STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LANTZ HOWARD WASHINGTON,

Defendant-Appellant.

FOR PUBLICATION
December 1, 2022
9:05 a.m.

No. 353052
St. Clair Circuit Court
LC No. 19-002078-FH

Before: GLEICHER, C.J., and MARKEY and PATEL, JJ.

GLEICHER, C.J.

The Sixth Amendment's Confrontation Clause prohibits the admission of a testimonial statement made by an unavailable witness unless the witness was previously made available for cross-examination. The question presented is whether evidence implicitly introducing an unavailable witness's testimonial statement is similarly precluded.

A Canadian Customs and Border Service Agency (CBSA) agent, Officer Matthew Lavers, arrested Lantz Washington after Washington avoided paying the Blue Water Bridge toll in Port Huron. Lavers brought Washington back to the American side of the bridge and reported that Washington was wearing a bulletproof vest under his shirt. The prosecution charged Washington with being a violent felon in possession of body armor contrary to MCL 750.227g.

Lavers did not testify at Washington's trial and was never offered for cross-examination. The prosecution circumvented this Confrontation Clause problem by questioning a United States Customs and Border Protection officer about his "communications" with Lavers. Through this questioning, the prosecution effectively admitted Lavers' unconfronted testimony that Washington possessed the body armor.

Lavers was the only witness who could connect Washington to the body armor, and thus a witness whom Washington had a constitutional right to confront. Because the error in allowing another witness to establish Washington's guilt was not harmless beyond a reasonable doubt, we vacate Washington's conviction and remand for a new trial.

I. THE TRIAL EVIDENCE

Washington crossed the Blue Water Bridge from Port Huron, Michigan, into Canada without paying the toll. The toll collector, Denise Fenner, recounted that a vehicle "actually blew through my lane." Fenner could not see the vehicle's occupant or discern whether the driver was male or female. From her vantage point, Fenner admitted, she would not have been able to tell if the driver wore a bulletproof vest. Video evidence revealed that the driver wore red clothing and drove a Ford pickup truck. Fenner reported the event to her supervisor.

Paul Stockwell, a supervisory officer with United States Customs and Border Protection, supplied the testimony needed to convict Washington: that Washington was in possession of a body armor. Stockwell explained that he met Officer Lavers and a crew of CBSA officers on the American side of the bridge. They had Washington in a police cruiser. Stockwell's observation of Washington in the Canadian police cruiser was his only relevant first-hand observation.

Because Lavers' did not appear at the trial, the prosecution relied on the following testimony by Officer Stockwell to establish Washington's possession of the vest:

> *Q.* . . . Who gave you custody of [Washington] . . . ?
>
> *A.* I, I don't know which specific CBSA officer turned him over to us. We actually, me and the guys that work with me, took him out of the cruiser. So, he was in the back.
>
> *Q.* Okay, so a collective group of you?
>
> *A.* There was.
>
> *Q.* Okay.
>
> *A.* There was about six of us.
>
> * * *
>
> *Q.* At some point did Officer Lavers from the Canadian services hand you any other evidence?
>
> *A.* Yes, he did.
>
> *Q.* What did he hand you?
>
> * * *
>
> *A.* A body armor.
>
> * * *
>
> *Q.* Now, without saying anything about what was said, the only question I have for you is *were there communications between you and Officer Lavers*?

A. There were.

Q. Okay. *And . . . based on those communications you took custody of [Washington]*?

A: Yes, we did.

Q. And you took possession of the body armor that was turned over at the same time?

A. Yes, sir. [Emphasis added.]

On cross-examination, Officer Stockwell acknowledged that Washington was not wearing the bulletproof vest when he took him into custody, that he never saw Washington wearing the vest, that he did not witness the vest being removed from Washington's person or possession, and that he had no direct personal knowledge that Washington had ever possessed the vest. The questioning concluded:

Q. So would it be fair to summarize, Officer, you have no direct knowledge of Mr. Washington having possession of [the body armor], seeing him in possession of it in any . . . way, shape or form; is that correct?

A. No direct knowledge.

Officer Stockwell transferred custody of Washington to Port Huron Police Officer Kyle Whitten. Whitten took Washington to the St. Clair County Jail, where he "overheard [Washington] say that he was wearing the body armor because he was afraid people were going to kill him." Like Stockwell, Whitten conceded on cross-examination that he did not have any personal knowledge that Washington had worn or possessed the body armor.

Port Huron Police Officer Ernesto Fantin authenticated a jailhouse recording of a phone call from Washington to his mother. During the call, Washington stated that "James" gave him a bulletproof vest and he "put on the bulletproof vest." The transcribed call continued, "And I went to the police with it on. I was [in] fear for my life, they was threatening me."

Washington testified on his own behalf and denied having made the statement attributed to him by Whitten. He otherwise claimed that he could not recall or remember whether he possessed or wore the bulletproof vest.

The jury found Washington guilty as charged.

