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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, **Plaintiff and Respondent,** **v.** **WILLIAM EDWARD KILDAY,** **Defendant and Appellant.**	**A099095** **(San Mateo County Super. Ct. No. SC050425)**

In this case we apply the United States Supreme Court's recent decision in *Crawford v. Washington* (2004) __ U.S. __ [124 S.Ct. 1354] (*Crawford*) to victim statements obtained by police officers at or near the scene of an alleged crime. The *Crawford* Court held that the admission of "testimonial" hearsay against a criminal defendant violates the Sixth Amendment confrontation clause if the declarant was unavailable to testify at trial and the defendant had no previous opportunity to cross-examine the declarant.

William Edward Kilday appeals from his convictions for torture, inflicting corporal injury upon a cohabitant, and making criminal threats. Kilday's primary contention is that the trial court erred in admitting the victim's out-of-court statements to police officers under the statutory hearsay exception for statements purporting "to

* Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for publication with the exception of parts IVand V.

narrate, describe, or explain the infliction or threat of physical injury upon the declarant." (Evid. Code, § 1370, subd. (a)(1).)

We hold that two of the victim's three statements are testimonial and that admission of those two statements violated the confrontation clause under the new rule announced in *Crawford*. In the unpublished portion of the decision, we conclude that the People forfeited arguments not raised in their initial brief on appeal and conclude that the error in admitting the two testimonial statements was harmless with respect to certain counts but not as to others. We reverse the judgment of conviction for count three (torture), count five (infliction of corporal injury upon a cohabitant), and count seven (making criminal threats); affirm the remainder of the judgment; and remand.[1]

PROCEDURAL BACKGROUND

On March 20, 2002, the District Attorney for San Mateo County filed an amended information charging defendant William Edward Kilday with mayhem (Pen. Code, § 203; count one), inflicting corporal injury upon a cohabitant (Pen. Code, § 273.5, subd. (a); counts two, four, five, and six), torture (Pen. Code, § 206; count three), making criminal threats (Pen. Code, § 422; count seven), false imprisonment (Pen. Code, § 236; count eight), and two misdemeanor counts of violating a protective order (Pen. Code, § 166, subd. (c)(1); counts nine and ten). The information further alleged the use of a deadly weapon and the infliction of great bodily injury and that counts one, two, three, four, and seven were serious felonies. Counts one and two (mayhem and domestic violence) occurred on September 3, 2001; counts three and four (torture and domestic violence) occurred on October 10, 2001; counts five and nine (domestic violence and violating a protective order) occurred on the evening of October 19; and counts six, seven, eight, and

[1] A petition for writ of habeas corpus was filed concurrently with Kilday's brief on appeal. By separate order, the petition was dismissed as moot. (Cal. Rules of Court, rule 24(b)(4).)

ten (domestic violence, making criminal threats, false imprisonment, and violating a protective order) occurred on the morning of October 20, 2001.

The trial court granted the prosecutor's motion in limine to admit out-of-court statements made by the victim to police officers, based in part on a finding that the victim was unavailable due to her unwillingness to testify. (Evid. Code, §1370.)[2] At the start of trial, the trial court dismissed the mayhem count on the motion of the prosecutor. The jury found Kilday guilty of all counts except counts two (Pen. Code, § 273.5, subd. (a)) and eight (Pen. Code, § 236) and found true the special allegations. The trial court imposed a three-year prison sentence for the October 20, 2001 domestic violence (count six); a consecutive term of life imprisonment with the possibility of parole for the torture (count three); and a consecutive year for the deadly weapon enhancement on the torture count. The court imposed a concurrent six-month term for the October 19 domestic violence (count five); a concurrent two-year term for the criminal threat (count seven); and two concurrent six-month terms for the two protective order violations (counts nine and ten), stayed pending completion of the sentences on counts five and six. Finally, the court stayed pursuant to Penal Code section 654 a sentence of nine years for the October 10 infliction of corporal injury with enhancements (count four). The total sentence was an aggregate un-stayed determinate term of four years in prison, followed by an indeterminate sentence of life with the possibility of parole.

FACTUAL BACKGROUND

Prosecution Case

The manager of the Sequoia Hotel testified that he saw burns on the legs of the victim, Patricia Kiernan, on the morning of October 20, 2001. Previously he had seen her wearing a bandage and she told him that she had been injured at work. On October 20 he

[2] All further references are to the Evidence Code unless otherwise indicated.

asked to see the injury and concluded that it could not have been the result of an accident. He asked Kiernan what happened and she reluctantly admitted that Kilday, her live-in boyfriend, intentionally burned her with an iron. The manager told his daughter to call the police.

Kiernan's first statement

At approximately 12:15 p.m. on October 20, police officers David Cirina and Russell Federico arrived at the Sequoia Hotel. The officers encountered Kiernan in the lobby. Kilday was not present at the hotel when the officers arrived. Kiernan was upset, frightened, and reluctant to speak to the officers. Officer Federico observed that she had a bruise on her right shoulder and arm, a cut on her left wrist and arm, and a bump on the back of her head.

