STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

TERRY NUNLEY,

Defendant-Appellee.

FOR PUBLICATION
October 13, 2011

No. 302181
Washtenaw Circuit Court
LC No. 10-001573-AR

Before: SAAD, P.J., and JANSEN and DONOFRIO, JJ.

SAAD, P.J. *(dissenting)*.

I. INTRODUCTION

I respectfully dissent because the certificate of mailing is nontestimonial. Accordingly, I would reverse the circuit court's order.

The majority incorrectly concludes that because proof of notice is an element of Driving While License Suspended (DWLS), the certificate of mailing produced by the Secretary of State is testimonial. This analysis is flawed because it does not address the context in which the certificate was created, and it reasons backwards to find that a statement must be testimonial if it is an element of the crime. In *Davis v Washington*, 547 US 813; 126 S Ct 2266; 165 L Ed 2d 224 (2006), the United States Supreme Court held that consideration of context is critical in determining whether evidence is testimonial. Here, the context in which the certificate of mailing was created demonstrates that it was made before the commission of a crime, and thus independently from any investigatory or prosecutorial purpose. Further, it is not the rule as articulated in *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004) and its progeny that evidence is testimonial merely because it constitutes an element of a crime. Moreover, to hold that the certificate of mailing here is testimonial runs contrary to the purpose of the confrontation clause—to ensure the reliability of evidence through vigorous cross-examination—because cross-examination here would elicit little or nothing of value to ensure that reliability.

II. ANALYSIS

A. TESTIMONIAL EVIDENCE UNDER *DAVIS*

I disagree with the majority's conclusion that because proof of notice is an element of DWLS, the disputed certificate of mailing is testimonial. Simply because a piece of evidence is an element of a crime does not automatically render it testimonial. As our Supreme Court explained in *Davis*, it is the context surrounding the creation of evidence that determines whether that evidence is testimonial—not whether it proves an element of the crime charged.

Davis involved a domestic dispute between defendant Davis and his former girlfriend, Michelle McCottry. *Davis*, 547 US at 817. Davis violated a no-contact order and assaulted McCottry. *Id*. at 818. McCottry called 911 while the incident was still in progress, and, at the prompting of the 911 operator, gave Davis's name and a description of the assault over the telephone. *Id.* at 817. The prosecutor used a recording of the 911 call at trial. *Id.* at 819. It was presumably an important piece of evidence in leading to Davis's conviction because the "state's only witnesses in the case were the two police officers who responded to the 911 call" and McCottry did not testify at trial. *Id.* at 818-819. Davis took the position that the prosecution's use of the recorded 911 call violated his constitutional rights, because the recording was testimonial and he did not cross examine McCottry. *Id.* at 813.

The Supreme Court rejected Davis's argument, and held that the 911 recording was nontestimonial. *Id.* at 822. In explaining its decision, the Court stressed the context in which the 911 call was made, and contrasted its provenance with that of a truly testimonial statement:

> The question before us in *Davis,* then, is whether, objectively considered, the interrogation that took place in the course of the 911 call produced testimonial statements. When we said in *Crawford,* that "interrogations by law enforcement officers fall squarely within [the] class" of testimonial hearsay, we had immediately in mind (for that was the case before us) interrogations solely directed at establishing the facts of a past crime, in order to identify (or provide evidence to convict) the perpetrator. The product of such interrogation, whether reduced to a writing signed by the declarant or embedded in the memory (and perhaps notes) of the interrogating officer, is testimonial. It is, in the terms of the 1828 American dictionary quoted in *Crawford*, "'[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact.'" A 911 call, on the other hand, and at least the initial interrogation conducted in connection with a 911 call, is ordinarily not designed primarily to "establis[h] or prov[e]" some past fact, but to describe current circumstances requiring police assistance. [*Id.* at 826-27 (citations omitted.)]

In other words, in the 911 recording, McCottry was "speaking about events *as they were actually happening*, rather than describ[ing] past events." *Id.* at 827 (emphasis in original; citations omitted). Such a situation, the Court ruled, is entirely different than the police interrogation at issue in *Crawford*, which "took place hours after the events [the speaker] described had occurred." *Id.* The Court was careful to note that McCottry faced "an ongoing emergency," and that the "circumstances of [her] interrogation objectively indicate its primary purpose was to enable police assistance to meet an ongoing emergency. She simply was not acting as a *witness*; she was not *testifying*." *Id.* at 828 (emphasis in original). Thus—despite its critical importance in securing Davis's conviction—the 911 call was not testimonial.

