of Mack's statement through Crowley's testimony. Crowley testified that he was talking on the phone to his girlfriend, April Johnson, about the burning of her mother's car. Mack got on the phone and told Crowley that "they" were planning to retaliate with bombs. Crowley testified at the preliminary examination:

Q. Okay. When you had that conversation with your girl earlier, where she told you what had happened, did anybody else get on the phone with you?

A. Yes, sir.

Q. Who got on the phone?

A. Sean.

Q. And who is that, what's his full name?

A. Caprice.

Q. Okay. Caprice Mack?

A. Yes, sir.

* * *

Q. Did he tell you anything about what had happened or what they were going do [sic]?

A. Yes, sir, he told me that some boys in that neighborhood had come and blew up Tonya's car, so—

* * *

Q. Go ahead, Judge says you can answer. What did Mr.—what did Sean say?

A. Some boys had blew up Tonya car, so they was gonna, ah, they said that they was gonna take care of it, and they—

* * *

Q. What did he say?

A. When he got on the phone, he said, "Man, Bro, some niggers done blew up mom's car, but yeah, we got these bombs, they gonna get 'em back, we gonna take care of it."

Pursuant to the directive of our Supreme Court, we address whether the circuit court erroneously allowed the statement of Mack to be introduced into evidence through the preliminary examination testimony of Crowley.

II. ANALYSIS

Defendant raises two bases of alleged error in the admission of Mack's out-of-court statement through Crowley's testimony. He claims that the admission of the statement violated his Sixth Amendment right of confrontation, and that the statement was inadmissible hearsay.

Because defendant did not preserve this issue for appellate review by raising it in the trial court, this Court's review is for plain error affecting defendant's substantial rights. *People v Pipes*, 475 Mich 267, 274-279; 715 NW2d 290 (2006), citing *People v Carines*, 460 Mich 750,

763-764; 597 NW2d 130 (1999). Under the plain error rule, defendant must establish that (1) error occurred, (2) the error was plain, that is, clear or obvious, and (3) the plain error affected a substantial right of the defendant. *Pipes*, 475 Mich at 279, citing *Carines*, 460 Mich at 763-764. Reversal is warranted only when plain error results in the conviction of an actually innocent defendant or seriously affected the fairness, integrity or public reputation of the judicial proceedings, independent of defendant's guilt or innocence. *Id*.

A. CONSTITUTIONAL ERROR (RIGHT OF CONFRONTATION)

The Confrontation Clause of the Sixth Amendment to the United States Constitution guarantees criminal defendants the right to confront witnesses who testify against them. US Const, Am VI. Michigan's constitution guarantees the same right. Const 1963, art 1, § 20. The right of confrontation has been interpreted to prohibit the admission of out-of-court testimonial statements unless the accused has had a prior opportunity to cross-examine the declarant, and the declarant is unavailable. *Crawford v Washington*, 541 US 36, 53-54, 59, 68; 124 S Ct 1354; 158 L Ed 2d 177 (2004); *People v Shepherd*, 472 Mich 343, 347; 697 NW2d 144 (2005).

Only out-of-court statements that are testimonial implicate the Confrontation Clause. *Crawford*, 541 US at 50-52, 61, 68; *People v Taylor*, 482 Mich 368, 374; 759 NW2d 361 (2008). A testimonial statement is "a solemn declaration or affirmation made for the purpose of establishing or proving some fact." *Crawford*, 541 US at 51. A statement is testimonial if its "primary purpose" or the questioning that elicits it "is to establish or prove past events potentially relevant to later criminal prosecution." *Davis v Washington*, 547 US 813, 814; 126 S Ct 2266; 165 L Ed 2d 224 (2006). Stated differently, statements are testimonial if they are made under circumstances that would lead an objective declarant reasonably to believe that the statement would be available for use in a later trial or criminal prosecution. *Id*. at 821-822; *Taylor*, 482 Mich at 377-378. The rationale for limiting the Confrontation Clause's application to testimonial statements is that only testimonial statements cause the declarant to be a "witness" within the meaning of the Confrontation Clause. *Davis*, 547 US at 821. "It is the testimonial character of a statement that separates it from other hearsay that, while subject to traditional limitations upon hearsay evidence, is not subject to the Confrontation Clause." *Id*.

The Supreme Court in *Crawford* did not attempt "to spell out a comprehensive definition of 'testimonial[,]'" but the Court recognized that "a casual remark to an acquaintance" is not a testimonial statement in the same way that an accuser making a formal statement to a government officer is. *Crawford*, 541 US at 51, 68. This Court similarly held in *People v Bauder*, 269 Mich App 174, 180-182; 712 NW2d 506 (2005), that a victim's statements to friends, coworkers, and the defendant's relatives shortly before her death were not testimonial.

In *Taylor*, our Supreme Court applied *Crawford* and concluded that inculpatory statements of a codefendant to an acquaintance were nontestimonial and admissible through the acquaintance's testimony. *Taylor*, 482 Mich at 378, 380. In that case, the three defendants—Marlon Scarber, Eric Taylor, and Robert King—were tried together on charges arising from a kidnapping and murder. One of the prosecution's main witnesses was Troy Ervin, an acquaintance of all three defendants. *Id*. at 371. Ervin testified that Scarber phoned him and stated that he (Scarber) and the other defendants had kidnapped the victim and were holding him

at a house owned by Ervin's sister. In a later phone call, Scarber told Ervin that King had fatally shot the victim. *Id*. at 371, 374.

