Filed 10/12/11

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. SYDNEY DAVIS, Defendant and Appellant.	C061536 (Super. Ct. No. 08F06253)

APPEAL from a judgment of the Superior Court of Sacramento County, Ernest W. Sawtelle, Judge. Affirmed as modified.

Michael Willemsen, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Michael P. Farrell, Senior Assistant Attorney General, Julie A. Hokans and Larenda Delaini, Deputies Attorney General, for Plaintiff and Respondent.

INTRODUCTION

A jury found defendant Sydney Davis guilty of assaulting Jonathan Coleman with a deadly weapon in violation of Penal Code section 245, subdivision (a)(1) and mayhem in violation of Penal Code section 203. During trial, the prosecution called an expert witness, a physician, who testified about the injury Coleman sustained. During his testimony, the expert discussed Coleman's medical records, including reports prepared by other nontestifying physicians. On appeal, defendant contends that under *Melendez-Diaz v. Massachusetts* (2009) 557 U.S. ___ [174 L.Ed.2d 314] (*Melendez-Diaz*), these reports constitute "testimonial" out-of-court statements and their admission into evidence violated his rights under the Sixth Amendment to the United States Constitution. We disagree and affirm the judgment of conviction. We modify, however, to correct a sentencing error.

PROCEDURAL AND FACTUAL BACKGROUND

On February 19, 2009, the Sacramento County District Attorney filed a first amended information against defendant, charging him with (1) assault with a deadly weapon, i.e., a "commercial grade toilet brush," upon Coleman (count one); (2) unlawfully and maliciously putting out Coleman's eye, i.e., mayhem (count two); and (3) battery upon Coleman resulting in the infliction of serious bodily injury (count three). In regard to count one, it was further alleged that the offense

constituted a "serious" felony under Penal Code section 1192.7, subdivision (c)(8) because defendant personally inflicted great bodily injury upon Coleman, who was not an accomplice.

I. Trial

On February 18, 2009, the case proceeded to a jury trial.[1] The prosecution's theory of the case was that while defendant and Coleman were in the same "pod" at the Rio Cosumnes Correctional Center, defendant attacked Coleman with a toilet brush, causing serious damage to Coleman's left eye. The prosecution had a videotape of the incident, which the jury watched. Essentially, the defense's theory was that the videotape lacked sufficient clarity to conclusively identify defendant as Coleman's attacker and the evidence was otherwise insufficient to meet the prosecution's burden.

As part of its case-in-chief, the prosecution called Dr. Christopher Richardson as an expert witness. Dr. Richardson was a second-year surgical resident at San Joaquin General Hospital (hospital), the facility to which Coleman was admitted for treatment of his eye injury. Dr. Richardson participated in Coleman's discharge from the hospital.

On the witness stand, Dr. Richardson acknowledged that he recognized Coleman's medical records from the hospital, marked collectively as People's exhibit 2, and reviewed them prior to

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[1] For efficiency purposes, we omit several facts elicited at trial as unnecessary to our analysis and disposition.

testifying. Some of those records were, in fact, prepared by Dr. Richardson himself. Dr. Richardson testified that Coleman's medical records were the types of records that are made and kept in the ordinary course of business of treating patients at the hospital. He further explained:

"[Prosecution:] So as a diagnosis is made, it's updated to the chart?

"[Dr. Richardson:] Yes.

"[Prosecution:] And that's actually because you guys rely on those charts to be accurate in how you treated patients?

"[Dr. Richardson:] Yes."[2]

Turning to Coleman's injury as reflected in the medical records, Dr. Richardson was asked several questions pertaining to an operative report prepared by the attending ophthalmologist, Dr. Philip Edington, and a computerized tomography (CT) scan report prepared by Dr. Peter Loew.

The operative report was prepared in connection with Dr. Edington's repair of Coleman's eye. The operative report states that Coleman had a "large globe rupture" of the left eye, and Dr. Richardson was asked to explain this terminology. Dr. Richardson testified that the "globe" refers to the "eyeball." The operative report further represents that Coleman had a "large prolapse of uvea and vitreous." Again,

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[2] In addition to being offered as an expert witness, Dr. Richardson was offered as a custodian of records, without objection.

Dr. Richardson was asked to explain this terminology and he confirmed that this essentially means "the inside of the globe is coming outside." Dr. Richardson was asked what kind of eye problems could result from this type of ocular injury. He indicated that such an injury could result in blindness, glaucoma, or infection; have a substantial impact on visual acuity; and could render the eye useless.

As for Dr. Loew's CT scan report, Dr. Richardson explained that it was the official radiology report from Coleman's CT scan upon admission. The CT scan report indicates that Coleman was "hit in left eye" and sustained a "comminuted fracture of the nasal arch" and a "comminuted and slightly depressed fracture of the . . . medial wall of the left eye orbit." Dr. Richardson explained this terminology. In essence, Coleman had two splintered (comminuted) fractures: one fracture at the "bony top of [the] nose" and another fracture on the nasal side of the left eye socket.

Toward the end of his direct examination, Dr. Richardson was asked what type of impact would cause the injuries Coleman sustained. He responded that a "penetrating" injury was substantially more likely than a "blunt" injury. Dr. Richardson elaborated that a "penetrating" injury is one caused by something with a "sharpened edge" that "penetrates any tissue." Dr. Richardson further acknowledged that being struck with a sharpened toilet brush would likely cause a penetrating injury.