Kiernan told Officer Cirina that her boyfriend had cut her arm and had burned her leg with an iron. She also told him that the night before (October 19) her boyfriend had pulled her hair and thrown her into the walls, and that earlier that day (October 20) he had injured her shoulder by throwing her into the walls. Kiernan told Officer Federico that Kilday had cut her wrist and arm with a piece of glass and held her down and burned her leg with an iron. She also told him than Kilday had pushed her into the street during a fight the night before and that morning had pulled her hair and thrown her against the wall.

Kiernan's second statement

Because Kiernan was reluctant to speak to them, Cirina decided to summon a female officer and he asked for Detective Denise Randall "to come over and talk to [Kiernan]." Kiernan had provided "very, very, very minimal information," and they "certainly needed to get a more detailed statement." Detective Randall arrived at the hotel around 1:15 p.m. There were four or five male police officers at the scene when she arrived. She met with Federico and Cirina, who "told [her] a little bit about what was

going on." She then "met with" Kiernan in the lobby; Kiernan still appeared upset and frightened. Kiernan's first words to Randall were, "I deserve this" and she started crying.

Detective Randall asked Kiernan about the scar on her arm. Kiernan told her that Kilday had held her arm down and cut her with a piece of glass in a hotel room in Palo Alto on Labor Day, September 3, 2001. She described the treatment she obtained for the injury and the continuing nerve damage. Kiernan told Randall that she and Kilday had fought the night before and that Kilday had shoved her against the wall. Further, on the morning of October 20 while Kiernan was ironing her clothes for work Kilday said something to the effect of "if you like the iron so much, let me plug it in for you and burn you again." Kilday threw her against the wall.

Kiernan was afraid that Kilday would come back and get her and she became extremely frightened and withdrawn when Randall told her he was approaching the hotel. Kilday was apprehended by other officers outside the hotel; Kiernan, clutching Randall's hand, watched Kilday being taken away in a patrol car.

Kiernan's third statement

Detective Randall then conducted a tape-recorded interview with Kiernan in Kiernan's hotel room, in order to "obtain a complete taped statement from her." Randall told Kiernan that "in order to have [Kilday] in custody, I needed to get a complete statement from her as to what had transpired." During the tape-recorded interview, Kiernan told Randall about abuse inflicted by Kilday on four separate dates in September and October 2001.

Kiernan told Randall that Kilday cut her hand on Labor Day (September 3, 2001) in a motel room in Palo Alto. She went to the emergency room at Stanford Hospital and later had hand surgery. She told the doctors at Stanford that she had hurt herself at work. The manager of Kiernan's workplace testified that she told him that she had cut herself on a mirror at home.

Kiernan told Randall that on October 10, 2001, in a hotel room in Mountain View, Kilday held her down and burned her on the right leg with a hot clothing iron. She later told Officer Cirina that during the incident she kicked away Kilday's hand, causing the iron to burn his shoulder. On October 10, Kiernan told police officers who came to investigate the disturbance in her hotel room that the burns occurred at work, and she told her coworkers that she had burned herself cooking. Detective Randall testified that at the time of the interview she saw that Kiernan had burns on her entire right shin, two additional burns on her inner right thigh, and the imprint of a clothing iron with the steam holes visible on the back of her right calf.

Kiernan told Randall that on October 19, 2001, she and Kilday argued while having dinner at a restaurant. Later that evening in their hotel room in Redwood City, Kilday grabbed her by the hair and threw her against a wall. Randall observed a bruise on Kiernan's right shoulder, which Kiernan said was caused by Kilday's conduct that night. A downstairs neighbor testified that she heard an argument in Kiernan and Kilday's room that night. Kiernan told Randall that Kilday eventually left the room and that she later encountered him outside a nearby bar. Kilday threw her into the street and hit her in the head. Kilday was arrested for being drunk in public and Kiernan returned to the hotel room.

The following morning, October 20, Kilday returned to the hotel room as Kiernan was getting ready for work and hit her. As Kiernan was preparing to iron her clothes for work, Kilday threatened, "Oh, you like to iron so much, here let me plug it in and burn you again." Kilday threw her against a wall and pulled out some of her hair. A next-door neighbor testified that she heard an argument in Kilday and Kiernan's room that morning, including loud thuds against the wall and a male voice saying, "Bitch, you're a whore." She reported the disturbance to the hotel manager.

Kilday's statement

After his arrest, Kilday gave a tape-recorded statement to the police. During trial, the tape of the interview was played for the jury. Kilday did not testify. In the interview, Kilday denied ever assaulting Kiernan. Initially, he claimed that the scar on Kiernan's wrist was a work injury. When the police asked if Kiernan had received workers' compensation payments for the injury, Kilday said she cut herself on glass on a cabinet at home. He claimed that Kiernan burned him on the shoulder with an iron, but he did not know how Kiernan received her burns. He did not know how she received a bump on her head or bruises on her arms.

