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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. LISA MARIE CAGE, Defendant and Appellant.	E034242 (Super.Ct.No. RIF097168) **OPINION**

APPEAL from the Superior Court of Riverside County. Robert J. McIntyre, Judge. Affirmed.

Jeanne Courtney Van Derhoff, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Gary W. Schons, Senior Assistant Attorney General, Michael T. Murphy and Scott C. Taylor, Deputy Attorneys General, for Plaintiff and Respondent.

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

During a fight between defendant and her 15-year-old son John F., John sustained a long and nasty cut down his neck. John made three successive hearsay statements -- to a police officer at the hospital, to a doctor at the hospital, and to the same police officer at the police station -- each to the effect that defendant had picked up a piece of glass and deliberately slashed him with it. Two of defendant's other children denied this; one testified that John cut himself accidentally.

John was unavailable to testify at trial; however, his hearsay statements were admitted. As a result, defendant was found guilty of assault with a deadly weapon. (Pen. Code, § 245, subd. (a)(1).) A "strike" prior allegation (Pen. Code, §§ 667, subds. (b)-(i), 1170.12) and a prior serious felony enhancement allegation (Pen. Code, § 667, subd. (a)) were found true. Defendant was sentenced to a total of 13 years in prison.

While this appeal was pending, the United States Supreme Court decided *Crawford v. Washington* (2004) 541 U.S. ___ [124 S.Ct. 1354] (*Crawford*). *Crawford* held that the admission of a "testimonial" hearsay statement by an unavailable declarant violates the confrontation clause unless the defendant has had an opportunity to cross-examine the declarant. *Crawford* also held that a statement taken by a police officer in the course of an interrogation is testimonial, because such an interrogation is the modern analog of a pretrial examination by a justice of the peace in 16th- through 18th-century England.

We are called upon to decide whether each of John's three hearsay statements was testimonial under *Crawford*. The statement to the police officer at the police station was clearly testimonial. The statement to the doctor at the hospital was just as clearly

nontestimonial. We will hold that the statement to the police officer at the hospital was not testimonial because the interview was not sufficiently analogous to a pretrial examination by a justice of the peace; among other things, the police had not yet focused on a crime or a suspect, there was no structured questioning, and the interview was informal and unrecorded. We will also hold, however, that the admission of the one hearsay statement that we are holding testimonial was harmless beyond a reasonable doubt.

FACTUAL BACKGROUND

A. *The Prosecution's Case*.

1. *Nonhearsay Evidence*.

On May 16, 2001, around 2:30 p.m., Riverside Sheriff's Deputy Perry Mullin was dispatched to defendant's house in response to a 911 call regarding "a fight between a mother and son." As he approached the house, he saw a bloody towel and drops of blood. Inside, he found defendant picking up broken glass. There were two small cuts on her left hand. The glass top of a nearby coffee table was missing. He spoke to defendant, to her mother, and to her daughter Kathy. At that point, he testified, he had no reason to think a crime had been committed.

About an hour later, Deputy Mullin was dispatched to an intersection a mile or two away to look for an "injured person." He found defendant's son John F. sitting on the curb. There was a large cut on the left side of his face.

John was taken to the hospital, where he was seen by Dr. Paul Russell. The cut on John's face was five or six inches long. It went down in front of the whole left ear and

onto the neck, curving back somewhat toward the bottom. The top was shallower than the bottom. It would leave a scar.

In Dr. Russell's opinion, the cut could have been caused by a knife or a piece of glass. It was "not at all" consistent with hitting a piece of glass and going through it; in that event, John would have had bruising, more wounds, and "more ripping rather than cutting type wounds."

2. *First Hearsay Statement*.

Deputy Mullin went to the hospital, where he found John in the emergency room. John had not yet been treated. Deputy Mullin asked John "what had happened between [him] and the defendant." John told him that: "[T]here was an argument, a fight between his mother and him over a belt. She became angry because she thought he was messing up the house. She began pushing him, and . . . he fell on . . . the glass top of [a] coffee table, and th[e] coffee table broke.

"About th[at] time . . . , his grandmother came downstairs and had grabbed ahold of him. While she was holding him, [defendant] grabbed a piece of glass and came over and cut him. [W]hen she started to go and cut him a second time, he broke free and ran from the residence."

3. *Second Hearsay Statement*.

For purposes of treatment, Dr. Russell asked John what had happened. John told him that "he had been held down by his grandmother and cut by his mother."

4. *Third Hearsay Statement*.