The defense briefly cross-examined Dr. Richardson about the medical records and Coleman's injury.

There were several documents in Coleman's medical records to which Dr. Richardson did not testify. One such document was a "preliminary" CT scan report prepared by Dr. Susan Enlow. This report, similar to Dr. Loew's CT scan report, indicates that Coleman had a "comminuted fracture of the nasal bone."

After all the witnesses testified, including Coleman, the parties moved several exhibits into evidence. Coleman's medical records were admitted in their entirety, without objection.

Ultimately, the jury found defendant guilty on count one, assault with a deadly weapon, and count two, mayhem. The jury also found true the great bodily injury enhancement associated with count one. The jury acquitted defendant of count three as the court instructed them to do after finding defendant guilty of mayhem.

II. Sentencing

On March 6, 2009, the trial court sentenced defendant to a term of two years eight months in state prison, which consisted of one-third the *upper* term of eight years on count two, mayhem, to run "consecutive to any time that he is already sentenced to in state prison." Defendant was awarded zero presentence credits, as he was already a sentenced prisoner serving time for another offense. This appeal followed.

DISCUSSION

I. Sixth Amendment Argument

As revealed by the record and the parties' appellate briefing, the prosecution called Dr. Richardson to help prove the mayhem charge against defendant. Penal Code section 203 provides: "Every person who unlawfully and maliciously deprives a human being of a member of his body, or disables, disfigures, or renders it useless . . . or puts out an eye . . . is guilty of mayhem." The statutory expression "puts out an eye" has been interpreted to mean that "the eye has been injured to such an extent it cannot be used for the 'ordinary and usual practical purposes of life' [citation]." (*People v. Green* (1976) 59 Cal.App.3d 1, 3.) Mayhem occurs "when the inflicted injury not only completely destroys the victim's eyesight [citation], but also when it causes impairment less than total blindness." (*People v. Dennis* (1985) 169 Cal.App.3d 1135, 1138.) The degree of Coleman's eye injury was thus critical to the mayhem charge, and this injury was described in the medical reports prepared by nontestifying physicians, including Drs. Edington, Loew, and Enlow. In turn, Dr. Richardson explained terminology appearing in these reports.[3]

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[3] These reports, however, were not the exclusive evidence of Coleman's injury. Indeed, Coleman himself testified at trial.

A. The Reports of Drs. Edington, Loew, and Enlow

Under *Crawford v. Washington* (2004) 541 U.S. 36, 59 and footnote 9, 61, 68 [158 L.Ed.2d 177, 197, 199, 203] (*Crawford*), the "testimonial" out-of-court statements of a declarant cannot be admitted to prove the truth of the matter asserted unless the declarant is unavailable to testify and the defendant had a prior opportunity for cross-examination. Defendant's sole argument on appeal is that under *Melendez-Diaz*, which was decided after his trial, the medical records in this case, in particular Dr. Edington's operative report, Dr. Loew's CT scan report, and Dr. Enlow's preliminary CT scan report, represent "testimonial" out-of-court statements and their admission at trial violated his Sixth Amendment confrontation rights. Without these reports, defendant maintains that it cannot be concluded, beyond a reasonable doubt, that the jury would have found him guilty of mayhem.[4]

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[4] Coleman's medical records consist of 67 pages. We construe defendant's Sixth Amendment "testimonial" argument as being directed at a subset of them, including Dr. Edington's operative report, Dr. Loew's CT scan report, and Dr. Enlow's preliminary CT scan report. Defendant states in his appellate briefing that although "Dr. Richardson wrote some of the reports, . . . the crucial language describing the eye injury comes from the report[] by Dr. Phillip Edington, the ophthalmologic surgeon who operated on Coleman and the attending physician in charge of the case. There is also a description of the injury in the report of Dr. Susan Enlow, a radiologist." In defendant's statement of facts, defendant further cites the portion of the trial transcript in which Dr. Richardson discussed the official CT scan report prepared by Dr. Loew. Apart from these documents,

Defendant concedes that he did not object at trial to the medical records on Sixth Amendment confrontation grounds. Nevertheless, he argues that raising a Sixth Amendment objection would have been "futile" and thus no forfeiture has occurred. (See *People v. Sandoval* (2007) 41 Cal.4th 825, 837, fn. 4; see also *People v. Welch* (1993) 5 Cal.4th 228, 237-238; *People v. Simms* (1970) 10 Cal.App.3d 299, 309-310.) According to defendant, an objection on Sixth Amendment grounds would have been futile because the trial court would have been obligated to follow *People v. Geier* (2007) 41 Cal.4th 555 (*Geier*), which would have required the trial court to overrule any such objection.

In *Geier*, after analyzing and interpreting *Crawford* and *Davis v. Washington* (2006) 547 U.S. 813 [165 L.Ed.2d 224] (*Davis*), the California Supreme Court held that the confrontation clause did not preclude the prosecution's expert witness, Dr. Robin Cotton, from testifying about the DNA analysis performed by another declarant, biologist Paula Yates, who did not testify at trial. (*Geier*, *supra*, 41 Cal.4th at pp. 593-596, 607). The DNA analysis at issue was recorded in a report and notes prepared by Yates. (*Id.* at pp. 595-596.) *Geier* concluded that Yates's report and notes were not testimonial in nature. (*Id.* at 607.)

