Filed 3/1/06

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

In re FERNANDO R., a Person Coming Under the Juvenile Court Law.	H028851 (Monterey County Super.Ct.No. J39804)
THE PEOPLE, Plaintiff and Respondent, v. FERNANDO R., Defendant and Appellant.	

Since March 2004, courts across the country have attempted to apply the United States Supreme Court's landmark decision in *Crawford v. Washington* (2004) 541 U.S. 36 (*Crawford*) in thousands of cases potentially implicating the Sixth Amendment right of confrontation. *Crawford*—a "case [that] may fairly be characterized as a revolutionary decision in the law of evidence" (*People v. Pantoja* (2004) 122 Cal.App.4th 1, 9)—held that an out-of-court "testimonial" statement of an absent witness is admissible at trial "only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine." (*Crawford*, *supra*, at p. 59, fn. omitted.) The late Chief Justice Rehnquist lamented (prophetically) that the court's decision "casts a mantle of uncertainty over future [federal and state] criminal trials" (*id.* at p. 69 (conc. opn. of Rehnquist, C.J.)), and that the majority's reluctance to define "testimonial" left federal

and state prosecutors temporarily without answers as to what types of statements would be deemed "testimonial" under the new rule announced in *Crawford*. (*Id.* at pp. 75-76.)

Appellate courts (post-*Crawford*) have utilized a number of different tests and criteria to define "testimonial" in addressing claims that the admission of an unavailable witness's hearsay statement violated a defendant's constitutional right of confrontation. We are required here to determine whether a robbery victim's account of the crime given to the police in the field immediately following the commission of the crime was a testimonial statement.

In March 2005,[1] Fernando R., a minor, was alleged to have committed a robbery (violation of Pen. Code, § 211). After a contested jurisdictional hearing in which the victim did not testify, the allegation of the petition was found true. The minor contends on appeal that the introduction of the victim's statement through a police officer's testimony violated his constitutional right of confrontation, under *Crawford*, *supra*, 541 U.S. 36. The minor also claims sentencing error. Because we conclude that the former claim has merit and that the error was prejudicial, we will reverse the judgment.

FACTS

We present a summary of the evidence from the trial utilizing the applicable standard. We resolve factual conflicts in support of the judgment. (*People v. Holt* (1997) 15 Cal.4th 619, 667-668.)[2]

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[1] All further date references are to the year 2005 unless otherwise specified.

[2] The prosecution called only three witnesses; the minor called none. As we discuss, *post*, the impact upon the outcome of the jurisdictional hearing of the victim's statement that was improperly introduced is critical to our determination of whether the error was prejudicial. We have accordingly segregated the testimony of the three witnesses—and have further set apart the victim's statement introduced through Sergeant Jeffrey Carr from other testimony of the officer—in our recitation of the facts.

I. *Testimony Of Lisa Dallmann*

On the afternoon of March 9 while she was in her Marina apartment, Lisa Dallmann heard a woman screaming. After Dallmann went outside, she saw a young woman running after a man. The woman screamed, " 'Help me, help me. Stop him. Stop him. Someone stop him. Please help me.' " The man who was running from the young woman had something in his left hand that had a strap; Dallmann testified that "it looked like a purse." Dallmann went back to her apartment and called 911.

II. *Testimony Of Aaron Martinez*

Aaron Martinez was stopped at a traffic signal at Reservation Road and Del Monte in Marina. He "heard screaming and yelling" and backed up his truck to investigate the commotion. Martinez saw the minor running down a path with a purse. He observed that the minor was being chased by a woman who was "screaming for help, trying to get her purse back."

Martinez turned his truck around (to the direction the minor was headed) and honked the horn to scare him. He positioned the truck in front of the minor, got out of his truck, and told the minor to stop. The minor stopped on the path, tried to change direction, and dropped the purse. Martinez gave the purse to the woman and continued to pursue the minor; the minor crossed the street and stopped running. Martinez told the minor repeatedly to get on the ground.[3] Martinez and another man stood by the minor after he got on the ground until the police arrived a short time afterward.

III. *Testimony Of Sergeant Jeffrey Carr*

A. *Direct Testimony*

Jeffrey Carr is a patrol sergeant with the Marina Department of Public Safety. On the afternoon of March 9, he was dispatched to the vicinity of Reservation Road in Marina. Sergeant Carr was responding initially to a "suspicious circumstance" involving

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[3] Martinez testified that he was not the only person helping to pursue the minor.

"[a] woman being chased by a male," which "was later upgraded while [they] were in route to a robbery that just occurred."

When Sergeant Carr arrived on the scene, there were already two public safety officers (Officer Bechtel and Lieutenant Melendy) present, and "[t]here were also two or three other people standing around the person that was on the ground." Sergeant Carr initially was diverted to a woman yelling at him over a fence from an apartment complex. Because the woman "was very agitated and animated," he thought initially that "she might be involved" (i.e., a victim). After learning that the woman was instead a third-party witness (i.e., "a reporting party [who] had seen part of the incident"), he asked her to stand by.

Sergeant Carr approached the person on the ground. As the two other officers were handcuffing the minor, Sergeant Carr overheard the civilian males in the group say that the minor had robbed someone.[4]

Sergeant Carr then contacted the victim, Barbara Durward, who was located about 10 to 15 feet from the group and was leaning against a retaining wall adjacent to the sidewalk. She "was dressed casually but she seemed a little disheveled. When [Sergeant Carr] first contacted her, she was extremely excited and agitated; she was visibly upset and shaken." Her purse lay on the ground next to her during the interview.

B. *Testimony Describing the Statement of the Victim*

Over the minor's repeated hearsay objections,[5] Sergeant Carr offered testimony as to what Durward told him when he interviewed her in the field. Durward identified herself and complained of pain in the back of her head and middle of her back. She

[4] This overheard statement was admitted by the court not for the truth of the matter stated, but to explain Sergeant Carr's subsequent conduct.

[5] Counsel for the minor made at least 17 hearsay objections to Sergeant Carr's testimony reciting the victim's statement.

stated "during the altercation she had been struck in the back of the head" and that after she went down to the ground, "she believe[d] she was kicked in the center of the back."

Durward told Sergeant Carr that while walking in the brush at Locke-Paddom Wetlands Park, "she heard a noise behind her." She then saw a young Hispanic male standing behind her. The male said something like, " 'Do you want to have some fun?' " Durward responded in the negative and tried to hurry away from him. The male then struck her on the back of the head with what felt like " 'the flat of his hand,' " which caused her to fall to her knees. Durward then "felt a sharp blow to the center of her back" that felt as if the male had kicked her; this caused her to fall on her stomach. Durward "felt her purse and her nap sack [*sic*] being tugged on." The male tried to pull them away from her. Durward said that she turned onto her back and tried to kick the male as he was attempting to wrest the bags from her. The male "yanked on the purse and she finally lost the grasp of the straps and then he turned and ran away with the bags." Durward chased after the male, "and she was screaming to anybody that could hear her, 'Stop, call the police.' "

As the police were handcuffing him, Durward identified the minor as the male who had robbed her. Sergeant Carr testified that "[o]nce we got to that point of worrying about how much everything was worth, [Durward said] that she estimated the value of the purse and contents to be about $300."