The day after Kilday's arrest Kiernan told Officer Cirina that Kilday had called her from jail and declared "I'm going to get out." Kiernan hung up the phone before Kilday said anything else. Kiernan was frightened by the call and told Cirina that Kilday would kill her when or if he got out of jail.

Defense Case

On July 19, 2001, Palo Alto police officers arrested Kiernan due to her belligerence when they came to investigate a disturbance involving screaming and thumping coming from Kiernan and Kilday's room at the Palo Alto Motel. Kilday, who had a fresh fingernail scratch above his left eye, was calm and cooperative with the police. Kiernan's daughter, who was in the hotel room at the time, was taken to a children's shelter.

In November 2001, before trial, a private investigator employed by the defense interviewed Kiernan. Kiernan told the investigator that she cut her wrist after punching a bathroom mirror. She said she received the burn on her shin by accident during a wrestling match with Kilday; after the iron landed on her leg, she threw it off and Kilday threw it back towards her, hitting her in her right inner thigh. She said that during the

same argument, before getting burned by the iron, she stabbed Kilday with a knife in the shoulder. Kiernan denied that Kilday had physically abused her on October 19 and 20.

DISCUSSION

At trial, the jury received evidence regarding three temporally and analytically distinct "statements" by Kiernan: (1) the jury heard the testimony of police officers David Cirina and Russell Federico recounting Kiernan's communications to them in the lobby of the Sequoia Hotel shortly after their arrival on October 20, 2001; (2) the jury heard the testimony of Detective Denise Randall recounting Kiernan's communications to her in the lobby of the hotel, after Randall was summoned to the scene by Cirina; and (3) the jury heard Randall's testimony recounting Kiernan's communications during subsequent questioning in Kiernan's hotel room, as well as a tape recording of the questioning. The statements describe the infliction of injuries by Kilday on four separate dates in September and October 2001. Kiernan did not testify.

The trial court admitted all of Kiernan's statements under section 1370, which sets forth a limited exception to the general rule of inadmissibility of hearsay. Under section 1370, a victim's statement made to law enforcement personnel, or a recorded statement, which "purports to narrate, describe, or explain the infliction or threat of physical injury upon the declarant," made at or near the time of the injury or threat, is admissible notwithstanding the hearsay rule if the victim is an "unavailable . . . witness" and if the statement "was made under circumstances that would indicate its trustworthiness." (§ 1370.)[3]

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[3] Section 1370 states 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 pursuant to Section 240. [¶] (3) The statement was made at or near the time of the infliction or threat of physical injury. Evidence of statements made more than five years before the filing of the current action or proceeding shall be inadmissible under this

In his opening and reply briefs, Kilday argued that admission of Kiernan's hearsay statements under section 1370 violated his right to confrontation under the Sixth Amendment. While this appeal was pending, the United States Supreme Court announced its decision in *Crawford*, *supra*, ___ U.S. ___ [124 S.Ct. 1354]. "[A] new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final . . . ." (*Griffith v. Kentucky* (1987) 479 U.S. 314, 328; see also *People v. Sisavath* (2004) 118 Cal.App.4th 1396, 1400 (*Sisavath*); *People v. Price* (2004) 120 Cal.App.4th 224, 237-238.) At our request, the parties submitted supplemental briefs on the effect of *Crawford*. We now conclude that admission of Kiernan's second and third statements to Randall in the lobby and then in the hotel room, violated the confrontation clause. Admission of Kiernan's first statement to the responding officers was not unconstitutional.[4]

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section. [¶] (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 the 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."

[4] Because we conclude admission of the second and third statements violated the confrontation clause, we need not reach Kilday's additional arguments that the statements did not meet the statutory requirements of section 1370, that he received ineffective assistance of counsel with respect to admission of the statements, and that venue was not proper in San Mateo County on the torture count. Neither do we need to reach these additional arguments as to Kiernan's first statement, admission of which did not violate the confrontation clause. This is because, as we conclude in the unpublished portion on harmless error, that statement was merely cumulative to other properly admitted evidence. (See *Brown v. United States* (1973) 411 U.S. 223, 231.)

I. *The* Crawford *Decision*

The Sixth Amendment confrontation clause, made applicable to the states through the Fourteenth Amendment, provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." Since 1980, the admission of an unavailable witness's statement against a criminal defendant was governed by *Ohio v. Roberts* (1980) 448 U.S. 56, 66 (*Roberts*). As the Court explained the *Roberts* rule in 1999, "the veracity of hearsay statements is sufficiently dependable to allow the untested admission of such statements against an accused when (1) 'the evidence falls within a firmly rooted hearsay exception' or (2) it contains 'particularized guarantees of trustworthiness' such that adversarial testing would be expected to add little, if anything, to the statements' reliability. [Citation.]" (*Lilly v. Virginia* (1999) 527 U.S. 116, 124-125, quoting *Roberts*, *supra*, at p. 66.)