II. ANALYSIS

A. HEARSAY AND THE CONFRONTATION CLAUSE

The United States Constitution provides, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him[.]" US Const, Am VI. Under the Michigan Constitution, "[i]n every criminal prosecution, the accused shall have the right . . .

to be confronted with the witnesses against him or her[.]" Const 1963, art 1, § 20. "The right of confrontation insures that the witness testifies under oath at trial, is available for cross-examination, and allows the jury to observe the demeanor of the witness." *People v Yost*, 278 Mich App 341, 370; 749 NW2d 753 (2008) (quotation marks and citations omitted). A witness's testimony incriminating a defendant is inadmissible at a trial unless the witness is present for cross-examination or previously submitted to cross-examination by the defendant. *Melendez-Diaz v Massachusetts*, 557 US 305, 309; 129 S Ct 2527; 174 L Ed 2d 314 (2009).

Washington challenges the following portion of the prosecutor's exchange with Officer Stockwell on Confrontation Clause grounds:

> *Q*. At some point did Officer Lavers from the Canadian services hand you any other evidence?
>
> *A*. Yes, he did.
>
> *Q*. What did he hand you?
>
> * * *
>
> *A*. A body armor.
>
> * * *
>
> *Q*. Now without saying anything about what was said, the only question I have for you is *were there communications between you and Officer Lavers*?
>
> *A*. *There were*.
>
> *Q*. Okay. *And . . . based on those communications you took custody of [Washington]*?
>
> *A*. *Yes, we did*.
>
> *Q*. *And you took possession of the body armor that was turned over at the same time?*
>
> *A*. *Yes, sir*. [Emphasis added.]

Our Confrontation Clause analysis of this testimony requires two inquiries: was Lavers "(1) . . . a 'witness against' the accused under the Confrontation Clause; and (2) if so, has the accused been afforded an opportunity to 'confront' that witness under the Confrontation Clause?" *People v Fackelman*, 489 Mich 515, 562; 802 NW2d 552 (2011). The first question concerns whether Stockwell's questioning introduced a "testimonial" statement. A testimonial statement is one made for an evidentiary purpose. *Crawford v Washington*, 541 US 36, 51; 124 S Ct 1354; 158 L Ed 2d 177 (2004). *Crawford* instructs that for Confrontation Clause purposes, testimonial statements are those in which witnesses " 'bear testimony' " against an accused. *Id*. "Testimony . . . is typically a solemn declaration or affirmation made for the purpose of

establishing or proving some fact." *Id*. (cleaned up.) The United States Supreme Court has characterized the exclusion of testimonial hearsay as the "primary object" of the Sixth Amendment. *Id*. 53. "Where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation." *Id*. at 68-69.

Lavers' "affirmation" that Washington was wearing the body armor, communicated through Stockwell, was testimonial. Lavers told Stockwell about the body armor "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). Had the prosecutor simply asked Stockwell, "what did Officer Lavers tell you about the body armor," it is easy to conclude that the Confrontation Clause would have prohibited an answer (and undoubtedly, that is the reason the prosecutor did not ask that question).

But Stockwell's trial testimony conveyed precisely the same information: that Washington had been wearing the body armor when caught by the Canadian authorities. Either recapitulated directly as a statement made by Lavers to Stockwell, or through the implied method used at the trial, *Lavers* was the source of the incriminatory assertion that Washington possessed the body armor. Stockwell was not personally involved in Washington's arrest on the Canadian side of the bridge. He had no reason to know, or even to suspect, that Washington was wearing body armor until he spoke to Lavers. Stockwell relayed to the jury the *substance* of Lavers' out-of-court report and the prosecutor introduced this evidence to prove its truth: that Washington possessed the body armor.

Lavers' assertion of Washington's guilt was incorporated within Stockwell's testimony through an indirect method that checks all the boxes as unconfronted testimonial hearsay: an out-of-court assertion, testimonial in nature, admitted for its truth. Stockwell did not explicitly state that Washington was wearing the vest, but his testimony contained an implicit accusation that he was. And Lavers was Washington's accuser, not Stockwell, despite that Lavers' actual words were never revealed to the jury. Because Lavers never testified, the answer to the second *Fackelman* inquiry is obvious: Washington did not have an opportunity to confront Lavers.

The remaining question is whether the United States and Michigan Constitutions permit the introduction of this implied hearsay testimony.

Other courts have referred to similar end-runs around the Confrontation Clause as the elicitation of implied hearsay. For example, in *Mason v Scully*, 16 F3d 38 (CA 2, 1994), the prosecutor questioned a detective about a conversation the detective had with an armed robbery suspect (George Rivera), who was unavailable to testify at the defendant's trial:

> "*Q*. And, after the lineup . . . was a conversation held with George Rivera? This is a yes or no question.
>
> *A*. Yes.
>
> *Q*. And, after this conversation with George Rivera, were you looking for somebody?

