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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. GUILLERMO RUIZ, Defendant and Appellant.	B169642 (Los Angeles County Super. Ct. No. PA044100)

APPEAL from a judgment of the Superior Court of Los Angeles County. Meredith C. Taylor, Judge. Reversed.

Ronnie Duberstein, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Lance E. Winters and Timothy M. Weiner, Deputy Attorneys General, for Plaintiff and Respondent.

By jury, in counts 1 and 2, appellant Guillermo Ruiz was convicted of ex-felon possessing a firearm and of ex-felon possessing ammunition. (Pen. Code, §§ 12021, subd. (a)(1), 12316, subd. (b)(1).) In bifurcated proceedings, he admitted three prior felony convictions that were alleged as an element of the offenses.[1] Later, he admitted that he had served two separate prison terms for his 1998 and 2001 convictions. (Pen. Code, § 667.5, subd. (b).) The trial court sentenced him to a term of five years in state prison, consisting of concurrent upper terms of three years for the offenses, enhanced by two 1-year terms for having served prison terms.

In his opening brief, appellant raises contentions of evidentiary and instructional error. In his supplemental opening brief, he raises issues of a denial of confrontation within the meaning of *Crawford v. Washington* (2004) ___ U.S. ___ [158 L.Ed. 2d 177, 124 S.Ct. 1354] (*Crawford*) and of unconstitutional sentencing pursuant to *Blakely v. Washington* (2004) __ U.S. ___ [159 L.Ed.2d 403, 124 S.Ct. 2531].

We conclude that the use of the unavailable victim's testimonial hearsay statement during the trial resulted in a denial of his Sixth Amendment right to confrontation. We also conclude that the error is prejudicial, and the judgment is reversed.

SUMMARY OF FACTS

Viewed in accordance with the usual rule of appellate review (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11), the evidence established that at about 9:30 p.m. on March 31, 2003, after a 911 call for assistance, uniformed Los Angeles Police Officers Richard Acosta and Craig Burns, responded to a Los Angeles County residence. When the officers arrived at the residence, which was at the end of a cul-de-sac, the officers parked their marked police car and got out. G. Sanchez (Sanchez) and another woman drove up in a car. The women parked their car, approached the officers, and spoke to them. The

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[1] He admitted a 1997 felony conviction for receiving stolen property, a 1998 conviction of ex-felon possessing a firearm, and a 2001 conviction of ex-felon possessing a firearm.

officers determined that Sanchez was the person who had placed the 911 call requiring their response.

During a conversation with Sanchez, she told Officer Acosta that she had had an argument with appellant, and during the argument, appellant had pulled a handgun from his waistband. After speaking briefly with the women, the officers approached the residence and a neighbor's residence. Then, the officers returned to the sidewalk to the women's location.

As the officers continued to speak to the women, Officer Burns saw a Toyota pull into the cul-de-sac and park. Appellant got out of the Toyota and walked toward the officers. Sanchez said, "There he is," indicating appellant. Appellant's arrival occurred about five to 10 minutes after the officers parked at the residence. The officers ordered appellant to lie down. Appellant walked across the street and sat on the curb. The officers detained, searched, and handcuffed him and put him in their police car. Appellant was unarmed.

Believing that appellant might have a firearm in his possession, Officer Burns searched appellant's Toyota. There was a shoulder holster and a large canvas bag sitting on its front seat. Inside the bag, Officer Burns found a gun-cleaning kit, nine-millimeter ammunition, a glass pipe for smoking illicit narcotics, approximately 73 small Ziplock baggies, and 17.48 grams of methamphetamine. Sitting on the car seat underneath the canvas bag were the keys for the Toyota. Officer Burns looked under the Toyota's front passenger seat. There, he found a loaded, black nine-millimeter semi-automatic handgun.[2]

After a *Miranda* waiver (*Miranda v. Arizona* (1966) 384 U.S. 436), appellant admitted to Detective Andrew Barkman that he and his girlfriend had had an argument at his residence. He claimed that thereafter, she took his cellular telephone and left. After a

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[2] In counts 3 and 4 of the information, appellant was charged with possessing a controlled substance while in possession of a firearm and with possessing methamphetamine for sale. The jury was unable to reach a verdict on these counts. A mistrial was declared, and later, the People asked the trial court to dismiss the charges.

few minutes, he went to look for her, and then he returned to his residence. Appellant denied driving the Toyota. He claimed that he had just entered the Toyota for a few minutes to sit there with the door open. He admitted that the black bag in the Toyota belonged to him. However, he denied possessing the contraband Officer Burns found in the bag. He claimed that the contraband was planted and suggested that his girlfriend or her two younger brothers, ages five and 10, may have planted it. He also denied possessing the gun and claimed that he did not know to whom it belonged.