Davis, then, stands for two propositions regarding the classification of evidence as testimonial or nontestimonial. First, the context in which the evidence is created is crucial in determining whether that evidence is testimonial or nontestimonial. Second, it is inconsequential for the purposes of a testimonial vs. nontestimonial determination whether the evidence in question is essential to proving that defendant committed the crime with which he is charged. Accordingly, we must examine the context of the evidence at issue here—the context in which the certificate of mailing was created—to accurately determine whether or not that certificate is testimonial or nontestimonial.

B. THE CERTIFICATE OF MAILING

As the majority observes, the certificate of mailing at issue here was created pursuant to MCL 257.212, which outlines the procedures used in mailing notices of license status to their recipients. MCL 257.212 fits in the wider statutory framework created by MCL 257.204a(1), which governs the maintenance of driving records in the state of Michigan.[1] And, as the majority points out, a notice sent in compliance with MCL 257.212 is a necessary element of DWLS, criminalized by MCL 257.904(1).

The majority makes much of this link between the certificate of notice and MCL 257.904(1), asserting that the former's presence in the latter's elements automatically makes the former testimonial. The "primary purpose of the certificate," the Court states, "'is to establish or prove past events potentially relevant to later criminal prosecution.'" The quoted passage is from *Davis*, but it is used out of context. The sentence the majority cites applies only to statements made during police interrogations—not documents produced by the Secretary of State, or evidence in general. The full quote reads:

> Without attempting to produce an exhaustive classification of all conceivable statements . . . as either testimonial or nontestimonial, it suffices to decide the present cases to hold as follows: *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*, 547 US at 822 (emphasis added).

While the majority is certainly correct that the certificate of notice is an essential piece of evidence in proving defendant's guilt, it does not follow that this renders the proof of mailing

[1] Note the primarily administrative—not criminal or prosecutorial—nature of MCL 257.204a(1). Among other things, the statute requires the Secretary of State to "create and maintain a computerized central file that provides an individual historical driving record for a person . . ."—a central file, hence, that includes every driver (criminal and non-criminal alike) in the state of Michigan.

testimonial. As noted, the majority's analysis also ignores the context in which the evidence is made. At the time the certificate of mailing was created, no crime had taken place, nor was there an ongoing criminal investigation involving the defendant. Thus, it was impossible for F. Beuter, or an "objective witness," "reasonably to believe" that the certificate of mailing, at the time of its creation, "would be available for use at a later trial." *Crawford*, 541 US at 52.

The Secretary of State suspended Nunley's license effective June 11, 2009. The corresponding certificate of mailing is dated June 22, 2009. Nunley was cited for DWLS on September 9, 2009. Thus, Nunley's "driving record was created *prior* to the events leading up to his criminal prosecution." *State of Iowa v Shipley*, 757 NW2d 228, 237 (2008) (emphasis in original)[2]. The certificate of mailing "would exist even if there had been no subsequent criminal prosecution." *Id.* Indeed, it predated the event that led to Nunley's citation by over two months. It strains credulity to suggest that the certificate 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," because Nunley had not committed a crime, and F. Beuter, when he certified the mailing, had no reason to expect that Nunley would commit a crime. *Crawford*, 541 US at 52. Beuter, or any other state employees who create certificates of mailing, "cannot be considered witnesses against [Nunley] when no prosecution existed at the time of data entry." *Shipley*, 757 NW2d at 237. Beuter would likely suspect that the certificate of notice is just that—a certificate of notice, certifying a warning to encourage defendant to comply with the law—not a piece of evidence for use in a hypothetical trial.[3] As such, the certificate of mailing was "created under