A. Yes, I was.

Q. And who were you looking for?

A. [The defendant] Terrence Mason." [*Id*. at 40.]

The United States Court of Appeals for the Second Circuit held that the admission of this testimony violated the defendant's right to confront Rivera, whose statement was implicitly introduced through the detective. The Court explained, "To implicate the defendant's confrontation right, the statement need not have accused the defendant explicitly but may contain an accusation that is only implicit." *Id*. at 42-43. That the precise content of Rivera's statement was never revealed was "immaterial," the Court continued, "for the plain implication that the prosecutor sought to elicit, and emphasized in his summation, was that the conversation with Rivera led the police to focus on Mason." *Id*. at 43.

The Second Circuit considered the same legal issue in *Ryan v Miller*, 303 F3d 231 (CA 2, 2002), which arose from the murder of a young boy. Four teenagers were suspected of having killed the child. Detectives questioned many witnesses and possible suspects, narrowing down the potential defendants to Peter Quartararo and three others. *Id*. at 234-235. Detective Palumbo questioned Quartararo while detectives Gill and Reck questioned Thomas Ryan and Robert Brensic. *Id*. at 235. The prosecutor elicited the following testimony from Sergeant Jensen, who oversaw the investigation:

"*Q.* And did something happen at 4:30?

A. Yes, there did.

Q. What?

A. I received a phone call from Detective Palumbo.

Q. Did you then have a conversation with Detective Palumbo on the telephone at about 4:30?

A. Yes, I did.

Q. Now, as a result of talking with Detective Palumbo at 4:30, did you do something with respect to Gill and Reck?

A. Yes, I did.

Q. What was that?

A. I directed Gill and Reck to advise Tom Ryan and Robert Brensic of their rights."

[Defense Counsel]. I'm going to object.

The court. No overruled.

Q. As to what charge?

A. Murder." [*Id*. at 241.]

The opinion details additional testimony given by the detectives referencing other conversations and inculpatory actions taken after conversations with suspects who confessed (and who did not testify), such as reading another suspect his *Miranda*[1] rights. *Id*. at 241-244.

The Court characterized the objectionable content of the testimony as "accusatory assertions introduced without the testimony of the accuser" in violation of the Confrontation Clause. *Id*. at 247. Recalling *Mason*, the Court reasoned, "Testimony need not contain an explicit accusation in order to be excluded as a violation of the Confrontation Clause," and admonished that "it is well established in this Circuit that lawyers may not circumvent the Confrontation Clause by introducing the same substantive testimony in a different form." *Id*. at 248.

Other Courts have analyzed similar efforts to avoid the Confrontation Clause and have reached the same conclusion. In *United States v Kizzee*, 877 F3d 650, 653 (CA 5, 2017), a case resembling ours, the prosecutor questioned a detective "about questions he posed to a criminal suspect, Carl Brown, during an interrogation." Brown did not testify. Here is the colloquy:

> "*Prosecutor*. Detective Schultz, did you ask Mr. Brown a series of questions after you arrived at the police department?
>
> *[Schultz]*. Yes, sir, I did.
>
> *Prosecutor*. Did you ask Mr. Brown whether or not he obtained the narcotics that were discovered in his hat from Pereneal Kizzee?
>
> *[Schultz]*. Yes, sir, I did.
>
> *Prosecutor*. Did you ask him if he obtained the narcotics that were discovered in his hat immediately prior to being stopped?
>
> *[Schultz]*. Yes, sir.
>
> *Prosecutor*. Did you ask Mr. Brown whether or not he had seen any additional narcotics at 963 Trinity Cut Off?
>
> *[Schultz]*. Yes.
>
> * * *
>
> *Prosecutor*. Did you ask him whether or not he obtained drugs from Mr. Kizzee on previous occasions?

[1] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

[Schultz]. Yes, sir.

Prosecutor. Based on your observations the day before that involved the surveillance at Mr. Kizzee's residence, the stop by Officer Taylor [Wilkins], the discovery of narcotics, and your subsequent interview of Mr. Brown, what did you and Detective Lehman do?

[Schultz]. I was able to obtain a search warrant for 963 Trinity Cut Off." [*Id*. at 655 (alterations altered).]

The United States Court of Appeals for the Fifth Circuit vacated Kizzee's conviction on Confrontation Clause grounds, explaining:

> This Court has recognized that police testimony about the content of statements given to them by witnesses are testimonial under *Crawford*; officers cannot refer to the substance of statements made by a nontestifying witness when they inculpate the defendant. Where an officer's testimony leads to the clear and logical inference that out-of-court declarants believed and said that the defendant was guilty of the crime charged, Confrontation Clause protections are triggered. [*Id*. at 657 (cleaned up).]

The detective's testimony was inadmissible because it allowed the jury "to reasonably infer the defendant's guilt," the Court continued, based on testimonial statements made to the officer by nontestifying witnesses. *Id*. See also *Young v United States*, 63 A3d 1033 (US App DC, 2013); *United States v Meises*, 645 F3d 5, 21 (CA 1, 2011) ("[I]f what the jury hears is, in substance, an untested, out-of-court accusation against the defendant, particularly if the inculpatory statement is made to law enforcement authorities, the defendant's Sixth Amendment right to confront the declarant is triggered.").