At trial, appellant's mother, Carmen Ruiz (Ruiz), testified that she and her family, including appellant and his girlfriend, lived at the residence to which the officers had responded. The Toyota belonged to her. Ruiz worked a night shift and slept during the evenings, and Ruiz was sleeping when the officers arrived at the residence. Ruiz kept the keys for her Toyota atop the family's television set. If appellant and his girlfriend wanted to drive the Toyota when Ruiz was at home, appellant's girlfriend had permission to drive it. Ruiz claimed that the canvas bag, the methamphetamine, and the firearm were not hers, and she knew nothing about the canvas bag. If her son and his girlfriend had been using the car on the evening of appellant's arrest, she was unaware of it. She said that she did not know if from time to time, without her permission, her son drove her Toyota.

The detective, who had previous experience as a narcotics officer, gave his opinion that the methamphetamine was possessed for sale.

DISCUSSION

Appellant contends that he was denied his Sixth Amendment right to confrontation when pursuant to Evidence Code section 1370,[3] the trial court admitted Sanchez's hearsay statement into evidence. He does not challenge the facial validity of section 1370 or the admissibility of the statement pursuant to the hearsay exception set forth in section 1370. We agree with appellant that pursuant to the decision in *Crawford, supra*,

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

124 S.Ct. 1354, Sanchez's extrajudicial statement to the police officer was inadmissible in evidence because it was testimonial hearsay, Sanchez was unavailable as a witness, and appellant had no prior opportunity to cross-examine Sanchez.[4]

A. The Facts Pertinent to the Confrontation Contention

The prosecutor filed a written motion giving the defense notice that at trial, he would seek to use Sanchez's hearsay statement to Officer Acosta pursuant to section 1370 to prove guilt. Before trial, the prosecutor asked the trial court to consider the admissibility of the hearsay in a section 402 hearing. At the pretrial hearing, admissibility was submitted to the trial court on the facts stated in the People's motion.

The motion indicated that Sanchez had telephoned 911 to obtain police assistance. (The prosecutor did not seek to use the statements Sanchez made during her 911 call against appellant.) Shortly thereafter, the officers responded to the residence she shared with appellant. Sanchez met the officers on the street. She told them that during an argument with appellant, he had become angry, he had grabbed her by the arm, and there

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[4] Section 1370 provides in pertinent part: "(a) Evidence of a statement by a declarant is not made inadmissible by the hearsay rule if all of the following conditions are met: [¶] (1) The statement purports to narrate, describe, or explain the infliction or threat of physical injury upon the declarant. [¶] (2) The declarant is unavailable as a witness pursuant to Section 240. [¶] (3) The statement was made at or near the time of the infliction or threat of physical injury. Evidence of statements made more than five years before the filing of the current action or proceeding shall be inadmissible under this section. [¶] (4) The statement was made under circumstances that would indicate its trustworthiness. [¶] (5) The statement was made in writing, was electronically recorded, or made to a physician, nurse, paramedic, or to a law enforcement official. [¶] (b) For purposes of paragraph (4) of subdivision (a), circumstances relevant to the issue of trustworthiness include, but are not limited to, the following: [¶] (1) Whether the statement was made in contemplation of pending or anticipated litigation in which the declarant was interested. [¶] (2) Whether the declarant has a bias or motive for fabricating the statement, and the extent of any bias or motive. [¶] (3) Whether the statement is corroborated by evidence other than statements that are admissible only pursuant to this section."

had been a struggle. Then, he had grabbed her by her hair, and he had "pulled a black handgun from his waistband and had said, 'if you call the cops, I'm going to kill you in front of them.'" Officer Acosta observed bruises on Sanchez's arm. The officer recorded the statement in appellant's arrest report. The People requested that the entire statement be admitted into evidence.

