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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. LUIS MANUEL GARCES, Defendant and Appellant.	D045022 (Super. Ct. No. SCD133238)

APPEAL from a judgment of the Superior Court of San Diego County, David M. Gill, Judge. Affirmed in part and reversed in part.

After retrial, a jury convicted Luis Manuel Garces of first degree murder (Pen. Code,[1] § 187, subd. (a); count 1) and assault with a deadly weapon (§ 245, subd. (a)(1); count 2). The jury also found Garces had used a deadly weapon, a knife, during the murder (§ 12022, subd. (b)) and assault (§ 1192.7, subd. (c)(23)), and he had caused great

1 All statutory references are to the Penal Code unless otherwise specified.

bodily injury during the assault (§ 12022.7, subd. (a)). After denying a motion for new trial, the trial court sentenced Garces to a total prison term of 28 years to life and, among other things, imposed a $10,000 restitution fine under section 1202.4, subdivision (b).[2]

Garces appeals, contending (1) Evidence Code section 1370, which allows evidence of threats of infliction of injury, is unconstitutional on its face because it allows testimonial hearsay, as defined in *Crawford v. Washington* (2004) 541 U.S. 36 (*Crawford*) that violates a defendant's Sixth Amendment right to confront witnesses; (2) Evidence Code section 1370, if constitutional on its face, is unconstitutional as applied in this case to allow testimonial hearsay in violation of his confrontation rights; (3) the murder victim's statements to two police officers were testimonial and inadmissible as excited utterances under Evidence Code section 1240; (4) the trial court violated his confrontation rights when it allowed hearsay testimony from the murder victim's mother

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[2] The People correctly point out that section 1202.45 requires an additional fine be imposed in the same amount as the section 1202.4 restitution fine whenever a sentence includes a period of parole and that such fine be suspended pending the defendant's successful completion of parole. (See *People v. Dickerson* (2004) 122 Cal.App.4th 1374, 1380.) In addition, we note the court imposed an unauthorized sentence in imposing the count 2 assault consecutive to the count 1 murder by using the section 1170.1 computation for determinate terms. The sentence for murder is an indeterminate term which is imposed under section 1168, subdivision (b) and is computed separately from determinate sentences imposed under section 1170. Such indeterminate term is not part of the principal/subordinate computation under section 1170.1, subdivision (a) which the court used in this case. When consecutive indeterminate and determinate sentences are imposed, as in this case, the determinate term is served first and is not credited toward any indeterminate parole eligibility. (§ 669; *People v. Polk* (1982) 131 Cal.App.3d 764, 778.) Although such unauthorized sentences must normally be corrected when discovered, because we shall reverse Garces's first degree murder conviction, the matters become moot.

and from a friend who had been in the victim's home about telephone conversations an hour before the victim's death; and (5) the constitutional error in allowing the jury to hear the victim's testimonial hearsay statements and the inadmissible telephone conversations' evidence cannot be said to be harmless beyond a reasonable doubt.

We find *Crawford* error, which is prejudicial to the first degree murder conviction. We, therefore, reverse that conviction, but affirm Garces's conviction of assault with a deadly weapon.

FACTUAL AND PROCEDURAL BACKGROUND

On December 4, 1997, at around noon, when Rachael Brooks responded to a knock on her front door on Madison Avenue in San Diego, she saw a woman, who appeared very distraught and fearful, and spoke only Spanish. The woman tried to tell Brooks about something happening in the house next door and repeatedly mentioned a Cuban male and another person. When she turned to walk away, Brooks noticed a stab wound in her back. Brooks called 911 at 12:06 p.m., to report the incident at her neighbor's house, saying a Spanish speaking woman had been assaulted with a knife by a man and was sitting, bleeding on Brooks's front porch. A Spanish speaking 911 dispatcher talked briefly with the woman who confirmed she had been stabbed in the back by a man who might still be in the neighboring house.

San Diego Police officers and paramedics arrived within minutes. After the police briefly talked with Brooks and the wounded person, a transvestite named Rodolfo "Janet" Rodriguez (Janet), Janet was taken to the hospital for treatment and the officers entered the neighboring house on Madison Avenue. There, the officers discovered the body of

Jorge "Yamile" Lee (Yamile), another transvestite, who had been stabbed several times in the hand, back, neck and chest, on the floor between the living and dining rooms, directly in view of the front door.[3] Blood was found throughout the house with the carpet underneath Yamile's head and shoulders being saturated with the heaviest concentration. A blood-stained plaid shirt and a sock, which was turned inside out, were also found near the body on the living room floor. A large brown-handled butcher knife with blood smeared about four inches from its tip was found near the doorway leading from the dining room to the hallway to the bedroom. Officers also found the base of a cordless telephone unplugged from the dining room wall.

Inside Yamile's bedroom, the officers found various photo albums containing photographs of Yamile and Garces together, a cigarette butt on the floor, numerous coins on the bed and floor, Janet's blue fanny pack on the bed and a purse containing, among other things, Yamile's identification and credit cards.

San Diego Police Officer Miguel Morales interviewed Janet at the hospital for about 10 minutes shortly after the knife attack and murder. Janet had been treated for multiple stab wounds to the middle of her back, left side of her chest near the armpit, upper part of the left arm and on the back of her right hand. Janet, who was in pain and crying at the time, told Morales she had not known Yamile long and had just moved in

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[3] We refer to both Janet and Yamile by their first names to avoid confusion with other witnesses who share their same last names. We also refer to both in the feminine as they were referred to throughout the proceedings below.

We further note that during in limine motions, Yamile was referred to as Yamaley.

with her. Yamile and her ex-boyfriend, named "Luis," had serious relationship problems and he had just gotten out of jail where he was in custody for violating a restraining order. The ex-boyfriend had called Yamile that morning asking for a ride, but she had refused and told him not to call again. Not expecting the ex-boyfriend to come to the house, Janet was surprised when she heard Yamile screaming, "you're killing me" from the next room and saw Yamile being assaulted by a man she recognized from photos as Luis, the ex-boyfriend. Janet rushed into the room and made eye contact with Luis as she fled the house, but he pursued and attacked her. Janet told Morales the ex-boyfriend or "Luis" was Cuban or Hispanic, about 5'6" tall, weighed about 160 pounds, had curly shoulder length hair, a mustache, and was in his middle 20's.

San Diego Police Detective Miguel Angel Penalosa joined Morales at the hospital emergency room at about 2:30 p.m. on December 4, 1997, and together with another officer, showed Janet a photographic lineup which included Garces's photo. Janet identified Garces from the lineup as the attacker. Penalosa then interviewed Janet for almost two hours. She told Penalosa she had met Yamile when they were jailed together for about 15 days and had become good friends. Yamile had referred to Garces as her ex-husband, had shown her photos of him, had talked about violence in their relationship and said she had a restraining order against him. Janet had spent the night before the attack with Yamile and had answered the phone that morning and had given it to Yamile when the man who identified himself as "Luis" asked for her. Janet overhead Yamile say something about a ride downtown, about someone owing him some money, and Yamile

telling him to leave her alone. When she got off the phone, Yamile told Janet that her ex-husband was coming over to the house.

Janet told Penalosa that a short time later Garces, whom Janet recognized from the photographs in Yamile's albums, arrived at the house. Yamile introduced him as "Luis" and he asked Janet if she were living there. Janet told him "no," and when he and Yamile left the bedroom, Janet heard Yamile screaming, "You're killing me, you're killing me, leave her alone." When she walked to the doorway, Janet saw Garces stabbing Yamile with a large 10- to 12-inch kitchen knife which he then used to attack her. Janet struggled with him and then collapsed to the floor after he stabbed her. Luis stabbed Yamile again before leaving the house. Janet passed out, and when she awoke she went to a neighbor's house where she collapsed again. Janet told Penalosa she heard Garces tell Yamile, "something to the effect that I'm going to kill you and heard him repeat [it] two or three times." Janet again described the man she identified as Garces to Penalosa, as she had with Morales.

In the meantime, Yamile's mother and brother were both notified about Yamile's death and interviewed by the police. In addition to other things, each told the police about the stormy relationship between Yamile and Garces, about Garces's threats to harm Yamile and about a recent prior domestic violence incident for which Garces had been jailed.

During the subsequent investigation, it was determined that Garces had pled guilty November 26, 1997 to misdemeanor domestic violence (§ 273.5, subd. (a)) and making annoying phone calls (§ 653m), and had been released from jail on November 30, 1997.

It was also learned that Garces had stayed at the home of his friends Reyna Rodriguez and her husband Saul Madrid the night before the attacks on Janet and Yamile. Rodriguez and Madrid lived on 36th Street in San Diego, about nine-tenths of a mile from Yamile's house. Garces, whom they knew as "Luis" or "Conio," a term of endearment amongst Cubans, had arrived at the friends' home around 5:00 p.m. on December 3, 1997, with a bag full of clothes and shoes, telling them he had just been released from jail, he had a problem at home and needed a place to stay for a few days. The next morning Madrid left for work before 6:00 a.m. and Rodriguez left the home sometime between 10:00 a.m. and noon to go shopping with her friend Esther Espana (Cortez). Garces was at the house when Rodriguez left and asked Rodriguez to leave the key to the house and the security gate with him. When Rodriguez returned home about one or two hours later, but no later than 12:30 p.m., Garces was outside, running up the stairs of the house, looking wet as if he had just fixed his hair. Appearing nervous, Garces said something horrible had happened, he had to leave and that if anyone asked her, Rodriguez should tell them he had gone to the store with her. He also told Rodriguez he had left some pants in the bathtub and she could either leave them or get rid of them. Rodriguez called Cortez and asked her to give Garces a ride to his work in San Ysidro. Garces then walked to Cortez's house which was also on 36th Street.