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defendant has not specified whether any other documents form the basis of his Sixth Amendment challenge.

We assume, arguendo, that under *Geier*, the medical records at issue here were not testimonial, making any Sixth Amendment objection to their admission futile.[5] The only issue on appeal then is whether, as defendant claims, *Melendez-Diaz* changes the result, i.e., whether *Melendez-Diaz* renders the medical records testimonial in nature. To put defendant's argument and *Melendez-Diaz* in context, a short discussion of *Crawford* and *Davis* is warranted.

Crawford explained that the Sixth Amendment is concerned with a "specific type of out-of-court statement." (*Crawford*, *supra*, 541 U.S. at p. 51 [158 L.Ed.2d at p. 193].) *Crawford* continued: "Various formulations of this core class of 'testimonial' statements exist: '*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,' [citation]; 'extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions,' [citation]; [and] 'statements that were made under circumstances which would lead

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[5] For whatever reason, the People do not squarely address whether *Geier* foreclosed a Sixth Amendment objection to the medical records. The People represent, however, that under the "substantive law" as it stood at the time of trial, the medical records were admissible "as nontestimonial business records" and that this substantive law "remains unchanged by *Melendez-Diaz*."

an objective witness reasonably to believe that the statement would be available for use at a later trial.'" (*Id.* at pp. 51-52 [158 L.Ed.2d at p. 193].)

Although *Crawford* noted that "[v]arious formulations" of "'testimonial'" statements exist, *Crawford* did not adopt any particular articulation. Instead, *Crawford* left "for another day any effort to spell out a comprehensive definition of 'testimonial'" and held that "[w]hatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations." (*Crawford*, *supra*, 541 U.S. at p. 68 [158 L.Ed.2d at p. 203].)

In *Davis*, the Supreme Court again declined to adopt any particular articulation of the various formulations of testimonial statements *Crawford* outlined (*Davis* declined to even reiterate them). In its analysis, *Davis* utilized the dictionary definition of "testimony" as set forth in *Crawford*. (See *Davis*, *supra*, 547 U.S. at pp. 823-824, 826-827 [165 L.Ed.2d at pp. 238, 240].) This brings us to *Melendez-Diaz*.

In *Melendez-Diaz*, the defendant was charged with distributing and trafficking in cocaine. (*Melendez-Diaz*, *supra*, 557 U.S. at p. ___ [174 L.Ed.2d at p. 320].) Prior to trial, the police submitted the substance associated with the defendant to state drug analysts for testing purposes. (*Ibid.*) At trial, the prosecution admitted in evidence three affidavits from the drug analysts, which were sworn before a notary public and which

stated that the substance had been examined and "'[t]he substance was found to contain: Cocaine.'" (*Ibid.*) The sworn affidavits were admitted to prove the truth of the matter asserted and the drug analysts did not testify at trial. (*Id.* at p. ___ [174 L.Ed.2d at pp. 320-321].)

In a five-to-four decision, *Melendez-Diaz* concluded that the sworn affidavits were testimonial. (*Melendez-Diaz*, *supra*, 557 U.S at pp. ___ [174 L.Ed.2d at pp. 321-322, 332-333].) Justice Thomas, the fifth vote, joined the *Melendez-Diaz* "opinion" in a separate concurrence. (*Id.* at p. ___ [174 L.Ed.2d at p. 333].) Because Justice Thomas concurred on grounds narrower than those set forth in the plurality opinion, we must treat as controlling only the position shared between Justice Thomas and the plurality. (See *Gregg v. Georgia* (1976) 428 U.S. 153, 169, fn. 15 [49 L.Ed.2d 859, 872]; see also *Romano v. Oklahoma* (1994) 512 U.S. 1, 9 [129 L.Ed.2d 1, 11].) We tailor our discussion of *Melendez-Diaz* accordingly.

The *Melendez-Diaz* plurality held that the "Sixth Amendment does not permit the prosecution to prove its case via *ex parte* out-of-court affidavits, and the admission of such evidence against [defendant] was error." (*Melendez-Diaz*, *supra*, 557 U.S at p. ___ [174 L.Ed.2d at p. 332].) The plurality reasoned that "[t]here is little doubt that the documents at issue in this case fall within the 'core class of testimonial statements' [outlined in *Crawford*]. Our description of that category mentions affidavits twice. See also *White* v. *Illinois*, 502 U.S.

346, 365, 112 S.Ct. 736, 116 L.Ed.2d 848 (1992) (Thomas, J., concurring in part and concurring in judgment) ('[T]he Confrontation Clause is implicated by extrajudicial statements only insofar as they are contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions'). The documents at issue here, while denominated by Massachusetts law 'certificates,' are quite plainly affidavits: 'declaration[s] of facts written down and sworn to by the declarant before an officer authorized to administer oaths.' Black's Law Dictionary 62 (8th ed. 2004)." (*Melendez-Diaz*, *supra*, 557 U.S. at p. ___ [174 L.Ed.2d at p. 321].)

In his separate concurrence, Justice Thomas reiterated his view that the confrontation clause is implicated by out-of-court statements "'only insofar as they are contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions.' [Citation.]" (*Melendez-Diaz*, *supra*, 557 U.S. at p. __ [174 L.Ed.2d at p. 333].) Because the documents at issue were "'quite plainly affidavits,'" Justice Thomas joined the court's opinion. (*Ibid*.)