PROCEDURAL BACKGROUND

On March 11, the Monterey County District Attorney filed a petition under Welfare and Institutions Code section 602 with the juvenile court, alleging that the minor, on or about March 9, committed a felony, namely, robbery (violation of Pen. Code, § 211).[6] After a jurisdictional hearing on the petition, the court found the allegation true

[6] "Robbery is the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear." (Pen. Code, § 211.)

on April 4. The court thereafter committed the minor to the California Youth Authority for a period of five years. The minor filed timely a notice of appeal.

DISCUSSION

I. *Claimed Violation Of Confrontation Right*

A. *Contentions of the Parties*

The minor contends that the court committed prejudicial error by permitting Sergeant Carr to testify to the substance of Durward's statement given to him. He claims that admission of the evidence was improper because it violated the guarantee under the Sixth Amendment of the United States Constitution that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." The minor argues that, even if it was a spontaneous declaration under Evidence Code section 1240 (and thus an exception to the hearsay rule),[7] the victim's statement was inadmissible under *Crawford*, *supra*, 541 U.S. 36, because it was a testimonial statement of an unavailable witness and the minor had no opportunity to cross-examine the witness.[8]

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[7] "Evidence of a statement is not made inadmissible by the hearsay rule if the statement: [¶] (a) Purports to narrate, describe, or explain an act, condition, or event perceived by the declarant; and [¶] (b) Was made spontaneously while the declarant was under the stress of excitement caused by such perception." (Evid. Code, § 1240; see also Fed. Rules Evid., rule 803(2), 28 U.S.C.: "**Excited utterance.** A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.")

[8] The minor argues at some length that an appellate decision from the District of Columbia Circuit Court, *Stancil v. U.S.* (D.C. 2005) 866 A.2d 799, offers strong support for his position that admission of Durward's statement violated his right of confrontation under *Crawford*. The judgment in *Stancil* was vacated and a rehearing en banc was granted by the District of Columbia Circuit Court of Appeals last June, nearly two months before the minor filed his opening brief. (See *In re Stancil* (D.C. 2005) 878 A.2d 1186.) We therefore will not consider this authority in resolving the minor's claim.

The Attorney General makes two essential points in response to the minor's claim of error. The focus of the response is that the minor forfeited his appellate claim of *Crawford* error by failing to object below on confrontation grounds to the admission of the victim's statement. Second, the Attorney General argues briefly that, in any event, the court properly allowed the victim's statement because it was a spontaneous statement that was nontestimonial.

We first summarize the holding in *Crawford*, *supra*, 541 U.S. 36. Next we address whether the minor forfeited any appellate challenge that he was deprived of his constitutional right of confrontation. Rejecting the Attorney General's forfeiture argument, we review the Supreme Court's discussion of the meaning of the term "testimonial" in the context of the admission of out-of-court statements and the application of the Sixth Amendment right of confrontation. Lastly, we determine whether there was *Crawford* error here and whether any error was harmless beyond a reasonable doubt.

B. *Crawford v. Washington*

In *Crawford*, the Supreme Court was called upon to reexamine the admissibility of an absent witness's out-of-court statements under the Sixth Amendment's Confrontation Clause. Under the high court's prior decision in *Ohio v. Roberts* (1980) 448 U.S. 56 (*Roberts*), the test for admissibility was as follows: "[A]n unavailable witness's out-of-court statement may be admitted so long as it has adequate indicia of reliability—*i.e.*, falls within a 'firmly rooted hearsay exception' or bears 'particularized guarantees of trustworthiness.' [Citation.]" (*Crawford*, *supra*, 541 U.S. at p. 42, quoting *Roberts*, *supra*, at p. 66.)

In *People v. Pirwani* (2004) 119 Cal.App.4th 770, 784, we described *Crawford*'s factual and procedural context: "[T]he defendant was charged with assault but claimed self-defense. The police interrogated both [the] defendant and his wife, Sylvia. Sylvia's tape-recorded statement subtly undermined her husband's defense. At trial, Sylvia did

not testify because the defendant invoked the state marital privilege. [(*Crawford*, *supra*, 541 U.S. at p. 40).] The prosecution then offered her taped statement to police as a statement against her penal interest. The defendant objected on confrontation clause grounds, but the Washington State trial court found the statements trustworthy and admissible under *Ohio v. Roberts*. . . . [After state court appeals that ultimately resulted in affirmance of the judgment], [t]he United States Supreme Court 'granted certiorari to determine whether the State's use of Sylvia's statement violated the Confrontation Clause.' [(*Crawford*, *supra*,] at p. 42)."

The Supreme Court repudiated the *Roberts* test, concluding that it "allows a jury to hear evidence, untested by the adversary process, based on a mere judicial determination of reliability. It thus replaces the constitutionally prescribed method of assessing reliability with a wholly foreign one." (*Crawford*, *supra*, 541 U.S. at p. 62.) Instead, the high court held that, in keeping with the understanding of the Framers of our nation's Constitution, "[t]estimonial statements of witnesses absent from trial [may be] admitted only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine." (*Id.* at p. 59, fn. omitted.)[9]

C. *Potential Forfeiture of Constitutional Challenge*

The Attorney General argues that the minor forfeited his *Crawford* challenge by failing to raise that objection below. The Attorney General asserts that the minor objected to Durward's statement solely on hearsay grounds and that this objection was insufficient to preserve the minor's claim of *Crawford* error.

The relevant statute governing the preservation of evidentiary objections for appeal provides: "A verdict or finding shall not be set aside, nor shall the judgment or

[9] The *Crawford* court's discussion of what may or may not be statements deemed "testimonial" and our application of the Supreme Court's explanation of this term to the case before us are presented in some detail in part I sections D and E, *post*.

decision based thereon be reversed, by reason of the erroneous admission of evidence unless: [¶] (a) There appears of record an objection to or a motion to exclude or to strike the evidence that was timely made and so stated as to make clear the specific ground of the objection or motion; and [¶] (b) The [reviewing] court . . . is of the opinion that the admitted evidence should have been excluded on the ground stated and that the error or errors complained of resulted in a miscarriage of justice." (Evid. Code, § 353.) Thus, " 'questions relating to the admissibility of evidence will not be reviewed on appeal in the absence of a specific and timely objection in the trial court on the ground sought to be urged on appeal. [Citation.]' [Citation.]" (*People v. Seijas* (2005) 36 Cal.4th 291, 301.)

