STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee, V ALVIN C. WALKER, JR., Defendant-Appellant.	FOR PUBLICATION March 24, 2005 9:00 a.m. No. 250006 Oakland Circuit Court LC No. 2002-187306-FH Official Reported Version

Before: Neff, P.J., and Cooper and R.S. Gribbs*, JJ.

COOPER, J. (*dissenting*).

I respectfully dissent from the majority opinion of my colleagues. I would find that the admission of the complainant's several statements to her neighbor and police officers violated defendant's Sixth Amendment right to confront the witnesses against him. As the remaining evidence against defendant was weak at best, I would vacate defendant's convictions and sentences.

I cannot agree with the majority's conclusion that the trial court properly admitted testimony regarding the complainant's statements as excited utterances under MRE 803(2). These statements are testimonial hearsay and defendant had no opportunity to cross-examine the complainant. Accordingly, the statements are inadmissible, pursuant to *Crawford v Washington*.[1] 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 there was no prior opportunity for cross-examination.[2] "The *Crawford* Court intentionally '[left] for another day any effort to spell out a comprehensive definition of

[1] *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004). I do not agree with the majority that we must treat this challenge as unpreserved. *Crawford* had yet to be determined at the time of defendant's trial and, therefore, could not be raised below.

[2] *Id.* at 61-62, 68-69.

"testimonial.""[3] However, the Court did provide guidance in determining whether a statement is testimonial:

> The text of the Confrontation Clause . . . applies to "witnesses" against the accused—in other words, those who "bear testimony." 1 N. Webster, An American Dictionary of the English Language (1828). "Testimony," in turn, is typically "[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact." *Ibid.* An 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. The constitutional text, like the history underlying the common-law right of confrontation, thus reflects an especially acute concern with a specific type of out-of-court statement.
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> Various formulations of this core class of "testimonial" statements exist: "*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," Brief for Petitioner 23; "extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions," *White v. Illinois*, 502 U.S. 346, 365, 112 S.Ct. 736, 116 L.Ed.2d 848 (1992) (Thomas, J., joined by Scalia, J., concurring in part and concurring in judgment); "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," Brief for National Association of Criminal Defense Lawyers et al. as *Amici Curiae* 3. These formulations all share a common nucleus and then define the Clause's coverage at various levels of abstraction around it. Regardless of the precise articulation, some statements qualify under any definition—for example, *ex parte* testimony at a preliminary hearing.[4]

The majority reasons that the complainant's statements were nontestimonial as they were "spontaneous." They assert that, as the complainant was agitated, she did not intend to bear testimony against defendant. However, this is an improper analysis to determine whether the complainant's statements were testimonial in nature; it is merely a reliability analysis in disguise. Determining whether a statement is testimonial in nature based on the declarant's state of mind is as amorphous as the reliability test of *Ohio v Roberts*,[5] which was partially abrogated by the

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[3] *People v Shepherd*, 263 Mich App 665, 674; 689 NW2d 721 (2004), quoting *Crawford*, *supra* at 68.

[4] *Crawford*, *supra* at 51-52.

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

Crawford Court.[6] Furthermore, the majority's specific determination that a "spontaneous" statement is rendered nontestimonial was rejected in *Crawford*.[7]

The majority ignores *Crawford* by allowing a hearsay exception to trump a defendant's constitutional right of confrontation. The *Crawford* Court clearly intended that the Sixth Amendment right of confrontation would take precedence over hearsay exceptions where testimonial statements are involved. The *Crawford* Court noted that, historically, "there is scant evidence that exceptions were invoked to admit *testimonial* statements against the accused in a *criminal* case."[8] The one hearsay exception under which testimonial statements could possibly be admitted is the dying declaration.[9] The hearsay exceptions allowing for the admission of nontestimonial statements do not extend to testimonial statements. The "[i]nvolvement of government officers in the production of testimony with an eye toward trial presents unique potential for prosecutorial abuse . . . . *This consideration does not evaporate when testimony happens to fall within some broad, modern hearsay exception, even if that exception might be justifiable in other circumstances*."[10] The intent of the United States Supreme Court is plain—evidentiary rules cannot be used to violate a defendant's constitutional right to confront the witnesses against him.[11] However, this is exactly what the majority opinion allows.