Based on the foregoing, it is clear that the plurality's holding—that the Sixth Amendment does not permit the prosecution to prove its case via ex parte out-of-court affidavits—is entirely consistent with Justice Thomas's concurrence and thus represents a controlling holding of the court. It is equally clear that this holding does not support defendant's position

that the medical records at issue here are "testimonial" and thus inadmissible under the Sixth Amendment.

Unlike the documents in *Melendez-Diaz*, the medical documents here are, quite plainly, not affidavits. The reports of Drs. Edington, Loew, and Enlow were not "'sworn'" by them "'before an officer authorized to administer oaths'" (*Melendez-Diaz*, *supra*, 557 U.S. at p. ___ [174 L.Ed.2d at p. 321]) or otherwise signed under penalty of perjury. The reports completely lack the solemnity or formality associated with the affidavits utilized in *Melendez-Diaz.*

Because the medical records at issue are not out-of-court affidavits or equivalent thereto, the controlling holding of *Melendez-Diaz* does not render these documents testimonial in nature.

In support of his argument that the medical records are, in fact, testimonial, defendant quotes a passage from *Melendez-Diaz* where the plurality reasoned that the "affidavits [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.*"'" (*Melendez-Diaz*, *supra*, 557 U.S. at p. ___ [174 L.Ed.2d at p. 321], quoting *Crawford*, *supra*, 541 U.S. at p. 52 [158 L.Ed.2d at p. 193], italics added.)[6]

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[6] The full passage reads: "Here, moreover, not only were the affidavits '"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,* at 52, 124 S.Ct. 1354, 158 L.Ed.2d 177, but under Massachusetts law the *sole purpose* of the affidavits was to provide 'prima facie

According to defendant, *Melendez-Diaz* establishes the italicized language as the test for determining what statements are testimonial. Applying this test, defendant maintains that the medical records are testimonial.

The fatal defect in defendant's argument is that his underlying premise is false: *Melendez-Diaz* did *not* establish that the test for determining what statements are "testimonial" is whether they 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."'" (*Melendez-Diaz*, *supra*, 557 U.S. at p. ___ [174 L.Ed.2d at p. 321], quoting *Crawford*, *supra*, 541 U.S. at p. 52 [158 L.Ed.2d at p. 193].) This part of the plurality opinion did not gain Justice Thomas's support and thus did not establish precedent. Moreover, neither *Crawford* nor *Davis*, nor Justice Thomas in his partial concurrence and partial dissent in *Davis*, adopted this language as the test for "testimonial" statements. (*People v. Cage* (2007) 40 Cal.4th 965, fn. 14 [recognizing that the formulation of a "testimonial" statement as one "'"made under circumstances which would lead *an objective witness* reasonably to believe that the statement *would be available* for later use at a later trial"'" was *not* adopted in *Crawford* or *Davis*];

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evidence of the composition, quality, and the net weight' of the analyzed substance, Mass. Gen. Laws, ch. 111, § 13." (*Melendez-Diaz*, *supra*, 557 U.S. at p. ___ [174 L.Ed.2d at p. 321].)

Davis, *supra*, 547 U.S. at pp. 834-842 [165 L.Ed.2d at pp. 244-249 [conc. & dis. opn. of Thomas, J].)

Apart from basing his argument on a faulty premise, defendant's position that the medical records at issue are testimonial is also contradicted by other language in *Melendez-Diaz*. The *Melendez-Diaz* plurality specifically observed that "medical reports created for treatment purposes . . . would not be testimonial under our decision today." (*Melendez-Diaz*, *supra*, 557 U.S. at p. ___, fn. 2 [174 L.Ed.2d at p. 322, fn. 2].) Although this observation went beyond the scope of Justice Thomas's concurrence, it is entirely consistent with *Crawford's* recognition that "business records" covered by the federal hearsay exception are "by their nature" not testimonial. (*Crawford*, *supra*, 541 U.S. at p. 56 [158 L.Ed.2d at pp. 195-196].)[7] Medical records can certainly qualify as "business records" under the federal hearsay exception. (See, e.g., *United States v. Hall* (9th Cir. 2005) 419 F.3d 980, 987.) In order to qualify as admissible "business records" under the federal rule, among other things, the documents must be prepared in the ordinary course of business and not "for purposes of litigation." (*United States v. Arias-Izquierdo* (11th Cir. 2006) 449 F.3d 1168, 1183-1184; see also *Clark v. City of Los Angeles* (9th Cir. 1981) 650 F.2d 1033, 1037; *Melendez-Diaz*, *supra*, 557 U.S. at p. ___ [174 L.Ed.2d at p. 328] [document does not

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[7] Justice Thomas joined the *Crawford* decision without comment.

constitute admissible "business record" if "it was 'calculated for use essentially in the court, not in the business,'" quoting *Palmer v. Hoffman* (1943) 318 U.S. 109, 114 [87 L.Ed. 645]].)

Here, Dr. Richardson's testimony indicates that Coleman's medical records were generated in the ordinary course of the hospital's business of treating patients, and further that they were created for medically-related, not litigation, purposes. That the reports of Drs. Edington, Loew, and Enlow were created for medically-related purposes is made clear by the heavy medical jargon they contain, which indicates they were written for use by other medical professionals, not for evidentiary use by judge or jury. Furthermore, there is no evidence that the reports were made at the behest of the police or the prosecution.

