STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant,	UNPUBLISHED June 29, 2010
v	No. 289933 Wayne Circuit Court
DEBORAH LEE, Defendant-Appellee.	LC No. 08-011750-01

Before: METER, P.J., and MURRAY and BECKERING, JJ.

PER CURIAM.

Defendant was charged with insurance fraud, MCL 500.4511(1), and making a false police report, MCL 750.411a(1)(a). The district court dismissed the charges at defendant's preliminary examination after concluding that the principal evidence linking defendant to the charged crimes was inadmissible. Plaintiff appealed to the circuit court, which affirmed the district court's decision. This Court thereafter granted plaintiff's application for leave to appeal. At issue on appeal is whether a note identifying defendant's license plate number, provided by an unavailable anonymous bystander, qualifies as testimonial such that it cannot be considered without violating the Confrontation Clause. Because we conclude that the note is not testimonial, we reverse and remand.

On February 25, 2007, just before 3:00 p.m., Laurette Seldon was involved in an accident with a hit-and-run vehicle at the intersection of Beaubien and Congress in Detroit. Seldon was only able to see the last two digits of the vehicle's license plate number as it left the scene. However, a bystander wrote down the complete license plate number, gave it to Seldon, and left the scene. The license plate number was registered to defendant's vehicle. The charges in this case arose after defendant filed a claim with her insurance company indicating that she had been involved in an accident at the intersection of Lafayette and Mt. Elliott at 5:30 p.m. on the same day; there was evidence that she had only been involved in one accident, that being the earlier accident with Seldon.

The district court dismissed the charges after determining that the bystander's note containing defendant's license plate number, although qualifying as a present-sense impression under MRE 803(1), was nonetheless testimonial in nature and, therefore, inadmissible under *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004), and *Davis v Washington*, 547 US 813; 126 S Ct 2266; 165 L Ed 2d 224 (2006), because the bystander could not be identified and there was no way for defendant to confront him.

Generally, issues regarding the admission of evidence are reviewed for an abuse of discretion. *People v Jambor (On Remand)*, 273 Mich App 477, 481; 729 NW2d 569 (2007). However, where admissibility is based on the construction of a constitutional provision, the lower court's decision is subject to de novo review. *Id*.

In all criminal trials, the defendant has a right to be confronted by witnesses against him. US Const, Am VI; Const 1963, art 1, § 20. "The main and essential purpose of confrontation is to secure for the opponent the opportunity of cross-examination." *Davis v Alaska*, 415 US 308, 315-316; 94 S Ct 1105; 39 L Ed 2d 347 (1974) (internal citation, quotation marks, and emphasis omitted).

In *Crawford*, 541 US at 68, the Court held that testimonial statements by a witness who does not appear at trial are not admissible unless the witness is unavailable and the defendant had a prior opportunity to cross-examine the witness. The Court defined "testimony" as "[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact," and noted that "[a]n accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not." *Id*. at 51 (internal citation and quotation marks omitted). The Court declined "to spell out a comprehensive definition of 'testimonial,'" but instead identified three "formulations of [the] core class of testimonial statements." *Id*. at 51-52, 68. These are

> [(1)] *ex parte* in-court testimony or its functional equivalent – that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine or similar pretrial statements that declarants would reasonably expect to be used prosecutorially[; (2)] extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions[; and (3)] 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. [*Id*. at 51-52 (internal citations and quotation marks omitted).]

The Court held that testimonial statements include "prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and . . . police interrogations." *Id*. at 68. It held that these were "the modern practices with closest kinship to the abuses at which the Confrontation Clause was directed." *Id*.

In *Davis*, 547 US at 825-829, the Court held that the rule in *Crawford* was not limited to formal testimony and could potentially extend to statements made during informal police interrogation, such as questioning during a 911 call. The relevant consideration is whether the questions were intended to help the police respond to an ongoing emergency or whether the questions were intended to obtain facts regarding past events "potentially relevant to later criminal prosecution." *Id*. at 822, 827-829. The *Davis* Court indicated that its holding referred to questioning because the statements at issue were obtained through questioning, but the Court specifically noted that "[t]his is not to imply . . . that statements made in the absence of any interrogation are necessarily nontestimonial." *Id*. at 822 n 1. However, the Court expressly declined "to consider whether and when statements made to someone other than law enforcement personnel are 'testimonial.'" *Id*. at 823 n 2.

More recently, in *Melendez-Diaz v Massachusetts*, ___ US ___; 129 S Ct 2527, 2531-2532; 174 L Ed 2d 314 (2009), the Court held that certain forensic scientists' "certificates of analysis" regarding the chemical analysis of a suspected controlled substance were testimonial under *Crawford*. The Court held that the certificates came within the class of testimonial statements described in *Crawford* because they were essentially affidavits, which, by their nature, are solemn declarations made for the purpose of establishing or proving a fact (in *Melendez-Diaz*, the "fact" in question was that the substance was cocaine). *Id*. at 2532. The certificates 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 . . . ." *Id*. at 2532 (internal citations and quotation marks omitted). The Court again noted that volunteered testimony is not exempt from Confrontation Clause requirements, but then noted that the testimony at issue was not strictly volunteered because it had been presented "in response to a police request . . . ." *Id*. at 2535.

In the context of volunteered statements, this Court has held that a crime victim's unsolicited statements to her friends, relatives, and coworkers were not testimonial because "[n]one of the witnesses to whom the victim made her declarations was a government official, and there is nothing to indicate that the statements were made with the intent to preserve evidence for later possible use in court." *People v Bauder*, 269 Mich App 174, 182; 712 NW2d 506 (2005). Conversely, a confidential informant's unsolicited statement to his law enforcement contact is considered testimonial. *People v Chambers*, 277 Mich App 1, 10; 742 NW2d 610 (2007). We find persuasive the decision of one state court that held that a bystander's note containing information about a crime, voluntarily given to the victim, was not testimonial because

> [t]he note was intended for the victim, and the use to which it would be put was solely at the victim's discretion. It was not solicited by or given to the police by the declarant, whose only apparent motive was helping the victim ascertain the identity of the thief. [*State v Chavez*, 144 NM 849, 851-852; 192 P3d 1226 (2008).]

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." *Bauder*, 269 Mich App at 182. 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.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Patrick M. Meter
/s/ Christopher M. Murray
/s/ Jane M. Beckering