After John was released from the hospital, Deputy Mullin interviewed him again at the police station. A tape recording of this interview was played for the jury.

John told Deputy Mullin he was 15 years old. As of May 16, 2001, he was staying with defendant. He was looking for a belt. Defendant would not let him look in the closet. He looked in the garage; when he came back in, defendant accused him of "messing up" the garage. She told him to leave. She pushed him onto the coffee table, which broke. At first, John said he was holding her when he fell, and she fell too. Later, however, he said he grabbed her shirt, but she did not fall.

John's grandmother and his sister Kathy both came downstairs. His grandmother was holding him when defendant picked up "a big piece of glass" and "slashed [him] with it across the face." Defendant tried to do it again, but John broke free and "took off out the door running . . . ." "[S]he tried to throw glass at [him], but it hit the door . . . ." He heard her say, "[C]all the police."

At one point during the interview, Deputy Mullin told John he would be going to juvenile hall because there was a warrant out for his arrest. John replied, "I know that."

B. *The Defense Case*.

Jermaine was defendant's son. He was seven at the time of trial and about five when the fight took place. According to Jermaine, John had been living with defendant. Jermaine found defendant and John already fighting. He saw them fall through the coffee table; defendant fell backward, and John fell on top of her. When John got up, a piece of

glass that was on the floor cut his neck. Jermaine did not see his grandmother holding John.

Kathy was defendant's daughter.[1] She denied that John had been staying with defendant. She testified that John knocked at the door. Defendant told him to leave; then they started pushing each other. John "grabbed [defendant's] hair and put her against the wall and told her he was gonna kill her." He pushed her "frontwards" onto the coffee table, breaking the glass; he fell on top of her. John then got up and ran out. Their grandmother tried to break up the fight; she did not hold John, and defendant did not cut John with a piece of glass. Defendant told Kathy to call 911. According to Kathy, defendant was right-handed.

Six days after the incident, Kathy told a social worker she was upstairs when the fight happened and she did not see any of it.

The grandmother died before trial.

PROCEDURAL BACKGROUND

The prosecution filed a motion in limine concerning the admissibility of John's hearsay statements, noting that John was unavailable as a witness and arguing that the statements were admissible as a victim's report of physical injury under Evidence Code section 1370 (section 1370) and hence not inadmissible under the confrontation clause.

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[1] According to the probation report, Kathy was about 14 when she testified, and hence about 12 at the time of the fight.

In a separate trial brief, the prosecution also argued that the statements were admissible as spontaneous statements under Evidence Code section 1240 (section 1240).

The trial court heard argument on the motion; it was not asked to hold, and it did not hold, an evidentiary hearing. With respect to section 1240, defense counsel argued that the "time delay" was "enough to take it out of the realm of spontaneity." With respect to section 1370, he argued: " . . . I think the law is a bad law no matter how you slice it. It violates the person's right to cross-examine. The courts have ruled otherwise. I will respect that. However, the [c]ourt must make a finding that the statements are trustworthy." He argued that John's statements were not sufficiently trustworthy. He claimed that John was "a diagnosed schizophrenic" who "had a pattern of untruthfulness."

The trial court ruled that the statements were admissible under both section 1240 and section 1370. It specifically ruled that "there is sufficient reliability to admit the statements, and I don't believe that would violate [defendant's] . . . right as to confrontation."

I

ADMISSIBILITY UNDER STATE LAW

Defendant contends John's hearsay statements were not admissible under either section 1240 or section 1370.

"'It is well established that "we do not reach constitutional questions unless absolutely required to do so to dispose of the matter before us."' [Citation.] Accordingly, before addressing defendant's confrontation clause claim, we examine his

claim of error respecting the trial court's evidentiary ruling." (*People v. Duarte* (2000) 24 Cal.4th 603, 610, quoting *People v. Leonard* (1983) 34 Cal.3d 183, 187, quoting *De Lancie v. Superior Court* (1982) 31 Cal.3d 865, 877.)

A. *Section 1240: Spontaneous Statements*.

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

"'The crucial element in determining whether a declaration is sufficiently reliable to be admissible under this exception to the hearsay rule is . . . the mental state of the speaker. The nature of the utterance -- how long it was made after the startling incident and whether the speaker blurted it out, for example -- may be important, but solely as an indicator of the mental state of the declarant. . . . [U]ltimately each fact pattern must be considered on its own merits, and the trial court is vested with reasonable discretion in the matter.' [Citation.]" (*People v. Brown* (2003) 31 Cal.4th 518, 541, quoting *People v. Farmer* (1989) 47 Cal.3d 888, 903-904.)