Two reported decisions in California have held that section 1370 is facially constitutional under *Roberts* because the statute requires that the hearsay statement at issue "contain[ ] particularized guarantees of trustworthiness and adequate indicia of reliability." (*People v. Hernandez* (1999) 71 Cal.App.4th 417, 423-424; *People v. Kons* (2003) 108 Cal.App.4th 514, 521-523.) The *Hernandez* court concluded that section 1370 was constitutional *as applied* in the case, while the *Kons* court concluded that admission of the statement at issue was unconstitutional because it lacked the guarantees of trustworthiness required by *Roberts*. (*Hernandez*, at p. 425; *Kons*, at pp. 524-525.) The United States Supreme Court decision in *Crawford* requires a different analysis.

Crawford rejected continued application of the *Roberts* rule with respect to "testimonial" hearsay. In *Crawford*, the defendant was charged with assault and attempted murder. (*Crawford, supra,* ___ U.S. at p. ___ [124 S.Ct. at p. 1357].) The defendant had stabbed a man who allegedly tried to rape his wife. (*Ibid.*) The police *Mirandized*, interrogated, and obtained a recorded statement from his wife, who had

witnessed the stabbing. (*Ibid.*) The wife did not testify at trial because of Washington State's marital privilege, but the prosecutor was permitted to present her recorded statement to the jury, under the hearsay exception for statements against penal interest. (*Id.* at pp. ___ [124 S.Ct. at pp. 1357-1358].) The defendant was convicted of assault. (*Id.* at p. ___ [124 S.Ct. at p. 1358].)

The *Crawford* Court reversed the decision of the Washington Supreme Court, which had upheld admission of the statement under *Roberts*. (*Crawford*, *supra*, at p. ___ [124 S.Ct. at p. 1358].) The Court held that "[w]here testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation." (*Id*. at p. ___ [124 S.Ct. at p. 1374].) Thus, *testimonial* hearsay is admissible only if the declarant is unavailable *and* there has been a prior opportunity for cross-examination of the declarant. (*Ibid.*)

II. *Forfeiture by Failure to Object*

At the outset, we reject the People's claim that Kilday forfeited any claim based upon the confrontation clause because his trial counsel did not assert an objection based upon the confrontation clause below. "Reviewing courts have traditionally excused parties for failing to raise an issue at trial where an objection would have been futile or wholly unsupported by substantive law then in existence." (*People v. Welch* (1993) 5 Cal.4th 228, 237-238.) At the time of trial section 1370 had been upheld as facially constitutional in the *Hernandez* and *Kons* decisions. The *Crawford* decision rejected the *Roberts* rule upon which those California cases relied. Although defense counsel could have argued that Kiernan's statement lacked adequate indicia of reliability for admissibility under *Roberts*, the confrontation clause challenge available post-*Crawford* based upon the testimonial nature of Kiernan's statements would have been futile at the

time of trial. The failure to object on confrontation clause grounds does not bar consideration of the issue on appeal in this case.[5]

III. *Application of* Crawford *to Kiernan's Statements*

Before trial, the court found that Kiernan was unavailable due to her unwillingness to testify; she did not testify at trial. There is no contention that Kilday had a pre-trial opportunity to cross-examine Kiernan regarding her statements. Thus, application of *Crawford* depends on whether Kiernan's statements to the police are "testimonial." As noted previously, there are three analytically separate statements at issue: (1) the statement obtained by responding Officers Cirina and Federico in the lobby of the Sequoia Hotel upon their arrival; (2) the statement obtained by Detective Randall in the lobby after being summoned by Officer Cirina; and (3) the statement obtained by Randall in Kiernan's hotel room following Kilday's arrest. We conclude that the second and third statements are testimonial, and that the first statement is not testimonial.

Crawford declined to "spell out a comprehensive definition of 'testimonial.' " (*Crawford, supra,* ___ U.S. at p. ___ [124 S.Ct. at p. 1374].) The Court did state that "[w]hatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations. These are the modern practices with closest kinship to the abuses at which the Confrontation Clause was directed." (*Ibid.*) The final category, police interrogations, was at issue in *Crawford*. The Court did not define the term "interrogation," but it did suggest that the term should be construed broadly, emphasizing that it used the term in its "colloquial, rather than any technical legal, sense." (*Id.* at p. ___, fn. 4 [124 S.Ct. at

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[5] Moreover, we have discretion to consider constitutional claims without an objection below. (See *People v. Blanco* (1992) 10 Cal.App.4th 1167, 1172-1173; see also *Hale v. Morgan* (1978) 22 Cal.3d 388, 394.)

p. 1365, fn. 4].) There, the wife's "recorded statement, knowingly given in response to structured police questioning, qualifie[d] under any conceivable definition." (*Ibid.*)

The instant case involves statements obtained through police officer questioning of a witness. Because the *Crawford* court held that statements produced during interrogations are testimonial, the Court's explanation of why interrogations implicate core confrontation clause concerns is central to our analysis. Nevertheless, the ultimate issue before us is whether Kiernan's statements are testimonial, *not* whether Kiernan's statements were obtained during an "interrogation." The *Crawford* court emphasized that the term "testimonial" applies "*at a minimum*" to prior testimony and to police interrogations. (*Crawford*, *supra,* ___ U.S. at p. ___ [124 S.Ct. at p. 1374], italics added.) The Court left undecided what *other* "modern practices" produce testimonial statements. (*Ibid.*)