Were we to look no further than that portion of the reporter's transcript concerning Sergeant Carr's testimony, we would agree with the Attorney General's position that the minor forfeited his constitutional challenge. During testimony describing Durward's statement, the minor's counsel—her repeated hearsay objections notwithstanding—did not object to the evidence on confrontation grounds. But during closing argument that immediately followed Sergeant Carr's testimony, the minor's counsel twice stated that she had had no opportunity to cross-examine the victim. The court disregarded the objection and noted that the victim's statement had been admitted as a spontaneous statement under Evidence Code section 1240.[10] We find these statements during closing argument to have been sufficient to preserve the minor's *Crawford* challenge.

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[10] "[Minor's Counsel]: Your Honor, I don't believe that the evidence is sufficient to find the allegations to be true. The statements of the alleged victim came in by way of a police officer. I had no opportunity to cross examine her and I— [¶] [The Court]: It came in by way of Evidence Code [section] 1240, spontaneous declaration. [¶] [Minor's Counsel]: I understand that, [Y]our Honor, and I respectfully object to that evidence coming in. I do not believe it's sufficient without the opportunity for me to cross examine her." (This dialogue appears in the reporter's transcript commencing on the page following Sergeant Carr's excusal as a witness.) Although not specifically denominated a motion to strike evidence previously introduced (see Evid. Code, § 353, subd. (a)), the argument of minor's counsel and the court's rejection of that argument

As our high court explained last November, the requirement of a specific trial objection to preserve a matter for appeal "is necessary in criminal cases because a 'contrary rule would deprive the People of the opportunity to cure the defect at trial and would "permit the defendant to gamble on an acquittal at his trial secure in the knowledge that a conviction would be reversed on appeal." ' [Citation.] . . . '[A] specifically grounded objection to a defined body of evidence . . . allows the trial judge to consider excluding the evidence or limiting its admission to avoid possible prejudice. It also allows the proponent of the evidence to lay additional foundation, modify the offer of proof, or take other steps designed to minimize the prospect of reversal.' [Citation.] [¶] Thus, the requirement of a specific objection serves important purposes. But, to further these purposes, the requirement must be interpreted reasonably, not formalistically. 'Evidence Code section 353 does not exalt form over substance.' [Citation.]" (*People v. Partida* (2005) 37 Cal.4th 428, 434.)

In this instance, the minor made the specific objection that the admission of Durward's statement deprived him of his confrontation right. His only failing was that his objection occurred *after* (albeit moments after) the evidence was admitted.[11] In making the objection that he was deprived of the right to cross-examine the victim, the minor did so "in such a way as to alert the trial court to the nature of the anticipated evidence and the basis on which exclusion [was] sought." (*People v. Williams* (1988) 44 Cal.3d 883, 906.) The minor's objection "fairly inform[ed] the trial court, as well as the party offering the evidence, of the specific reason . . . [for excluding] the evidence . . . ,

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were effectively a motion to strike Durward's statement and a denial of the motion, respectively.

[11] Contrast the circumstances here that militate against a finding of forfeiture with the case in which the defendant belatedly objected to evidence (i.e., photographs claimed to be prejudicial) long after the evidence had been received and placed before the jury during a lengthy trial. (See *People v. Boyette* (2002) 29 Cal.4th 381, 423-424.)

[thereby allowing] the party offering the evidence [the opportunity to] respond appropriately and the court [the ability to] make a fully informed ruling." (*People v. Partida*, *supra*, 37 Cal.4th at p. 435; see also *People v. Scott* (1978) 21 Cal.3d 284, 290 [objection in criminal case "will be deemed preserved if, despite inadequate phrasing, the record shows that the court understood the issue presented"].)

It would indeed exalt form over substance—and would be contrary to the purpose of the "specific objection rule" under Evidence Code section 353—were we to conclude that the minor forfeited his constitutional challenge simply because he made it during the trial, but moments late. We decline to apply the forfeiture doctrine so formalistically; we hold here that the minor preserved his constitutional challenge.[12]

D. *Meaning of "Testimonial" Under Crawford*

As discussed in part I section B, *ante*, *Crawford* held that an out-of-court testimonial statement by an unavailable witness is inadmissible unless the defendant had a previous opportunity to cross-examine that witness. The Supreme Court declined to "spell out a comprehensive definition of 'testimonial.' " (*Crawford*, *supra*, 541 U.S. at p. 68, fn. omitted; see also *People v. Roldan* (2005) 35 Cal.4th 646, 711, fn. 25 [after *Crawford*, "the precise contours of the category of 'testimonial' statements remain unclear"].) But it did provide some guidance.

The court explained that "the principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused. It was these practices that . . . English law's assertion of a right to confrontation was meant to prohibit; and that the founding-

[12] Even had the record been less convincing that the minor preserved his *Crawford* challenge—but nonetheless presented a debatable question—we still would have elected here to address the constitutional claim on its merits. (See *People v. Champion* (1995) 9 Cal.4th 879, 908, fn. 6 [whether the defendant preserved claim for appeal was "close and difficult"; court therefore assumed issue was preserved and addressed its merits].)

era rhetoric decried. The Sixth Amendment must be interpreted with this focus in mind." (*Crawford*, *supra*, 541 U.S. at p. 50.) The court thus concluded that "[w]hatever else the term ['testimonial'] 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." (*Id.* at p. 68; see also *id.* at p. 52 [statements obtained by police "in the course of interrogations are also testimonial under even a narrow standard"].)

In addition to offering these four examples of testimonial statements, the *Crawford* court provided three illustrations of *non*testimonial statements: (1) business records (*Crawford*, *supra*, 541 U.S. at p. 56; but see *People v. Mitchell* (2005) 131 Cal.App.4th 1210, 1223 [business records may be testimonial if produced " 'with an eye toward trial' "]); (2) "statements in furtherance of a conspiracy" (*Crawford*, *supra*, at p. 56); and (3) "casual remark[s] to . . . acquaintance[s]" (*id.* at p. 51). As to the third example, the court contrasted two seemingly polar opposite statements: "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." (*Ibid.*; see also *ibid.* ["off-hand, overheard remark . . . bears little resemblance to the civil-law abuses the Confrontation Clause targeted"].)

The Supreme Court—besides giving four examples of testimonial statements and three others that are decidedly nontestimonial—described three proposed "formulations" for identifying a testimonial statement: "Various formulations of this core class of 'testimonial' statements exist: [(1)] '*ex 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,' Brief for Petitioner 23; [(2)] 'extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions,' *White v. Illinois*, 502 U.S. 346,

365, 112 S.Ct. 736, 116 L.Ed.2d 848 (1992) (Thomas, J., joined by Scalia, J., concurring in part and concurring in judgment); [and (3)] '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,' Brief for National Association of Criminal Defense Lawyers et al. as *Amici Curiae* 3. These formulations all share a common nucleus and then define the [Confrontation] Clause's coverage at various levels of abstraction around it." (*Crawford*, *supra*, 541 U.S. at pp. 51-52.)