Defendant argues, as she did at trial, that too much time had elapsed for John's statements to be considered spontaneous. Significantly, she has never argued, below or in this court, that there was insufficient evidence that John was under the stress of excitement. Indeed, in the trial court, defense counsel conceded, "Had [John] made the statement[s] at the time of this incident . . . , that would be spontaneous." She did not request a hearing under Evidence Code section 402. She did not ask the trial court to

listen to the tape of the third statement before it ruled, nor has she asked to have the tape transmitted to this court so that we could listen to it. (See Cal. Rules of Court, rule 18(a)(1).) Accordingly, in this appeal, defendant is limited to the contention that the amount of elapsed time was excessive. (Evid. Code, § 353, subd. (a).)

Defendant concedes that the first and second statements were made about one hour after John was injured, and the third statement was made about three hours after John was injured.[2] This lapse of time did not preclude a finding that the statements were spontaneous. "' . . . "Neither lapse of time between the event and the declarations nor the fact that the declarations were elicited by questioning deprives the statements of spontaneity if it nevertheless appears that they were made under the stress of excitement and while the reflective powers were still in abeyance."' [Citation.]" (*People v. Brown*, *supra*, 31 Cal.4th at p. 541, italics omitted, quoting *People v. Poggi* (1988) 45 Cal.3d 306, 319, quoting *People v. Washington* (1969) 71 Cal.2d 1170, 1176.) In *People v. Raley* (1992) 2 Cal.4th 870, the Supreme Court held that an elapsed time of 18 hours did not preclude admission under section 1240. (*Raley*, at pp. 893-894; see also *In re Emilye A*. (1992) 9 Cal.App.4th 1695, 1713 [Fourth Dist., Div. Two] [elapsed time of "a day or two" did not preclude admission under section 1240].)

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[2] The evidence at trial showed only that the third statement was made sometime "after [John] was released from the hospital[.]" In connection with the motion in limine, however, the prosecution represented that the police transported John more or less straight from the hospital to the police station, and therefore the statement was made "probably two to three hours after the actual event took place . . . ."

Defendant argues that John not only had time to fabricate, but also a motive for doing so -- there was a warrant out for his arrest, and he would not want the police to think he assaulted his mother rather than vice versa. This motive existed, however, from the very moment the fight ended. Its mere existence does not preclude the possibility that John was speaking unreflectively, under the stress of excitement. If he could be excited and unreflective at the time, he could still have been excited and unreflective three hours later. Certainly we cannot say the trial court abused its discretion by so finding.

Thus, defendant has not shown that the trial court erred by admitting John's hearsay statements under section 1240.

B. *Section 1370: Victim's Report of Physical Injury*.

Under section 1370, the hearsay rule does not apply to a statement if all of the following conditions are met:

"(1) The statement purports to narrate, describe, or explain the infliction or threat of physical injury upon the declarant.

"(2) The declarant is unavailable as a witness . . . .

"(3) The statement was made at or near the time of the infliction or threat of physical injury. . . .

"(4) The statement was made under circumstances that would indicate its trustworthiness.

"(5) The statement was made in writing, was electronically recorded, or made to a physician, nurse, paramedic, or to a law enforcement official." (§ 1370, subd. (a).)

Section 1370 further provides that: "[C]ircumstances 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." (§ 1370, subd. (b).)

We review the trial court's ruling under an abuse of discretion standard. (*People v. Hernandez* (1999) 71 Cal.App.4th 417, 425 [Fourth Dist., Div. Two].) "A trial court abuses its discretion when its ruling 'fall[s] "outside the bounds of reason."' [Citation.]" (*People v. Waidla* (2000) 22 Cal.4th 690, 714, quoting *People v. Ochoa* (1998) 19 Cal.4th 353, 408, quoting *People v. DeSantis* (1992) 2 Cal.4th 1198, 1226.)

Defendant challenges only the trustworthiness of John's statements. She argues, once again, that John had a motive to fabricate. It is true that, if John did assault his mother, he had a motive to shift the blame to her. Other factors, however, suggest that John's statements were trustworthy, and hence that she assaulted him.

First, John's statements were corroborated by Dr. Russell's uncontradicted testimony. We realize that, when the question is whether a hearsay statement has sufficient indicia of reliability to be admitted under the confrontation clause, corroboration is irrelevant. (*Idaho v. Wright* (1990) 497 U.S. 805, 819-823 [110 S.Ct. 3139, 111 L.Ed.2d 638].) The confrontation clause, however, is not the present issue.

