

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 17, 2007

David R. Schanker
Clerk of Court of Appeals

NOTICE

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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. 2005AP1787-CR

Cir. Ct. No. 2004CF218

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

VICTOR A. KOLOSSO,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Brown County:
DONALD R. ZUIDMULDER, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Victor Kolosso appeals a judgment convicting him of sexually assaulting a three-year-old girl. At trial, the victim's father testified to statements she made immediately after the incident. Kolosso argues that the victim's statements to her father were testimonial, and admitting the statements

violated his right to confront witnesses. Because we conclude that the statements are not testimonial, we affirm the judgment.

¶2 The victim's father testified that he went into the house to change a baby's diaper, leaving his daughter in the backyard with Kolosso. When he returned approximately ten minutes later, he found his daughter crying. He picked her up and asked what was wrong, "Are you fighting with Victor?" She responded, "Victor bad boy." He touched my pee pee." Upon hearing the accusation, Kolosso turned white and fled. Four days later, the father reported the incident to police.

¶3 In *Crawford v. Washington*, 541 U.S. 36, 51-52 (2004) the Court identified three types of statements that are testimonial. Kolosso argues that the third definition applies to his case: "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." *Id.*

¶4 After the parties completed briefing in this case, the Court further refined the difference between testimonial and nontestimonial statements. 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. *Davis v. Washington*, 126 S. Ct. 2266, 2273-74 (2006). They are testimonial when the circumstances objectively indicate that there is no ongoing emergency, and the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution. *Id.* A statement is testimonial if it is in response to police interrogation as part of an investigation into past conduct after

the emergency has ended and the perpetrator and victim have been separated. *Id.* at 2278.

¶5 Wisconsin courts have also clarified the definitions of testimonial and nontestimonial. A statement that is “volunteered” rather than elicited through formalized police interrogation is nontestimonial if a reasonable person in the declarant’s position would not objectively foresee that the statement might be used in the investigation or prosecution of a crime. *State v. Jensen*, 2007 WI 26, ¶¶24-25, 727 N.W.2d 518. An informal statement to a neighbor or a son’s teacher is not testimonial when made under circumstances that would not lead an objective witness to reasonably believe it would be available at a later trial. *Id.*, ¶33. Statements made to loved ones or acquaintances are not the kind of memorialized, judicial-process-created evidence of which *Crawford* speaks. See *State v. Manuel*, 2005 WI 75, ¶35, 281 Wis. 2d 554, 697 N.W.2d 811. A statement is not testimonial if the declarant would not reasonably expect the statement to be reported to the police. *Id.*

¶6 An objective witness’s reasonable belief must be limited to the facts readily available to the actual speaker at the time of the speech at issue, not every fact potentially available to an omniscient observer. *State v. Savanh*, 2005 WI App 245, ¶24, 287 Wis. 2d 876, 707 N.W.2d 549. The declarant’s statement must be evaluated to determine whether it is, on the one hand, overtly or covertly intended by the speaker to implicate an accused at a later judicial proceeding, or, on the other hand, is a burst of stress-generated words whose main function is to get help and succor, or to secure safety, and are thus devoid of the possibility of fabrication, coaching, or confabulation. *State v. Rodriguez*, 2006 WI App 163, ¶26, 722 N.W.2d 136.

¶7 Here, the child's statements to her father are not testimonial. The statements were not elicited or made with an eye toward trial. They were made within ten minutes of the crime, before any police involvement, while the child was still crying, as she sought comfort and protection from her father while the perpetrator was still present. Focusing on the declarant's intent, a reasonable person in the child's position would not have anticipated her statement being used in the investigation or prosecution of a crime.

By the Court.—Judgment affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5 (2005-06).