Courts disagree on whether the identification of these formulations in *Crawford* represented the Supreme Court's adoption of them as categories of testimonial statements. Some courts have read *Crawford* as holding that any statement falling within any of the three descriptions is indisputably testimonial. (See *People v. Morgan* (2005) 125 Cal.App.4th 935, 947 [referring to *Crawford* formulations as "definitions"]; *People v. Corella* (2004) 122 Cal.App.4th 461, 467-468 (*Corella*) [*Crawford* "states that a testimonial hearsay statement includes" each of the three formulations]; *People v. Cervantes* (2004) 118 Cal.App.4th 162, 172-173 [formulations represent "illustrations of statements that could be considered ' "testimonial" ' "].)

But other courts have concluded that the formulations in *Crawford* are something less than court-adopted standards for determining if a statement is testimonial. (See *People v. Taulton* (2005) 129 Cal.App.4th 1218, 1224 ["nothing in *Crawford* compels the conclusion that, by quoting a statement from a brief, the court intended to adopt its language as the test for determining whether a statement is 'testimonial' "]; *People v. Rincon* (2005) 129 Cal.App.4th 738, 755-756 [*Crawford* formulations are "some suggestive, less-defined guidelines"].) Absent a contrary pronouncement from the Supreme Court, we conclude that the three formulations are *proposed* standards for determining whether a statement is testimonial. (See *U.S. v. Cromer* (6th Cir. 2004) 389 F.3d 662, 672-673 [*Crawford* court "found no need to choose among" various proposed formulations for defining the core of testimonial statements]; Kirst, *Does Crawford*

Provide A Stable Foundation For Confrontation Doctrine? (2005) 71 Brooklyn L.Rev. 35, 87.) We believe that these formulations (as well as, potentially, others)[13] are subject to further consideration by our nation's highest court when it has occasion to define more specifically those statements that are testimonial under its holding in *Crawford*.[14]

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[13] Although there is no single test for determining if an out-of-court statement is testimonial under *Crawford*, there are a number of tests (including the three *Crawford* formulations and hybrids of them) that have been used by the courts and proposed by various commentators. (See, e.g., *People v. Taulton*, *supra*, 129 Cal.App.4th at p. 1224 [statement testimonial if "obtained for the purpose of potentially using it in a criminal trial or determining if a criminal charge should issue"]; *People v. Rincon*, *supra*, 129 Cal.App.4th at p. 757 [spontaneous statement to former gang member nontestimonial because it lacked formality and declarant could not have reasonably anticipated statement would be related to police or somehow used in court]; *People v. Cervantes*, *supra*, 118 Cal.App.4th at p. 174 [statement to third party nontestimonial because declarant "did not reasonably anticipate [it] would be used at trial"]; *Hammon v. State* (Ind. 2005) 829 N.E.2d 444, 457 [whether statement testimonial determined by looking at both declarant's intent and officer's purpose for obtaining statement]; Friedman, *Grappling With the Meaning of "Testimonial"* (2005) 71 Brooklyn L.Rev. 241, 266 [statement testimonial "if the declarant [makes it] in a situation warranting a reasonable anticipation of prosecutorial use"]; Holland, *Testimonial Statements Under Crawford: What Makes Testimony . . . Testimonial?* (2005) 71 Brooklyn L.Rev. 281, 285 (hereafter Holland) [statement testimonial if "foreseeab[le] to a declarant that his or her statement will contribute to a formal decision-making process"]; Lininger, *Yes, Virginia, There Is a Confrontation Clause* (2005) 71 Brooklyn L.Rev. 401, 405 [statement to police officers presumptively testimonial if declarant knew he or she was speaking to police officer; prosecution may rebut presumption with "strong showing that [nontestimonial] characteristics" predominate over testimonial ones]; Mosteller, *"Testimonial" and the Formalistic Definition—The Case for an "Accusatorial" Fix* (2005) 20-SUM Crim. Just. 14, 17 [testimonial statements are "accusatory . . . [i.e.,] statements that are accusations, viewed at the time they were made, of conduct that is criminal"].)

[14] The Supreme Court has granted certiorari in two cases involving convictions that resulted from the admission of out-of-court statements by domestic violence victims who were unavailable at trial; in each instance, the state supreme court concluded that the statement was nontestimonial and that there was therefore no *Crawford* violation. (See *State v. Davis* (2005) 154 Wash.2d 291 [111 P.3d 844], cert. granted Oct. 31, 2005, No. 05-5224, ___ U.S. ___ [126 S.Ct. 547, ___ L.Ed. 2d ___]; *Hammon v. State*, *supra*, 829 N.E.2d 444, cert. granted Oct. 31, 2005, No. 05-5705, ___ U.S. ___ [126 S.Ct. 552, ___ L.Ed. 2d ___].) In *Davis*, the Washington Supreme Court held that a victim's statement

E. *Application of Crawford*

In assessing the minor's contention that he was deprived of his constitutional right of confrontation,[15] we must decide whether, under *Crawford*, Durward's statement was testimonial. As a starting point, we note that the statement was not any of the three forms of statements that the Supreme Court declared to be clearly nontestimonial: it was not a business record (*Crawford*, *supra*, 541 U.S. at p. 56), a "statement[] in furtherance of a conspiracy" (*ibid.*), or a "casual remark to an acquaintance" (*id.* at p. 51). Likewise, at least three of the four kinds of statements that *Crawford* held were clearly testimonial are not applicable here: Durward's statement was clearly not "prior testimony at a preliminary hearing, before a grand jury, or at a former trial." (*Id.* at p. 68.)

But the answer is less clear as to *Crawford*'s fourth example of testimonial statements—"police interrogations." (*Crawford*, *supra*, 541 U.S. at p. 68.) Like the term "testimonial," the court did not define "interrogation." But it stated that it "use[d] the term 'interrogation' in its colloquial, rather than any technical legal, sense. [Citation.] Just as various definitions of 'testimonial' exist, one can imagine various definitions of 'interrogation,' and we need not select among them in this case. [The witness's] recorded

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to a 911 operator reporting that she was being beaten and identifying the defendant as the person responsible—admitted under the state's excited utterance exception to the hearsay rule (*Davis*, *supra*, 111 P.3d at p. 847)—was nontestimonial. (*Id.* at p. 851.) In *Hammon*, after the police responded to a report of a domestic disturbance, the victim told the police that she and her husband had been in a verbal argument that had become physical, and that he had hit her and thrown her down. (*Hammon*, *supra*, at pp. 446-447.) The trial court admitted the oral statement as an excited utterance, an exception to the state's hearsay rule. (*Id.* at p. 447.) The Indiana Supreme Court—holding that "responses to initial inquiries by officers arriving at a scene are typically not testimonial" (*id*. at p. 457)—concluded that the oral statement was nontestimonial. (*Id.* at pp. 457-458.) *Davis* and *Hammon* are scheduled for oral argument on March 20, 2006.