Michigan has not yet officially weighed in on the evidentiary and constitutional issues presented here. We find the federal implied hearsay cases cited in this opinion persuasive and consistent with our State's Confrontation Clause jurisprudence. Evidence directly implying the substance of a testimonial, out-of-court statement made by an unavailable witness and offered to prove its truth is inadmissible because it violates the Sixth Amendment of the United States Constitution, and Article 1, § 20 of Michigan's Constitution.

Contrary to our dissenting colleague's position, this Court's decision in *Jones (After Remand)*, 228 Mich App 191, is neither dispositive of nor relevant to the evidentiary issue now before us. *Jones* involved only a hearsay question and not a Confrontation Clause issue. A witness testified to having heard another witness shout, " 'Bitch come out, I'm gonna kick your ass. And Alphonzo don't want you, Alphonzo don't love you.' " *Id*. at 203. The defendant objected solely on hearsay grounds. This Court held that the first phrase ("Bitch come out") was not a "statement" for hearsay purposes because it "contains no assertion. It is incapable of being true or false. It is a command, not an assertion[.]" *Id*. at 204-205. The remainder of the testimony was assertive, this Court observed, but was not offered to prove its truth. *Id*. Rather, the words were offered "as an integral part of the series of events that led to the shooting of the victim" and "a component of the threat" made to another witness. *Id*. at 205.

The dissenter in *Jones* maintained that the words contained an "implied assertion" that the speaker was angry, and therefore qualified as hearsay. *Id*. at 227 (O'CONNELL, J., dissenting). The majority rejected the dissent's version of the "implied assertion" theory, defining the concept as follows:

> The use of the term "implied assertion" to denote hearsay has occurred in situations where out-of-court conduct of a person, sometimes verbal and sometimes nonverbal, is offered in evidence to demonstrate that person's belief, from which the inference is offered that the belief is true, *when it was not the actor's intent to communicate the matter to be proved in court*. And so, to use a famous example, if the issue were the seaworthiness of a ship, evidence that the ship captain sailed away with his family aboard after making a thorough inspection of the ship would be considered hearsay as being the captain's implied assertion that the ship was seaworthy. [*Id*. at 207-208 (emphasis added).]

Stockwell's recount of his conversation with Lavers does not fall within this definition of an "implied assertion" because it *was* offered to prove Lavers' intent "to communicate the matter to be proved in court." Unlike an "implied assertion," the term used in *Jones*, the substance of Lavers' conversation with Stockwell on the Blue Water Bridge—that Washington had the body armor in his possession—was offered by the prosecution to prove its truth. And when Lavers handed over Washington and the vest to Stockwell, Lavers made a statement that he intended as accusatory. Unlike the witness quoted in *Jones*, Lavers meant to "bear testimony" against Washington, thereby situating the statement squarely within the definition of unconfronted hearsay. See *Fackelman*, 489 Mich at 515 ("And we understand from the constitution that 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.").

Notably, the defendant in *Jones* did not challenge the admission of the statements on Confrontation Clause grounds; that case was decided six years before *Crawford*. Through *Crawford*'s lens, the statements would have been admissible because they were not testimonial. The evidence being conveyed was the speaker's state of mind rather than an accusation. *Jones* and its newest progeny, *People v Propp (on Remand)*, ___ Mich App ___; ___ NW2d ___ (2022) (Docket No. 343255), involve communications that were neither hearsay nor testimonial, and lack any relevance here.

We also respectfully disagree with our dissenting colleague's view that the "communication" testimony elicited from Stockwell was intended only to explain why Stockwell took Washington into custody and not to prove that Washington possessed the body armor. Stockwell took Washington into custody because Washington was in possession of body armor. That fact was personally unknown to Stockwell until Lavers shared it. The reason that Stockwell took Washington into custody is logically and legally inextricable from the out-of-court accusation made by Lavers that Washington was wearing the body armor when arrested in Canada. The "explanation" for Stockwell's conduct is relevant only because it inculpated Washington.

The prosecutor asked Officer Stockwell three questions critical to proving Washington's guilt: whether he had "communications" with Lavers, whether "based on those communications [he] took custody of [Washington]," and whether he "took possession of the body armor that was

turned over at the same time." Implicit within Stockwell's answers is Lavers' out-of-court statement that Washington possessed the body armor when he was arrested. Absent this implied testimonial hearsay, the prosecutor could establish only one crime: jumping the toll. Stockwell did not recount the exact words the two shared, but the substance of Lavers' communication was obvious, and the reason for its introduction was to prove that Washington was wearing the body armor when stopped by the Canadian authorities rather than to explain why he was taken into custody.

Permitting the prosecution to "weav[e] an unavailable declarant's statements into another witness's testimony by implication" violates the Confrontation Clause. *Meises*, 645 F3d at 22. Stockwell's testimony regarding his "communications" with Lavers therefore violated Washington's Sixth Amendment right to confront Lavers. We turn to a discussion of the appropriate remedy for this constitutional violation.