Cortez, along with her child, drove Garces, whom she knew as Luis or "Conio," to San Ysidro at about 1:00 p.m. and he paid her $20 for the ride. Garces had no luggage or clothing with him. When she returned, Cortez called Rodriguez to tell her she had driven Garces to the border crossing in San Ysidro.

That evening when Madrid returned home from work, he found a pair of Garces's pants soaking in the bathtub with his own work clothing. Madrid later saw on the television news that Yamile had been killed and that Garces was suspected as the murderer. The next day the still wet pants were turned over to investigating detectives. Subsequently, Rodriguez noticed that a 12-inch brown-handled kitchen knife was missing from her home. She believed that a picture of a knife found at the murder scene was her missing knife.

The autopsy showed Yamile had died from a four-inch deep stab wound to the back of the neck which had severed her subclavian artery and penetrated the top of her left lung. No defensive wounds were found on Yamile. The San Diego Police Department Crime Laboratory found Yamile and Janet were the likely sources of all blood evidence found in the Madison home and no prints lifted from the crime scene had any evidentiary value because there was insufficient ridge detail for comparison purposes.

On September 30, 2002, Jorge Hechavarria, whose wife was Garces's sister, reported to the Hialeah Police Department near Miami, Florida, that he had overheard Garces, whom he knew as "Fernando," say on Thanksgiving Day of 2001 to another person, "I had a problem with my girlfriend in California and the blood ran." Hechavarria identified Garces from a photographic lineup as his wife's brother whom she had said was fleeing and had changed his name. Hechavarria had waited 10 months to tell the police about Garces's statement because his wife had threatened to accuse him of rape or domestic violence and put him in jail if he reported her brother to the police.

Hechavarria finally could not live with himself and the threats anymore, and wanted to confirm whether Garces was a murderer.

Garces was subsequently arrested and brought back to San Diego for trial. A mistrial and new trial were ordered after the first jury was unable to reach unanimous verdicts on counts of murder regarding Yamile and attempted murder regarding Janet.

Pertinent Procedural Matters

During the in limine hearings for the retrial, the prosecutor advised the court that defense counsel objected to "[t]he portion of the telephone conversation as overheard by Janet . . . that Yamile could not take [Garces] downtown to pay his probation fine. . . . Yamile told [Garces] not to come over to the house and just leave [her] alone." Defense counsel was not objecting to any of the other statements being admitted. Nor was he objecting to the admission of any Evidence Code sections 1101, subdivision (b) or 1109 evidence, providing the prosecutor laid the proper evidentiary foundation at the time the statements were introduced. The court thought the portion of the telephone conversation had independent significance whether it was true or not, but would look at the matter further.

Defense counsel noted he was not going to object to any of the out-of-court statements of Yamile set forth in the prosecutor's motion for admission under Evidence Code sections 1240, 1250 and 1370, as long as a proper evidentiary foundation was laid.[4]

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4 Although the notice of the prosecutor's motion listing six types of evidence for admission is part of the augmented record, the actual motion which sets out the exact statements sought for admission is not part of the appellate record.

After the trial court ruled defense counsel could present an eyewitness identification expert and considered several other matters, it reconsidered the phone conversation overheard by Janet. The prosecutor represented that when the call ended, Yamile told Janet her ex-husband was coming over and argued such statement was relevant to clarify who the person was with whom Yamile had had the telephone conversation. The court was not sure whether it was really a hearsay issue as both counsel represented that Janet would testify she did not remember any telephone conversation. The court thought it was more like circumstantial evidence to prove identity because who else would need to go downtown to pay a probation fine. Defense counsel objected that Janet's ability to identify Garces as the person on the telephone from the statements was unreliable because she had never spoken with him. The court thought it would be relevant to the issue of identity if Janet did remember the call and could say it was a male voice or one that she could identify.

Defense counsel then objected on hearsay grounds to Janet being impeached with her statements to anyone who took them as to what Yamile had said the morning she was killed. The court overruled the objection, stating it was not being offered for the truth but only as circumstantial evidence of identification, and offered to so instruct the jury.

The Prosecution Case

At the retrial, Brooks, Madrid, Rodriguez, Chavez and Hechavarria essentially testified as noted above. In addition, Brooks testified Garces resembled her neighbor's boyfriend, only older in court, with whom she had often heard her neighbor fighting and had seen them outside with police and an ambulance at least three times before the day of

the stabbing. Chavez testified she did not see "Conio" or "Luis" in court, but said she did not want to remember what he looked like. Rodriguez could not remember what Garces had said when she returned from shopping and was not sure the knife in the photograph was her missing knife.

Yamile's mother, Gloria Fong, testified she had emigrated from Cuba to San Diego in 1993 to live with Yamile, who had emigrated to the United States in 1980. Yamile kept a clean and orderly home and all her kitchen utensils, pots and pans had black plastic handles. One of Fong's acquaintances had introduced Garces to Yamile and the friendship developed into a romantic relationship by August 1994. Garces began living with Yamile and Fong that same year.

Almost immediately, Fong became aware of violence in the relationship. Garces had a temper, was controlling, impulsive and jealous of Yamile, and took all her friends away. Garces disapproved of Yamile's friendships with other transvestites and tore up any papers containing telephone numbers of her friends. Garces and Yamile argued often and Fong sometimes heard blows, punching and loud angry words from the two. Yamile would complain to Fong about her ear and head hurting a lot. Otherwise, Yamile would not talk with Fong about any problems because she was afraid of Garces. Garces would threaten her and Fong also heard Yamile tell Garces to leave Fong alone and not involve her. Fong asked Garces to leave the house two times because of the fights. She told Yamile she did not have to take the abuse.

In 1996, after Yamile's brother, Miguel Lee, had emigrated from Cuba to San Diego, they all moved to the house on Madison. The fighting between Garces and Yamile continued. Eventually, Fong moved out because of all of the problems.

Fong remembered one incident around October 30, 1997, when Yamile was assaulted by Garces and talked to her about her injuries. Yamile was "lost" for three days and then home sleeping before the police came on November 3, 1997 to talk with Yamile. At that time, Fong saw injuries to Yamile's face. When Fong asked Yamile why she had taken pills, Yamile told her it was something to do with Garces and she did not want to see him anymore. A few days later, Garces went to jail. Garces called the home every day from the jail asking for Yamile or Fong. Fong said his voice on the answering machine sounded "like a lion, he was furious. . . ." Even though there was a restraining order in effect prohibiting Garces from having contact with Yamile, Fong had accompanied Yamile to visit Garces at the jail and the conversation was friendly at that time. Garces asked Yamile to take him back.

Over defense objections, Fong was permitted to testify that on the day of Yamile's death, Fong had telephoned her around 10:15 a.m. Yamile told Fong "she was in a hurry, that she couldn't take care of [Fong] right now. She told [Fong] that Mr. Garces had [called on the phone and] asked her for a ride because he had to go pay some probation." Yamile also had told Fong "[t]hat she had to go get the car which was in the shop, and that she had to take a shower, wash her hair and pick me up at work, then she would take care of me later." On cross-examination, Fong explained she did not tell the police about

the telephone call during the investigation of Yamile's murder because no one had asked her any questions about it.

Yamile's brother Lee testified he had called 911 in October 1997 when Yamile reappeared at home after being gone three days with injuries to her face below the right eye and Fong came to the home scared from something Garces had said. Yamile went to bed, telling Lee not to ask questions. Yamile had taken an overdose of pills two times to Lee's knowledge. He also knew Garces had made threats to Yamile, even telling Lee, "[t]ell Yamile that if the clothes doesn't come up or appear again she can wait and see what's going to happen."

On the morning Yamile died, Lee left the house at 9:30 a.m. for work and Yamile's friend Janet was still there with Yamile. When he returned to the home after the police let him in, Lee found all the furniture in order and no property broken or taken except for some pictures of Yamile from albums. Lee had no personal knowledge whether Garces was to meet Yamile on the day she died, but he knew Garces was impulsive and always caused arguments, especially with Yamile.

Regarding the prior domestic violence incident on October 30, 1997, San Diego Police Officer Raphael Cimmarrusti responded to Lee's call on November 3, 1997. Going to the home, he spoke first with Lee and Fong, who were concerned about Yamile's safety after a fight with her ex-boyfriend Garces. Cimmarrusti then awoke Yamile and asked her about the incident. He took a photograph of the injuries he saw on her face, an abrasion on her chin and bruising to her left eye. Yamile appeared afraid and cried throughout the interview. She told Cimmarrusti she and Garces had had an

argument because he was possessive and afraid she was seeing someone else. During the encounter, he had punched her with a closed fist three or four times and had pushed her into a wall as she tried to run away, causing pain in the left side of her ribs. He then had apologized and calmed down. Yamile did not want to press charges because she was afraid of Garces's threats to kill her and her family. Over objection, Cimmarrusti related Yamile had explained that an individual in Cuba who made domestic violence complaints would have her hand cut off for retaliation if the police were involved.[5] Yamile claimed she had attempted to kill herself so she would not have to "live this way anymore" and be away from Garces's violent ways.

The next day, San Diego Police Detective Alex De Armas, who was Cuban and familiar with the culture, was assigned to the domestic violence case involving Yamile. He called the home for Yamile and left a message with his name and telephone number. Yamile returned the call a few minutes later and De Armas conducted an interview with her. Yamile told him Garces's acts of violence against her on October 30, 1997, occurred

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[5] In addition to overruling defense counsel's objection based on grounds of speculation as to what Yamile believed Garces would do if she went forward with charges and he were arrested, it also overruled relevance and Evidence Code section 352 objections to the admission of Yamile's statements regarding her belief of what happens in Cuba to persons who make domestic violence complaints. The prosecutor had represented that the answer to that question was not offered for its truth, but only as evidence of Yamile's state of mind as to why she was so afraid of Garces and of going forward with the domestic violence charge against him. The court admonished the jury it could not consider the answer to the question for the "truth of what [Yamile] may have said to the officer," and repeated the admonishment when it again overruled defense counsel's renewed relevance objection as the officer started to answer the repeated question.

because Garces was angry with the thought she was seeing another man. Garces also had threatened to kill her, burn her house down or kill her family if she left him or reported the assault to the police.[6] Yamile took the threats seriously, pleading with De Armas not to arrest Garces because he was very impulsive and would kill her if he were arrested. She did not believe the police could protect her from Garces.