[2] Courts in other states have been careful to take stock of this temporal distinction in deciding whether evidence is testimonial. In addition to *Shipley*, see *State v Vonderharr*, 733 NW2d 847, 852 (Minn App, 2007) (contrasting certificates of laboratory analysis prepared exclusively for prosecutorial use with state-created driving records: "Unlike the laboratory report, Vonderharr's DPS records were not prepared for the purpose of prosecuting Vonderharr. The records were produced before Vonderharr was charged and even before the incident that lead to him being charged occurred."); *People v Espinoza*, 195 P3d 1122, 1127 (Colo App, 2008) (holding a proof of notice of license revocation nontestimonial: "Although an objective person who prepared such a proof of service might reasonably believe it would be available in the event of a later traffic violation, we conclude that this possibility does not make the document testimonial where, as here, the document served a routine administrative function and was created before the charged crime occurred."); and *State v Dukes*, 174 P3d 914, 917-18 (Kan App, 2008) (ruling that a driving record is nontestimonial, because the state is statutorily required to create and maintain driving records regardless of whether they become relevant to a later criminal investigation).

[3] Indeed, the notice itself (which defendant admits receiving) contains a large header stating "WARNING – DO NOT DRIVE," suggesting that the purpose of the notice (and its accompanying certification) is to help the suspended license-holder comply with the law and *avoid* any ensuing consequences, not to serve as a piece of evidence should the suspended license-holder disregard the notice and break the law. The hundreds (or thousands) of such certificates of mailing the Secretary of State produces each month are certainly not all used in criminal trials—in fact, it is more probable that the vast majority of certificates are never used as

conditions far removed from the inquisitorial investigative function—the primary evil that *Crawford* was designed to avoid." *Id.* at 238. Therefore, on the basis of the context in which it was created, the certificate of mailing is nontestimonial.

C. COMPARISON TO OTHER CONFRONTATION CLAUSE CASES

In *Crawford*, *Davis*, *People v Lonsby*, 268 Mich App 375; 707 NW2d 610 (2005) and *Melendez-Diaz v Massachusetts*, ___ US ___; 129 S Ct 2527; 174 L Ed 2d 314 (2009), the statements, affidavits, and laboratory certificates at issue were made *after* the alleged commission of a crime, as part of ongoing criminal investigations of the defendants.[4] The Courts in each case found the "statements" to be testimonial because they 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." *Crawford*, 541 US at 52. In other words, at the time the evidence in question was created, the defendants in *Crawford*, *Davis*, *Lonsby*, and *Melendez-Diaz* were already identified as suspects by the criminal justice system. For that reason, that evidence—created after the commission of the crime, with an express prosecutorial purpose—was testimonial. And, accordingly, the defendants in those cases had the right to confront and cross-examine the individuals who produced the very evidence used to prove the crime.

Crawford and its progeny robustly defended the right of confrontation for good reason—the "crucible of cross-examination" is essential to assessing the reliability of evidence. *Crawford,* 541 US at 61. "The Clause thus reflects a judgment, not only about the desirability of reliable evidence (a point on which there could be little dissent), but about how reliability can best be determined." *Id.* The confrontation clause, then, is not a mere formality that serves "symbolic goals"—instead, "'the right to confront and to cross-examine witnesses is primarily a functional right that promotes reliability in criminal trials.'" *People v Fackelman*, 489 Mich 515, 528; ___ NW2d ___ (2011), quoting *Lee v Illinois*, 476 US 530, 540; 106 S Ct 2056; 90 L Ed 2d 514 (1986).

Melendez-Diaz explains why confrontation ensures the reliability of evidence at trial, in the context of forensic analysts responsible for testing and assessing evidence against criminal defendants. First, "neutral scientific testing" is not necessarily neutral or reliable: "Forensic evidence is not uniquely immune from the risk of manipulation." *Melendez-Diaz*, 129 S Ct at 2536. A "forensic analyst responding to a request from a law-enforcement official may feel pressure—or have an incentive—to alter the evidence in a manner favorable to the prosecution."

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evidence at all, as the recipients of the suspended-license notices comply with the law and do not drive—unlike defendant here.

[4] See *Crawford*, 541 US at 38–40 (involving a witness's response to a police interrogation regarding a stabbing); *Davis*, 547 US at 822 (holding that statements made to law-enforcement personnel during a 911 call immediately after the commission of a crime were nontestimonial); *Lonsby*, 268 Mich App at 380–381 (concerning a lab report conducted after defendant allegedly committed sexual assault); and *Melendez-Diaz*, 129 S Ct at 2530 (addressing a forensic analysis of substance in defendant's possession suspected to be cocaine).