(Indeed, as we will discuss in part II, *post*, indicia of reliability may no longer matter even when the confrontation clause *is* the issue.) Rather, the question is whether John's hearsay statements were sufficiently trustworthy to be admissible, as a matter of state law, under section 1370. For this purpose, section 1370, by its terms, makes corroboration relevant.

Second, John's statement to Dr. Russell was made for the purpose of obtaining medical treatment. John would have wanted to give his doctor accurate information. He may even have known that the statement could not be used against him. (See Evid. Code, § 994.) Similarly, John's first and third statements were made to a police officer; the third was even tape-recorded. "It cannot be ignored that a police officer is generally a neutral and detached party and that making a false report to an officer is a violation of the law." (*People v. Hernandez*, *supra*, 71 Cal.App.4th at p. 424, fn. 6.)

Third, there were other eyewitnesses to the fight, including the grandmother, Kathy, Jermaine and another sister named Jasmin, to say nothing of defendant herself. Thus, John knew that, if he lied, he would promptly be exposed. Fourth and finally, John's statements were generally consistent with each other.

The fact that there was a warrant for John's arrest does not seem particularly relevant. It did not give him a motive to lie about the fight; if anything, it gave him slightly less incentive to lie, because lying would not keep him out of custody.

Defendant also argues that John was "a diagnosed schizophrenic with a history of making untruthful statements . . . ." Defendant, however, did not request a hearing under Evidence Code section 402 and did not present any evidence to support this claim. If it

were true, one would have expected her to offer such evidence at trial (see Evid. Code, § 1202 [“evidence offered to attack or support the credibility of the declarant is admissible if it would have been admissible had the declarant been a witness at the hearing”]), but she did not.

We conclude that the trial court did not abuse its discretion by finding John’s hearsay statements sufficiently trustworthy to be admissible under section 1370.

II

CONFRONTATION CLAUSE ANALYSIS UNDER *CRAWFORD V. WASHINGTON*

In the unpublished portion of our opinion, we held that defendant has not shown any error of state statutory law in the admission of John’s hearsay statements under either section 1240 or section 1370. This requires us to confront defendant’s additional contention that John’s hearsay statements were inadmissible under the federal and state confrontation clauses.

In her opening brief, defendant’s only constitutional argument was that John’s hearsay statements lacked sufficient “indicia of reliability.” Before the People’s respondent’s brief was due, *Crawford* was decided. To their credit, the People recognized that *Crawford* provided new grounds for challenging the admissibility of John’s hearsay statements. They therefore argued that the statements were admissible even under *Crawford*. Defendant devoted her entire reply brief to arguing that the statements were inadmissible under *Crawford*.

So what is all the fuss about? A paradigm shift in confrontation clause analysis, that’s what. Before *Crawford*, if hearsay was admissible, as a matter of state law, under a

"firmly rooted hearsay exception," it was admissible under the confrontation clause. Even if not, it was admissible under the confrontation clause as long as it was accompanied by "particularized guarantees of trustworthiness" (also known as "indicia of reliability"). (*Ohio v. Roberts* (1980) 448 U.S. 56, 66 [100 S.Ct. 2531, 65 L.Ed.2d 597] (*Roberts*).)

In this case, for example, the hearsay exception for spontaneous statements is firmly rooted (*White v. Illinois* (1992) 502 U.S. 346, 355 and 355, fn. 8 [112 S.Ct. 736, 116 L.Ed.2d 848]); hence, any hearsay admissible under section 1240 was admissible under the confrontation clause. Similarly, California's hearsay exception for a victim's report of physical injury, even if not firmly rooted, requires a showing of certain specified facts that tend to prove that a statement is trustworthy, plus a showing of other, unspecified facts that confirm its trustworthiness. Thus, in most, if not all, cases, any hearsay that was sufficiently trustworthy to be admissible under section 1370 also had sufficient indicia of reliability to be admissible under the confrontation clause. (*People v. Kons* (2003) 108 Cal.App.4th 514, 522; *People v. Hernandez*, *supra*, 71 Cal.App.4th at p. 424.)

Not any more.