A few days later, De Armas checked his voice mail at the office and heard a man speaking Spanish with a Cuban accent, saying he was going to kill De Armas and asking De Armas to kill him. The man identified himself as "Luis," and called the detective a "maricon," which is slang for "faggot." The man thought the detective was having an affair with Yamile and told him Yamile was not a woman. There were three or four more voice mail messages from the same person in mixed Spanish and English, sometimes in an angry voice and sometimes in a mumbled calm voice. In them, the man repeatedly made threats to kill De Armas and asked De Armas to kill him. He accused De Armas of having his clothes and said he was following him and challenged him to meet face-to-face.

On November 8, 1997, De Armas had Garces arrested and brought to the station. When Garces discovered De Armas was a detective, he said "Oh, you are Alex . . ." and apologized for leaving messages on his voice mail. Garces explained he thought

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[6] Defense counsel objected to the prosecutor asking De Armas whether he could tell from his police report if Yamile had said anything else about threats to her family. Counsel was unclear whether knowledge of the threats came from the family members or from Yamile. The prosecutor said he would clarify the matter and no ruling was made on the objection.

De Armas was someone who had his clothes and did not know he was a police officer. Although Garces then invoked his right to an attorney, when he saw De Armas holding a photograph of Yamile's facial injuries, he voluntarily told him how they occurred and said he had called an ambulance to take her to the hospital.

The taped voice mail messages from Garces to De Armas were played for the jury. The parties stipulated that Garces had pled guilty to misdemeanor offenses for domestic violence and making annoying telephone calls and that he had been released from jail four days before the stabbings.

Janet testified she emigrated from Havana, Cuba in 1994, and had met Yamile in September or October of 1997, and they became good friends. Janet was considering renting one of the rooms in the Madison home and had spent the night there with Yamile four or five times, sleeping in the same bed even though they were not lovers. Before December 4, 1997, Janet had met Yamile's mother and brother, but had never met Garces, only having seen photos of him in Yamile's albums. Yamile had told Janet that Garces was her ex-partner from whom she was separated and that he did not come near the house because she had a restraining order against him.

Janet had spent the night at the Madison house in Yamile's room on December 3, 1997. Janet awoke around 7:00 a.m. the next day and awakened Yamile sometime later, around 8:00 a.m., because they were to go shopping. Yamile's brother left the house sometime after 9:30 a.m. before Janet showered and got dressed. Then sometime between 11:00 a.m. and 12:00 p.m., Garces arrived at the home, opened the front door and walked in. Yamile introduced him to Janet as her "ex-husband." Janet left the room

to go into the bathroom to put on her make-up. Yamile then came in and asked her if she could find some change so she could give it to her "ex" to take the bus.

As Janet sat on the bed in the bedroom looking for change in her fanny pack and Yamile looked for change in the chest of drawers, Garces came into the room with a medium-sized kitchen knife and attacked Janet. Janet tried to push Garces away and yelled at Yamile to call the police as Garces stabbed Janet on the right hand, left forearm, left breast and then in her back. Yamile pulled on Garces's arm and asked him why he was doing this. Before Janet lost consciousness, she was able to close the bedroom door. She also remembered seeing Yamile running down the hall with Garces pulling on her hair and thought she heard Yamile yell, "you're killing me, you're killing me, leave her alone." Janet did not see Garces stab Yamile.

When Janet regained consciousness, she opened the door, pulled herself up, crawled against the closet and down the hallway, where she saw Yamile laying in the living room. Yamile was still breathing, but did not move or talk. Janet thought Yamile was "delirious." Janet did not see Garces leave the house. In pain and bleeding, Janet then crawled to the house next door and knocked. The woman there called 911.

Janet did not remember anyone calling the house the morning of the stabbings. Although she remembered talking with a police officer at the hospital, she did not remember telling him the phone had rung and she thought she was talking with "Luis." Nor did she remember Yamile telling her that her ex-boyfriend or husband was coming over to the house. Janet could not remember what Garces was wearing that day, except for a coat or jacket, or whether he asked her if she lived there. She also did not remember

telling the police she had seen Garces stab Yamile. Janet did remember being shown a photographic lineup at the hospital and picking Garces's photo as the person who had attacked her and Yamile. Janet identified Garces in court as "Luis" and the person who stabbed her and Yamile on December 4, 1997.

On cross-examination, Janet conceded the only injury she had sustained that required medical treatment was the stab wound to her left elbow. She did not recall whether she talked to one or more police officers at the hospital and did not remember whether she told an officer Garces had called asking Yamile for a ride that morning and Yamile had told him she would not give him one. Janet conceded that another man, the mechanic who was working on Yamile's car, had come to the house that morning, but said it was earlier and that the man did not come inside the house. Janet had subsequently been diagnosed with acute pancreatis and had been admitted to a hospital for alcohol dependence in 2000. Janet stated she had not been a drinker of alcohol before the 1997 stabbings, but since that time had become dependent on alcohol because she was so affected by the crimes.

Patricia Deck, the owner of a residential care home for seniors, who had become friends with Garces in 1995 when he applied for a job, testified Garces had called her between 7:00 and 7:30 a.m. on December 4, 1997, asking her for a ride downtown that day to pay a fine. He called her again at noontime, indicating he would be in her neighborhood doing errands. Deck saw Garces around 12:30 p.m. on 36th Street in the company of an Hispanic woman and child. At that time, he mentioned something about

going to find work and left in a car with the woman and child. Deck did not see or hear from him until she saw him in court on this case.

Deck's testimony was impeached by statements she made in an interview with detectives several days after Yamile's murder and Janet's assault. Deck had told detectives Garces had called her around noontime on December 4, 1997, asking her to pick him up on 36th Street because he was looking for a job. He offered to pay for gas and pleaded with her to give him a ride when she could not accommodate his schedule. Deck had also telephoned De Armas more than twice, representing herself as a social worker and requesting information about Garces's domestic violence case in October involving Yamile. Deck stated on cross-examination that Garces had tried to leave the relationship with Yamile many times. Deck also confirmed that Garces was possessive and suffered from homophobic feelings.

The jury was also presented with the results of the autopsy and the physical evidence found at the crime scene. A bloodstain expert testified Janet's testimony, including her prior testimony and her statements to police, was consistent with the blood transfer evidence found at the Madison home.

Finally, after the defense rested, Officer Penalosa testified in the prosecution case as noted above.[7] During his testimony, the court overruled defense counsel's objection of

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[7] The prosecutor originally rested subject to the admission of exhibits and the testimony of Officer Morales. After the defense made its opening statement and presented the testimony of Morales, the prosecutor rested again subject to calling Officer Penalosa.

lack of foundation for the officer to state what Janet had told him in response to his questions while interviewing her at the hospital after the stabbing.

The Defense Case

Garces did not testify. He presented a defense of mistaken identity and in the alternative, argued that the evidence at best proved the killing of Yamile was voluntary manslaughter due to his impulsive personality. Officer Morales was called to testify to the statements Janet had told him when he interviewed her at the hospital after the stabbing. A defense investigator was also called who had met with Rodriguez to photograph her kitchen knives. Many of the knives had the same logo on them, but many did not. Some knives had black handles. Rodriguez had more than one knife missing from her set of knives since 1997.

An eyewitness identification expert further testified about eyewitness identification research, the acquisition and retention of information, problems of misidentification, including factors such as stress and alcohol use on the ability to make reliable identifications, and the problems associated with live and photographic lineups.

A forensic scientist specializing in crime reconstruction testified some of Janet's statements to Officers Morales and Penalosa about where she and Yamile were attacked were inconsistent with the physical evidence and that based solely on the physical evidence, he could not determine whether two or three people were involved in the stabbing incident. The expert also disagreed with the prosecution's blood expert's testimony as to whether the stabber was left handed, used the sock to hold the knife, or inflicted the stab wounds on Yamile in a downward motion.

A psychologist specializing in clinical and forensic psychology, who had interviewed Garces and had performed various tests on him, testified Garces had a borderline personality disorder which resulted in unstable personal relationships. He also stated Garces suffered from "impulse control disorder," paranoia, neurological impairment which made it difficult to process information when Garces was emotional, and cultural issues such as "machismo" which caused Garces to be "very vigilant" about proving his sexual prowess. As an example of Garces's poor impulse control, the psychologist related that Garces had rammed a car into nine other vehicles one time because he was angry at a car dealer.

The psychologist noted that Garces had also indicated he had been abused by his father when he was a child, had had a prior head injury, and suffered from depression. Garces had further discussed with the expert his traumatic relationship with Yamile, saying there was a lot of domestic violence. The expert opined Garces exhibited abnormal or intense anger, which he had difficulty controlling, especially when he felt he was being disrespected or abandoned by a loved one.

Essentially, Garces attempted to show that Janet had made inconsistent and conflicting statements to Morales regarding the sequence of the stabbing attacks and about a phone call to the house, and that her identification of him, whom she had never met, was suspect. He further pointed out that no physical evidence was found which placed him at the scene. Alternatively, he argued that if he were the person who had called for Yamile, and Janet had answered, then his coming to the residence and stabbing

Yamile would only be voluntary manslaughter because of his jealousy, anger and lack of impulse control.