Defendant's Sixth Amendment argument finds no support in the controlling holding of *Melendez-Diaz*, is contradicted by other language in the plurality opinion, and runs contrary to *Crawford*'s recognition that "business records" covered by the federal hearsay exception are generally not testimonial in nature. Accordingly, defendant's argument is unpersuasive.

After the briefing closed in this case, the Supreme Court decided two additional Sixth Amendment cases, neither of which helps defendant's cause. (*Michigan v. Bryant* (2011) 562 U.S. ___ [179 L.Ed.2d 93] (*Bryant*); *Bullcoming v. New Mexico* (2011) 564 U.S. ___ [180 L.Ed.2d 610] (*Bullcoming*).)

In *Bryant*, the court concluded that statements made by a mortally wounded gunshot victim in response to police questioning at a gas station were not testimonial. (*Bryant*, *supra*, 562 U.S. at p. ___ [179 L.Ed.2d at pp. 101-102].) To assess whether the statements qualified as testimonial, the court conducted an "objective analysis" of the "relevant" circumstances to determine the "primary purpose" of the police interrogation. (*Id.* at pp. ___ [179 L.Ed.2d at pp. 108, 114-115].) The court considered various factors, including the "ongoing emergency" context in which the statements were elicited, the nature of the questions asked by the police, the purpose a "reasonable" person would have in giving the statements to the police, the purpose a reasonable officer would have in obtaining the statements, and the informal setting in which the police questioning occurred. (*Id.* at pp. ___ [179 L.Ed.2d at pp. 115-119].) While the facts here are readily distinguishable from *Bryant*, language in the case (to which a majority subscribed) is instructive.

The majority, led by Justice Sotomayor, explained: "Whether formal or informal, out-of-court statements can evade the basic objective of the *Confrontation Clause*, which is to

prevent the accused from being deprived of the opportunity to cross-examine the declarant about statements taken for use at trial. When, as in *Davis*, the primary purpose of an interrogation is to respond to an 'ongoing emergency,' its purpose is not to create a record for trial and thus is not within the scope of the Clause. But there may be *other* circumstances, aside from ongoing emergencies, when a statement is not procured with a primary purpose of creating an out-of-court substitute for trial testimony. . . . Where no such primary purpose exists, the admissibility of a statement is the concern of state and federal rules of evidence, not the *Confrontation Clause*." (*Bryant*, *supra*, 562 U.S. at p. ___ [179 L.Ed.2d at pp. 107-108].)

Whatever can be distilled from this language, at least one underlying principle of law emerges: the evidentiary purpose *vel non* of an out-of-court statement matters, as the confrontation clause is implicated when out-of-court statements are "taken for use at a trial" or generated to create "an out-of-court substitute for trial testimony."[8]

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[8] Although *Bryant* involved police interrogation, there is no reason to suspect that a statement's evidentiary purpose is relevant only in the police interrogation context. The evidentiary purpose of a statement played a significant role in *Bullcoming*, *supra*, 564 U.S. ___ [180 L.Ed.2d 610], a case that did not involve police interrogation. (See also *People v. Blacksher* (2011) 52 Cal.4th 769, 817 [concluding statements made by one neighbor to another were not testimonial in view of their purpose, i.e., they "were not made or received to create an out-of-court substitute for trial testimony"].) Further, in each post-*Crawford* opinion, the court has invoked the dictionary

Here, the circumstances we confront do not suggest that the reports of Drs. Edington, Loew, and Enlow were "taken for use at trial" or generated to create "an out-of-court substitute for trial testimony." On the contrary, the objective circumstances indicate that their reports, prepared in connection with the injury assessment and treatment of a patient, were created for medically related purposes. Thus *Bryant*, to the extent it applies, is of no help to defendant.[9]

In *Bullcoming*, which is more analogous, the court determined whether the Sixth Amendment precluded the admission of a forensic laboratory report signed by an analyst, Curtis Caylor, who certified that the defendant's blood-alcohol concentration was ".21 grams per hundred milliliters," well above the threshold necessary to convict the defendant on a charge of aggravated driving while intoxicated (DWI). (*Bullcoming*, *supra*, 564 U.S. at pp. ___ [180 L.Ed.2d at pp. 616-

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definition of "testimony" as set forth in *Crawford:* a "'solemn declaration or affirmation made for the *purpose* of establishing or proving some fact.'" (*Crawford*, *supra*, 541 U.S. at p. 51 [158 L.Ed.2d at p. 192], quoting 2 N. Webster, An American Dictionary of the English Language (1828), italics added; see *Davis*, *supra*, 547 U.S. at pp. 824, 826 [165 L.Ed.2d at pp. 238, 240]; *Melendez-Diaz*, *supra*, 557 U.S. at p. ___ [174 L.Ed.2d at p. 321]; *Bryant*, *supra*, 562 U.S. at p. ___ [179 L.Ed.2d at p. 104]; *Bullcoming*, *supra*, 564 U.S. at p. ___ [180 L.Ed.2d at p. 623].) On its face, the definition of testimony clearly has an evidentiary "purpose" component.