The complainant's statements to the police officers and her written statement dictated to her neighbor are clearly inadmissible testimonial hearsay under *Crawford*. Regardless of the complainant's state of mind, it would be evident to any reasonable person that her written and verbal statements to police officers accusing defendant of abuse would be used to prosecute defendant. The complainant not only recounted her story to the police officers, both verbally and in writing, but she also allowed pictures to be taken of her injuries and took the officers to her home to inspect the alleged crime scene. Her statements were clearly taken by the officers as part of their investigatory function, a fact which would have been obvious to the complainant. Therefore, the statements were clearly inadmissible testimonial hearsay.[12]

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[6] *Crawford*, *supra* at 68-69.

[7] See *id.* at 58 n 8 (criticizing a prior opinion regarding the exception for spontaneous declarations as "[i]t is questionable whether testimonial statements would ever have been admissible on that ground in 1791 . . .").

[8] *Id.* at 56 (emphasis in original).

[9] *Id.* at 56 n 6.

[10] *Id.* at 56 n 7 (emphasis added).

[11] The *Crawford* Court made this strong assertion with regard to the federal rules of evidence. The federal rules are a congressional act and, therefore, have more force than the Michigan rules of evidence. Our mere court rules are promulgated by four justices of the Michigan Supreme Court, not by the elected legislative body. See *People v Stevens*, 461 Mich 655, 666 n 10; 610 NW2d 881 (2000).

[12] *Crawford*, *supra* at 53.

I would also find that the complainant's statements to her neighbor are inadmissible testimonial hearsay. In *United States v Cromer*,[13] the Sixth Circuit provided a more comprehensive definition of "testimonial."[14] In *Cromer*, the Sixth Circuit adopted the definition of "testimonial" proposed by Professor Richard Friedman of the University of Michigan Law School:

> Professor Friedman . . . urges a broader definition of "testimonial" that would include any statement "made in circumstances in which a reasonable person would realize that it likely would be used in investigation or prosecution of a crime." . . . Based on his proposed definition, Friedman offers five rules of thumb:
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> "A statement made knowingly to the authorities that describes criminal activity is almost always testimonial. A statement made by a person claiming to be the victim of a crime and describing the crime is usually testimonial, whether made to the authorities or not. If, in the case of a crime committed over a short period of time, a statement is made before the crime is committed, it almost certainly is not testimonial. A statement made by one participant in a criminal enterprise to another, intended to further the enterprise, is not testimonial. And neither is a statement made in the course of going about one's ordinary business, made before the criminal act has occurred or with no recognition that it relates to criminal activity."
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> We find the definition of "testimonial" proposed by Professor Friedman to be both well-reasoned and wholly consistent with the purpose behind the Confrontation Clause. . . .
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> . . . As explained by Professor Friedman, . . . the broader definition "is necessary to ensure that the adjudicative system does not effectively invite witnesses to testify in informal ways that avoid confrontation."[15]

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

[14] Although decisions of lower federal courts are not binding on this Court, they are persuasive. *Abela v Gen Motors Corp*, 469 Mich 603, 606-607; 677 NW2d 325 (2004). An opinion of the Sixth Circuit Court of Appeals is especially persuasive where, as here, it interprets a federal constitutional right for which the Supreme Court has provided minimal guidance. See, e.g., *Abdur-Ra'oof v Dep't of Corrections (On Remand)*, 221 Mich App 585, 588-589; 562 NW2d 251 (1997).