The *Crawford* Court instructs that police interrogations implicate core Sixth Amendment concerns because police officers have adopted the investigative functions that were previously handled by justices of the peace in England. (*Crawford, supra,* ___ U.S. at pp. ___ [124 S.Ct. at pp. 1364-1365].) "Justices of the peace conducting examinations under the Marian statutes . . . had an essentially investigative and prosecutorial function. [Citations.] England did not have a professional police force until the 19th century [citation], so it is not surprising that other government officers performed the investigative functions now associated primarily with the police. The involvement of government officers in the production of testimonial evidence presents the same risk, whether the officers are police or justices of the peace." (*Id.* at p. ___ [124 S.Ct. at p. 1365].)

Thus, under *Crawford*, statements obtained during police interrogations are testimonial fundamentally because police officers who obtain a statement during an interrogation are performing investigative and evidence-producing functions formerly handled by justices of the peace. The use of such an out-of-court statement to convict a

defendant implicates the central concerns underlying the confrontation clause. (*Crawford, supra,* ___ U.S. at p. ___ [124 S.Ct. at p. 1365].) Extending this rationale here to a setting involving statements obtained through police officer questioning at or near the scene of a crime, such statements are testimonial under *Crawford* if obtained by an officer acting in an investigative capacity to produce evidence in anticipation of a potential criminal prosecution. The last part of this formulation ("in anticipation of a potential criminal prosecution") reflects *Crawford's* emphasis on purposeful conduct by government officers. (See, e.g., *id.* at p. ___, fn. 7 [124 S.Ct. at p. 1367, fn. 7] ["[i]nvolvement of government officers in the production of testimony with an eye toward trial presents unique potential for prosecutorial abuse . . . ."].) The production of evidence for use in a potential prosecution through purposeful questioning implicates core confrontation clause concerns much more so than questioning incidental to other law enforcement objectives, for example, exigent safety, security, and medical concerns.[6]

We turn now to Kiernan's statements, discussing them in reverse chronological order.

A. *Kiernan's Third Statement*

The third statement, obtained by Detective Randall in Kiernan's hotel room following Kilday's arrest, was obtained in circumstances much like the "interrogation" involved in *Crawford*. As in that case, Kiernan's statements were knowingly given, recorded, and the product of structured questioning. (See *Crawford, supra*, ___ U.S. at p. ___, fn. 4 [124 S.Ct. at p. 1365, fn. 4].) The only difference is that Kiernan was the

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[6] The California Supreme Court recently granted review in two cases that address whether statements obtained through police officer questioning in the field are testimonial. (See *People v. Cage*, previously published at 120 Cal.App.4th 770, review granted and opinion superseded October 13, 2004, S127344; *People v. Adams*, previously published at 120 Cal.App.4th 1065, review granted and opinion superseded October 13, 2004, S127373.) The decisions in those cases will provide guidance on the issues addressed in this opinion.

victim, while the wife in *Crawford* was a suspect. However, *Crawford* does not suggest that only suspects' testimonial statements implicate Sixth Amendment concerns. The confrontation clause is concerned with the "production of testimonial evidence" (*id.* at p. ___ [124 S.Ct. at p. 1365]), which can come from suspects, victims, and third party witnesses. Kiernan's statements to Randall in the hotel room are "testimonial" hearsay.

B. *Kiernan's Second Statement*

Kiernan's second statement, obtained by Detective Randall after being summoned to the scene by Officer Cirina, requires close analysis. That statement differs from the third because it was not recorded and it was obtained in the hotel lobby, a public location. Nevertheless, the totality of the circumstances surrounding the making of the statement lead us to conclude that it is testimonial under *Crawford* because at the time Randall obtained the statement from Kiernan, she was acting in an investigative capacity to produce evidence in anticipation of a potential criminal prosecution.

First, by the time Randall obtained Kiernan's statement in the lobby, the police had secured the area and had an opportunity to assess and resolve any other exigent matters. Randall did not arrive at the Sequoia Hotel until an hour after Officers Cirina and Federico. By that time, there were a total of four or five officers at the scene. Cirina and Federico had already ascertained that Kilday was not present at the hotel and they were prepared to arrest him and they did upon his return to the hotel. The responding officers already had an opportunity to evaluate whether Kiernan needed immediate medical attention. Thus, by the time Randall questioned Kiernan the overarching purpose of the interaction was obtaining a detailed statement; the responding officers had dealt with the exigent safety, security, and medical concerns initially predominant when officers arrive on a scene in response to a call for assistance.

Second, before Randall spoke to Kiernan she met with Federico and Cirina to learn what was going on. Those responding officers had already learned from Kiernan

that Kilday inflicted various injuries on Kiernan on various dates. Thus, before Randall began questioning Kiernan she was aware of the nature of the crimes at issue and the identity of the likely assailant. This enabled her to conduct a more purposeful and focused questioning.