When the court gave instructions to the jury, it also told the jurors,

> "There were some instances where [the court] indicated that [it] would allow a witness to answer certain questions and by doing so perhaps to relate to you something that the witness was told by somebody else or something that the witness heard somebody else say. And [the court] indicated on several occasions that [it] would allow the witness to tell you what the witness heard, not to prove the truth of what was said or what the witness heard, but simply the fact that the witness was told certain things or had heard certain things may have some independent relevance aside from the truth of what was said in terms of explaining why the witness took certain actions, or in terms of explaining a certain set of expectations or a certain state of mind may have been created on the part of the witness having heard certain things. So that's an example of evidence received for a limited purpose. And again, we expect you'll follow the directions of the law, and in those instances not consider what was heard or what was told to prove the truth, to decide whether it has some independent significance in that regard."

The court additionally instructed the jury on the limited purpose for which it could consider evidence of other crimes or other instances of domestic violence Garces had committed.

The New Trial Motion

After the jury returned its verdicts of guilty on March 2, 2004, the United States Supreme Court decided *Crawford, supra*, 541 U.S. 36 (decided March 8, 2004). On May 25, 2004, Garces filed a motion for new trial based on *Crawford*, arguing the admission of Yamile's hearsay statements to Officers Cimmarrusti and De Armas without prior opportunity to cross-examine her violated his Sixth Amendment right to confrontation and deprived him of a fair trial. Garces further asserted that *Crawford*

effectively overruled the hearsay exception created by Evidence Code section 1370 and thus the trial court erred in ruling the statements given by Yamile to Cimmarrusti and De Armas admissible under that section. The prosecutor opposed the motion, arguing that Yamile's statements to the officers were admissible under the hearsay exception for spontaneous declarations and that any *Crawford* error was harmless.

At the hearing on the matter, the court tentatively ruled the statements by Yamile to De Armas were testimonial, any statements "to the extent that the testimony of [Yamile]'s mother and brother included statements attributed to [Yamile,] would not be testimonial." The court was inclined to think the statements made to Cimmarrusti were nontestimonial based on *People v. Cage* (2004) 120 Cal.App.4th 770 (*Cage*) which has since been granted review (review granted Oct. 13, 2004, S127344). The court was further inclined to find any error harmless under the *Chapman v. California* (1967) 386 U.S. 18, 24 (*Chapman*) standard because the evidence was "very strong, very compelling."

After hearing arguments of counsel, the trial judge reaffirmed his tentative, stating:

> "I think based on the *Crawford* analysis that we spread on the record, I think the statements were otherwise admissible under [Evidence Code section] 1370 or as spontaneous excited utterances. And I think there is the inherent reliability or trustworthiness that I referred to. And if there was error, *Crawford* error or otherwise, I think that it's harmless under the *Chapman* standard. So the motion for new trial is denied."

DISCUSSION

Based on *Crawford*, *supra*, 541 U.S. 36, Garces again claims the admission of Yamile's hearsay statements to Officers Cimmarrusti and De Armas without prior opportunity to cross-examine her violated his Sixth Amendment right to confrontation. He specifically asserts Evidence Code section 1370, which allows evidence of "the infliction or threat of physical injury upon the declarant," and the section under which the trial court admitted Yamile's statements to the officers, has been rendered unconstitutional on its face, or as applied in his case, thereby constituting *Crawford* error. Alternatively, he argues Yamile's statements to the officers did not qualify as nontestimonial or spontaneous statements for admission under either Evidence Code sections 1370 or 1240. Garces additionally asserts the testimony from Yamile's mother and from Officers Morales and Penalosa as related to them by Janet about what Yamile said during telephone conversations the morning she died were inadmissible hearsay which violated his right of confrontation. Finally, he claims the *Crawford* error was prejudicial under *Chapman*, *supra*, 386 U.S. 18, requiring reversal of his convictions, and that such reversible error was compounded by the inadmissible hearsay testimony of Morales, Penalosa and Fong.

Although we generally do not review on appeal questions relating to the admissibility of evidence absent a specific and timely objection in the trial court on the exact ground raised on appeal (Evid. Code, § 353; see *People v. Alvarez* (1996) 14 Cal.4th 155, 186), we nonetheless address Garces's constitutional objections which would

have been overruled if made given the status of existing law at the time of the trial.[8] Because the trial court found Yamile's statements in the interviews with Officers Cimmarrusti and De Armas qualified under the requirements of Evidence Code section 1370, and the state of the law at the time of trial was that application of that statute did not violate the confrontation clause (*People v. Hernandez* (1999) 71 Cal.App.4th 417, 423-424 (*Hernandez*)), Garces's failure to object on specific Sixth Amendment right to confrontation grounds is excusable as the trial occurred before *Crawford, supra,* 541 U.S. 36, was decided. (See *People v. Johnson* (2004) 121 Cal.App.4th 1409, 1411, fn. 2.)

Moreover, even though Garces did not object per se to the admission of Yamile's statements to the officers under Evidence Code sections 1370 or 1240, he did so at the new trial motion in light of the new law in *Crawford, supra,* 541 U.S. 36.

We, therefore, turn to Garces's various contentions.

CRAWFORD AND THE RIGHT TO CONFRONTATION

I

RELEVANT LAW

The Sixth Amendment's confrontation clause (U.S. Const., 6th Amend.) provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the

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8 Our Supreme Court has declined in two instances to decide whether a defendant tried before *Crawford, supra,* 541 U.S. 36, was decided forfeits an appellate challenge to the admission of testimonial evidence in violation of the confrontation clause under *Crawford* due to the failure to raise the issue at trial. (See *People v. Harrison* (2005) 35 Cal.4th 208, 239 (*Harrison*); *People v. Monterroso* (2004) 34 Cal.4th 743, 763 (*Monterroso*).)

witnesses against him." Historically, such clause had been held to preclude the admission of hearsay statements implicating the defendant in a criminal proceeding unless the prosecution demonstrated that the statements possessed "adequate indicia of reliability." (*People v. Roberto V.* (2001) 93 Cal.App.4th 1350, 1373.) To meet that test, the United States Supreme Court in *Ohio v. Roberts* (1980) 448 U.S. 56 (*Roberts*) held that evidence of an unavailable witness's statements either had to fall within a "firmly rooted hearsay exception" to the hearsay rule or bear "particularized guarantees of trustworthiness." (*Id*. at p. 66; *People v. Waidla* (2000) 22 Cal.4th 690, 726, fn. 8.)[9]

"In overruling *Roberts*, *Crawford* held that out-of-court statements by a witness that are testimonial are barred under the Sixth Amendment's confrontation clause unless the witness is shown to be unavailable and the defendant has had a prior opportunity to cross-examine the witness, regardless of whether such statements are deemed reliable by the trial court. 'Where testimonial statements are involved, we do not think the Framers meant to leave the Sixth Amendment's protection to the vagaries of the rules of evidence, much less to amorphous notions of "reliability." . . . To be sure, the Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular

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9 Some "firmly rooted" exceptions to the hearsay rule include "(1) statements by a coconspirator during and in furtherance of the conspiracy, *Bourjaily v. United States* (1987) 483 U.S. 171, 183-184. . . ; (2) excited utterances, *White v. Illinois* (1992) 502 U.S. 346, 356-357 . . .; and (3) statements made for purpose of obtaining medical treatment. (*Ibid*.)" (*People v. Cervantes* (2004) 118 Cal.App.4th 162, 172, fn. 4 (*Cervantes*).)

manner: by testing in the crucible of cross-examination.' [Citation.]" (*Monterroso, supra*, 34 Cal.4th at pp. 763-764.) This new rule announced by *Crawford, supra*, 541 U.S. 36, applies retroactively "to all cases, state or federal, pending on direct review or not yet final . . . ." (*Griffith v. Kentucky* (1987) 479 U.S. 314, 328.)

Although the court in *Crawford* declined to "spell out a comprehensive definition of 'testimonial,' " (*Crawford, supra*, 541 U.S. at p. 68, fn. omitted), "it did list '[v]arious formulations' of the class of testimonial statements: ' "[E]x parte in-court testimony or its functional equivalent--that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially," [citation]; "extrajudicial statements . . . contained in formalized testimonial material, such as affidavits, depositions, prior testimony, or confessions," [citation]; "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," [citation].' [Citation.]" (*People v. Sisavath* (2004) 118 Cal.App.4th 1396, 1401 (*Sisavath*).)

The court in *Crawford* further explained that "[w]hatever else the term covers, [testimonial] applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations." (*Crawford, supra*, 541 U.S. at p. 68.) "*Crawford* observed these modern practices were close kin to the abuses at which the Confrontation Clause was directed." (*Cervantes, supra*, 118 Cal.App.4th at p. 172.) "The court used the term ' "interrogation" ' in 'its colloquial, rather than any technical legal, sense.' It reasoned that the statement at issue in [that] case was 'knowingly given in response to

structured police questioning' and consequently 'qualifie[d] under any conceivable definition.' [Citation.]" (*Sisavath, supra,* 118 Cal.App.4th at p. 1402.)

The Supreme Court also noted that the history of the confrontation clause "suggests that not all hearsay implicate[s] the Sixth Amendment's core concerns. An off-hand, overheard remark might be unreliable evidence and thus a good candidate for exclusion under hearsay rules, but it bears little resemblance to the civil-law abuses the Confrontation Clause targeted." (*Crawford, supra*, 541 U.S. at p. 51.) The court further recognized that "[w]here nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law—as does *Roberts,* and as would an approach that exempted such statements from Confrontation Clause scrutiny altogether." (*Crawford, supra,* 541 U.S. at p. 68.) The court declined to resolve the issue of whether the confrontation clause applies to nontestimonial hearsay. (*Id*. at p. 56.) A state court thus may consider "reliability factors beyond opportunity for cross-examination when the hearsay statement at issue [is] not testimonial. [Citation.]" (*Id*. at p. 57.)

Moreover, the court in *Crawford* explained that "when the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his [or her] prior testimonial statements." (*Crawford, supra*, 541 U.S. at p. 59, fn. 9.) In addition, the Confrontation "Clause also does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted." (*Ibid*.)