[15] It is of course the case that a minor accused of a crime in juvenile court is entitled to confront witnesses in the same manner as is an adult in a criminal prosecution. (See *In re Gault* (1967) 387 U.S. 1, 56; *In re Eddie M.* (2003) 31 Cal.4th 480, 503.)

statement, knowingly given in response to structured police questioning, qualifies under any conceivable definition." (*Crawford*, *supra*, 541 U.S. at p. 53, fn. 4.)

Thus, in determining whether the victim's statement was testimonial, we decide whether it was the product of police interrogation. In doing so, we identify and discuss the factors here that potentially support and potentially rebut a finding that the statement was the product of police interrogation. In the context of such inquiry, we also examine whether it was objectively reasonable for Durward to have anticipated that her statement would be made available for future prosecution.

1. *Factors suggesting statement was the product of police interrogation*

Some aspects of Durward's statement suggest that it was the product of police interrogation and thus testimonial. (*Crawford*, *supra*, 541 U.S. at pp. 52, 68.) Sergeant Carr himself testified that he "obtained [the victim's] statement"; he also used the term "interview" to describe his contact with her. Apart from the officer's characterization of the encounter, that Durward gave her statement to Sergeant Carr while he was investigating a crime is suggestive of an interrogation. (See Black's Law Dict. (8th ed. 2004) p. 838, col. 2: "***investigatory interrogation.*** Routine, nonaccusatory questioning by the police of a person who is not in custody.") The fact that a statement was given to a police officer by a crime victim later unavailable for trial is obviously a significant circumstance potentially triggering a right of confrontation. And, as we have noted, "interrogation" must be construed "in its colloquial . . . sense" (*Crawford*, *supra*, at p. 53, fn. 4); in making this observation, the Supreme Court cited *Rhode Island v. Innis* (1980) 446 U.S. 291, 300-301 (*Innis*), a case in which "interrogation," in another context, was construed broadly.[16]

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[16] In *Innis*, after the defendant was placed under arrest and advised of his *Miranda* rights (*Miranda v. Arizona* (1966) 384 U.S. 436), he stated that he wanted to speak to an attorney; after overhearing the officers' conversation expressing concern that a missing

But we seriously doubt that the fact that the person to whom the statement was made was a peace officer is, of itself, sufficient to constitute a "police interrogation." (See *People v. Morgan*, *supra*, 125 Cal.App.4th 935 [brief statement by caller who did not know he was speaking to police officer held not testimonial]; *State v. Parks* (2005) 211 Ariz. 19 [116 P.3d 631, 641], review granted Nov. 29, 2005: "[N]ot every police-citizen encounter will be an interrogation. Statements made by witnesses to police so the police may secure their own or the witnesses' safety, render emergency aid, or protect the security of a crime scene may not be testimonial.") We can envision many instances in which statements to the police may be nontestimonial, such as those that are very preliminary in nature and in which the focus has nothing to do with building a criminal case. For example, a witness's report of a suspicious noise that prompts a police investigation that ultimately results in the conclusion that a crime was committed would in all likelihood be nontestimonial. (Cf. *People v. Newland* (2004) 6 A.D.3d 330 [775 N.Y.S.2d 308, 309] ["brief, informal remark to an officer conducting a field investigation" by person who did not witness crime not testimonial].) The same may be true where a witness provides more detail to a peace officer during a nascent investigation when law enforcement is still attempting to determine whether a crime has occurred and, if so, the identities of the perpetrator and any victims. (Cf. *Hammon v. State*, *supra*, 829 N.E.2d 444.)

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shotgun would be found by a disabled child, he led officers to the weapon. (*Innis*, *supra*, 446 U.S. at pp. 294-295.) The Supreme Court, in considering the admissibility of the defendant's statements, held that the constitutional safeguards under *Miranda* came into play whenever a suspect in custody was "subjected to either express questioning or its functional equivalent. That is to say, the term 'interrogation' under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police . . . that the police should know are reasonably likely to elicit an incriminating response from the suspect." (*Innis*, *supra*, at pp. 300-301, fn. omitted.)

The level of detail given by the witness may suggest a case-building purpose that might render the statement the product of police interrogation and thus testimonial. (See *Crawford*, *supra*, 541 U.S. at p. 56, fn. 7: "Involvement of government officers in the production of testimony with an eye toward trial presents unique potential for prosecutorial abuse.") Likewise, the status of the investigation and whether the witness's statement was volunteered or solicited are relevant considerations in determining whether the resulting statement was the product of an interrogation. (See, e.g., *People v. West* (2005) 355 Ill.App.3d 28 [823 N.E.2d 82, 87-88 [victim's statement to police at hospital held testimonial, where the defendant already in custody, police already knew of his involvement in crime, and questioning "conducted for the purpose of further investigating the defendant's involvement and to gather evidence for use in a criminal prosecution"].)[17]

Here, when Sergeant Carr approached the witness, the following facts were already clear to the police: A crime had occurred; the crime involved a theft; Durward was the victim; and the minor was the perpetrator.[18] Indeed, two officers had arrested the

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[17] See Mendez, *Crawford v. Washington: A Critique* (2004) 57 Stan. L.Rev. 569, 602, fn. 187: "[I]f what counts in determining whether a victim's statement is testimonial is the officer's state of mind, then what 'people' consider to be a 'police interrogation' would be largely, if not completely, immaterial. On the other hand, the formality or informality surrounding the interrogation would, of course, be circumstantial evidence of the role the officer thought he or she was discharging in interrogating a victim. So would be the stage of the proceeding—whether suspicion had or had not begun to focus on a particular suspect."

[18] By the time Sergeant Carr contacted Durward, the police officer had already (1) learned from dispatch that he was to investigate a reported robbery; (2) spoken with one "very agitated" woman who he originally thought might have been the victim, but was instead a person who had witnessed a portion of the incident; (3) approached a group that included two officers who were in the process of handcuffing the minor; (4) heard a person in the group say that the minor "had robbed someone"; and (5) observed Durward (with her purse on the ground next to her), who was "a little disheveled," "extremely excited and agitated," and "visibly upset and shaken." "It took [Sergeant Carr] one or two minutes to get [Durward] to the point where she could put sentences together and answer [his] questions." The only reasonable inference that can be drawn from this

minor by the time Sergeant Carr spoke with Durward. And the information that Sergeant Carr elicited from Durward was far more detailed than one would expect of a preliminary investigation.[19] Durward gave Sergeant Carr information that was significantly detailed, including (1) the specific nature of her injuries and how they were inflicted; (2) a detailed account of her encounter with the minor, what he and she said, and a step-by-step account of how the robbery took place; (3) a description of what she did after the minor had (successfully) wrested her purse away from her; (4) an identification of the minor as the perpetrator; and (5) an estimate of the value of her purse and its contents. The status of the investigation at the time, the nature and extent of the inquiry, and the contents of the witness's account all indicate that the statement here was the product of police interrogation.[20]

2. *Factors militating against finding of interrogation*

We recognize that other factors might suggest, at first glance, a contrary conclusion, i.e., that Durward's statement was not the product of police interrogation and therefore nontestimonial. The statement was given informally in a public setting, rather than in a police station. It thus differed from Sylvia Crawford's "recorded statement, knowingly given in response to structured police questioning" (*Crawford*, *supra*, 541

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evidence is that Sergeant Carr knew that Durward was the victim at the time he contacted her.