Third, Randall was summoned specifically to obtain a statement from Kiernan. Officer Cirina testified that he asked Randall to come to the scene because Kiernan had provided only minimal information and they "certainly needed to get a more detailed statement," which he believed a female officer might be better able to obtain. Where, as here, a different officer is summoned to the scene to question the victim, the shift in focus from securing a scene to the production of evidence is particularly clear.

In this case, we do not consider critical the circumstances that Randall's questioning took place in the hotel lobby and was not recorded. There is no indication that the public location prevented Randall from engaging in a purposeful questioning of Kiernan. And, although the later-obtained tape-recorded statement is more powerful evidence, Detective Randall's recollection of Kiernan's statements is evidence as well. While her memory is theoretically less reliable than a tape, it is still accorded significant evidentiary weight.

During her questioning of Kiernan in the lobby Detective Randall was acting in an investigatory capacity to produce evidence in anticipation of a potential criminal prosecution. Accordingly, the statement she obtained is testimonial under *Crawford* and was inadmissible absent a prior opportunity for cross-examination.

C. *Kiernan's First Statement*

Considering the same factors, we conclude that Kiernan's first statement to the responding officers is not testimonial.[7] When Officers Cirina and Federico arrived at the

[7] The *Crawford* Court did not decide whether nontestimonial hearsay is now altogether outside the scope of the confrontation clause or whether such hearsay

Hotel Sequoia and encountered a frightened and upset Kiernan, the area was unsecured and the situation uncertain. There is no indication in the record that the officers were aware of the nature of the crime at issue or the identity of the alleged assailant;[8] whether Kilday was on or near the premises; whether Kilday possessed any weapons that could pose a danger to the officers or others; or whether Kiernan needed immediate medical attention.

Kiernan's first statement is analogous to the statement obtained by the police officer dispatched to the scene following a 911 call in *People v. Corella* (2004) 122 Cal.App.4th 461. The Second District concluded that the statement was not testimonial, holding that the victim's statement "did not become part of a police interrogation merely because [the responding officer] was an officer and obtained information from [the victim]. Preliminary questions asked at the scene of a crime shortly after it has occurred do not rise to the level of an 'interrogation.' " (*Id.* at p. 469.) To the extent that the *Corella* decision can be read to limit the concept of testimonial hearsay in the police questioning context to *Crawford's* facts of an "interrogation" we disagree. (See *Corella* at p.469.) As noted previously, the *Crawford* Court specifically instructed that modern law-enforcement practices other than interrogations may also produce testimonial

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continues to be subject to the *Roberts* rule. (*Crawford, supra,* ___ U.S. at p. ___ [124 S.Ct. at pp. 1370, 1374].) Some recent decisions have applied the *Roberts* reliability test to the admission of nontestimonial hearsay. (See *Horton v. Allen* (1st. Cir. 2004) 370 F.3d 75, 83; *U.S. v. Manfre* (8th Cir. 2004) 368 F.3d 832, 838, fn.1.) We need not decide whether Kiernan's first, nontestimonial statement should have been excluded under the *Roberts* test because, as we conclude in the unpublished portion of the decision on harmless error, that statement was merely cumulative to other, properly admitted evidence. (See *Brown*, *supra*, 411 U.S. at p. 231.)

[8] The substance of the 911 call is not in the record. We express no opinion on how such knowledge would affect the analysis of whether a statement obtained by a responding officer is testimonial.

statements. (*Crawford, supra,* ____U.S. at p.____ [124 S.Ct. at p. 1373].)[9] Further, the *Corella* decision suggests that "under *Crawford,* a police interrogation requires a relatively formal investigation where a trial is contemplated." (*Corella,* at p. 468.) We believe that an interpretation of *Crawford* that makes the presence or absence of indicia of formality determinative is inconsistent with the Supreme Court focus on the "production of testimonial evidence" (*Crawford,* at p. 1365), which may occur during relatively informal questioning in the field.[10]

Based on the record before us, we conclude that Officers Cirina and Federico were not producing evidence in anticipation of a potential criminal prosecution in eliciting basic facts from Kiernan about the nature and cause of her injuries.[11] In reaching this conclusion, we do not adopt a blanket rule that all statements obtained from victims or witnesses by police officers responding to emergency calls are necessarily

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[9] To the extent that they can be read to limit the application of *Crawford* to formal interrogations, we disagree with two post-*Crawford* Indiana decisions (filed the same day, by the same judge). (*Fowler v. Indiana* (Ind.Ct.App. 2004) 809 N.E.2d 960, 961-964; *Hammon v. Indiana* (Ind.Ct.App. 2004) 809 N.E.2d 945, 950-953.)