In determining whether statements are "testimonial" under *Crawford*, requiring a prior opportunity of cross-examination before admission if the declarant is unavailable to

testify at trial, some California courts have utilized the formulation from *Crawford* that " 'statements . . . made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.' [Citation.]" (See, e.g., *People v. Rincon* (2005) 129 Cal.App.4th 738, 756 (*Rincon*); *Cervantes, supra,* 118 Cal.App.4th at pp. 173-174.) Other courts have rejected this test as focusing only on the foreseeability of the potential use of a statement at trial, holding "*Crawford* supports a conclusion that the test for determining whether a statement is 'testimonial' is . . . whether it was obtained for the purpose of potentially using it in a criminal trial or determining if a criminal charge should issue." (*People v. Taulton* (2005) 129 Cal.App.4th 1218, 1224 (*Taulton*).)

In *Taulton,* the court noted the *Crawford* majority had "distinguished between statements made to government officers and others: 'An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not.' [Citation.]" (*Taulton, supra*, 129 Cal.App.4th at p. 1224.) The court in *Taulton* thus found "the focus of *Crawford* is the *purpose* for which the ex parte statement was obtained or given." (*Taulton, supra*, at p. 1224.)

With these principles in mind, we address Garces's specific claims of error.

II

YAMILE'S STATEMENTS TO OFFICERS CIMMARRUSTI AND DE ARMAS

Garces claims Evidence Code section 1370 has been rendered unconstitutional on its face by the holding in *Crawford, supra,* 541 U.S. 36 and, alternatively, it is unconstitutional

as applied to him, because it allowed the testimonial hearsay of Yamile to be admitted. He also claims that Yamile's statements were not spontaneous statements under Evidence Code section 1240, and, even if they were, they were still testimonial and inadmissible under *Crawford*, which no one disputes applies retroactively to this case.[10]

A. Were the statements testimonial?

In order to address these assertions, we must first determine whether Yamile's statements to Cimmarrusti and De Armas were "testimonial." If so, the only acceptable indicia of reliability under *Crawford*, *supra*, 541 U.S. 36 is confrontation. (*Cervantes*, *supra*, 118 Cal.App.4th at p. 173.) Generally, only if the statements were nontestimonial, would we then consider whether they can be admitted consistent with the hearsay rules of evidence in this state. (*Ibid*.) Although the trial court determined on the new trial motion that Yamile's statements to Officer Cimmarrusti's were not testimonial because they were spontaneous and reliable for admission under either Evidence Code sections 1370 or 1240, and that any *Crawford* error regarding the statements to De Armas was harmless, we review the matter de novo because the question of whether the statements were testimonial was not a concern at the time the statements were presented at trial.

As noted above, *Crawford*, *supra*, 541 U.S. 36 does not provide a comprehensive definition of "testimonial." Nonetheless, the opinion makes clear that statements made to law enforcement officers in the course of an interrogation generally qualify as "testimonial"

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10 The issue whether spontaneous statements made to police officers are testimonial is currently pending before our Supreme Court in *Cage, supra*, S127344.

because the officers' solicitation of ex parte statements against an accused during an investigative or prosecutorial process gives rise to a risk of abuse against which the right of confrontation is designed to protect. (*Crawford, supra*, at p. 68.) Here, although Yamile was not being "interrogated" by Cimmarrusti in a technical sense, he was acting in an investigative and/or prosecutorial capacity at the time she made the statements to him. Cimmarrusti had been summoned to the Madison house by Yamile's brother who had called 911 to report an incident of domestic violence against Yamile by Garces several days earlier. Before Cimmarrusti talked with Yamile, he spoke with both Yamile's mother and brother who gave him some information about Yamile's and Garces's violent relationship, telling him they were concerned for Yamile after a recent fight with her ex-boyfriend Garces. Cimmarrusti then solicited Yamile's statements about what had happened and took a photograph of her injuries. Although Yamile appeared afraid and cried throughout the interview, she told Cimmarrusti the nature of her injuries and specifically how they were inflicted. She told him she did not want charges filed because she was afraid of Garces's threats to kill her or her family.

Although the statements Cimmarrusti obtained from Yamile were not recorded, they were used to open a domestic violence case against Garces, which was then assigned to De Armas who telephoned Yamile the next day. Yamile returned the call almost immediately and De Armas conducted another interview with her. He asked the questions, obtaining in more detail the information she had given to Cimmarrusti the day before. Yamile again pleaded with the officer not to arrest Garces because he was impulsive and she was afraid he would kill her as he had threatened to do.

Given the involvement of both officers in the production of evidence from Yamile, we believe her statements to them were " 'made under circumstances which would lead an objective witness reasonably to believe that the statement[s] would be available for use at a later trial.' " (*Crawford, supra*, 541 U.S. at p. 52.) Further, we believe the purpose for which her statements were obtained was for potentially using them in a criminal trial or to determine whether criminal charges should be filed. (*Taulton, supra*, 129 Cal.App.4th 1218, 1224.) We, therefore, conclude Yamile's statements to both Cimmarrusti and De Armas were testimonial for confrontation clause purposes.

B. Is there Crawford error?

The question then becomes whether the admission of Yamile's testimonial statements in her interviews with Cimmarrusti and De Armas violated *Crawford*'s two-prong test: (1) that the witness was unavailable for trial; and (2) that defendant had a prior opportunity to cross-examine the witness. (*Crawford, supra*, 541 U.S. at p. 68.) Clearly, the trial court properly found Yamile, who had been murdered, was unavailable for trial. Thus, based on their testimonial nature, the statements would be a violation of *Crawford* and subject to exclusion under the confrontation clause if Garces had lacked the opportunity to cross-examine Yamile regarding her statements made during her two interviews. Garces was arrested by De Armas several days after the detective had talked with Yamile and had heard messages left on his voice mail by Garces who thought the detective was seeing her. Garces pled guilty to misdemeanor charges of domestic violence and placing annoying phone calls before any preliminary hearing or trial. He thus had no opportunity to cross-examine Yamile

about her statements. Consequently, the admission of those statements against Garces violated his Sixth Amendment right to confrontation.

C. Is Evidence Code section 1370 still viable?

Leaving the question aside for the moment whether this error requires reversal under *Chapman, supra,* 386 U.S. 18, we confront the matter of whether Evidence Code section 1370, under which the court admitted Yamile's statements to both officers, remains constitutionally viable. Such section provides in pertinent part:

> "(a) Evidence of a statement by a declarant is not made inadmissible by the hearsay rule if all of the following conditions are met: [¶] (1) The statement purports to narrate, describe, or explain the infliction or threat of physical injury upon the declarant. [¶] (2) The declarant is unavailable as a witness . . . . [¶] (3) The statement was made at or near the time of the infliction or threat of physical injury. . . . [¶] (4) The statement was made under circumstances that would indicate its trustworthiness. [¶] (5) The statement was made in writing, was electronically recorded, or made to a physician, nurse, paramedic, or to a law enforcement official. [¶] (b) For purposes of paragraph (4) of subdivision (a), circumstances relevant to the issue of trustworthiness include, but are not limited to, the following: [¶] (1) Whether the statement was made in contemplation of pending or anticipated litigation in which he declarant was interested. [¶] (2) Whether the declarant has a bias or motive for fabricating the statement and the extent of any bias or motive. [¶] (3) Whether the statement is corroborated by evidence other than statements that are admissible only pursuant to this section." (Evid. Code, § 1370, subds. (a) & (b).)

On its face, Evidence Code section 1370 pertains to both statements made to law enforcement as well as medical practitioners for the sole purpose of seeking medical treatment. Moreover, some statements to law enforcement officers may be so informal and preliminary in nature, without any focus on building a criminal case, or spontaneously given moments after a crime, that they may be determined to be

nontestimonial. (See *People v. Corella* (2004) 122 Cal.App.4th 461, 468-469 (*Corella*).) As such, it encompasses nontestimonial as well as testimonial statements. Because it is not restricted to testimonial statements, it is constitutional on its face.

Contrary to Garces's assertion, Evidence Code section 1370 is thus distinguishable from Evidence Code section 1380 which permits admission of statements of elder and dependent adults and was found unconstitutional on its face in *People v. Pirwani* (2004) 119 Cal.App.4th 770 (*Pirwani*) in light of *Crawford, supra,* 541 U.S. 36. Because that section "requires that the statements be 'memorialized in a videotape recording *made by a law enforcement official*' [citation]," the court in *Pirwani* could not "conceive of a situation in which a statement given to law enforcement officers under Evidence Code section 1380 would be other than 'testimonial' within the meaning of *Crawford*." (*Pirwani, supra,* at p. 786.)

D. Was Evidence Code section 1370 constitutional as applied in this case?

Even though Evidence Code section 1370 is still viable after *Crawford, supra,* 541 U.S. 36, when the statements in question admitted under that statute are determined to be "testimonial," as here, it appears such section as applied comes in direct conflict with *Crawford*. Although Evidence Code section 1370, which was enacted in 1996 and is not a firmly rooted hearsay exception for confrontation purposes (*People v. Kons* (2003) 108 Cal.App.4th 514), withstood constitutional challenges due to its required "particularized guarantees of trustworthiness" ("indicia of reliability") under *Roberts, supra,* 448 U.S. 56 (*Hernandez, supra,* 71 Cal.App.4th at pp. 423-424), since *Crawford* such holding is undermined. In other words, the admission of testimonial statements under Evidence

Code section 1370 after *Crawford* "would only be consistent with the confrontation clause of the Sixth Amendment of the United States Constitution if [Garces] had a prior opportunity to cross-examine [Yamile]. [Citation.]" (*People v. Price* (2004) 120 Cal.App.4th 224, 238 (*Price*).)