B. PRESERVATION AND OUR STANDARD OF REVIEW

On the morning of the trial, Washington moved in limine to exclude from the trial evidence the bulletproof vest and the recorded jailhouse phone call. Defense counsel maintained that the prosecution could establish an evidentiary foundation for the introduction of the bulletproof vest, "the corpus delicti itself," only through testimony that would violate the Confrontation Clause. Counsel contended, "And if you read *Crawford [v] Washington*, I don't think anyone can doubt having read that wonderful opinion by Justice Scalia that if you don't have the ability to cross examine the real witness, . . . the only one who saw you do anything, you're being denied your right to a fair trial and there's a Sixth Amendment violation." Regarding Washington's alleged statements at the jail and during the phone call, counsel invoked the "rule of corpus delicti."

The trial court denied the motion, but it precluded Officer Stockwell from testifying to any statements made by Officer Lavers. The court explained, "[H]e can say factually I received this from a Canadian Customs officer at the same time I received the Defendant, as well as his truck was turned over. That then is okay. You've got those circumstances."

Counsel also pointed out that Washington had been deemed incompetent to stand trial following a forensic examination conducted approximately two weeks after his arrest, and moved to exclude his statements on voluntariness grounds. Washington was only later deemed competent to stand trial. The court denied that motion, too.

We review de novo whether a defendant's Sixth Amendment right of confrontation has been violated. *People v Bruner*, 501 Mich 220, 226; 912 NW2d 514 (2018). Because the Confrontation Clause error was preserved by an appropriate objection, we must determine whether the beneficiary of any error has established that the error was harmless beyond a reasonable doubt. *People v Sammons*, 505 Mich 31, 56; 949 NW2d 36 (2020). This analysis requires us to assess "the probable effect of that testimony on the minds of an average jury." *Id*. (quotation marks and citation omitted). "Reversal is required if the average jury would have found the prosecution's case significantly less persuasive without the erroneously admitted testimony" of Officer Stockwell, and the introduction of the body armor. *Id*. (quotation marks and citation omitted). This analysis requires us to consider the remainder of the prosecution's case.

C. THE APPROPRIATE REMEDY

The prosecution has not demonstrated that the error in this case was harmless beyond a reasonable doubt. The primary evidence linking Washington to the body armor was provided by Stockwell's inadmissible testimony conveying Lavers' statements. Through Stockwell, the prosecution admitted the vest into evidence and connected it to Washington. Absent Stockwell's testimony regarding the substance of his "communications" with Lavers, the prosecution would have lacked any testimony that could serve as a foundation for the vest's admission, to establish the chain of custody, or to prove that a crime had been committed.

The additional evidence linking Washington to the body armor consisted of Washington's alleged jailhouse confession (overheard by an officer), and the recorded telephone conversation with his mother explaining that "James" gave him the vest and he "put it on" because he "was [in] fear for my life, they was threatening me." But without Stockwell's prohibited testimony, the prosecution would have been unable to introduce the vest into evidence. Given that evidentiary vacuum, Washington's statements would have been inadmissible under the corpus delicti rule.

"In Michigan, it has long been the rule that proof of the corpus delicti is required before the prosecution is allowed to introduce the inculpatory statements of an accused." *People v McMahan*, 451 Mich 543, 548; 548 NW2d 199 (1996). The "corpus delicti" rule originally applied only to homicide cases, but Michigan applies the rule to other crimes as well. *People v Cotton*, 191 Mich App 377, 384-387; 478 NW2d 681 (1991).

> In defining the concept of corpus delicti, Wigmore notes that an analysis of every crime reveals three components: (1) the occurrence of the specific injury or loss; (2) some person's criminality as the cause of the loss; and (3) the accused's identity as the perpetrator of the crime. In its strictest sense, the term "corpus delicti" refers only to the first of these elements. For example, the corpus delicti of homicide is the fact of death. However, most courts also have included the second element, someone's criminality. On the other hand, most courts have held that the accused's identity as the perpetrator of the crime is not an element of the corpus delicti. [*Id*. at 386.]

Without direct or circumstantial evidence that Washington possessed the vest, the prosecution had no evidence that any crime had been committed. Likely the prosecution was aware of this problem and questioned Stockwell regarding his "communications" with Lavers in an attempt to work around it. Regardless, we cannot conclude beyond a reasonable doubt that Washington would have been convicted had the inadmissible testimony been excluded.

We vacate Washington's conviction and remand for a new trial. We do not retain jurisdiction.

/s/ Elizabeth L. Gleicher
/s/ Sima G. Patel

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Before: GLEICHER, C.J., and MARKEY and PATEL, JJ.

MARKEY, J. (*dissenting*).

I would affirm defendant's jury-trial conviction of possession or use of body armor by a violent felon, MCL 750.227g. Accordingly, I respectfully dissent.

