

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
December 6, 2012

v

DEBORAH LEE,

No. 306192
Wayne Circuit Court
LC No. 10-012068-FH

Defendant-Appellant.

Before: WILDER, P.J., and GLEICHER and BOONSTRA, JJ.

PER CURIAM.

Defendant appeals as of right from her jury trial convictions for a fraudulent insurance act, MCL 500.4511(1), and false report of a misdemeanor, MCL 750.411a(1)(A). She was sentenced to 30 days in jail. We affirm.

This case arose from a car accident that occurred at Beaubien and Congress streets in Detroit at approximately 2:30 p.m. on February 25, 2007, during which Aurette Seldon's vehicle was struck by a black Lincoln pick-up truck. The driver of the Lincoln drove off without stopping at the scene of the accident. A bystander who witnessed the accident saw the license plate number of the Lincoln and provided that number to Seldon on a piece of paper. The Lincoln truck was owned by defendant. Later that day, defendant reported to her insurance company that she had been involved in a car accident at Mt. Elliott and Lafayette in Detroit and that the driver that struck her black Lincoln truck drove off without stopping. Defendant also reported this alleged accident to the police. Defendant denied having been in an accident earlier that day at Beaubien and Congress streets. Thereafter, defendant was charged with, and convicted of, insurance fraud and filing a false police report.

Defendant first argues that the admission into evidence of the note from the bystander containing the license plate number of the truck that struck Seldon's car violated her rights under the Confrontation Clause. We disagree.

A criminal defendant has the right to be confronted with the witnesses against him or her. US Const, Am VI; Const 1963, art 1, § 20; *People v Fackelman*, 489 Mich 515, 525; 802 NW2d 552 (2011). The right of confrontation "is concerned with a specific type of out-of-court statement, i.e., the statements of 'witnesses,' those people who bear testimony against a defendant." *Fackelman*, 489 Mich at 525. The Confrontation Clause applies not only to in-court testimony but also to out-of-court statements introduced at trial. *Crawford v Washington*, 541

US 36; 50-51; 124 S Ct 1354; 158 L Ed 2d 177 (2004). Even then, only out-of court statements that are *testimonial* implicate the Confrontation Clause, while nontestimonial, out-of-court statements are merely subject to the normal rules of hearsay evidence. *Id.* at 50-52, 61, 68; *People v Taylor*, 482 Mich 368, 374, 377; 759 NW2d 361 (2008).

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).]

In a pre-trial appeal, this Court determined that the note at issue was not testimonial in nature and, therefore, defendant's right to confrontation was not violated by the admission of the note into evidence:

We conclude that the bystander's note in this case was not testimonial in nature. It was made in response to an emergency — the hit-and-run vehicle leaving the scene of an accident. It was made voluntarily and not in response to a request for information from anyone. It was not a solemn declaration offered to prove a fact relevant to the charged offenses but was offered for informational purposes should Seldon have needed to identify the other driver. Moreover, the note was not given to a government official, and “there is nothing to indicate that the” evidence was given “with the intent to preserve [it] for later possible use in court.” [*People v Bauder*, 269 Mich App 174, 182; 712 NW2d 506 (2005).] At best, the information was offered to provide an avenue for investigation should the other driver's identity need to be determined. In fact, the bystander could not have anticipated that his information would be used in the prosecution here, because it appears that the charged offenses were not committed until after the bystander left the accident scene. For those reasons, the note was not testimonial for purposes of the Confrontation Clause. [*People v Lee* (“*Lee I*”), unpublished opinion per curiam of the Court of Appeals, issued June 29, 2010 (Docket No. 289933), slip op, p 3.]

Although defendant now urges this Court to reach a different result on the basis of the subsequent decisions in *Bullcoming v New Mexico*, ___ US___; 131 S Ct 2705; 180 L Ed 2d 610 (2011), and *Fackelman*, 489 Mich at 515, we find these cases factually distinguishable from the instant case.¹

¹ Normally, the law of the case doctrine would bar us from reconsidering this issue since it was previously addressed by this Court, *People v Mitchell*, 231 Mich App 335, 340; 586 NW2d 119