To resolve this matter of application, the court in *Price* construed Evidence Code section 1370 "in a manner that is consistent with applicable constitutional provisions, seeking to harmonize the Constitution and the statute. [Citations.]" (*Price, supra*, 120 Cal.App.4th at pp. 238-239.) Doing so, it interpreted "the trustworthiness prong of subdivision (a)(4) of that statute to require a prior opportunity to cross-examine the declarant. [Citation.]" (*Price, supra*, at p. 239.) We agree with this construction, and applying such interpretation here, we conclude that the trial court abused its discretion in admitting Officers' Cimmarrusti and De Armas hearsay testimony of Yamile's November 1997 statements to them under Evidence Code section 1370 because Garces was not provided a prior opportunity to cross-examine Yamile on those statements. Stated differently, Evidence Code section 1370's application in this case was thus unconstitutional.

E. The question of spontaneous statements.

Before *Crawford, supra,* 541 U.S. 36, the California Supreme Court generally rejected Sixth Amendment right to confrontation challenges to the admission of

spontaneous statements under Evidence Code section 1240 by unavailable witnesses.[11] These decisions were founded on the application of the *Roberts* test regarding the reliability of the out-of-court statements. (See, e.g., *People v. Farmer* (1989) 47 Cal.3d 888, 905-906, disapproved on another ground in *People v. Waidla* (2000) 22 Cal.4th 690, 724, fn. 6; *People v. Pensinger* (1991) 52 Cal.3d 1210, 1266-1267.) As noted earlier, the *Roberts, supra,* 448 U.S. 56, test of reliability was rejected in *Crawford* as to testimonial statements. Although several courts have suggested that the nature of a statement given spontaneously necessarily precludes a finding that it is testimonial (see, e.g., *Rincon, supra,* 129 Cal.App.4th at p. 757; *Corella, supra*, 122 Cal.App.4th at p. 469), we do not read *Crawford* as supporting such view. Rather, we believe *Crawford* suggested a contrary view in a footnote. (*Crawford, supra*, 541 U.S. at p. 58, fn. 8.)[12] We do not believe that *Crawford* intended to carve out an exception to its holding for spontaneous statements.

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11 Under Evidence Code section 1240, the hearsay rule does not apply to a statement that "(a) [p]urports to narrate, describe, or explain an act, condition, or event perceived by the declarant; and [¶] (b) [w]as made spontaneously while the declarant was under the stress of excitement caused by such perception."

12 The footnote we refer to is one by Justice Scalia stating: "One case arguably in tension with the rule requiring a prior opportunity for cross-examination when the proffered statement is testimonial is *White v. Illinois* [citation], which involved, inter alia, statements of a child victim to an investigating officer admitted as spontaneous declarations. [Citation.] It is questionable whether testimonial statements would ever have been admissible on that ground in 1791; to the extent the hearsay exception for spontaneous statements existed at all, it required that the statements be made 'immediately upon the hurt received and before [the declarant] had time to devise or contrive anything for her own advantage.' [Citation.]" (*Crawford, supra*, 541 U.S. at p. 58, fn. 8.)

Moreover, even if such an exception were to apply, we would find that the trial court here abused its discretion in ruling on the new trial motion that Yamile's statements to Cimmarrusti and De Armas in this case were spontaneous and would be admissible also on that ground.

Although the mental state of the declarant is the crucial element in determining whether a declaration is sufficiently reliable to be admissible under Evidence Code section 1240 (*People v. Raley* (1992) 2 Cal.4th 870, 892-893 (*Raley*)), our Supreme Court has held that:

> " 'To render [statements] admissible [under the spontaneous declaration exception] it is required that (1) there must be some occurrence startling enough to produce this nervous excitement and render the utterance spontaneous and unreflecting; (2) the utterance must have been made before there has been time to contrive and misrepresent, i.e., while the nervous excitement may be supposed still to dominate and the reflective powers to be yet in abeyance; and (3) the utterance must relate to the circumstance of the occurrence preceding it.' [Citations.] [¶] 'The foundation for this exception is that if the declarations are made under the immediate influence of the occurrence to which they relate, they are deemed sufficiently trustworthy to be presented to the jury. [Citation.] [¶] The basis for this circumstantial probability of trustworthiness is "that in the stress of nervous excitement the reflective faculties may be stilled and the utterance may become the unreflecting and sincere expression of one's actual impressions and belief." [Citation.] [¶] Whether the requirements of the spontaneous statement exception are satisfied in any given case is, in general, largely vested in the court, not the jury. [Citation.] In performing this task, the court 'necessarily [exercises] some element of discretion. . . .' [Citation.] [¶] Because the second requirement relates to the peculiar facts of the individual case more than the first or third does [citations], the discretion of the trial court is at its broadest when it determines whether this requirement is met [citation]." (*People v. Poggi* (1988) 45 Cal.3d 306, 318-319 (*Poggi*).)

Here, there was a lapse of three or more days between the acts of domestic violence against Yamile and the date such acts were reported to the police by her brother. The subject statements were then elicited from Yamile in response to the questioning of one police officer who visited her at home and another who telephoned her the next day with more questions. Although " ' "[n]either lapse of time between the event and the declarations nor the fact that the declarations were elicited by questioning deprives the statements of spontaneity if it nevertheless appears that they were made under the stress of excitement and while the reflective powers were still in abeyance." ' [Citation.]" (*People v. Trimble* (1992) 5 Cal.App.4th 1225, 1234-1235 (*Trimble*), italics omitted), the utterance must truly be spontaneous. (*Poggi*, *supra*, 45 Cal.3d at pp. 318-319.) Such must be "made without deliberation or reflection. [Citation.]" (*Raley*, *supra*, 2 Cal.4th at pp. 892-893.)

In this case, even though Yamile was crying and obviously afraid of Garces, the circumstances surrounding the giving of her statements to Cimmarrusti and De Armas reveal adequate opportunity for deliberation and reflection on her part. Yamile had returned home to where the acts of domestic violence had occurred at least three days earlier. Before her brother had telephoned the police, Yamile had decided not to talk to him about the matter, telling him not to ask her any questions. She also had talked with her mother about her injuries. Although she was tearful and shaky the whole time she talked with Cimmarrusti, she decided to answer his questions, allowed him to take photographs of her injuries, and pleaded with him not to prosecute Garces because of his threats. The next day she did not pick up the telephone when De Armas called, but

telephoned him in response to the voice message he left on her machine. She then again answered De Armas's questions about the domestic violence incident and talked to him about her fears in case Garces learned that the police were involved and he were arrested.

Under these circumstances, we believe the court abused its discretion in finding Yamile's statements to Cimmarrusti and De Armas were made while her "reflective powers [were still] in abeyance." (*Showalter v. Western Pacific R. R. Co.* (1940) 16 Cal.2d 460, 468.) In contrast to the two-and-a-half year old child in *Trimble* who witnessed the defendant stab her mother and remained alone with the defendant and another child for two days before another trusted adult arrived on the scene when defendant was not there before giving her "frantic description of the assault" in response to questions about her mother's disappearance (*Trimble, supra*, 5 Cal.App.4th at p. 1235), Yamile was "an adult declarant . . . who had [over three] days in which to gather her thoughts, reflect on them, and regain her composure." (*Pirwani, supra*, 119 Cal.App.4th at p. 790.) Although Yamile's mental state was poor from Garces's continual abuse and threats, in light of the fact she had chosen to return home, talk in part to both her mother and brother, expressing her desire not to involve the police because of her fears, we cannot agree she lacked the opportunity for reflection and deliberation before she spoke with Cimmarrusti and De Armas. We, therefore, conclude that any reliance on Evidence Code section 1240 for Yamile's statements to the officers was error.

F. Were the subject statements otherwise admissible?

We have already determined that Garces did not forfeit his right to raise the *Crawford* issue regarding such statements, that such were "testimonial" under *Crawford,*

supra, 541 U.S. 36, and improperly admitted against his confrontation rights under Evidence Code section 1370, and that they would have also been violative of his rights under *Crawford* if originally admitted under Evidence Code section 1240. Nonetheless, the People contend Yamile's statements regarding the domestic violence incident were already properly admitted without objection under Evidence Code section 1109, which permitted the court to admit evidence of the October 1997 incident to show Garces's propensity to commit acts of domestic violence, and her statements regarding any threats were not admitted for their truth, but only to show her state of mind in disappearing for three days, attempting suicide in the past, and explaining why she did not want to prosecute the October 30, 1997 domestic violence incident. The People further contend Garces has waived any issue concerning Evidence Code section 1250 because he failed to object on such specific grounds below. Although the fact some of the statements were admissible under Evidence Code section 1109 is relevant to our later determination whether the *Crawford* error is harmless, we do not believe the statements regarding the threats would have been justified under Evidence Code section 1250.[13]

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13 Evidence Code section 1250 provides: [¶] (a) Subject to Section 1252, evidence of a statement of a declarant's then existing state of mind, emotion, or physical sensation (including a statement of intent, plan, motive, design, mental feeling, pain, or bodily health) is not made inadmissible by the hearsay rule when: [¶] (1) The evidence is offered to prove the declarant's state of mind, emotion, or physical sensation at that time or any other time when it is itself an issue in the action; or [¶] (2) The evidence is offered to prove or explain acts or conduct of the declarant. [¶] This section does not make admissible evidence of a statement of memory or belief to prove the fact remembered or believed."

Our review of the record reveals that Garces objected to the threats, especially those concerning what happens in Cuba to those who report domestic violence, as irrelevant and prejudicial under Evidence Code section 352. The relevance objection was essentially a foundational objection which we find sufficient to preserve Garces's right to raise an objection to their admission on appeal. The court overruled the objections, agreeing to admonish the jury that the statements went to Yamile's state of mind explaining why she was reluctant to report the domestic violence incident that had occurred three days earlier. However, because Garces had not put Yamile's state of mind in issue regarding the prior incident of domestic violence by his defense, and the threats and Yamile's fear in prosecuting Garces were not relevant to a contested issue for the murder charge, the court erred in overruling Garces's relevance objection in the first instance.