[10] In dicta, *Crawford* suggests that an informal statement ruled admissible in *White v. Illinois* (1992) 502 U.S. 346, may have been testimonial. (*Crawford, supra*, ___ U.S. at p. ___, fn. 8 [124 S.Ct. at p. 1368, fn. 8].) In *White* the statement at issue was obtained by a police officer summoned to the scene of a crime. A child was sexually assaulted by an intruder into the home and the officer questioned the victim "alone in the kitchen." (*White*, at p. 349.) The *Crawford* court cites *White* in the course of explaining that the *outcomes* of its past decisions were consistent with its new rule excluding testimonial statements without an opportunity for cross-examination. In a footnote the Court acknowledged that the outcome in *White* is arguably inconsistent with the new rule: that is, in *White* the Court may have allowed admission of a testimonial statement without a prior opportunity for cross examination. (*Crawford,* at p. 1368, fn. 8.)

[11] In *People v. Sisavath, supra,* 118 Cal.App.4th at p. 1402, the Fifth District held that an unrecorded victim statement taken by a responding officer is testimonial. Because the People conceded the issue in that case, the facts of the questioning are not provided in sufficient detail to determine whether the statement there was more like that obtained by Detective Randall in the lobby or more like that obtained by Officers Cirina and Federico.

nontestimonial. The determination whether a statement obtained through police questioning in the field is testimonial requires a case-specific, fact-based inquiry. Under *Crawford*, this inquiry must center around whether the officer involved was acting in an investigative capacity to produce evidence in anticipation of a potential criminal prosecution. Here, where the responding officers were still principally in the process of accomplishing the preliminary tasks of securing and assessing the scene, we conclude that the statement elicited is not testimonial.[12]

IV. *Forfeiture by Wrongdoing*

In its post-*Crawford* supplemental briefing, the People argued for the first time that Kilday forfeited his confrontation clause rights because (1) Kilday's threats to Kiernan caused her refusal to testify; and (2) he did not attempt to call Kiernan as a witness when, after the start of trial, she left a message for the prosecutor indicating that she might be willing to testify. Both of these arguments could have been presented in the People's initial brief on appeal in opposition to Kilday's pre-*Crawford* confrontation clause claim. The People contend that they had no reason to raise their forfeiture by wrongdoing argument before the *Crawford* decision. They argue that because the *Hernandez* and *Kons* decisions "clearly refuted [Kilday's] challenge to section 1370," those cases "sufficed to refute [Kilday's] confrontation claim. Respondent thus had no need to additionally argue forfeiture in Respondent's Brief." We disagree. The courts in

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[12] This conclusion is consistent with the Fourth District's recent decision in *People v. Ochoa* (2004) ___ Cal.App.4th ___ [2004 WL 1945741]. There, the Fourth District concluded that a statement obtained from a rape victim the day after the incident was testimonial; the judgment was nonetheless affirmed because the defendant had an opportunity to cross-examine the declarant. There is no indication that there was any scene to secure; instead officers were dispatched to interview the victim after the victim's mother called the police. As far as can be discerned from the limited facts appearing in the opinion, the officers' primary focus from the beginning of the interaction was on obtaining a statement as part of an anticipated prosecution.

Hernandez, *supra*, 71 Cal.App.4th 417, and *Kons*, *supra*, 108 Cal.App.4th 514, held that Section 1370 is *facially* constitutional. But Kilday also argued in his opening brief that Section 1370 was unconstitutional *as applied* because the statements lacked adequate indicia of reliability to be admissible under the *Roberts* test. This was a fact-intensive, hotly contested issue subject to our independent review. The People could have presented their forfeiture by wrongdoing argument in response to that potentially meritorious confrontation clause claim.

V. *Harmless Error*

With respect to the convictions for torture (count 3), inflicting corporal injury upon a cohabitant (counts 4, 5, and 6), and making criminal threats (count 7), we must determine whether the error of admitting Kiernan's second and third statements was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24; see also *Sisavath*, *supra*, 118 Cal.App.4th 1396 [applying *Chapman* standard].) The *Chapman* standard requires the People " 'to prove beyond a reasonable doubt that the error complained of did not contribute to the [result] obtained.' [Citation.]" (*People v. Neal* (2003) 31 Cal.4th 63, 86.) " 'To say that an error did not contribute to the [result] is . . . to find that error unimportant in relation to everything else the [factfinder] considered on the issue in question, as revealed in the record.' [Citation.]" (*Ibid.*)

Without taking into consideration Kiernan's statements, we conclude that the other evidence admitted at trial rendered admission of the statements harmless as to counts four and six (infliction of corporal injury upon a cohabitant). The result is the same if we consider Kiernan's first statement to Officers Cirina and Federico; that statement is cumulative to the other evidence. Admission of the second and third statements prejudiced Kilday with respect to count three (torture), count five (infliction of corporal injury upon a cohabitant), and count seven (making criminal threats) and we reverse the judgment of conviction on those counts.

A. *The Counts Related to the October 10 Incident*

Count three (torture) and count four (infliction of corporal injury on a cohabitant) relate to Kilday's alleged act of burning Kiernan with an iron on October 10, 2001. To prove torture, the People were required to prove beyond a reasonable doubt that Kilday inflicted great bodily injury upon Kiernan "with the intent to cause cruel or extreme pain and suffering for the purpose of revenge, extortion, persuasion, or for any sadistic purpose. . . . " (Pen. Code, § 206.) To prove infliction of injury on a cohabitant, the People were required to prove that Kilday willfully inflicted corporal injury resulting in a traumatic condition. (Pen. Code, § 273.5, subd. (a).)