In *Bullcoming*, the evidence at issue was a forensic laboratory report certifying that the defendant's blood-alcohol content ("BAC") was above the threshold for aggravated DWI. *Bullcoming*, 131 S Ct at 2710-2711. While the author of the report did not testify at trial, another scientist at the laboratory testified regarding the operation of the machine that analyzed the defendant's blood. The New Mexico Supreme Court found the report to be testimonial and that the defendant's confrontation rights were preserved because the defendant was able to cross-examine that other scientist. The New Mexico Court determined that the author of the report was merely a scrivener who simply transcribed the results generated by the machine. *Id.* at 2713. In other words, according to the New Mexico Supreme Court, the true witness was the BAC machine and any "qualified analyst" could act as a surrogate for the author and testify to afford the defendant his right of confrontation. *Id.* The United States Supreme Court reversed because the defendant was unable to cross-examine the true witness, who was the report's author – not the machine.² *Id.* at 2714-2716. However, the only reason that the defendant's right to confrontation was implicated at all was because the report in that case was testimonial. See *id.* at 2713 ("[I]f an out-of-court statement is testimonial in nature, it may not be introduced against the accused at trial unless the witness who made the statement is unavailable and the accused has had a prior opportunity to confront that witness."). The *Bullcoming* Court explained that the report was testimonial irrespective of the fact that it was not a "sworn" statement. *Id.* at 2717. The dispositive fact was that the report was "'made for the [express] purpose of establishing or proving some fact' in a criminal proceeding." *Id.* at 2716, quoting *Melendez-Diaz v Massachusetts*, 557 US 305, 310; 129 S Ct 2527; 174 L Ed 2d 314 (2009). The instant case is distinguishable because, while the note in question here and the report in *Bullcoming* were not sworn statements, (1) the handwritten note did not contain *any* of the formalities present in the *Bullcoming* report and (2) as this Court previously observed in *Lee I*, the note was not created with the purpose of establishing some fact in a criminal proceeding. Thus, because the note is not testimonial, defendant's right to confrontation is not implicated, and his reliance on *Bullcoming* is misplaced.

Defendant's reliance on *Fackelman* is misplaced as well. The Michigan Supreme Court in *Fackelman* determined that a report of a psychiatrist, who evaluated the defendant shortly after the alleged crime occurred, was testimonial. Even though the report was not admitted into evidence at trial, the diagnosis from the report was "repeatedly told" to the jury. *Fackelman*, 489 Mich at 518. The Court determined that the contents of the report were indeed testimonial because the report was a "solemn declaration or affirmation made for the purpose of establishing or proving some fact." *Id.* at 532, quoting *Crawford*, 541 US at 51. The Court noted that the report was on hospital letterhead, headed "Psychiatric Evaluation," and was signed and dated by the psychiatrist. *Fackelman*, 489 Mich at 532 n 11. Furthermore, the Court found that the report was "'made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.'" *Id.* at 532,

(1998), but when there is an intervening change of law, as defendant alleges here, this prohibition does not apply, *Freeman v DEC Int'l*, 212 Mich App 34, 38; 536 NW2d 815 (1995).

² Although not pertinent for the issues present in this case, the Supreme Court explained that the true witness was the author of the report because the report "certified to more than a machine-generated number." *Id.* at 2715.

quoting *Crawford*, 541 US at 52. The Court relied on the following factors in making this determination:

(1) defendant's admittance to the hospital was arranged by lawyers, (2) defendant was arrested en route to the hospital, (3) the report noted that the Monroe County Sheriff requested notification before defendant's discharge, (4) defendant referred to a trial and to a gun in his responses related in the report, and, perhaps most significantly, (5) at its very beginning and ending, in which its overall context is most clearly identified, the report expressly focused on defendant's alleged crime and the charges pending against him. [*Fackelman*, 489 Mich at 532-533.]

Thus, the evidence at issue in *Fackelman* was materially distinguishable from the evidence at issue in the present case. First, the note in the instant case contained none of the formalities associated with the report in *Fackelman*. In fact, there were no formalities present with the handwritten note. Second, none of the factors that the *Fackelman* Court relied upon in determining that an objective witness would have had a reasonable belief that the report would be available for use at a later trial was present either. As this Court noted previously, "At best, the information was offered to provide an avenue for investigation should the other driver's identity need to be determined. In fact, the bystander could not have anticipated that his information would be used in the prosecution here, because it appears that the charged offenses were not committed until *after* the bystander left the accident scene." *Lee I*, unpub op at 3 (emphasis added).

We therefore conclude that defendant has not demonstrated that the admission of the note violated her right to confrontation.

Defendant next argues that the trial court erred in admitting the recording of the 911 call made by Seldon, in which she reported a license plate number to the operator, on the ground that the evidence was hearsay. We disagree. While a trial court's ultimate decision to admit or exclude evidence is reviewed for an abuse of discretion, questions of law underlying a trial court's evidentiary decision, such as the application of a rule of evidence, are reviewed de novo. *Hardrick v Auto Club Ins Ass'n*, 294 Mich App 651; 819 NW2d 28 (2011).