I. FACTUAL BACKGROUND

Defendant crossed the Blue Water Bridge from Port Huron, Michigan, into Canada without paying the required toll. The toll booth agent on duty at the time saw red clothing in the cabin of defendant's vehicle, which was a Ford pickup truck. While the gate was still open at the toll station for a van directly in front of defendant's truck, defendant raced forward and proceeded through the open gate. The toll booth agent immediately contacted her supervisor and reported the incident.

Several Canadian authorities quickly pursued defendant's truck. Officer Matt Lavers of the Canada Border Services Agency stopped and apprehended defendant. Officer Lavers observed and reported that defendant was wearing body armor in the form of a bulletproof vest under a red shirt. Officer Lavers then returned defendant to the American side of the bridge.

Officer Lavers turned defendant, his truck, and the bulletproof vest over to United States Customs and Border Protection Officer Paul Stockwell. Officer Lavers did not testify at trial. The focus of this appeal is on the following testimony by Officer Stockwell regarding his interactions with Officer Lavers:

> [*The Prosecutor*]: At some point did Officer Lavers from the Canadian services hand you any other evidence?

Officer Stockwell: Yes, he did.

[*The Prosecutor*]: What did he hand you?

* * *

Officer Stockwell: A body armor.

* * *

[*The Prosecutor*]: Now, without saying anything about what was said, the only question I have for you is were there communications between you and Officer Lavers?

Officer Stockwell: There were.

[*The Prosecutor*]: Okay. And . . . based on those communications you took custody of [defendant]?

Officer Stockwell: Yes, we did.

[*The Prosecutor*]: And you took possession of the body armor that was turned over at the same time?

Officer Stockwell: Yes, sir.

On cross-examination, Officer Stockwell acknowledged that defendant was not wearing the bulletproof vest when he took custody of defendant, that he never saw defendant wearing the body armor, that he did not witness the bulletproof vest being removed from defendant's person or possession, and that he had no direct personal knowledge that defendant had ever worn or possessed the vest.

Officer Stockwell transferred custody of defendant to Port Huron Police Officer Kyle Whitten. Officer Whitten then took defendant to the St. Clair County Jail. Officer Whitten testified that while at the jail, he "overheard the Defendant say that he was wearing the body armor because he was afraid people were going to kill him." Officer Whitten stated that he did not interview or interrogate defendant. Like Officer Stockwell, Officer Whitten conceded on cross-examination that he did not have any personal knowledge that defendant had worn or possessed the body armor.

Port Huron Police Officer Ernesto Fantin testified about a jailhouse recording of a phone call from defendant to his mother in which defendant confessed that "James" had given him the bulletproof vest and that he was wearing it when stopped by police because people were threatening his life. The trial transcript contains a verbatim reproduction of the phone conversation. Defendant took the stand in his own defense, and he testified that he did not make the statement attributed to him by Officer Whitten. Defendant otherwise indicated that he could not recall or remember whether he possessed or wore the bulletproof vest.

Defendant was charged with one count of possession or use of body armor by a violent felon[1] and one count of operating a vehicle with a suspended license, second offense, MCL 257.904. A nolle prosequi was entered with respect to the suspended-license charge. On the morning of the jury trial, defendant moved in limine to exclude evidence of the recorded jail phone call and evidence of the bulletproof vest. With respect to the bulletproof vest, defense counsel maintained that the only way the prosecution could establish an evidentiary foundation or the chain-of-custody relative to the bulletproof vest was through testimony that would violate the Confrontation Clause because Officer Lavers would not be testifying. The trial court denied the motion, but it precluded the prosecutor from eliciting testimony about any statements made by Officer Lavers, which, as indicated earlier, the prosecutor honored when examining Officer Stockwell. The jury found defendant guilty of possession or use of body armor by a violent felon. The trial court sentenced defendant to a year in jail. The court denied defendant's motion to vacate his conviction or grant a new trial. This appeal followed.

II. ANALYSIS

A. DEFENDANT'S APPELLATE ARGUMENTS

Defendant argues that the prosecution violated his Sixth Amendment confrontation rights when it introduced implied testimonial hearsay statements by Officer Lavers through the testimony of Officer Stockwell. Defendant contends that the plain inference arising from Officer Stockwell's testimony was that Officer Lavers had informed Officer Stockwell that defendant was caught in possession of or using the body armor. Defendant argues that the implied hearsay was offered for the truth of the matter asserted, that defendant had no opportunity to cross-examine Officer Lavers at a prior hearing, that the prosecution cannot demonstrate that the Confrontation Clause violation was harmless beyond a reasonable doubt, and that to the extent that defense counsel failed to properly preserve the issue, his performance was deficient and prejudicial. With regard to his analysis of why the purported error was not harmless, defendant maintains that without the challenged testimony implicitly showing that defendant had worn or possessed the bulletproof vest, the only evidence demonstrating that defendant did so were his confessions in front of Officer Whitten and to his mother, which would not suffice for conviction under the *corpus delicti* rule.