A. <u>*Crawford v. Washington*</u>.

In *Crawford*, the Supreme Court began with "the historical background of the [confrontation c]lause . . . ." (*Crawford, supra,* 124 S.Ct. at p. 1359.) "The common-law tradition is one of live testimony in court subject to adversarial testing, while the civil law condones examination in private by judicial officers. [Citation.]" (*Ibid*.) "Nonetheless,

England at times adopted elements of the civil-law practice. Justices of the peace or other officials examined suspects and witnesses before trial. These examinations were sometimes read in court in lieu of live testimony . . . ." (*Ibid*.) "Pretrial examinations became routine under two statutes passed during the reign of Queen Mary . . . . These Marian bail and committal statutes required justices of the peace to examine suspects and witnesses in felony cases and to certify the results to the court. [T]he examinations . . . came to be used as evidence in some cases . . . ." (*Id*. at p. 1360.) Finally, in Sir Walter Raleigh's treason trial, he was convicted based on statements made by his alleged accomplice "in an examination before the Privy Council and in a letter." (*Ibid*.)

Eventually, " . . . English law developed a right of confrontation that limited these abuses." (*Crawford, supra,* 124 S.Ct. at p. 1360.) Most significantly, by 1791, when the Sixth Amendment was ratified, it had come to be the rule that "the admissibility of an unavailable witness's pretrial examination depended on whether the defendant had had an opportunity to cross-examine him." (*Crawford,* at p. 1360; see also *id*. at p. 1361.)

The court concluded: "[T]he 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." (*Crawford, supra,* 124 S.Ct. at p. 1363.) It found that the text of the confrontation clause confirmed this: "It applies to 'witnesses' against the accused -- in other words, those who 'bear testimony.' [Citation.] 'Testimony,' in turn, is typically '[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact.' [Citation.] 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." (*Id.* at p. 1364, quoting 1 N. Webster, An American Dictionary of the English Language (1828).) It concluded that the "focus" of the confrontation clause was on "'testimonial' statements . . . ." (*Crawford,* at p. 1364.)

The court continued: "The historical record also supports a second proposition: that the Framers would not have allowed admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination." (*Crawford, supra,* 124 S.Ct. at p. 1365.) It therefore held: "Where testimonial evidence is at issue, . . . the Sixth Amendment demands . . . unavailability and a prior opportunity for cross-examination." (*Id*. at p. 1374.)

The court then also held that "[s]tatements taken by police officers in the course of interrogations are . . . testimonial . . . ." (*Crawford, supra,* 124 S.Ct. at p. 1364.) It explained: "Police interrogations bear a striking resemblance to examinations by justices of the peace in England." (*Ibid*.) "Justices of the peace conducting examinations under the Marian statutes were not magistrates as we understand that office today, but 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. 1365.)

It added: "We use the term 'interrogation' in its colloquial, rather than any technical legal, sense." (*Crawford, supra,* 124 S.Ct. at pp. 1365, fn. 4.) In the case before the court, involving attempted murder and assault, the police had given the defendant's wife, Sylvia, *Miranda*[3] warnings and then questioned her. (*Crawford,* at p. 1357.) "In response to often leading questions from police detectives, she implicated her husband in [the] stabbing and at least arguably undermined his self-defense claim." (*Id*. at p. 1372.) She refused to testify at trial, claiming a state marital privilege. (*Id*. at p. 1357.) As a result, a tape recording of her statement was played to the jury at the defendant's trial. (*Id*. at pp. 1356-1358.) The court concluded: "Sylvia's recorded statement, knowingly given in response to structured police questioning, qualifies under any conceivable definition [of 'interrogation']." (*Id*. at p. 1365, fn. 4.)

"We leave for another day," the court declared, "any effort to spell out a comprehensive definition of 'testimonial.' Whatever 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." (*Crawford, supra,* 124 S.Ct. at p. 1374, fn. omitted.)

The court did quote several "formulations" proposed by others, which, it said, "share a common nucleus and then define the Clause's coverage at various levels of abstraction around it." (*Crawford, supra,* 124 S.Ct. at p. 1364.) These included: (1)

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[3] *Miranda v. Arizona* (1966) 384 U.S. 436

"'*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;'" (2) "'extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions;'" 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[.]'" (*Ibid*.)

Finally, the court overruled *Roberts*, at least to the extent that it "condition[ed] the admissibility of all hearsay evidence on whether it falls under a 'firmly rooted hearsay exception' or bears 'particularized guarantees of trustworthiness.' [Citation.]" (*Crawford, supra,* 124 S.Ct. at p. 1369; see also *id*. at pp. 1370-1374.) It found this "framework . . . so unpredictable that it fails to provide meaningful protection from even core confrontation violations." (*Id*. at p. 1371.) It also condemned *Roberts* because "[i]t applies the same mode of analysis whether or not the hearsay consists of *ex parte* testimony. This often results in close constitutional scrutiny in cases that are far removed from the core concerns of the Clause." (*Crawford*, at p. 1369.)