The challenged 911 call is an example of hearsay within hearsay, which is admissible as long as each layer of the hearsay conforms to an exception to the hearsay rule. MRE 805. The two layers are the bystander's writing of the license plate number on the piece of paper and Seldon's relay of the contents of the paper to the 911 operator. Both of these components meet the requirements for the present sense impression exception under MRE 803(1).

For hearsay evidence to be admissible under the present sense impression exception, three criteria must be met: "(1) the statement must provide an explanation or description of the perceived event, (2) the declarant must personally perceive the event, and (3) the explanation or description must be 'substantially contemporaneous' with the event." *Ykimoff v WA Foote Mem Hosp*, 285 Mich App 80, 105; 776 NW2d 114 (2009), citing *People v Hendrickson*, 459 Mich 229, 236; 586 NW2d 906 (1998).

For the initial hearsay layer, the declarant, an unidentified bystander, provided a description of a perceived event – the hit-and-run accident – and, in particular, the license plate of the offending vehicle. Accordingly, the first criterion was met. Additionally, the declarant’s description was based on the fact that the declarant personally witnessed the event. The declarant told Seldon, “I saw the whole thing and I wrote down the license plate.” Accordingly, the second criterion was met. Finally, the declarant made the statement to Seldon immediately after witnessing the accident. Thus, the third and final criterion was met. Therefore, the bystander’s statement/note to Seldon meets the requirements of MRE 803(1).

The second layer of hearsay consists of Seldon’s statement to the 911 operator, while reading the note. Her statement was reflecting a perception of the note, Seldon personally perceived the note’s contents, and her statement to the 911 operator was substantially contemporaneous to her reading/perceiving the note. Thus, this final layer meets the present sense impression exception as well. Accordingly, because both layers of the hearsay qualified as present sense impressions under MRE 803(1), Seldon’s statement to the 911 operator was admissible under MRE 805.

Moreover, we conclude that even if the admission of the 911 tape was erroneous, the error was harmless, and defendant is not entitled to any relief. As we noted earlier in our hearsay-within-hearsay analysis, the physical note was properly admitted into evidence as a present sense impression. As a result, no prejudice could have resulted from any erroneous admission of the 911 tape,³ which simply conveyed the exact same information, i.e., the observed license plate number of the vehicle that struck Seldon.

Finally, defendant argues that the evidence was insufficient to support her convictions. We disagree.

When determining whether sufficient evidence was presented at trial to support a conviction, this Court must view the evidence in a light most favorable to the prosecution to determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). “[A] reviewing court is required to draw all reasonable inferences and make credibility choices in support of the jury verdict.” *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

We have already concluded that the bystander’s note and the 911 tape were properly admitted into evidence. Additionally, Martin Owczarek, an accident reconstructionist, stated that the damage to defendant’s pick-up truck was consistent with being in the accident at Beaubien and Congress. Owczarek further testified that the pick-up was involved with only one accident,

³ For instance, if Seldon’s hearsay statement to the 911 operator did not qualify as an exception to hearsay, then the statement, which also relayed the contents of the note, would have been inadmissible. But regardless of the status of this layer of hearsay, we have concluded that the note itself was still admissible as a present sense impression.

and the description of the Mr. Elliot-Lafayette “accident” was not consistent with the damage to defendant’s pick-up truck. The fact that defendant had her own expert witness who came to different conclusions is not dispositive because on review, all conflicts in the evidence are resolved in favor of the prosecution. *People v Unger*, 278 Mich App 210, 222; 749 NW2d 272 (2008). Thus, there was sufficient evidence that defendant filed a false police report and fraudulently filed an insurance claim when she claimed she was involved in an accident at Mt. Elliot and Lafayette.

We note that defendant’s challenge of the admissibility of other evidence, such as Detroit Police Sergeant John Kennedy’s testimony and certain demonstrative evidence, is not properly presented to this Court because these issues were not stated in defendant’s statement of questions presented as required by MCR 7.212(C). Accordingly, to the extent that defendant raises these evidentiary issues, they are abandoned on appeal. *Id.* at 262. Regardless, as stated above, the other admissible evidence was sufficient to support defendant’s convictions.

Affirmed.

/s/ Kurtis T. Wilder
/s/ Elizabeth L. Gleicher
/s/ Mark T. Boonstra