B. STANDARD OF REVIEW

We review for an abuse of discretion a trial court's decision to admit evidence. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). "When the decision regarding the admission of evidence involves a preliminary question of law, such as whether a statute or rule of evidence precludes admissibility of the evidence, the issue is reviewed de novo." *People v Washington*, 468 Mich 667, 670-671; 664 NW2d 203 (2003). And this Court reviews de novo the issue whether a defendant was denied his or her constitutional right to confront a complaining witness. *People v Benton*, 294 Mich App 191, 195; 817 NW2d 599 (2011).

[1] There was no dispute that defendant was properly characterized as a "violent felon" for purposes of the charged offense. A stipulation was entered recognizing defendant as a violent felon, and the jury was so instructed.

C. CONFRONTATION CLAUSE PRINCIPLES

Under the United States Constitution, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him[.]" US Const, Am VI. Similarly, under the Michigan Constitution, "[i]n every criminal prosecution, the accused shall have the right . . . to be confronted with the witnesses against him or her[.]" Const 1963, art 1, § 20. The Confrontation Clause bars the admission of out-of-court testimonial statements unless the declarant was unavailable to testify at trial and the defendant had a prior opportunity for cross-examination. *Crawford v Washington*, 541 US 36, 68; 124 S Ct 1354; 158 L Ed 2d 177 (2004); *People v Chambers*, 277 Mich App 1, 10; 742 NW2d 610 (2007). "[T]he Confrontation Clause does not bar the use of out-of-court testimonial statements for purposes other than establishing the truth of the matter asserted." *Chambers*, 277 Mich App at 10-11. In *People v Nunley*, 491 Mich 686, 697-698; 821 NW2d 642 (2012), our Supreme Court explained:

> The Confrontation Clause is "primarily a functional right" in which the right to confront and cross-examine witnesses is aimed at truth-seeking and promoting reliability in criminal trials. Functioning in this manner, the principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of ex parte examinations as evidence against the accused.
>
> The specific protections the Confrontation Clause provides apply only to statements used as substantive evidence. In particular, one of the core protections of the Confrontation Clause concerns hearsay evidence that is "testimonial" in nature. The United States Supreme Court has held that the introduction of out-of-court testimonial statements violates the Confrontation Clause; thus, out-of-court testimonial statements are inadmissible unless the declarant appears at trial or the defendant has had a previous opportunity to cross-examine the declarant. [Quotation marks and citation omitted.]

A statement is testimonial in nature when it was produced with the primary purpose of establishing or proving past events that were potentially relevant to a later criminal prosecution. *Davis v Washington*, 547 US 813, 822; 126 S Ct 2266; 165 L Ed 2d 224 (2006). Statements made by witnesses during interrogations by law enforcement officers are generally testimonial in nature because they are directed at establishing the facts of a past event in order to identify or provide evidence to convict the perpetrator. *Id.* at 826. A statement is testimonial in nature when made under circumstances that would lead an objective witness to reasonably believe that the statement would be available for later use at trial. *Crawford*, 541 US at 52.

D. DISCUSSION

In *People v Jones*, 228 Mich App 191, 207; 579 NW2d 82 (1998), this Court addressed the issue of "implied assertions" and observed:

> While a number of decisions over the years have regarded "implied" assertions as hearsay, we believe that the theory had a questionable origin, that it

> has never achieved general recognition in decided cases, that it is expressly negated by the modern rules of evidence, and that it is contrary to Michigan precedent.

After an exhaustive review of federal and Michigan caselaw, the *Jones* panel concluded its opinion by stating that "under the rule definition of hearsay, an 'implied assertion' is a contradiction in terms and a euphemism for declining to apply the rules as they are written." *Id.* at 225-226. Indeed, the rules of evidence make clear that "hearsay" refers to a "statement," MRE 801(c), in the form of "an oral or written assertion," MRE 801(a). This Court recently reaffirmed that "Michigan does not recognize the 'implied assertion' theory that has been adopted in some other jurisdictions." *People v Propp (On Remand)*, ___ Mich App ___, ___; ___ NW2d ___ (2022) (Docket No. 343255); slip op at 8. In my view, we are bound by this precedent under MCR 7.215(J)(1) even if the federal cases the majority cites are viewed as being persuasive.

Proceeding on the *assumption* that the prosecutor effectively introduced an oral statement by Officer Lavers that potentially triggered protection under the Confrontation Clause, I cannot conclude that the assertion was "testimonial in nature." Consequently, there was no confrontation infringement. If the implication or implied statement was that defendant had possessed or used the bulletproof vest, the statement was not produced *at the time it was made* for the primary purpose to establish or prove past events and to use it as evidence in a criminal prosecution in an effort to convict defendant at a later trial. *Davis*, 547 US at 822, 826. Rather, the purpose of the communication was simply to provide Officer Stockwell with the information necessary for Officer Stockwell to formally take defendant into custody from Canadian authorities and proceed with the charging process under Michigan law. The implied statement explained Officer Stockwell's actions and his involvement in the case, including taking control of the bulletproof vest.