The court admitted that the history of the clause "suggests that not all hearsay implicates the Sixth Amendment's core concerns. An off-hand, overheard remark might be unreliable evidence and thus a good candidate for exclusion under hearsay rules, but it bears little resemblance to the civil-law abuses the Confrontation Clause targeted." (*Crawford, supra,* 124 S.Ct. at p. 1364.) "Where nontestimonial hearsay is at issue, it is

wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law . . . , as would an approach that exempted such statements from Confrontation Clause scrutiny altogether." (*Id*. at p. 1374.) The court confessed that its analysis "casts doubt" on whether the confrontation clause applies to nontestimonial hearsay at all. (*Id*. at p. 1370.) Nevertheless, it declined to resolve that question. (*Ibid*.)

Crawford indubitably applies retroactively in this case. "When a decision of th[e United States Supreme] Court results in a 'new rule,' that rule applies to all criminal cases still pending on direct review. [Citation.]" (*Schiro v. Summerlin* (2004) ___ U.S. ___, ___ [2004 WL 1402732 at p. 3].) This is true regardless of whether the new rule is substantive or procedural (*ibid*.) and regardless of whether it "constitutes a 'clear break' with the past." (*Griffith v. Kentucky* (1987) 479 U.S. 314, 328 [107 S.Ct. 708, 93 L.Ed.2d 649].) While *Crawford* probably would not apply retroactively in a habeas corpus proceeding (see *Schiro*, at p. 3), we need not decide that issue.

The People do not contend that defendant waived her contention in any way. "Though evidentiary challenges are usually waived unless timely raised in the trial court, this is not so when the pertinent law later changed so unforeseeably that it is unreasonable to expect trial counsel to have anticipated the change. [Citations.]" (*People v. Turner* (1990) 50 Cal.3d 668, 703.) Defense counsel could not have been expected to foresee a bombshell like *Crawford*. In any event, he did expressly argue that the admission of John's hearsay statements violated the confrontation clause; the trial

court expressly ruled to the contrary. Under the circumstances, this was more than adequate to preserve defendant's present contention.

Our task, then, is to apply the new rules that *Crawford* stated (or, sometimes, left to be worked out later) to the facts of this case. As it turns out, it is most convenient to discuss John's hearsay statements in reverse chronological order.

B. *The Third Hearsay Statement*.

John's third hearsay statement was made during a classic station-house interview. It featured structured police questioning and tape recording. Thus, it is indistinguishable from Sylvia's statement in *Crawford*. The only even arguable distinction is that Sylvia was in custody, but John was not. The People, however, do not argue this distinction; rather, they concede: "This type of statement seems to be the type of 'testimonial' statement identified in *Crawford* which requires an opportunity to cross-examine." In reliance on this concession, we conclude that the admission of John's third hearsay statement violated the confrontation clause.

C. *The Second Hearsay Statement*.

John's second hearsay statement was made to Dr. Russell. Dr. Russell was not a police officer or even an agent of the police. He was not performing any function remotely resembling that of a Tudor, Stuart, or Hanoverian justice of the peace. Using John's statement to him against defendant "bears little resemblance to the civil-law abuses the Confrontation Clause targeted." (*Crawford, supra,* 124 S.Ct. at p. 1364.)

Crawford repeatedly emphasized the significance of government involvement in a testimonial hearsay statement. It noted that "[a]n 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." (*Crawford, supra,* 124 S.Ct. at p. 1364.) One of its reasons for holding that a statement taken in the course of a police interrogation is testimonial was that "[i]nvolvement of government officers in the production of testimony with an eye toward trial presents unique potential for prosecutorial abuse" (*id*. at p. 1367, fn. 7), and "[t]he 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. 1365.)

Defendant gamely argues, "[I]t is unlikely that [John] made a significant distinction between the police officer's questions and those of the treating physician." She finds support in the three "formulations" proposed in *Crawford*. The first of these included "statements that declarants would reasonably expect to be used prosecutorially"; the third included all "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 v. Washington, supra,* 124 S.Ct. at p. 1364.) The second formulation, of course, was limited to "formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions" (*ibid*.); thus, it does not support defendant's argument.

