

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 20, 2026

Samuel A. Christensen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 2024AP738-CR
STATE OF WISCONSIN**

Cir. Ct. No. 2020CF297

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ERIC A. SKILLON,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: STEPHANIE ROTHSTEIN, Judge. *Affirmed.*

Before Donald, C.J., Colón, P.J., and Geenen, J.

Per curiam opinions may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

¶1 PER CURIAM. Eric A. Skillon appeals from a judgment convicting him of first-degree reckless homicide and attempted armed robbery, both as party to a crime. Skillon contends that the trial court erred when it allowed the State to introduce text messages from a witness who refused to attend trial because doing so violated Skillon’s right of confrontation. We conclude the text messages were not testimonial, so their admission was not error, and we affirm.

BACKGROUND

¶2 On December 1, 2019, Skillon and three others planned to rob Raamah Rutledge. During the attempt, Skillon shot Rutledge three times, killing him. Skillon was initially charged with one count of felony murder; an amended information charged Skillon with first-degree reckless homicide as a party to a crime with use of a dangerous weapon and one count of attempted armed robbery as a party to a crime, and Skillon went to trial on those charges.

¶3 One of the State’s witnesses was 14-year-old Darcy.¹ Darcy had told a detective that on December 1, 2019, she was with two friends when two men arrived. One of those men was called “Beno,” and Beno said he had “just caught a body” because someone had pulled out a gun. Beno was later determined to be Skillon.

¶4 The day after the shooting, Darcy had sent a series of text messages to her friend’s mother, Ann Fahy, after realizing that Fahy knew the victim. Prior to trial, the State moved to admit the texts. In those texts, Darcy described being with friends when two men “came over with guns talking bout they killed a

¹ “Darcy” is a pseudonym used by the State in its brief.

dude[.]” Darcy also talked about trying to get more information from the person she knew as “Beno” and told Fahy, “Imma try get as much evidence I can for you ma.”

¶5 By the time of trial, Darcy had moved out of state and refused to return to Wisconsin, so the State moved to admit the text messages because of Darcy’s unavailability. After a hearing on the State’s motion, the trial court concluded that Darcy was indeed unavailable and that the text messages were admissible under WIS. STAT. § 908.045(6) (2023-24),² a catch-all exception to the hearsay provision. The jury later convicted Skillon of first-degree reckless homicide and attempted armed robbery, both as party to a crime.³ The trial court sentenced Skillon to 28 years’ initial confinement and 12 years’ extended supervision for the homicide, plus a concurrent 14 years’ imprisonment for the attempted armed robbery. Skillon appeals, challenging only the admission of Darcy’s text messages.

DISCUSSION

¶6 Under the Sixth Amendment’s Confrontation Clause, the accused in a criminal prosecution “shall enjoy the right ... to be confronted with the witnesses against him [or her.]” U.S. CONST. amend. VI. Under the Confrontation Clause, hearsay evidence is generally inadmissible. See WIS. STAT. §§ 908.01(3), 908.02. The parties here agree that Darcy’s text messages are hearsay. However, WIS. STAT. § 908.045 includes several exceptions to the

² All references to the Wisconsin Statutes are to the 2023-24 version.

³ The jury answered “no” to the verdict questions of whether Skillon committed the homicide “while using a dangerous weapon.”

prohibition on hearsay when the declarant is unavailable. After concluding Darcy was unavailable, the trial court further determined her messages were admissible under § 908.045(6), which provides that “[a] statement not specifically covered by any of the foregoing exceptions but having comparable circumstantial guarantees of trustworthiness” is “not excluded by the hearsay rule if the declarant is unavailable as a witness[.]”

¶7 Generally, the trial court’s decision to admit or exclude evidence is a matter of discretion. *State v. Giacomantonio*, 2016 WI App 62, ¶17, 371 Wis. 2d 452, 885 N.W.2d 394. We will overturn a discretionary decision only if the trial court erroneously exercised that discretion. See *State v. Kandutsch*, 2011 WI 78, ¶23, 336 Wis. 2d 478, 799 N.W.2d 865. Discretion is properly exercised when the trial court examines the relevant facts, applies a proper legal standard, and, using a demonstrated rational process, reaches a reasonable conclusion. *Martindale v. Ripp*, 2001 WI 113, ¶28, 246 Wis. 2d 67, 629 N.W.2d 698. Whether the admission of certain evidence violates the defendant’s right of confrontation is a question of constitutional law, subject to do novo review. *State v. Nieves*, 2017 WI 69, ¶15, 376 Wis. 2d 300, 897 N.W.2d 363.

¶8 Prior to *Crawford v. Washington*, 541 U.S. 36 (2004), there was a two-step approach for analyzing the admission of hearsay evidence under the Confrontation Clause. See *State v. Manuel*, 2004 WI App 111, ¶18, 275 Wis. 2d 146, 685 N.W.2d 525; *Ohio v. Roberts*, 448 U.S. 56, 65-66 (1980). Under that approach, the witness must be unavailable for trial and the hearsay evidence must bear some “indicia of reliability.” *Manuel*, 275 Wis. 2d 146, ¶18 (citation omitted).