[9] Because this case does not involve police interrogation, we have not endeavored to force our facts into the larger analytical mold of *Bryant*.

617].) In the same document, the analyst further certified that he received the sealed blood sample intact and followed certain laboratory procedures. (*Id.* at p. ___ [180 L.Ed.2d at p. 617].) At trial, the prosecution used the analyst's certification against the defendant, but the analyst, who became unavailable due to a personnel matter, was not called to testify. (*Id.* at p. ___ [180 L.Ed.2d at pp. 616, 618].) Instead, the prosecution called another analyst who was familiar with the laboratory's testing procedures. (*Ibid.*) The question at bench was "whether the *Confrontation Clause* permits the prosecution to introduce a forensic laboratory report containing a testimonial certification -- made for the purpose of proving a particular fact -- through the in-court testimony of a scientist who did not sign the certification or perform or observe the test reported in the certification." (*Bullcoming*, at p. ___ [180 L.Ed.2d at p. 616].) In a five-to-four decision, with the fifth vote supplied by Justice Sotomayor, who penned a separate concurrence, the court concluded that the confrontation clause did not permit this approach.[10]

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[10] Parts of *Bullcoming* did not garner majority support, including footnote 6. In footnote 6, the plurality defined the term "testimonial" as follows: "To rank as 'testimonial,' a statement must have a 'primary purpose' of 'establish[ing] or prov[ing] past events potentially relevant to later criminal prosecution.' [Citations.]" (*Bullcoming*, *supra*, 564 U.S. at p. [180 L.Ed.2d at fn. 6].) Only four justices subscribed to footnote 6. Therefore, it appears that the Supreme Court has not settled on a controlling definition of "testimonial." Accordingly, defendant's claim that a testimonial statement is one "'"made under circumstances which would lead an objective

Bullcoming addressed two issues: (1) assuming the analyst's signed certificate qualified as testimonial, was the Sixth Amendment nonetheless satisfied because the analyst who testified served as an adequate substitute for the certifying analyst; and (2) was the analyst's signed certificate really "testimonial."

As to the first issue, a majority of the court (the plurality plus Justice Sotomayor) concluded that "if an out-of-court statement is testimonial in nature, it may not be introduced against the accused at trial unless the witness who made the statement is unavailable and the accused has had a prior opportunity to confront that witness." (*Bullcoming*, *supra*, 564 U.S. at p. ___ [180 L.Ed.2d at p. 619].) Accordingly, the confrontation clause did not permit the "surrogate" testimony approach taken in the trial court. (*Bullcoming*, at pp. ___, ___ [180 L.Ed.2d at pp. 616, 619.][11]

As to the second issue, a majority of the court (the plurality plus Justice Sotomayor) agreed that the analyst's signed certificate was testimonial. Justice Sotomayor wrote separately, however, to explain her reasoning. Because Justice

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witness reasonably to believe that the statement would be available for use at a later trial"'" (*Melendez-Diaz*, *supra*, 557 U.S. at p. ___ [174 L.Ed.2d at p. 321], quoting *Crawford*, *supra*, 541 U.S. at p. 52 [158 L.Ed.2d at p. 193]), remains unsubstantiated to date.

11 We need not address any "surrogate testimony" type argument in this case given our conclusion that the medical reports are not testimonial.

Sotomayor's analysis is different from the plurality's, we search once again for common ground to extract the controlling precedent.

In analyzing the issue, the plurality and Justice Sotomayor both discussed *Melendez-Diaz* and offered roughly parallel descriptions as to their understanding of the holding.

The plurality explained: "In *Melendez-Diaz*, a state forensic laboratory, on police request, analyzed seized evidence (plastic bags) and reported the laboratory's analysis to the police (the substance found in the bags contained cocaine). [Citation.] The 'certificates of analysis' prepared by the analysts who tested the evidence in *Melendez-Diaz*, this Court held, were 'incontrovertibly . . . affirmation[s] made for the purpose of establishing or proving some fact' in a criminal proceeding. [Citation.]" (*Bullcoming*, *supra*, 564 U.S. at p. ___ [180 L.Ed.2d at p. 623].)

In similar words, Justice Sotomayor explained: "[I]n *Melendez-Diaz . . .* we held that 'certificates of analysis,' completed by employees of the State Laboratory Institute of the Massachusetts Department of Public Health, [citation], were testimonial because they were 'incontrovertibly . . . "'solemn declaration[s] or affirmation [s] made for the purpose of establishing or proving some fact,'"' [citations]."

(*Bullcoming*, *supra*, 564 U.S. at p. ___ [180 L.Ed.2d at pp. 626-627].)[12]

Because the plurality and Justice Sotomayor seemingly agreed upon the holding of *Melendez-Diaz*, we must give weight to their shared understanding. Applying this understanding of *Melendez-Diaz* to the facts here further undermines defendant's position. The medical reports of Drs. Edington, Loew, and Enlow were not "certificates" prepared by state laboratory employees, and they were not made for the purpose of establishing or proving some fact in a criminal proceeding.

Although reaching apparent consensus on the holding of *Melendez-Diaz*, the plurality and Justice Sotomayor differed as to why the certificate of analysis in *Bullcoming* was testimonial.