[15] *Cromer*, *supra* at 673-674, quoting Friedman & McCormack, *Dial-in testimony*, 150 U Pa L R 1171, 1240-1241 (2002), and Friedman, *Confrontation: The search for basic principles*, 86 Geo L J 1011, 1042-1043 (1998). In formulating its limited definition of "testimonial" in *Crawford*,

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Based upon the guidance provided in *Crawford* and the definition of "testimonial" adopted in *Cromer*, I would find that the complainant's statements describing the previous evening's events to her neighbor are inadmissible testimonial hearsay. The complainant told her neighbor about the alleged assault after securing her neighbor's cooperation in contacting the police. It is clear that the complainant intended to "bear testimony against the accused" when she made these statements as "a reasonable person in the declarant's position would anticipate [her] statement being used against the accused in investigating and prosecuting the crime."[16] Certainly the officers responding to the scene would ask the homeowner to give her version of the events, which would include the narrative given by the complainant. Accordingly, I would find that the trial court abused its discretion in admitting these statements.

The majority rejects this reasoning, which is based upon case law of the Sixth Circuit Court of Appeals. The majority correctly notes that decisions of lower federal courts are not binding on this Court, but then proceeds to pick and choose among case law of the various circuits to reach its desired result. The majority first relies on the Third Circuit's decision in *United States v Hendricks*[17] for the sole purpose of noting the "struggle" of defining "testimonial." However, the court in *Hendricks* did not limit itself to a narrow definition of "testimonial." It analyzed each challenged statement under even the broadest definition suggested in *Crawford* and affirmed the defendant's convictions on a factual distinction.[18] The majority's reliance on *Leavitt v Arave*[19] and *Mungo v Duncan*[20] is also misplaced. In *Leavitt*, the Ninth Circuit considered the reliability of the challenged statements before considering whether they were testimonial in nature.[21] *Crawford* requires a court to consider a defendant's constitutional right of confrontation before reliability. Although the court in *Leavitt* did adopt the narrowest definition of "testimonial" provided in *Crawford*, it did so without any analysis or discussion. The court's limited treatment of a major constitutional issue was relegated to a footnote.[22] Similarly, the Second Circuit in *Mungo* declined to even apply *Crawford* to the challenged statements, finding that *Crawford* did not have retroactive effect.[23] The court's discussion, which was specifically referred to as dicta, was again relegated to a footnote.[24] If we are to look to these federal cases for their persuasive value, reliance on *Cromer* is certainly more appropriate. Unlike *Cromer*, these other cases give a perfunctory review of the issue before

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the United States Supreme Court relied on Professor Friedman's amicus curiae brief and academic works regarding the Confrontation Clause. See *Crawford*, *supra* at 61.

[16] *Cromer*, *supra* at 675.

[17] *United States v Hendricks*, 395 F3d 173 (CA 3, 2005).

[18] *Id.* at 182-183 & n 9.

[19] *Leavitt v Arave*, 383 F3d 809 (CA 9, 2004).

[20] *Mungo v Duncan*, 393 F3d 327 (CA 2, 2004).

[21] *Leavitt*, *supra* at 830.

[22] *Id.* at 830 n 22.

[23] *Mungo*, *supra* at 335-336.

[24] *Id.* at 336 n 9.

defining "testimonial," and give the reliability of statements precedence over the constitutional rights of the accused in violation of *Crawford*.

Absent the complainant's statements regarding the alleged assault, there is insufficient evidence to sustain defendant's convictions. The police officers and neighbor observed bruising on the complainant's buttocks, the back of her neck, and her right eye. The complainant had difficulty standing upright and descending to sit in a chair, and was walking "gingerly." Without the complainant's statements, however, it is impossible to ascertain whether these injuries resulted from the alleged assault, her alleged jump from a second-story window, or any other factual scenario. Inside defendant's master bedroom, police officers recovered a handgun near the headboard and three white sticks from the bed. Again, without the complainant's statements, there is no evidence tying these objects to any assault.[25] As the complainant's statements are necessary evidence to support defendant's convictions, I would find that his convictions and sentences must be vacated.

/s/ Jessica R. Cooper

[25] I would further note that the complainant left her young son in the home when she claimed to have escaped to her neighbor's house. When defendant was arrested in his vehicle near the home, the complainant's son was with him.