The People contend that admission of Kiernan's statements was harmless in light of other evidence admitted during the trial. Regarding the October 10 incident, the People point to evidence that an officer dispatched to Kilday and Kiernan's hotel room on that date testified that he observed an injury to Kiernan's leg; that Kiernan's supervisor testified that Kiernan did not sustain the burns at work; that the burns were caused by an iron and an iron was confiscated from Kilday and Kiernan's room; and that during his interrogation Kilday incredibly claimed that Kiernan had sustained the burns while attacking him with the iron. In light of this evidence and the other evidence admitted at trial, we conclude that admission of Kiernan's statements was harmless beyond a reasonable doubt with regard to count four (infliction of corporal injury), but *not* harmless with regard to count three (torture).

Kilday admitted that he was present and arguing with Kiernan around the time she was burned. The burns were too severe and numerous to be the result of brief accidental contact with the iron. And there was no basis to conclude that Kiernan intentionally burned herself. This evidence is sufficient to conclude the error was harmless with respect to count four. However, the torture count required the jury to find that Kilday burned Kiernan with a specific intent. The circumstantial evidence highlighted by the People provides little indication of Kilday's intent. Other circumstantial evidence

suggests that the burn may have occurred during mutual combat: the police observed that Kilday had a burn in the shape of the point of an iron which Kilday said was caused by Kiernan; when the police investigated the disturbance in their motel room on October 10, Kilday and Kiernan were arguing loudly over money. If the jury believed Kilday burned Kiernan during mutual combat, they might have concluded that Kilday had not formed the specific intent necessary to constitute torture. It is likely that admission of Kiernan's recorded third statement describing the incident and Kilday's cruel threat to burn her again in both the second and third statements contributed to the torture conviction. (See *People v. Pensinger* (1991) 52 Cal.3d 1210, 1255 [reversing the torture-murder special-circumstance finding where evidence did not "overwhelmingly establish[] intent to torture"].)[13]

B. *The Counts Related to the October 19 and 20 Incidents*

Counts five and six, also for infliction of corporal injury on a cohabitant, relate to Kilday's alleged violence on October 19 and 20, respectively. The People point out that on October 19 a downstairs neighbor heard stomping, yelling, and objects being thrown in Kilday and Kiernan's room; on October 20 a different neighbor heard from their room loud thuds on the wall and a man's voice saying, "bitch, you're a whore." When the police arrived, Kiernan was shaking and crying and had a bruise on her shoulder and bumps and welts on the back of her head. We conclude the erroneous admission of Kiernan's second and third statements was harmless with respect to the October 20 incident (count six), in light of the neighbor's description of the disturbance that morning, Kiernan's injuries consistent with being thrown against the wall, and Kiernan's demeanor

[13] In a supplemental brief, Kilday contends that imposition of an indeterminate sentence of life imprisonment on the torture count was unconstitutional in light of *Blakely v. Washington* (2004) __ U.S. __, 124 S.Ct. 2531. Because we reverse the conviction on that count, we need not reach that issue.

when the officers arrived. However, the error was *not* harmless with respect to the conviction for the October 19 incident (count five). Because there was no other evidence regarding the October 19 incident and no basis to associate particular injuries with that evening's disturbance, Kiernan's description of the events likely contributed to the conviction.[14]

Finally, count seven (criminal threats) relates to alleged threats Kilday made to Kiernan on October 20. To prove criminal threats, the People were required to prove that Kilday willfully threatened to commit a crime which would result in death or great bodily injury, resulting in Kiernan's sustained fear for her own safety. That conviction necessarily depended upon Kiernan's description of Kilday's threat; the People do not argue otherwise. Thus, the error in admitting Kiernan's second and third statements, which included Kilday's threat, was *not* harmless with respect to the conviction for criminal threats.

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[14] Our conclusion is the same if we also consider Kiernan's first statement to Officers Cirina and Federico, because the officers' testimony was in conflict regarding when Kiernan received her injuries. Cirina testified that Kiernan told him that the night before (October 19) Kilday pulled her hair and threw her into the walls, and that earlier that day (October 20) Kilday had injured her shoulder by throwing her into the walls. Federico testified that Kiernan told him that Kilday had pushed her into the street during a fight the night before and that morning had pulled her hair and thrown her against the wall.

DISPOSITION

The judgment is reversed as to counts three, five, and seven, affirmed in all other respects, and remanded for further proceedings consistent with this opinion.

GEMELLO, J.

We concur.

JONES, P.J.

STEVENS, J.

People v. Kilday (A099095)

Trial court:	San Mateo County Superior Court
Trial judge:	Hon. Dale A. Hahn
Counsel for defendant and appellant:	Donald Thomas Bergerson, under appointment by the Court of Appeal
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