[19] For instance, had Sergeant Carr simply determined whether the victim had been injured or obtained the victim's name and address (presumably for purposes of conducting a more detailed future investigation), the witness's responses to those preliminary questions would in all likelihood have been nontestimonial.

[20] Acknowledging that the *Innis* court's use of the term "interrogation" was in a different context (i.e., statement after *Miranda* warning was given to an in-custody suspect), police involvement here was an "interrogation" in the sense that it involved either "express questioning, [or] words or actions on the part of the police . . . that the police should know are reasonably likely to elicit [a] . . . response from the [witness]." (*Innis*, *supra*, 446 U.S. at p. 301, fns. omitted.)

U.S. at p. 53, fn. 4) after she and her husband were placed in custody. And it was not tape recorded; one might expect that a witness's statement would be memorialized where the peace officer anticipated its possible use at trial.[21] Some courts have emphasized the lack of formality of the witness's statement in reaching the conclusion that it was nontestimonial under *Crawford*. (See *People v. Morgan*, *supra*, 125 Cal.App.4th at p. 947 ["informal statement made in an unstructured setting does not resemble the police interrogation of concern in *Crawford*"]; *Corella*, *supra*, 122 Cal.App.4th at p. 468 ["under *Crawford*, police interrogation requires a relatively formal investigation where a trial is contemplated"; statements "[bore] no indicia common to the official and formal quality of the various statements deemed testimonial by *Crawford*"].)[22]

We agree that the formality or informality of the statement, whether it was recorded, and the extent to which the statement was made in response to structured questioning, are relevant factors to consider in determining whether a statement is testimonial. To the extent, however, that *Corella* or other authorities suggest that

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[21] But there is a strong suggestion from the record that the substance of Durward's statement was memorialized by a police report that Sergeant Carr referred to during his testimony. Although the police report is not part of the record, at the outset of providing testimony about his interview of the victim, Sergeant Carr asked, "If I can just refresh my memory with my report. Can I?" The court allowed the witness to do so. Sergeant Carr made one later reference to the report (relating to the length of time that elapsed from the time he received the dispatch to the time he observed the minor being handcuffed by other officers). The apparent memorialization of Durward's statement in a police report suggests a more formal process than one in which a witness talks briefly to a peace officer without it being recorded in any manner.

[22] There are cases from other jurisdictions that have similarly emphasized the formality of the statement in concluding that it was nontestimonial. (See, e.g., *Mungo v. Duncan* (2d Cir. 2004) 393 F.3d 327, 336, fn. 9 [dictum that statement to police, to be testimonial, requires formality in questioning]; *State v. Alvarez* (2005) 210 Ariz. 24 [107 P.3d 350, 355-356] [statement not in response to structured questioning or questioning designed to produce evidence for potential criminal prosecution]; *State v. Hembert* (2005) 269 Neb. 840 [696 N.W.2d 473, 482] [same].)

"structured police questioning" is the sine qua non of police interrogation under *Crawford*, we disagree. *Crawford* did not so hold. The court concluded that "Sylvia's recorded statement, knowingly given in response to structured police questioning, qualifies under any conceivable definition [of 'interrogation']." (*Crawford*, *supra*, 541 U.S. at p. 53, fn. 4.) It plainly did not make "structured questioning" or the recordation of the statement necessary elements to a finding that a witness's statement was the product of interrogation. (Cf. *Crawford*, *supra*, at p. 52 [holding that fact that witness's statement to police officer is unsworn does not render it nontestimonial].)

It would be neither consistent with *Crawford* nor prudent to make formality or "structured questioning" prerequisites of interrogation. Placing undue emphasis on either the formality under which the witness's statement was taken or the "structured" nature of the questioning could cause anomalous and arbitrary results. The same statement at the same juncture of a police investigation might be treated in completely different fashions: a statement taken "informally" or in an "unstructured" setting (e.g., in the field and unrecorded) would be considered nontestimonial, while the same statement, if taken "formally" (e.g., recorded in a police station), would be regarded as testimonial. Surely the right of confrontation is not based on such a tenuous footing. (See Holland, *supra*, 71 Brooklyn L.Rev. at p. 287 ["absence of terribly formal circumstances surrounding a statement . . . should not become a superficial talisman for nontestimonial hearsay rulings"].) Aside from a defendant's constitutional rights being decided on the arbitrary bases of a statement's "formality" or the extent to which questioning was "structured," this would produce inconsistencies in determining whether a statement is testimonial under the Confrontation Clause similar to the ones decried in *Crawford*, namely, the "unpredictable and inconsistent application" of *Roberts*' test of the reliability of hearsay statements. (*Crawford*, *supra*, 541 U.S. at p. 66; see also Friedman, *Confrontation: The Search for Basic Principles* (1998) 86 Geo. L.J. 1011, 1043 [broadening definition to include statements other than "formal" ones as testimonial "is necessary to ensure that the

adjudicative system does not effectively invite witnesses to testify in informal ways that avoid confrontation"].)

Two other factors suggest the possibility that Durward's statement was nontestimonial. It was obtained moments after the crime and shortly after Sergeant Carr arrived at the scene. And, significantly, Durward gave her statement while she was still very excited and upset.[23] As a result, the court found that the witness's statement constituted a spontaneous statement, an exception to the hearsay rule under Evidence Code section 1240.[24] The minor does not challenge this conclusion, and there was a substantial basis for the trial court's finding that the victim's statement was a spontaneous statement. (See *People v. Brown* (2003) 31 Cal.4th 518, 541 [statement of witness to shooting to witness's sister-in-law held spontaneous despite passage of time of two and one-half hours]; *People v. Farmer*, *supra*, at pp. 903-904 [statements by wounded victim to police dispatcher and to police officer at scene held spontaneous despite fact that victim responded to questioning].)

We do not doubt that there are many instances in which a witness's spontaneous statement is nontestimonial. (See, e.g., *People v. Rincon*, *supra*, 129 Cal.App.4th 738 [spontaneous statement by codefendant to witness nontestimonial]; *People v. Butler* (2005) 127 Cal.App.4th 49 [spontaneous statements by witness to crime made to

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[23] Sergeant Carr testified: "When I first contacted her, she was extremely excited and agitated, she was visibly upset and shaken. [¶] . . . [¶] [The Court]: Did she appear to be excited[?] [¶] [Sergeant Carr]: Yes. It took me one or two minutes to get her to the point where she could put sentences together and answer my questions."