Generally, a victim's expression of fear of the defendant is inadmissible where "neither the state[] of mind of [the] victim[] prior to [her] death[] . . . nor [her] acts or conduct . . . [are] an issue in the case which might have been resolved or assisted by the challenged evidence." (*People v. Ruiz* (1988) 44 Cal.3d 589, 608.) Although it is true that Yamile's statements were the type that could qualify to prove a declarant's "state of mind" or constitute circumstantial evidence of her fear of Garces (*People v. Cox* (2003) 30 Cal.4th 916, 957-959), some act or conduct of hers before the murder would have had to have been at issue or relevant to an issue in order to make such admissible in the present case. Garces did not challenge the prior incident of domestic violence. The fact the court admonished the jury about his threats to Yamile and her fear is yet another

matter that will be considered later in determining whether the *Crawford* error was harmless.

III

THE TELEPHONE CONVERSATION EVIDENCE

Garces also contends the trial court violated his right to confrontation when it allowed into evidence the hearsay testimony about a telephone conversation Yamile's mother claimed to have had with Yamile shortly before Yamile's death and when it allowed the double hearsay testimony from Officers Morales and Penalosa about a telephone conversation Janet purportedly overheard between Yamile and himself that same morning. We address the two different phone calls separately after briefly stating some pertinent law. We conclude any error in the admission of such evidence was harmless.

A. Pertinent Law

" 'Hearsay evidence' is evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated." (Evid. Code, § 1200, subd. (a).) Generally, hearsay evidence is inadmissible unless the law provides an exception for its admission. (Evid. Code, § 1200, subd. (b).) Double hearsay is admissible if each level falls within an exception to the hearsay rule. (*People v. Zapien* (1993) 4 Cal.4th 929, 950-952, 956 (*Zapien*).) Statements which are not offered to prove the truth of the matters asserted do not constitute hearsay.

Moreover, as earlier noted, the holding of *Crawford* does not apply to statements made by a declarant who is available at the time of trial for cross-examination or to

"nontestimonial" statements made by an unavailable declarant, such as offhand, overheard remarks by family or friends or casual comments made to an acquaintance. (*Crawford, supra*, 541 U.S. at pp. 51, 59, fn. 9; *Taulton, supra*, 129 Cal.App.4th at p. 1224.)

B. Fong's Telephone Call to Yamile

During a break in Fong's testimony at trial, the prosecutor requested she be allowed to testify about a telephone call the morning of Yamile's death that he had just learned about from Fong. He anticipated Fong would testify she talked with Yamile on the phone that day around 10:30 a.m. and Yamile had told her she was expecting Garces and she was going to take him downtown to pay his fine.

Defense counsel objected to such testimony based "upon veracity of the truth of that statement." Counsel argued the statement made six years after the crime was something Fong had never told the police when the case was originally investigated. The prosecutor claimed it was not admitted for its truth, but only for "circumstantial evidence of identification since [defense counsel] has made identification an issue, and I offer it for that purpose." The court agreed with the prosecutor that such objection merely went to the weight and not admissibility of the evidence and overruled it. Later, when Fong was testifying to what Yamile told her on the telephone, defense counsel raised a hearsay objection, which the court overruled based on its earlier ruling.

Garces claims the court's ruling was wrong because the statement he was coming over to see Yamile at the house to get a ride downtown was offered for its truth on the issue of identity. Although the court's ruling may have inartfully been stated based on the

prosecutor's representations, we believe the major portion of what Yamile told Fong during the telephone call was admissible for the limited nonhearsay purpose of showing Yamile's state of mind regarding her intention to get ready so she could give Garces a ride downtown to pay his fine, a fact corroborated by Deck's statements to the police that Garces had earlier called her needing such a ride that day. (Evid. Code, § 1250, subd. (a)(1); *People v. Jones* (1996) 13 Cal.4th 535, 548 (*Jones*) [in murder prosecution, testimony of victim's daughter that victim said she was going with defendant and to call her aunt if she did not return was properly admitted "to prove or explain acts or conduct of the declarant.") Generally, " ' "a ruling or decision, itself correct in law, will not be disturbed on appeal merely because given for a wrong reason. If right upon any theory of the law applicable to the case, it must be sustained regardless of the considerations which may have moved the trial court to its conclusion." [Citation.]' [Citation.]" (*Zapien, supra*, 4 Cal.4th at p. 976.)

This case is similar to the situation in *People v. Alcalde* (1944) 24 Cal.2d 177 (*Alcalde*)), where the deceased victim's statement made on the date of the crime "that she was going out with 'Frank' that evening" (*id.* at p. 185) was held admissible to show her present intention to do an act in the future and circumstantial evidence "relevant to the issue of guilt," i.e., the defendant's identity (*id.* at p. 188). Here, under the reasoning of *Alcalde*, the state of Yamile's mind as to what she intended to do before later seeing Fong that day was relevant to "the issue of [Garces's] guilt," his identity, which he had made an issue at the retrial. (*Id.* at pp. 185-188; see also *People v. Majors* (1998) 18 Cal.4th 385, 404-405.) Although we agree with Justice Traynor's dissent in *Alcalde* that such

evidence generally should not be admitted because it also tends to prove the acts of the defendant as well as the declarant (*Alcalde, supra*, 24 Cal.2d at p. 189 [dis. opn. of Traynor, J.]), we recognize, as did the court in *People v. Chambers* (1982) 136 Cal.App.3d 444, 452-453 (*Chambers*)), which addressed the issue of whether *Alcalde* was correctly decided in light of Justice Jefferson's agreement in his then published Evidence Benchbook with Justice Traynor's dissent that the holding in *Alcalde* was wrongly decided, that such "criticism, however meritorious, does not relieve us of the responsibility for following Supreme Court precedent [citation]. . . ." (*Chambers, supra*, 136 Cal.App.3d at p. 452.)[14]

However, regarding the portion of the telephone conversation where Yamile told Fong that Garces was going to come over to the house, the analysis is slightly different. Such statement became Fong's testimony based on the way the prosecutor phrased his question to Fong regarding the telephone conversation. As asked, the statement placed before the jury two levels of evidence, one level regarding Yamile's statements and another regarding Garces's statement of intent to go to the Madison house to obtain a ride

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14 The court in *Chambers* further noted that the legislative history for the adoption of the existing state of mind exception under Evidence Code section 1250 appeared to be in response to *Alcalde, supra*, 24 Cal.2d 177. (*Chambers, supra*, 136 Cal.App.3d 444.) Our Supreme Court in *Jones, supra*, 13 Cal.4th 535, in addressing another challenge to *Alcalde* as in *Chambers*, found that it had "no occasion or authority to reconsider the *Alcalde* decision" because its holding was clearly codified by the Legislature in enacting Evidence Code section 1250. (*Jones, supra*, at p. 548.) Although we believe legislative reconsideration of *Alcalde* and Evidence Code section 1250 is long overdue, *Alcalde* is still binding precedent which we are required to follow in this case. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450.)

downtown from Yamile. "From the declared intent to do a particular thing an inference that the thing was done may fairly be drawn." (*Alcalde, supra*, 24 Cal.2d at p. 185.) Thus, Garces's "declarations of . . . intent are [also] admissible . . . as evidence of the probable doing of the act. . . ." (*People v. Weatherford* (1945) 27 Cal.2d 401, 422.) Such evidence was relevant to show Garces had probably gone to the Madison home that morning and was circumstantial evidence on the issue of identity of the person who had murdered Yamile and assaulted Janet.

Garces did not raise any objection that the evidence of the telephone conversation between Fong and Yamile was too prejudicial. Nor did he challenge the reliability of Yamile's statements to Fong (Evid. Code, § 1252), only claiming Fong's remembrance of the telephone conversation was suspect.

Further, Garces does not show how the statements would be "testimonial" under *Crawford, supra,* 541 U.S. 36. Because such nontestimonial statements could have been admitted to show Yamile's intention of future conduct as well as Garces's future intention, both of which were relevant to an issue in the case, the identity of the murderer, no confrontation clause violation is shown by their admission.

Accordingly, we conclude the trial court did not err in admitting Fong's testimony as to the telephone conversation between Yamile and her mother.

C. Janet's Statements to Officers Regarding the Phone Call Between Yamile and Garces

As related in the facts, when Janet testified at trial, she could not recall any telephone call the morning she was assaulted and Yamile was murdered. Although she remembered talking to the police while she was in the hospital after the attack, she could

not remember whether she told the police she thought the phone had rung and the person calling was "Luis," whom she had been told was Yamile's "ex."

Garces's counsel cross-examined Janet regarding her memory lapse concerning the telephone call, and then called Officer Morales in the defense case to testify as to what Janet had told him about the telephone call. Janet had told Morales that Garces had called Yamile asking for a ride and she (Janet) had overheard Yamile refuse to give him one and tell him not to call again.

Although the prosecutor called Officer Penalosa in its case-in-chief, he testified out of order after the defense case, essentially stating Janet had told him at the hospital that she had answered the phone that morning and had talked to a man who identified himself as "Luis." Penalosa then related what Janet told him she overheard about Yamile's side of the conversation. Janet heard Yamile say something about a ride downtown and about someone owing some money. She then heard Yamile tell the male caller to leave her alone.

In his opening brief, Garces asserts the trial court erred in allowing Morales and Penalosa to testify about the statements Janet made to them about the telephone call between Yamile and the male caller who identified himself to Janet as "Luis" for impeachment of Janet's testimony she did not recall any telephone call or telling the officers about one. He claims such evidence is inadmissible double hearsay which the court should have kept out rather than ruling it was nonhearsay evidence which had some independent meaning as circumstantially showing identity. He argues the prosecutor improperly used the subject evidence for the truth of the matters stated in the phone

conversations because such evidence supported an inference he was present when the crimes were committed. We disagree.