In any event, *Crawford* did not adopt any of these formulations. It merely noted that they "exist," that they "share a common nucleus," and that certain indisputably testimonial statements also fall within that nucleus. (*Crawford v. Washington, supra,* 124 S.Ct. at p. 1364.) The court's actual holding -- that statements made in response to police

interrogation are testimonial -- was far narrower. So was its rationale, which turned on the "investigative and prosecutorial function" performed by both justices of the peace and police. (*Id*. at p. 1365.)

Finally, even under the proposed formulations, the declarant's subjective understanding is irrelevant. They state an objective, "reasonable person" test. No reasonable person in John's shoes would have expected his statements to Dr. Russell to be used prosecutorially, at defendant's trial. This is true even if he thought the doctor might relay his statements to the police. After all, *anyone* who obtains information relevant to a criminal investigation might (and certainly should) pass it along the police. This possibility, standing alone, does not suffice to make hearsay testimonial within the meaning of *Crawford*.

Although *Crawford* did not say so in so many words, it is arguable that it overruled *Roberts* with respect to *all* hearsay, such that nontestimonial hearsay can *never* violate the confrontation clause. We, however, need not go so far. We may assume, without deciding, that nontestimonial hearsay remains inadmissible under the confrontation clause absent either a firmly rooted hearsay exception or indicia of reliability.

Even if so, as we held in the unpublished portion of this opinion, defendant has not shown that the trial court erred by admitting John's hearsay statements under section 1240. (See part I.A, *ante*.) Section 1240 is a firmly rooted hearsay exception.

Accordingly, even assuming the nontestimonial hearsay statements lacked adequate indicia of reliability, defendant has failed to make out a confrontation clause violation.[4]

We conclude that defendant has not shown that the admission of John's second hearsay statement, to Dr. Russell, violated the confrontation clause.

D. *The First Hearsay Statement*.

John's first hearsay statement was made to Deputy Mullin at the hospital. The People argue that this statement was not testimonial because Deputy Mullin was engaged in "pre-investigative, informal[] fact gathering" rather than "an attempt to gather evidence in anticipation of a criminal prosecution." Defendant responds that it was testimonial because it consisted of "detailed answers given in direct response to questions by Deputy Mullin[] . . . ."

Crawford strongly suggested that a hearsay statement is not testimonial unless it is made in a relatively formal proceeding that contemplates a future trial. The court relied on the 19th-century definition of testimony as "'[a] *solemn* declaration or affirmation made for the purpose of establishing or proving some fact.'" (*Crawford, supra,* 124 S.Ct. at p. 1364, italics added.) It continued, "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*., italics added.)

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[4] The headings of defendant's constitutional arguments assert a violation of the federal confrontation clause as construed in *Crawford*. Although she mentions the state confrontation clause briefly, she does not argue that it would require any different analysis. Thus, she has waived any such argument.

One of the proposed "formulations" that the court quoted would require that the hearsay be "'in *formalized* testimonial materials, such as affidavits, depositions, prior testimony, or confessions.'" (*Crawford, supra,* 124 S.Ct. at p. 1364, italics added.) Another would require that it be the "functional equivalent" of "in-court testimony" and gave some examples, "such as affidavits, custodial examinations [and] prior testimony" (*ibid*.) -- all formal devices for obtaining and preserving testimony. Admittedly, the remaining formulation required only "'circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial[.]'" (*Crawford, supra,* 124 S.Ct. at p. 1364.) But this does suggest that the statement is being memorialized somehow, which sets at least a minimum required degree of formality. And it confirms that the participants must be anticipating a trial.

Crawford extended the usual meaning of "testimonial" to encompass statements made in response to police interrogation because the court considered a police interrogation to be the modern equivalent of a pretrial examination before a justice of the peace. The Marian bail and committal statutes, however, did not kick in until an accused had been arrested and brought before the justice of the peace. (4 Blackstone, Commentaries 293-296; 2 Hale, Pleas of the Crown (1778) p. 120.) At that point, "there was an accusation definitely formulated against some specific person . . . ." (4 Holdsworth, History of English Law (1977) p. 529.) Moreover, these statutes required the justice of the peace to "put [the examination] in writing" and to "certify" it (1 & 2 Phil. & M. (1554) ch. 13, § IV; 2 & 3 Phil. & M. (1555) ch. 10, § II; 2 Hale, Pleas of the Crown, *supra*, p. 284; Langbein, Prosecuting Crime in the Renaissance (1974) p. 19) --

i.e., they required official recordation of the proceedings. Indeed, that was what precisely made it possible for the preliminary examination to be used at trial, much to the framers' vexation.