[24] See footnote 7, *ante*. Before *Crawford*, the California Supreme Court had rejected Confrontation Clause challenges to the admission of spontaneous statements by unavailable witnesses. Those decisions, however, were founded on the application of the *Roberts* test concerning the reliability of the out-of-court statements, a test that was rejected in *Crawford* as to testimonial 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.)

coworkers nontestimonial].) And, depending on the circumstances, a witness's spontaneous statement made to governmental authorities, such as statements during a 911 call, may be nontestimonial. (See, e.g., *Corella*, *supra*, 122 Cal.App.4th 461; *People v. Coleman* (2005) 16 A.D.3d 254 [791 N.Y.S.2d 112, 114] [anonymous 911 caller's statement "was for the purpose of urgently seeking police intervention"]; see also *People v. Mitchell*, *supra*, 131 Cal.App.4th at pp. 1223-1224 [general discussion concerning split of authority as to whether statements from 911 calls are testimonial].)[25] But some courts have suggested that the fact that a statement is given spontaneously may, of itself, preclude a finding that it is testimonial. (See *People v. Rincon*, *supra*, 129 Cal.App.4th at p. 757; *Corella*, *supra*, 122 Cal.App.4th at p. 469 ["it is difficult to identify any circumstances under which [an Evid. Code, §] 1240 spontaneous statement would be 'testimonial' "].)[26]

Crawford contained no such holding and, in fact, suggested a contrary view in a footnote. (See *Crawford*, *supra*, 541 U.S. at p. 58, fn. 8.) We respectfully disagree with the suggestion in *Corella*, *supra*, 122 Cal.App.4th at p. 469 (followed in *People v. Rincon*, *supra*, 129 Cal.App.4th at p. 757), that a witness's statement that constitutes a spontaneous statement under Evidence Code section 1240 cannot be testimonial. Indeed,

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[25] The California Supreme Court has granted review in a number of cases in which *Crawford* violations were claimed. See footnote 29, *post*. Among those cases is one involving a statement made during a 911 call from an anonymous witness. (See *People v. Caudillo*, review granted January 12, 2005, S129212.)

[26] Cases from other jurisdictions have likewise emphasized the spontaneous nature of the witness's statement in concluding that the statement was nontestimonial. (See, e.g., *U.S. v. Brun* (8th Cir. 2005) 416 F.3d 703, 707 [adolescent's statement during 911 call while witnessing assault was "emotional and spontaneous rather than deliberate and calculated," and not testimonial]; *U.S. v. Luciano* (1st Cir. 2005) 414 F.3d 174, 180, fn. 3 [teenager's excited utterance as he flagged down police immediately after incident not testimonial]; *People v. King* (Colo. 2005) 121 P.3d 234, 240 [bleeding victim's statement to officer at scene and at hospital over two-hour period was excited utterance and nontestimonial].)

an arbitrary rule declaring that a statement that is spontaneous is per se nontestimonial would, we believe, be antithetical to *Crawford*'s underpinnings. *Roberts* held an unavailable witness's out-of-court statement was admissible if it bore "adequate 'indicia of reliability,' " either because it was founded on a "firmly rooted hearsay exception" or because it bore "particularized guarantees of trustworthiness." (*Roberts*, *supra*, 448 U.S. at p. 66.) *Crawford* rejected the *Roberts* test insofar as it concerned testimonial statements, holding that admission of such statements was in derogation of a defendant's right of confrontation. (*Crawford*, *supra*, 541 U.S. at pp. 60-68.) A conclusion that a spontaneous statement is always nontestimonial would essentially carve out an exception to *Crawford*'s holding that the fact that a statement satisfies a state hearsay exception does not permit its automatic admission without an analysis of whether it is a testimonial statement implicating a right of confrontation.

We conclude that the above-mentioned factors that superficially suggest that the Durward statement was not the product of police interrogation (and thus nontestimonial) are insufficient when evaluated in light of the circumstances that point to the statement being the result of interrogation (and therefore testimonial). Implicit in this conclusion is that Durward's statement was *both* a spontaneous statement *and* one that was the product of police interrogation.

3. *Whether it would have been reasonable to anticipate that Durward's statement would be available for later use at trial*

As discussed (see pt. I, sect. D, *ante*), the court in *Crawford* identified three proposed "formulations" of statements that are testimonial. While the court did not specifically adopt any of these formulations, some courts have utilized the third *Crawford* formulation—" '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' " (*Crawford*, *supra*, 541 U.S. at p. 52)—as a test for determining whether a witness's statement is testimonial. (See, e.g., *People v. Rincon*, *supra*, 129

Cal.App.4th at p. 757; *People v. Cervantes*, *supra*, 118 Cal.App.4th at pp. 173-174; *U.S. v. Cromer*, *supra*, 389 F.3d at pp. 672-675; *U.S. v. Saget* (2d Cir. 2004) 377 F.3d 223, 228-229.) We therefore use this formulation—not as a definition of a class of statements that are testimonial—but as guidance for our analysis.

Here, the police had already determined that a crime had been committed by the minor, knew that Durward was the victim, and had already arrested the minor. Sergeant Carr approached Durward, and she described in significant detail how the crime had occurred, the manner in which she had sustained injuries, and the value of the property stolen. Given these circumstances, we readily conclude that Durward's statement was " 'made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.' " (*Crawford*, *supra*, 541 U.S. at p. 52.)[27]

4. *Conclusion*

The determination of whether a statement is the product of police interrogation and thus testimonial, in our view, does not rest upon one feature, such as whether the statement occurred in a "formal" setting, was the product of "structured questioning," or constituted a spontaneous statement. Instead, the resolution of whether a statement was

[27] We acknowledge that some California courts have rejected this test, holding that the proper focus is the purpose for which the statement was obtained. (See, e.g., *People v. Taulton*, *supra*, 129 Cal.App.4th at p. 1224 [statement testimonial if "obtained for the purpose of potentially using it in a criminal trial or determining if a criminal charge should issue"].) The *Taulton* court based this conclusion in part on a footnote in *Crawford* in which the majority stated that "[i]nvolvement of government officers in the production of testimony with an eye toward trial presents unique potential for prosecutorial abuse—a fact borne out time and again throughout a history with which the Framers were keenly familiar." (*Crawford*, *supra*, 541 U.S. at p. 56, fn. 7.) Even were we to apply this standard here—given the status of the investigation at the time Sergeant Carr interviewed the witness and the extent of information obtained—we would conclude that Durward's statement was produced "with an eye toward trial" and was thus testimonial.

the product of police interrogation requires a fact-specific inquiry into a variety of circumstances. (See *State v. Wright* (Minn. 2005) 701 N.W.2d 802, 812-813; *State v. Sparks*, *supra*, 116 P.3d at p. 642.) These factors include the time at which the statement was given in relationship to the crime; the status of the police investigation at the time the statement was given, including the extent of police knowledge concerning the occurrence of a crime, potential suspects, and potential victims; whether the crime scene has been secured; the identity of the person hearing the statement (i.e., whether that person was a governmental authority); whether the declarant volunteered the statement or whether the person hearing the statement solicited it; the declarant's purpose for speaking and his or her mental state at the time; the location where the statement was given; whether the statement was recorded, and if so, by what means; the level of detail provided by the declarant; and whether all or part of the statement was in response to questioning.