On appeal, King argued that the admission of Scarber's statements through Ervin's testimony violated King's right of confrontation and were inadmissible hearsay. This Court disagreed and affirmed defendant's convictions. Our Supreme Court affirmed. Relying on *Crawford* and *Davis*, the Court held that "[b]ecause the hearsay statements in this case were nontestimonial, they do not implicate the Confrontation Clause . . . and their admissibility is governed solely by MRE 804(b)(3)." *Id*. at 374. The Court reasoned:

> Scarber's statements to Ervin were nontestimonial because they were made informally to an acquaintance, not during a police interrogation or other formal proceeding, see *Crawford*, *supra* at 68, or under circumstances indicating that their "primary purpose" was to "establish or prove past events potentially relevant to later criminal prosecution," *Davis*, *supra* at 822. Accordingly the admissibility of the statements in this case is governed solely by MRE 804(b)(3)." [*Taylor*, 482 Mich at 378.]

Similarly, in *People v Bennett*, ___ Mich App ___; ___ NW2d ___ (Docket Nos. 286960, 287768, November 2, 2010), this Court rejected the defendant's Confrontation Clause challenge to the admission of an acquaintance's testimony. Jessica Fritz, the codefendant's friend, testified that after the victim's murder, the codefendant told her that the defendant "did it." This Court relied on *Taylor* and found no error:

> [O]ur Supreme Court has ruled that a statement made to an acquaintance, outside of a formal proceeding, is a nontestimonial statement, and may be admitted as substantive evidence at trial pursuant to MRE 804(b)(3). [The defendant] argues that Fritz's testimony that [the codefendant] told her that [the defendant] killed the victim violated his right of confrontation. [The codefendant]'s statements were made to Fritz, a friend, and not within a formal proceeding. Thus, they were nontestimonial and do not implicate the confrontation clause. [*Bennett*, ___ Mich App at ___, slip op p 9 (citations omitted).]

Likewise, this Court rejected the defendant's challenge to the testimony of the codefendant's cousin, that the codefendant told the cousin that the defendant was threatening to kill the victim: "Because this statement was to an acquaintance and there is no indication that it was made for the purposes of identifying the perpetrator of a crime, the statement was nontestimonial and did not implicate the Confrontation Clause." *Id*., citing *Taylor*, 482 Mich at 378.

In the present case, Mack's statement was not testimonial and therefore its admission at trial did not violate defendant's confrontation rights. Mack's statement was made to an acquaintance over the telephone. He took the phone from Johnson during her call with her boyfriend, Crowley, and told Crowley that he and others planned to retaliate against persons who they believed had burned Wilson's car. Mack stated that "we got these bombs, they gonna get 'em back" and "they was gonna take care of it." The statement was not a solemn declaration for the purpose of establishing a past fact. And the informal circumstances under which the statement was made do not suggest that Mack made the statement in contemplation of later

criminal prosecution. See *Bauder*, 269 Mich App at 180-182. Because the statement was not testimonial, the Confrontation Clause is not implicated. *Taylor*, 482 Mich at 378. Therefore, defendant fails to establish error in the admission of Mack's statement through Crowley's preliminary examination testimony.

B. EVIDENTIARY ERROR (HEARSAY)

The rules of evidence pertaining to hearsay also govern the admissibility of Mack's statement to Crowley. "Hearsay" is an out-of-court statement offered in evidence to prove the truth of the matter asserted, MRE 801(c); it is generally not admissible, MRE 802. *People v Gursky*, 486 Mich 596, 606; 786 NW2d 579 (2010). A statement of a coconspirator is not hearsay if it "is offered against a party and is a statement by a coconspirator of a party during the course and in furtherance of the conspiracy on independent proof of the conspiracy." *People v Martin*, 271 Mich App 280, 316; 721 NW2d 815 (2006), quoting MRE 801(d)(2)(E). For admission of the statement under MRE 801(d)(2)(E), the proponent of the statement must establish by a preponderance of the evidence that a conspiracy existed, that the statement was made during the course of the conspiracy, and that the statement furthered the conspiracy. *Martin*, 271 Mich App at 316-317.

There is evidence that Mack's statement to Crowley furthered the conspiracy. Mack was with Johnson when Johnson told Crowley about her mother's car, and Mack got on the phone to tell Crowley that he and the others planned to "get 'em back" and "take care of it." The statement was made shortly before the conspirators executed their plan. Arguably, Mack's statement to Crowley furthered the conspiracy inasmuch as it may have induced Crowley not to report the burned car to the police, or to refrain from retaliating himself. In this respect, Mack's statement "promote[d] or facilitate[d] the accomplishment of the illegal objective" of the conspiracy, which is all that is required. *Martin*, 271 Mich App at 317. The fact that Crowley was not a conspirator is irrelevant, because the statement need not have been made to another conspirator in order to qualify for admission.[1] *Id*. MRE 801(d)(2)(E) requires that the statement be a statement *by a coconspirator of a party*, which in this case it was, under the prosecution's theory that Mack and defendant were coconspirators. On this record, the admission of Mack's statement against defendant as a statement by a coconspirator cannot be considered plain error.

[1] At oral argument, defense counsel suggested that Mack's statement was inadmissible under MRE 801(d)(2)(E) because Crowley was not a coconspirator. Counsel stressed that Crowley was never charged in this case and was an innocent bystander.

Affirmed.

/s/ Karen M. Fort Hood
/s/ Stephen L. Borrello
/s/ Cynthia Diane Stephens