We cannot believe that the framers would have seen a "striking resemblance" between Deputy Mullin's interview with John at the hospital and a justice of the peace's pretrial examination. There was no particular formality to the proceedings. Deputy Mullin was still trying to determine whether a crime had been committed and, if so, by whom. No suspect was under arrest; no trial was contemplated. Deputy Mullin did not summon John to a courtroom or a station house; he sought him out, at a neutral, public place. There was no "structured questioning," just an open-ended invitation for John to tell his story. The interview was not recorded. There is no evidence that Deputy Mullin even so much as recorded it later in a police report. Police questioning is not necessarily police interrogation. When people refer to a "police interrogation," however colloquially, they have in mind something far more formal and focused.

Defendant relies on *People v. Sisavath* (2004) 118 Cal.App.4th 1396, petition for review filed June 28, 2004, S125799. There, the trial court had admitted the videotape of an interview of a child victim by "a trained interviewer at Fresno County's Multidisciplinary Interview Center (MDIC)[,] . . . a facility specially designed and staffed for interviewing children suspected of being victims of abuse." (*Id*. at p. 1400.) The court held that this interview was testimonial because it "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."' [Citation.]" (*Id*. at p. 1402, fn.

omitted, quoting *Crawford v. Washington, supra,* 124 S.Ct. at p. 1364.) It therefore rejected the People's arguments that the interviewer was not a government employee, that the MDIC was a neutral location, and that the purpose of the interview may have been therapeutic or otherwise not prosecutorial. (*Sisavath,* at pp. 1402-1403.)

A number of factors present in *Sisavath* are absent here. For example, there -- as the court noted -- the interview took place after a preliminary hearing had already been held and an information already filed; moreover, the prosecutor and a prosecution investigator were present. (*People v. Sisavath*, *supra*, 118 Cal.App.4th at p. 1402.) We also find it significant that the interview in *Sisavath* was videotaped. The court concluded: "We have no occasion here to hold, and do not hold, that statements made in every MDIC interview are testimonial under *Crawford*. We hold only that [the victim's] statements in the MDIC interview in this case were testimonial." (*Id*. at p. 1403.) Thus, *Sisavath* does not compel the conclusion that John's first hearsay statement was testimonial. If, however, *Sisavath* could be read as holding that the third "formulation" in *Crawford* is determinative, we would disagree. We conclude that John's first hearsay statement was not testimonial within the meaning of *Crawford*.

Once again, assuming nontestimonial hearsay still must be admitted under a firmly rooted exception (or accompanied by indicia of reliability), John's first hearsay statement was admitted under section 1240. Accordingly, its admission did not violate the confrontation clause.

E. *Prejudice*.

We still must consider whether the admission of John's third hearsay statement, to Deputy Mullin at the police station, was harmless beyond a reasonable doubt. (*Lilly v. Virginia* (1999) 527 U.S. 116, 139-140 [119 S.Ct. 1887, 144 L.Ed.2d 117]; *Chapman v. California* (1967) 386 U.S. 18, 24 [87 S.Ct. 824, 17 L.Ed.2d 705].)

It was. "[U]nder the mandate of *Chapman* . . . we must ultimately look to the *evidence* considered by defendant's jury under the instructions given in assessing the prejudicial impact or harmless nature of the error." (*People v. Harris* (1994) 9 Cal.4th 407, 428.) John's third hearsay statement was essentially cumulative. Although it was longer and more detailed than his first and second hearsay statements, the details were either irrelevant or actually favorable to defendant. For example, it was from this interview that the jury learned that there was a warrant out for John's arrest. John contradicted himself about whether defendant fell onto the coffee table with him. He also admitted that defendant wanted to call the police.

John's account was the only one that was consistent with the physical evidence. Dr. Russell testified that the injury could not possibly have been caused by going through a piece of glass. Also, the cut curved backward at the bottom; this made sense if defendant slashed John, but not if John just fell. Defendant was right-handed and would have slashed the left side of John's face.

In the face of this physical evidence, Jermaine and Kathy were simply unbelievable. Kathy testified that defendant did not slash John. However, she had no alternative explanation for how John got cut; she testified that she was watching John

while he fell, got up, and ran out, yet she claimed she never saw the cut -- not even any blood. Jermaine testified that John got cut as he was getting up but insisted that the piece of glass that cut him was lying on the floor. This sounds physically impossible.

We conclude that reversal is not required.

DISPOSITION

The judgment is affirmed.

CERTIFIED FOR PARTIAL PUBLICATION

RICHLI
J.

We concur:

HOLLENHORST
Acting P.J.

GAUT
J.