It was the defense who cross-examined Janet about her statements to Morales she did not recall and the defense who called Morales as a witness to impeach Janet on such fact to show her identification of Garces as the person who attacked her and Yamile was inconsistent and suspect. Presentation of such evidence shows a tactical reason for introducing such statements, to impeach Janet. In addition, as with Fong's testimony regarding her phone call with Yamile, the admission of such evidence could be justified on other grounds as well as on grounds it was nonhearsay going to circumstantially show identity of the person who was needing a ride downtown to pay a fine that day. (*Zapien, supra,* 4 Cal.4th at p. 976.)

Evidence Code section 1235 allows the admission of a witness's prior inconsistent statement, stating, in pertinent part: "Evidence of a statement made by a witness is not made inadmissible by the hearsay rule if the statement is inconsistent with his [or her] testimony at the hearing . . . ." Janet's out-of-court statements made to Morales about what she overheard Yamile say during the telephone conversation were inconsistent with her denial at trial that she had made such statements. Janet's out-of-court statements made to Morales were also inconsistent with some of her out-of-court statements made to Penalosa, which in turn were contrary to her denial at trial. "The reason the prior inconsistent statement of a witness may be received is that the declarant is present in court *and subject to cross-examination*. 'The witness who has told one story aforetime and another today has opened the gates to all the vistas of truth which the common law

practice of cross-examination and re-examination was invented to explore. The reasons for the change of face, whether forgetfulness, carelessness, pity, terror, or greed, may be explored by the two questioners in the presence of the trier of fact, under oath, casting light on which is the true story and which the false. It is hard to escape the view that evidence of a prior inconsistent statement, when declarant is on the stand to explain if he [or she] can, has in high degree the safeguards of examined testimony.' [Citation.]" (*Zapien, supra*, 4 Cal.4th at p. 953.) Here, Janet was subject to cross-examination as well as were both Morales and Penalosa regarding the statements she had made to each of them that were inconsistent with her trial testimony and each other.

Further, the statements Janet had made to Morales and Penalosa about what she overheard Yamile say to the male on the telephone to which Garces had objected as inadmissible for impeachment on hearsay grounds pretrial, were in essence, as the trial court found, nonhearsay statements from which the prosecutor could argue the identity of the intruder who attacked Janet and Yamile.[15] Defense counsel had asked Janet about the people who had come to the house that morning, one of whom was the male mechanic who was working on Yamile's car that day, thus making any statement Janet

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15 Although Garces had objected pretrial to any hearsay statement coming in via impeachment of Janet as to what Yamile may have told her the morning she was killed, when Penalosa testified about what Yamile told Janet after she got off the phone, i.e., that her ex-husband was coming over to the house, Garces merely raised a lack of foundation objection which the court overruled. Garces also did not raise such as error in his opening brief. Because his passing reference to such statement as inadmissible hearsay in his reply brief does not properly present such issue on appeal, we decline to consider such statement in our discussion.

overheard of Yamile's intention of seeing Garces that morning, like Yamile's statements of intent to Fong, relevant to the identity issue.

Moreover, as with Yamile's statements to Fong, Yamile's statements overheard by Janet were not testimonial and Janet's statements to the officers were subject to cross-examination at trial. No confrontation clause violation under *Crawford, supra,* 541 U.S. 36, is thus shown in the admission of such statements.

However, even if we were to assume error in their admission, we would find the error harmless. As we have already determined, Fong's testimony regarding Yamile's statement to her about a telephone conversation involving Garces was already properly admitted going to the identity of the attacker that morning. Such was also corroborated by Deck's statements to officers regarding Garces calling people that morning to get a ride downtown to pay a fine, and Janet's inconsistent statements and denial at trial did not negate her positive identification of Garces as the attacker. Janet consistently identified Garces as that person. She had seen his picture in photo albums, she had seen his face at the time of the attacks, she had identified his photograph in a lineup while at the hospital, and had identified him at trial as her assailant. Therefore, even without the objected to impeachment evidence regarding the telephone call between a man and Yamile that morning, there is no reasonable probability of a more favorable outcome on the issue of the identity of the attacker.

IV

WAS THE CRAWFORD ERROR PREJUDICIAL?

The question remains, however, having determined that the admission of Yamile's statements to Cimmarrusti and De Armas violated Garces's confrontation rights under *Crawford, supra,* 541 U.S. 36, whether such error requires reversal of Garces's convictions for murder and assault with a deadly weapon. Error under *Crawford* is evaluated under the *Chapman* standard, which requires reversal "unless we found beyond a reasonable doubt that the jury verdict would have been the same absent any error [in the admission of the statements]." (*People v. Harrison* (2005) 35 Cal.4th 208, 239 (*Harrison*).) In other words, under *Chapman, supra,* 386 U.S. 18, "an error is harmless only when, beyond a reasonable doubt, it did not contribute to the verdict." (*People v. Williams* (1997) 16 Cal.4th 635, 689 (*Williams*).) Moreover, we apply the standard to each count separately, thoroughly reviewing the record as to the strength of the prosecution case in light of the instructions and arguments given. (See *People v. Bolden* (2002) 29 Cal.4th 515, 560; *People v. Song* (2004) 124 Cal.App.4th 973, 985 (*Song*).)

Here, the prosecution case against Garces, with the exception of Janet's eyewitness identification of him as the attacker, was basically supported by circumstantial evidence. Although there was no direct physical evidence found at the Madison home linking Garces to the crimes, there was no sign of forced entry and, as we have already noted, Janet's identification of Garces as the attacker was unwavering. Plainly, the circumstantial evidence was strong to tie Garces to the crimes. Garces had stayed the night before the attacks at the residence of friends less than a mile away from Yamile's

house. The morning of the attacks the friends had left home while Garces remained there with their keys. When Rodriguez returned home after shopping, Garces ran up to her, nervous and appearing to be wet as if he had just taken a shower. He told her something terrible had happened and he needed a ride to the border. He also told her he had left some clothe there and to do whatever she wanted with them, including get rid of them.

Later, Rodriguez and her husband found a pair of Garces's pants soaking in the bathtub with the husband's work clothes and Rodriguez determined one of her kitchen knives was missing that resembled the photo of the murder weapon she was shown by the police. Garces's flight from the state and later admission in Florida that he had had trouble with his girlfriend in California "and the blood ran," provided strong evidence of his guilt, i.e., that he was Yamile's murderer and Janet's attacker.

In addition, the jury had before it evidence from Yamile's mother and brother about her stormy relationship with Garces which included verbal and physical abuse as well as unspecified "threats," and the stipulated facts that Garces had committed acts of domestic violence on Yamile five weeks before her murder and had been released from jail four days before the attacks. The jury had also heard the taped voice messages to Officer De Armas threatening to kill him if he were involved with Yamile.

The prosecutor, as well as the court's instructions, told the jury it could only consider the evidence concerning the prior domestic violence as relevant to the count 1 murder charge. In addition to the circumstantial evidence regarding the knife and sock the attacker took to the Madison home with him, the prosecutor relied heavily on Yamile's statements to the officers, stressing her fear of involving the police in the prior

domestic violence incident because of Garces's threats to kill her to find the killing was premeditated and to return a verdict of murder in the first degree. The prosecutor told the jury to remember the October 30, 1997 incident because Yamile's "prophesy was correct. Don't press charges, please don't. Don't arrest him because he'll kill me. And he did."

The defense position was that if the evidence showed Garces were the attacker, then the murder was at most voluntary manslaughter because of his impulsive reaction to the provocation presented in finding Janet at the house with Yamile. The defense argued Garces's actions were committed in the heat of passion, essentially fighting for the person he loved, noting Yamile's mother and brother as well as the defense psychological expert had all testified to Garces's impulsiveness, anger and jealousy problems.

Although there was unquestionably evidence to support the prosecutor's theory of premeditated murder, because Yamile's statements to Officers Cimmarrusti and De Armas were considered important by the prosecutor to show Garces acted in conformity with his threats to Yamile to premeditate her murder, we cannot say such improperly admitted evidence did not also weigh heavily on the minds of the jurors in making their determination Garces's attack on Yamile was premeditated. (See *People v. Cruz* (1964) 61 Cal.2d 861, 868; *People v. Pantoja* (2004) 122 Cal.App.4th 1, 14-15.)

Moreover, limiting instructions are not always an adequate substitute for a defendant's constitutional right of cross-examination. (*Song, supra*, 124 Cal.App.4th at pp. 982-984.) Thus, even though the trial court did admonish the jury generally about such statements, the admonishment was not specific, merely lumping such evidence with other evidence presented for a limited purpose. Despite the prosecutor's earlier

representations that the statements were not being admitted for their truth and the court's general admonishment, the prosecutor nonetheless essentially asked the jury in closing to consider such statements for their truth--that Garces threatened to kill Yamile if he were arrested for the earlier incident and then he did so after he was released. Under these circumstances, where the error in admitting the statements was compounded by the prosecutor's argument, we think it is reasonably probable the jury may have considered such evidence as the prosecutor intended it to be considered. Given the nature and significance of the evidence, we cannot find "beyond a reasonable doubt, [such erroneously admitted evidence] did not contribute to the verdict." (*Williams, supra*, 16 Cal.4th at p. 689.) The first degree murder conviction in count 1 must, therefore, be reversed.

We reach a different conclusion as to the assault with a deadly weapon charge against Janet. As noted above, the jury was fully instructed that the subject statements were relevant only to the murder count and the identification of Garces as Janet's attacker was strongly supported by the evidence. In light of this record, we find "beyond a reasonable doubt that the jury verdict would have been the same [on the assault charge] absent any error [in the admission of the statements]." (*Harrison, supra*, 35 Cal.4th at p. 239.)

DISPOSITION

The count 1 murder conviction is reversed. In all other respects, the judgment is affirmed.

HUFFMAN, Acting P. J.

WE CONCUR:

McINTYRE, J.

AARON, J.