COURT OF APPEALS
DECISION
DATED AND FILED

March 17, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 04-1864-CR **Cir. Ct. No. 02CF000271**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DAVID W. THROM,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Jefferson County: WILLIAM F. HUE, Judge. *Affirmed*.

Before Vergeront, Lundsten and Higginbotham, JJ.

¶1 PER CURIAM. David Throm appeals a judgment convicting him of first-degree intentional homicide and hiding a corpse. He also appeals the order denying postconviction relief. The victim was his former fiancée, Colleen Wilke. The State's evidence at Throm's jury trial included six statements Wilke made to others shortly before her death. The issue on appeal is whether the use of those

statements as evidence violated Throm's constitutional right to confront witnesses, as interpreted in ***Crawford v. Washington***, 124 S. Ct. 1354 (2004). We affirm.

¶2 Wilke was beaten to death shortly after she and Throm decided to end their relationship. At his trial, Throm conceded he caused Wilke's death. His defense to the first-degree intentional homicide charge was involuntary intoxication caused by prescription medication. To rebut that defense, the State used evidence of Wilke's and Throm's relationship, including a series of incidents that occurred as the relationship ended. In part, the State attempted to prove intent through statements Wilke made to third persons shortly before she died. Those statements included:

1. (to a friend) She did not tell Throm who her replacement roommate would be after he moved out of their apartment;

2. (to her mother) Throm wanted to withhold part of his share of their rent as the relationship deteriorated;

3. (to her mother) Throm cursed Wilke in the ensuing argument;

4. (to her brother and to a friend) She had an escape plan if Throm threatened her safety.

5. (to her neighbor) Throm had threatened to bash her head in;

6. (to a co-worker) "If I ever end up missing, you will know who to look toward."

The State also used some of these statements as hypothetical examples in questioning an expert on behavioral patterns and abusive relationships.

¶3 In ***Crawford***, the United States Supreme Court held that prior "testimonial" statements from an unavailable witness are inadmissible because such statements violate the Sixth Amendment to the United States Constitution,

unless the defendant had a prior opportunity to cross-examine the witness. ***Id.*** at 1374. In this appeal, Throm contends all six statements identified above were testimonial and therefore inadmissible. He further contends their admission was not harmless error.

¶4 ***Crawford*** does not precisely delineate what statements must be considered testimonial for Sixth Amendment purposes. ***Id.*** However, ***Crawford*** includes within the scope of testimonial statements those made to police and those made under oath in a prior court proceeding. ***Id.*** It excludes casual remarks to acquaintances. *See* ***id.*** at 1364. It notes the primary concern of the Constitution's drafters was the use of *ex parte* examinations as evidence against a defendant in subsequent court proceedings. *See* ***id.*** at 1363. ***Crawford*** also quotes a dictionary definition of "testimony" as "[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact." ***Id.*** at 1364.

¶5 In this case, we conclude the first five of the six statements are not testimonial under even the most expansive definition of that term. They were not made formally or to authority but were the product of private conversations between closely associated persons. As such, they do not resemble the examples and categories of testimonial statements identified in ***Crawford.*** They are instead comparable to the type of casual remark ***Crawford*** excludes from the category of testimonial. In ***State v. Manuel***, 2004 WI App 111, ¶3, ¶21, 275 Wis. 2d 146, 685 N.W.2d 525, we held that an inculpatory statement an unavailable witness made to his girlfriend was admissible because it clearly did not fall within the ***Crawford*** testimonial categories. The same is true here.

¶6 Only the last of the six statements listed above is arguably testimonial because one could infer Wilke intended its recipient to report it to the

police if she disappeared. However, the use of this one statement, even if inadmissible, was harmless. There was much evidence of Wilke's concerns for her safety as her relationship with Throm disintegrated, including Throm's threat to bash Wilke's head in. The one arguably testimonial statement was merely cumulative in that regard. Furthermore, this statement was not one the prosecutor used as an example in questioning the abuse expert. An error, even of constitutional dimension, is harmless if there is no reasonable possibility it contributed to the verdict. *See* ***State v. Dyess***, 124 Wis. 2d 525, 543, 370 N.W.2d 222 (1985). Such is the case here, if admitting Wilke's statement was in fact error.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.