Finally, even if Officer Stockwell's challenged testimony should not have been admitted, the Confrontation Clause violation or error was harmless beyond a reasonable doubt given the evidence of defendant's admissions that he was wearing the body armor. See *People v Shepherd*, 472 Mich 343, 348; 697 NW2d 144 (2005) (applying the harmless-beyond-a-reasonable-doubt standard to a Confrontation Clause error). The majority relies on the *corpus delicti* rule to conclude that the prosecution fails to demonstrate that any error was harmless beyond a reasonable doubt. "[T]he corpus delicti of a crime must be established by evidence independent of an accused's confession[,]" but "[t]his rule is limited . . . to admissions which are confessions, and not to admissions of fact which do not amount to confessions of guilt." *People v Rockwell*, 188 Mich App 405, 407; 470 NW2d 673 (1991). I would hold that defendant's statements that he put on the bulletproof vest constituted admissions of fact, but they did not amount to confessions of guilt to the charged crime.

In *People v Porter*, 269 Mich 284, 290; 257 NW 705 (1934), our Supreme Court discussed the differences between true confessions of guilt, which can implicate the *corpus delicti* rule, and mere admissions of fact that do not implicate the rule:

> Defendant does not distinguish between confessions and admissions of fact. If the fact admitted necessarily amounts to a confession of guilt, it is a confession. If, however, the fact admitted does not of itself show guilt, but needs proof of other

> facts, which are not admitted by the accused, in order to show guilt, it is not a confession, but an admission, and, therefore, is not within the range of cases cited.

A confession involves a direct acknowledgment of guilt or an acknowledgment of the truth of the crime for which a defendant has been charged, as distinguished from acts, admissions, and exculpatory statements. *Id.* An oral admission of an inculpatory fact from which a juror may infer guilt is not a confession if it falls short of being an acknowledgment of guilt. *Id.* at 291. And the admission to one of the essential elements of a criminal offense, but not all of the elements, does not constitute a confession. *Id.* A mere admission, which needs other facts to support a conviction, is not a confession and is admissible on the *corpus delicti*. *Id.*; see also *People v Schumacher*, 276 Mich App 165, 181; 740 NW2d 534 (2007) (if a defendant does not admit facts that are necessary to establish guilt, there is no confession).

I cannot conclude that defendant's admission to his mother and his admission overheard by Officer Whitten constituted direct acknowledgements of guilt to the offense of possession or use of body armor by a violent felon. I first note that with respect to the essential element of being a violent felon, defendant's statements did not reveal a concession or admission that he was a violent felon. See MCL 750.227g. Regardless, it is clear that defendant's statements were not intended to be confessions to the charged offense. Rather, defendant's statements plainly reflected expressions of or attempts at exculpation, at least in his mind. Although he admitted wearing the bulletproof vest, he claimed that he did so out of fear for his life based on death threats. Defendant's statements indicated that he was simply trying to protect or defend himself and acting out of duress and fear. These were not confessions of guilt to a crime.

In *Smith v United States*, 348 US 147, 152-153; 75 S Ct 194; 99 L Ed 192 (1954), the United States Supreme Court addressed the *corpus delicti* rule and its purposes, observing as follows:

> The general rule that an accused may not be convicted on his own uncorroborated confession has previously been recognized by this Court, and has been consistently applied in the lower federal courts and in the overwhelming majority of state courts. Its purpose is to prevent errors in convictions based upon untrue confessions alone; its foundation lies in a long history of judicial experience with confessions and in the realization that sound law enforcement requires police investigations which extend beyond the words of the accused. Confessions may be unreliable because they are coerced or induced, and although separate doctrines exclude involuntary confessions from consideration by the jury, further caution is warranted because the accused may be unable to establish the involuntary nature of his statements. Moreover, though a statement may not be involuntary within the meaning of this exclusionary rule, still its reliability may be suspect if it is extracted from one who is under the pressure of a police investigation—whose words may reflect the strain and confusion attending his predicament rather than a clear reflection of his past. Finally, the experience of the courts, the police and the medical profession recounts a number of false confessions voluntarily made. [Citations and quotation marks omitted.]

In this case, defendant's statements were not made to the police during interrogation, did not appear to be involuntary or made as a result of coercion, inducement, strain, or confusion, and were made under circumstances suggesting that they were true. Again, defendant here was giving perceived excuses for his conduct, and the statements were made to his mother on the phone and simply overheard in the other circumstance. I see no reason to invoke the *corpus delicti* rule to bar consideration of the admissions and reverse the conviction considering the purposes of the rule. And if the admissions were admissible and subject to consideration by the jury, the presumed error in admitting Officer Stockwell's testimony about Officer Lavers' implied assertions was most certainly harmless beyond a reasonable doubt.

In sum, I would affirm defendant's jury-trial conviction of possession or use of body armor by a violent felon. Accordingly, I dissent.

/s/ Jane E. Markey