¶9 Skillon does not dispute that the trial court used the **Roberts** framework to make its decision, and he does not challenge the findings made under that framework. His argument on appeal, however, is that the trial court’s analysis was incomplete, because **Crawford** altered the **Roberts** analysis and determined that the protections of the Confrontation Clause apply only to “testimonial” statements, see **State v. Mattox**, 2017 WI 9, ¶24, 373 Wis. 2d 122, 890 N.W.2d 256, and the trial court failed to determine whether Darcy’s text messages were testimonial.⁴

¶10 While the trial court’s failure to utilize a proper legal standard for a discretionary decision may constitute an erroneous exercise of that discretion, we will uphold the discretionary decision of the circuit court if we can conclude “that there are facts of record which could support the circuit court’s decision, had discretion been exercised on the basis of those facts.” See **State v. Jenkins**, 168 Wis. 2d 175, 186, 483 N.W.2d 262 (Ct. App. 1992) (citation omitted).

¶11 There is no set definition of a “testimonial” statement, see **Mattox**, 373 Wis. 2d 122, ¶24, but the dispositive question is whether, in light of all the circumstances, viewed objectively, the primary purpose of the hearsay was to create an out-of-court substitute for trial testimony. See **State v. Reinwand**, 2019 WI 25, ¶24, 385 Wis. 2d 700, 924 N.W.2d 184; **Ohio v. Clark**, 576 U.S. 237, 245 (2015). **Clark** offers four factors relevant in the primary purpose analysis: “(1) the formality/informality of the situation producing the out-of-court statement; (2) whether the statement is given to law enforcement or a non-law enforcement

⁴ The State contends that Skillon failed to properly preserve this challenge in the trial court, but it nevertheless briefed the merits of Skillon’s claim. We are satisfied the issue was properly raised in the trial court.

individual; (3) the age of the declarant[;] and (4) the context in which the statement was given.” **Reinwand**, 385 Wis. 2d 700, ¶25; **Mattox**, 373 Wis. 2d 122, ¶32.

¶12 Skillon contends that Darcy’s text messages were testimonial, based largely on her message stating, “Imma try get as much evidence I can for you ma.” He argues that her messages “show an intent to preserve and gather evidence to be used against the defendant.” We disagree.

¶13 The first factor is the formality or informality of the situation or interrogation. A formal “station-house interrogation” is more likely to provoke testimonial statements than a less formal situation. See **Reinwand**, 385 Wis. 2d 700, ¶26. Here, Darcy’s text messages are clearly informal statements. Not only were they given outside the formality of any official police interview, the messages also lacked the “solemnity” that might attend an affidavit or deposition.

¶14 The second factor is whether the statement was given to a member of law enforcement; statements made to non-law enforcement officers are “much less likely to be testimonial.” See **Mattox**, 373 Wis. 2d 122, ¶34 (emphasis omitted). Here, Darcy was texting a trusted adult, not an officer of any law enforcement agency.

¶15 The third factor is the age of the declarant. “Statements by very young children will rarely, if ever, implicate the Confrontation Clause.” **Clark**, 576 U.S. at 247-48. If the declarant is an adult, then the age factor “is a neutral factor, making the statement neither more nor less likely to be testimonial.” **Reinwand**, 385 Wis. 2d 700, ¶29. Darcy was a child, but not a “very young” one. While this puts Darcy somewhere in the middle of a spectrum, her age

nevertheless weighs against the likelihood of an intentionally testimonial statement.

¶16 The final factor for consideration is the context in which the statement was given, as the circumstances often provide insight into what the statement’s objective primary purpose would have been. See *Clark*, 576 U.S. at 244. Here, the trial court found that the “texts still indicate[d] to the [c]ourt a certain amount of shock and concern about the circumstances she found herself in when [Skillon] was present making these statements and displaying his firearm” and reflected a person “who is concerned and apprehensive about having been in the presence and such close proximity with someone who’s been alleged to have committed a homicide.” In other words, the trial court seems to have viewed the statements as a way for Darcy to process what had happened, not a conscious attempt to create any sort of record for trial. Indeed, Skillon had not been identified to police at the time Darcy sent the texts, so she had no way to know whether there would ever be a trial.

¶17 Considering the foregoing, we conclude that Darcy’s text messages were not testimonial.

CONCLUSION

¶18 Darcy’s text messages, while hearsay, were admissible under an exception for unavailable witnesses. Those messages are not testimonial and

therefore do not violate the Confrontation Clause. Accordingly, the trial court did not err in allowing their admission.⁵

By the Court.—Judgment affirmed.

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

⁵ Because we conclude the messages do not violate the Confrontation Clause, we need not consider whether admission of them was harmless error.