Based upon a consideration of all of the circumstances presented here, we conclude that Durward's statement was the product of police interrogation and therefore testimonial. This result is consistent with *Crawford*'s teachings that a determination of whether a statement is "testimonial" or whether a police interview of a witness is an "interrogation" cannot be made by arbitrary or narrow applications of those terms. Rather, all of the facts and circumstances surrounding the witness's statement must be considered.

Durward was apparently unavailable to testify at trial.[28] And it is undisputed that the minor had no opportunity to cross-examine her. Therefore, it necessarily follows

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[28] There was no mention that the victim was an unavailable witness and there is nothing evident in the transcript from the jurisdictional hearing as to the basis for such unavailability. (Although not part of the reporter's transcript, there was an indication in a detention report from the probation department that Durward was a foreign exchange student who had planned to return to Australia in mid-March.) Since the minor did not raise below the issue of whether Durward was truly unavailable, he forfeited any challenge on this question. (See, e.g., *People v. Cudjo* (1993) 6 Cal.4th 585, 622 [failure

under *Crawford* that the introduction of Durward's statement deprived the minor of his constitutional right to confrontation.[29]

D. *Whether Crawford Error Was Prejudicial*

Having determined that the admission of Durward's statement violated the minor's confrontation rights, we must still decide whether this error requires reversal. Our Supreme Court has held that error under *Crawford* is evaluated under the *Chapman* standard (*Chapman v. California* (1967) 386 U.S. 18, 24), namely, "admission of the statements would require reversal unless we found beyond a reasonable doubt that the jury verdict would have been the same absent any error. [Citations.]" (*People v. Harrison* (2005) 35 Cal.4th 208, 239; see also *People v. Song* (2004) 124 Cal.App.4th 973, 984-985.) Under the *Chapman* standard, "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.)

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to object to witness's testimony on grounds of testimonial incompetence forecloses issue on appeal].)

[29] We note that a number of cases involving *Crawford* issues, including some involving potentially testimonial statements obtained during police field questioning, are currently pending before the California Supreme Court. (See *People v. Wahlert*, review granted September 28, 2005, S135805 [statement during conversation between defendants during pretext call]; *People v. Lee*, review granted March 16, 2005, S130570 [tape-recorded statement of witnesses taken during police interview at witnesses' home]; *People v. Caudillo*, *supra*, [statement from anonymous witness in 911 call]; *People v. Kilday*, review granted January 19, 2005, S129567 [victim's statements to police in field shortly after alleged battery]; *People v. Giles*, review granted December 22, 2004, S129852 [whether *Crawford* objection to deceased victim's statement was precluded under doctrine of forfeiture by wrongdoing]; *People v. Jiles*, review granted December 22, 2004, S128638 [same]; *People v. Ochoa*, review granted November 17, 2004, S128417 [alleged rape victim's statement to police]; *People v. Cage*, review granted October 13, 2004, S127344 [victim's statements to police at hospital and at station]; *People v. Adams*, review granted October 13, 2004, S127373 [victim's statements to police in field and at hospital].)

Here—disregarding the matters in Durward's statement as we must—there was little or no evidence supporting the elements of robbery under Penal Code section 211.[30] There was no direct testimony that the minor took the purse when it was "in the possession of [Durward] from [her] person or immediate presence." (*Ibid.*; see also *People v. Torres* (1995) 33 Cal.App.4th 37, 50.) Similarly, there was no direct evidence that the property was taken by the minor "against [Durward's] will, accomplished by means of force or fear." (Pen. Code, § 211; see also *People v. Wright* (1996) 52 Cal.App.4th 203, 210.)

There was, however, some evidence that circumstantially supported a finding that the minor took the purse from Durward's possession. Dallmann and Martinez both testified that they saw the minor holding a purse and that he was being chased by a woman who was screaming. And Martinez testified that the woman chasing the minor was "screaming for help, trying to get her purse back." But this same evidence—that gave some circumstantial support for the conclusion that the minor took the purse from Durward's possession—did not support the "by means of force or fear" element of robbery. The eyewitness testimony provided circumstantial evidence of a theft;[31] it did not establish that the minor took the purse "by means of force or fear" required under Penal Code section 211.

After conducting the requisite "thorough review of the record (*People v. Bolden* (2002) 29 Cal.4th 515, 560), we cannot conclude that the error in admitting Durward's statement was harmless beyond a reasonable doubt. Given the limited evidence supporting the robbery element that the purse was in fact taken "from [Durward's] person or immediate presence," and given the absence of evidence that the taking was

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[30] See footnote 6, *ante*.

[31] Theft under the Penal Code is defined as follows: "Every person who shall feloniously steal, take, carry, lead, or drive away the personal property of another . . . is guilty of theft." (Pen. Code, § 484, subd. (a).)

"accomplished by means of force or fear" (Pen. Code, § 211), it cannot be said that the erroneous admission of Durward's statement did not contribute to the jurisdictional finding. Accordingly, since the error was not harmless beyond a reasonable doubt, we will reverse the judgment.

II. *Claimed Sentencing Error*

The minor contends that the trial court abused its discretion in sentencing the minor, based upon the court's allegedly erroneous understanding of the law. He argues that the court failed to exercise any discretion under Welfare and Institutions Code section 731, subdivision (b)[32] in determining whether to set the maximum confinement time or some lesser term of confinement.

Because we have concluded that the judgment must be reversed, we do not address the merits of this claimed sentencing error. (See *Hiser v. Bell Helicopter Textron Inc.* (2003) 111 Cal.App.4th 640, 655 [appellate courts generally "decline to decide questions not necessary to the decision"].)

DISPOSITION

The judgment is reversed.

[32] "A minor committed to the Department of the Youth Authority may not be held in physical confinement for a period of time in excess of the maximum period of imprisonment which could be imposed upon an adult convicted of the offense or offenses which brought or continued the minor under the jurisdiction of the juvenile court. A minor committed to the Department of the Youth Authority also may not be held in physical confinement for a period of time in excess of the maximum term of physical confinement set by the court based upon the facts and circumstances of the matter or matters which brought or continued the minor under the jurisdiction of the juvenile court, which may not exceed the maximum period of adult confinement as determined pursuant to this section." (Welf. & Inst. Code, § 731, subd. (b).)

Duffy, J.

WE CONCUR:

Mihara, Acting P.J.

McAdams, J.

Trial Court:	Monterey County Superior Court No. J39804
Trial Judge:	Hon. Jonathan R. Price
Attorney for Defendant and Appellant: (Under appointment by the Court of Appeal)	Paul Couenhoven Staff Attorney Sixth District Appellate Program
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In re Fernando R., a minor (People v. Fernando R.)
No. H028851