According to the plurality, a "document created solely for an 'evidentiary purpose' . . . made in aid of a police investigation, ranks as testimonial," and the certificate in

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[12] Common to the plurality's and Justice Sotomayor's accounts of *Melendez-Diaz* is the apparent belief that the evidentiary purpose of the certificates factored into the court's conclusion in *Melendez-Diaz* that the certificates were testimonial. Looking back at Justice Thomas's concurrence in *Melendez-Diaz*, however, he did not emphasize or even discuss the purpose for which the certificates were made but rather deemed them testimonial because of their "formalized" nature. (*Melendez-Diaz*, *supra*, 557 U.S. at p. ___ [174 L.Ed.2d at p. 333.) The four dissenters in *Bullcoming* captured this distinction, explaining that "[s]olemnity" was "dispositive" in *Melendez-Diaz*. (*Bullcoming*, *supra*, 564 U.S. at p. ___ [180 L.Ed.2d at p. 632].)

Bullcoming fit that description. (*Bullcoming*, *supra*, 564 U.S. at p. ___ [180 L.Ed.2d at p. 623].) Moreover, even if the certificate was unsworn or lacked notarization, the absence of an oath or notarization is "'"not dispositive"'" in determining whether a statement is testimonial. (*Ibid.*) Comparing the certificate at issue in *Bullcoming* to those in *Melendez-Diaz*, the plurality explained that, despite the unsworn nature of the certificate, it shared all the same formalities as the certificates in *Melendez-Diaz*: "Here, as in *Melendez-Diaz*, a law-enforcement officer provided seized evidence to a state laboratory required by law to assist in police investigations, [citation]. Like the analysts in *Melendez-Diaz*, analyst Caylor tested the evidence and prepared a certificate concerning the result of his analysis. [Citation.] Like the *Melendez-Diaz* certificates, Caylor's certificate is 'formalized' in a signed document, [citation], headed a "report," [citation]. Noteworthy as well, the SLD report form contains a legend referring to municipal and magistrate courts' rules that provide for the admission of certified blood-alcohol analyses." (*Bullcoming*, at p. ___ [180 L.Ed.2d at p. 624].) Thus, despite the unsworn nature of the certificate, the "formalities" attending the certificate were "more than adequate to qualify Caylor's assertions as testimonial" and the certificate still fell "'within the core class of testimonial statements' [citation]" described in *Crawford* and its progeny. (*Bullcoming*, at p. ___ [180 L.Ed.2d at p. 624].)

Justice Sotomayor took a different approach. In step with *Bryant*, Justice Sotomayor looked at the "primary purpose" of the certificate and determined that it clearly had a "'primary purpose of creating an out-of-court substitute for trial testimony.' [Citation.]" (*Bullcoming*, *supra*, 564 U.S. at p. ___ [180 L.Ed.2d at p. 627].) Justice Sotomayor then turned to the formality of the certificate, stating: "The formality inherent in the certification further suggests its evidentiary purpose. Although '[f]ormality is not the sole touchstone of our primary purpose inquiry,' a statement's formality or informality can shed light on whether a particular statement has a primary purpose of use at trial. [Citation; fn. omitted.] I agree with the Court's assessment that the certificate at issue here is a formal statement, despite the absence of notarization. [Citations.] The formality derives from the fact that the analyst is asked to sign his name and 'certify' to both the result and the statements on the form. A 'certification' requires one '[t]o attest' that the accompanying statements are true. Black's Law Dictionary 258 (9th ed. 2009) (definition of 'certify'); see also *id.*, at 147 (defining 'attest' as "[t]o bear witness; testify," or '[t]o affirm to be true or genuine; to authenticate by signing as a witness')." (*Bullcoming*, at pp. ___ [180 L.Ed.2d at pp. 627-628].) In closing, Justice Sotomayor concluded that "[a]s in *Melendez-Diaz*, the primary purpose of the BAC report is clearly to serve as evidence. It

is therefore testimonial[.]" (*Bullcoming*, at p. ___ [180 L.Ed.2d at p. 630.)

Comparing the two approaches, Justice Sotomayor tied the "formality" of the certificate to its purpose, i.e., she used the formality as an indication of whether the certificate served an evidentiary purpose. The plurality, on the other hand, did not tether the certificate's formality to its purpose, instead suggesting that its formality brought it within the core class of testimonial statements described in the court's prior cases. To the plurality, the document's "formality" was "more than adequate" to render the analyst's assertions testimonial. Justice Sotomayor, however, did not examine the document's formality in order to make any sort of "adequa[cy]" assessment.[13]

Whatever the difference between the plurality's and Justice Sotomayor's positions, they both concluded that the certificate in *Bullcoming* was testimonial given its "evidentiary" purpose, which the plurality characterized as the "sole[]" purpose (*Bullcoming*, *supra*, 564 U.S. at p. ___ [180 L.Ed.2d at p. 623]) and Justice Sotomayor characterized as the "primary" purpose (*Id.* at pp. ___ [180 L.Ed.2d at pp. 623, 626). Moreover, both

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[13] The four dissenters in *Bullcoming* observed that the "majority [was] not committed in equal shares to a common set of principles in applying the holding of *Crawford*." (*Bullcoming*, *supra*, 564 U.S. at p. ___ [180 L.Ed.2d at p. 633].) Moreover, the dissenters lamented the "trouble" the court was having in "fashioning a clear vision of [*Crawford's*] meaning" as well as the "persistent ambiguities in the Court's approach." (*Bullcoming*, at p. ___ [180 L.Ed.2d at p. 633].)

concluded that the absence of an oath or notarization did not take the document outside the confrontation clause. (*Bullcoming*, at pp. ___ [180 L.Ed.2d at pp. 623-624, 628].) As to the document's formality, the plurality and Justice Sotomayor agreed that the document was formal while noting it was a signed certification. (*Id.* at pp. ___ [180 L.Ed.2d at pp. 624, 628].)

