STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant,	UNPUBLISHED December 14, 2006
v	No. 263531 Schoolcraft Circuit Court
CURTIS LEE MARTIN, Defendant-Appellee.	LC No. 05-006434-FH

Before: Murphy, P.J., and Smolenski and Kelly, JJ.

PER CURIAM.

Plaintiff appeals by leave granted from the circuit court's order reversing the district court's decision to bind defendant over for trial on a charge of domestic violence, third offense, MCL 750.81(4). We reverse and remand.

Defendant was charged with assaulting his wife. At issue is the admissibility of statements made by complainant recounting the circumstances of the assault to her landlord, who was also her neighbor, and to an investigating officer shortly after the assault had occurred. At the preliminary examination, complainant's landlord testified that she heard loud voices and "scuffling" from upstairs where defendant and complainant resided. Complainant came downstairs and entered her apartment. Complainant was crying, and was trembling and upset. Complainant sat in a chair, and "right away" stated that defendant had scraped or scratched her with a comb. The landlord saw that complainant had sustained an injury to her arm.[1] Complainant went back upstairs, and when she returned, defendant followed her. Defendant was visibly intoxicated. The landlord testified that several days later, she heard defendant tell complainant to make certain when they came to court that she stated that they were just drunk and arguing.

A police officer responded to a request for assistance shortly after the incident. He noted that complainant appeared very upset. He asked her to describe what had happened. She explained how defendant had assaulted her. The interview took approximately 15 minutes. The

[1] She also testified that she had seen a previous injury to complainant's nose. Complainant said that defendant had "backhanded" her in the face.

officer prepared a report and photographed complainant's arm as well as the previous injury to her nose.

The district court bound defendant over for trial on a charge of domestic violence, third offense. The prosecutor filed a notice of sentence enhancement charging defendant as a third habitual offender, MCL 769.12, in light of defendant's two prior convictions of domestic assault. The prosecutor filed a motion in limine with the circuit court to admit the testimony of the landlord and the officer regarding complainant's statements pursuant to MCR 803(2). The circuit court determined that the testimony was admissible under MRE 803(2), but that its admission would violate defendant's Sixth Amendment right to confrontation under *People v Crawford*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004), because complainant likely would be unable to testify at trial.[2] The trial court treated the matter as a defense motion to quash the bindover, granted the motion, and remanded the case to the district court without dismissing the charge. The trial court also granted the prosecution's motion for a stay pending appeal.

We review a circuit court's decision to grant or deny a motion to quash an information de novo to determine if the district court abused its discretion in binding over a defendant for trial. *People v Green*, 260 Mich App 710, 714; 680 NW2d 477 (2004).

"A district court must bind a defendant over for trial when the prosecutor presents competent evidence constituting probable cause to believe that (1) a felony was committed and (2) the defendant committed that felony." *People v Northey*, 231 Mich App 568, 574; 591 NW2d 227 (1998). In order to bind the defendant over for trial the court is not required to find that the evidence presented at the preliminary examination proves the defendant's guilt beyond a reasonable doubt. *People v Hudson*, 241 Mich App 268, 278; 615 NW2d 784 (2000). When deciding to bind a defendant over, the magistrate may factor into its consideration direct or circumstantial evidence. *Id.*

Plaintiff argues that the trial court erred when it found that complainant's statements were "testimonial" and could thus not be used against defendant at trial. We agree in part.

The Sixth Amendment of the United States Constitution guarantees the right of a criminal accused "to be confronted with the witnesses against him. . . ." See also Const 1963, art 1, § 20. In *Crawford* the United States Supreme Court articulated a bright-line rule against admission of custodial statements by a nontestifying witness against a criminal defendant. The Court held that the Confrontation Clause bars "admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination." *Crawford, supra* at 53-54. The Court did not set forth comprehensive criteria for determining what constituted testimonial statements for this purpose. It did, however, set out "various formulations" of the core class of "testimonial" statements. The Court did not

[2] Complainant, age 92, was admitted to a long-term care facility for reasons apparently unrelated to the assault. We decide this appeal under the assumption that complainant will not be available to testify.

endorse any of these formulations, but noted that "some statements qualify under any definition," including ex parte testimony at a preliminary hearing, and "statements taken by police officers in the course of interrogations." *Id*. at 52. The Court also determined that answers that were "knowingly given in response to structured police questioning" qualified under any definition of police interrogation. *Id*. at 53 n 4.

In *Davis v Washington*, 547 US ___; 126 S Ct 2266; 165 L Ed 2d 224 (2006), which dealt with statements made to police officers, the United States Supreme Court refined its definition of testimonial statements somewhat. It held that:

> 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. [*Id.* at 2273-2274.]

Applying this principle, the Court found that a recording of the early parts of conversation between a victim of domestic abuse and a 911 operator, in which the victim mainly described her need for assistance, was nontestimonial, and therefore not absolutely excluded by the Confrontation Clause. See *id.* at 2271, 2276-2277. However, in *Davis*' companion case, where the police responded to a report of a domestic disturbance, separated the parties, asked questions about what had occurred, and then had the complainant fill out and sign a "battery affidavit," the Court held that the statements provided by the complainant were testimonial and thus excluded by the Confrontation Clause. *Id.* at 2272-2273, 2278. The *Davis* Court further held that statements made in the absence of questioning were not necessarily nontestimonial. *Id*. at 2274 n 1. The Court declined, however, to further decide "whether and when statements made to someone other than law enforcement personnel are 'testimonial.'" *Id*. at 2274 n 2.

In the present case, defendant challenged two separate sets of hearsay statements, those complainant made to her neighbor when initially seeking help, and those she later made to the police officer. As to the statements to the officer, we conclude that they were testimonial as that term is defined in *Crawford*, *supra*, and *Davis*, *supra*. Despite the lack of formal questioning, complainant's remarks were made to essentially build a case against defendant for assault, and were similar to the statements made in *Davis*, *supra*. Even if those remarks qualified as excited utterances, or as some other form of otherwise admissible hearsay, they were testimonial in nature and thus barred from use at trial by the Sixth Amendment's Confrontation Clause. The trial court did not err when it held that these statements were inadmissible.

However, we conclude that complainant's initial requests for help were not testimonial. Instead, like the 911 caller in *Davis*, *supra*, complainant made those statements to obtain a position of temporary safety with her landlord. The testimony that defendant continued to attempt to pursue complainant as she sought assistance supports a finding that complainant's initial statements related to an ongoing emergency rather than to a description about a past event. She was not seeking, at that time, to create a record to be used against defendant. Therefore, even assuming that *Crawford*, *supra*, would bar testimonial statements to persons other than

police officers, we hold that the trial court erred when it found that the use of complainant's initial statements to her landlord was barred by the Confrontation Clause.

With this in mind, we find that the magistrate did not err in binding defendant over for trial. Complainant's initial statements to her landlord provided evidence of the identity of her assailant and the means and manner of the assault. When these statements are coupled with the witnesses' observations of complainant's demeanor, the testimony concerning defendant's actions during and after the event in question, and the photographs of complainant's injuries, the evidence was sufficient to establish probable cause that defendant assaulted the complainant. Therefore, the trial court erred when it granted defendant's motion to quash the information.

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

/s/ William B. Murphy
/s/ Michael R. Smolenski
/s/ Kirsten Frank Kelly