Id.[5] Confrontation, through rigorous cross-examination, can help expose such fraud if it exists. Second, "confrontation is designed to weed out not only the fraudulent analyst, but the incompetent one as well." *Id.*[6] Like all expert witnesses, "an analyst's lack of proper training or deficiency in judgment may be disclosed in cross-examination." *Id.* Third, confrontation provides the defendant a chance to question the technician's methodology. *Id.* at 2537–2538.[7]

None of these concerns are present here. The risks of inexperience or incompetence inherent in the forensic analyst's laboratory are not found at the desk of a driving-record administrator. See *State of Maine v Murphy*, 991 A2d 35, 42 (2010) ("The certificates of the Secretary of State, at issue here . . . do not involve expert analysis or opinion."). The certificates are not made by highly trained experts, who must constantly retrain and refresh their methodologies. If "confrontation is designed to weed out not only the fraudulent analyst, but the incompetent one as well," cross-examination will do no such weeding here, as there is little, if any, room for fraud or incompetence in creating certificates of mailing. *Melendez-Diaz*, 129 S Ct at 2536.

Further, there is no risk of bias in the certification and dissemination of hundreds of thousands of state administrative documents, as the state employee charged with that task reports "neutral information"—namely, the fact that a notice of suspended license was sent to a suspended-license holder. *Murphy*, 991 A2d at 42. Here, that information was all the more neutral because the certificate of mailing was made long before the commission of a crime—and with no advance knowledge that such a crime would take place. At the time F. Beuter created the so called "testimonial" statement, defendant was simply a record—he was not in the criminal-justice system, as he had committed no crime and thus could not be charged with one. Accordingly, F. Beuter, and the work product that he certified, cannot be considered a witness against Nunley. See *Shipley*, 757 NW2d at 228.

For these reasons, the cross-examination of F. Beuter or his colleagues does not serve the fundamental purpose of the confrontation clause: to serve as a vehicle to advance the truth and promote reliability at criminal trials. *Fackelman*, 489 Mich at 528.

D. PRACTICAL EFFECTS OF MAJORITY OPINION

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[5] *See* also *Lonsby*, 268 Mich App at 391 ("[T]he State Police crime lab is an arm of law enforcement and the scientists' written analyses are regularly prepared for and introduced in court.").

[6] *See* also *Lonsby*, 268 Mich App at 392 ("Moreover, the evidence at issue was based on [the analyst's] subjective observations and analytic standards that established a fact critical to proving the alleged offense.").

[7] *See* also *Lonsby*, 268 Mich App at 392 ("Because the evidence was introduced through the testimony of Woodford [the analyst's superior], who had no firsthand knowledge about Jackson's [the analyst] observations or analysis of the physical evidence, defendant was unable, through the crucible of cross-examination, to challenge the objectivity of Jackson and the accuracy of her observations and methodology.").

Moreover, if called to testify, it is highly unlikely that an administrative employee such as F. Beuter would be able to identify a specific recipient of his mailing. Yet, the majority's holding—classifying an administrative document from the Secretary of State as testimonial—will compel the prosecutor to produce such administrative employees from Lansing at every suspended-license trial in the state. Considering the volume of notices and other documents produced by the Secretary of State's office, a state employee cannot conceivably remember signing and certifying a particular notice. The Secretary of State presumably creates identical certificates for any other driver whose license is suspended for any number of reasons, which likely amounts to hundreds of thousands of certificates a year. And, as discussed, there is almost no room for bias or fraud on the employee's part—when he makes a certificate of mailing, the hypothetical defendant has not yet committed any crime. If the hypothetical defendant becomes real, the state employee's testimony at trial will reveal nothing, much less offer a substantial benefit to the defendant. Calling such a witness for cross-examination would truly be a "hollow formality" and a waste of judicial resources. *Bullcoming v New Mexico*, ___ US ___; 131 S Ct 2705, 2716; 180 L Ed 2d 610 (2011).

III. CONCLUSION

For the foregoing reasons, I would reverse the ruling of the circuit court, hold that the Secretary of State's certificate of notification is nontestimonial, and remand the case for further proceedings.

/s/ Henry William Saad