Applying the controlling aspects of *Bullcoming's* analysis, we look to the purpose of the reports at issue here. As discussed, the reports of Drs. Edington, Loew, and Enlow were created for medically related, not evidentiary, purposes. That fact alone removes this case from *Bullcoming*'s reach. Moreover, even though the unsworn nature of a document is not determinative, the medical reports still lack the formality of the document in *Bullcoming*. The reports here were not in "certificate" form -- the medical staff who completed the reports did not "certify" any facts. Instead, the reports merely documented medical information related to the patient, his injury, and the procedures performed.[14] Therefore, whether we must treat formality as an independent consideration or a potentially viable means for determining a statement's

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[14] Dr. Edington's report is signed, Dr. Loew's report is "electronically signed," and Dr. Enlow's report is unsigned. The footer of Dr. Enlow's report states that the report is "confidential and/or legally privileged," is "intended only for the use of the individual or entity named on" the report, and that any unintended recipient should return the report "to this Hospital immediately."

evidentiary or nonevidentiary purpose, the lack of formality attending the medical records further distinguishes this case from *Bullcoming*.

Defendant's position does not gain any traction from *Bryant* or *Bullcoming*. If anything, these cases further support the conclusion that the medical reports at issue are not testimonial.

B. Other Medical Documents

Apart from the reports of Drs. Edington, Loew, and Enlow, there are two other documents in Coleman's medical records that defendant makes reference to in his appellate briefing. The first document is a form from the hospital's emergency department entitled "Medical Screening Exam/Triage Assessment," which was apparently completed by a triage nurse. At the top of the form it indicates that Coleman was brought into the facility by law enforcement. The form contains various items of medical information, such as Coleman's blood pressure, temperature, pulse, and medical and social histories. In the triage assessment portion of the form, the following is penned: "Lac to [left] eyebrow," "Assaulted [with] toilet bowl scrubber," and "Feels dizzy/states fell from 'Bunk.'"

The other document is another emergency department form, apparently completed by a physician or member of the hospital staff. This form, which is untitled, includes results from a physical examination of Coleman. The form also contains a section for medical history wherein penned notes indicate that

Coleman came from jail and "was hit in [left] eye today with handle of toilet scrub brush. Pain in/around [left] eye."

It is unclear whether defendant is arguing that these two emergency department forms constitute or contain "testimonial" out-of-court statements under *Melendez-Diaz*, or whether he is using these documents merely to bolster his (erroneous) argument that the reports prepared by Drs. Edington, Loew, and Enlow are testimonial under *Melendez-Diaz*. As the appealing party, the burden is on defendant to delineate which documents he believes are "testimonial" in nature, a burden he has failed to meet.

In any event, even assuming, arguendo, that defendant's Sixth Amendment argument encompasses the two emergency department forms, it lacks merit. An application of *Melendez-Diaz* and the Supreme Court's more recent cases does not render these forms testimonial in nature. These forms lack the evidentiary purpose and formality of the certificates at issue in *Melendez-Diaz* and *Bullcoming.* These forms were not generated to create an out-of-court substitute for trial testimony or made for the purpose of establishing or proving some fact in a criminal proceeding. Nor are these forms on par with affidavits or signed certificates. Furthermore, to the extent these forms contain medical history provided by Coleman, he testified at trial and thus was subject to cross-examination on anything and everything he said that was reflected in these forms. Finally, there was an abundance of otherwise admissible evidence to establish the requisite degree of injury to Coleman's eye for

purposes of proving mayhem. Accordingly, even if admitting these forms violated defendant's Sixth Amendment rights, their admission was harmless under *Chapman v. California* (1967) 386 U.S. 18, 24 [17 L.Ed.2d 705, 710-711]. (See *Geier*, *supra*, 41 Cal.4th at p. 608 [recognizing that "Confrontation Clause violations are subject to federal harmless-error analysis under *Chapman*"].)

II. Sentencing Issue

In their appellate briefing, the People dutifully concede that the trial court's imposition of one-third the *upper* term on count two, mayhem, to run consecutively to any state prison sentence already being served, constituted an unauthorized sentence. Penal Code section 1170.1, subdivision (a) provides, in pertinent part, that the "subordinate term for each consecutive offense shall consist of one-third of the *middle term* of imprisonment prescribed for each other felony conviction for which a consecutive term of imprisonment is imposed." (Italics added.) We modify the judgment accordingly.

DISPOSITION

The judgment is modified to reduce defendant's sentence to 16 months (one-third the middle term) on count two for violation of Penal Code section 203 (mayhem). As modified, the judgment is affirmed. The trial court is directed to prepare an amended abstract of judgment reflecting the modification, and to forward

a certified copy of the amended abstract to the Department of Corrections and Rehabilitation.

RAYE, P. J.

We concur:

ROBIE, J.

BUTZ, J.