The trial court commented that it understood Sanchez was "unavailable as a witness" (§ 240), and it offered the parties a hearing on that issue. Defense counsel conceded Sanchez's unavailability. However, defense counsel objected on the grounds that the statement was more prejudicial than probative. Part of counsel's argument was there was a substantial time lapse between the display of the gun and the events surrounding the possession charges.[5] The trial court ruled that except for the threat, Sanchez's out-of-court statement was admissible in evidence. It excluded the threat, which it deemed irrelevant to the charges and more prejudicial than probative. (§ 352.)

At trial, Officer Acosta testified that Sanchez told him that she had had an argument with her boyfriend -- appellant -- and during the argument, appellant had pulled out a handgun.

B. The Guiding Legal Principles

i. Crawford

The Sixth Amendment right to confrontation provides that a defendant in a criminal case has a right "'to be confronted with the witnesses against the him.'" (*California v. Green* (1970) 399 U.S. 149, 155.) The purpose of confrontation is to ensure reliability by means of the oath, to expose the witness to cross-examination, and to permit the trier of fact to assess credibility. (*California v. Green, supra,* 399 U.S. at p. 158.)

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5 Defense counsel urged: "Well, in response to the comment about a display of a handgun, it's an event that's unrelated to the four remaining charges in that it occurred ten, 15 minutes or so before allegedly and in a different location, may be a different handgun. [¶] There is no way of knowing particularly, which is what makes it prejudicial. . . . [¶] [T]he relationship is very tenuous."

In *Crawford*, *supra*, 124 S.Ct. 1354, the defendant stabbed a man who he believed had attempted to rape his wife. The wife witnessed the stabbing but was unavailable as a witness at trial because of spousal privilege. The prosecution offered the tape recording of the wife's pretrial statement to police, which did not support her husband's claim of self-defense. (*Id*. at pp. 1357-1358.)

In reversing that defendant's conviction, the *Crawford* court overruled its earlier decision in *Ohio v. Roberts* (1980) 448 U.S. 56 and discarded the "adequate indicia of reliability" test insofar as it applied to "testimonial" hearsay. (*Crawford, supra*, 124 S.Ct. at pp. 1370-1373.) It held that the only indicium of reliability recognized by the framers of the Constitution was cross-examination. The court said that testimonial hearsay is admissible in evidence only if (1) the declarant is unavailable to testify and (2) the defendant had a previous opportunity to cross-examine the declarant. (*Id*. at pp. 1366, 1374.) The court also explained 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. (*Id*. at p. 1365.)

In its decision, the United States Supreme Court did not fully define all the factual contexts in which an unavailable witness's extrajudicial statement would be considered "testimonial." It said, "We leave for another day any effort to spell out a comprehensive definition of 'testimonial.'" (*Crawford, supra*, 124 S.Ct. at p. 1374.) The court listed three general categories of statements that it deemed testimonial: (1) "'*[E]x parte* in-court testimony or its functional equivalent -- that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially'"; (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.'" (*Crawford, supra,* 124 S.Ct. at p. 1364.)

The court commented that "[w]hatever else the term [testimonial] covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations." (*Crawford v. Washington, supra,* 124 S.Ct. at p. 1374.) The *Crawford* court explained that it used the term "'interrogation'" in "its colloquial, rather than any technical legal, sense," and it reasoned that the statement at issue there was "knowingly given in response to structured police questioning" and consequently "qualifie[d] under any conceivable definition." (*Id.* at p. 1365, fn. 4.)

The court emphasized that whether or not a statement was sworn is not a determinative factor in finding a statement to be testimonial. (*Crawford, supra*, 124 S.Ct. at pp. 1365-1366.) However, a statement is more likely to be "testimonial" if the person who heard, recorded, and produced the out-of-court statement at trial is a government officer. Casual remarks to acquaintances are generally nontestimonial. If the person obtaining the statement is a government employee or police officer carrying out an investigative and prosecutorial function, the statement is "testimonial." (*Id*. at p. 1365.)

The *Crawford* rationale is as follows: "Involvement of government officers in the production of testimony with an eye toward trial presents unique potential for prosecutorial abuse -- a fact borne out time and again through a history with which the Framers [of the Constitution] were keenly familiar. This consideration does not evaporate when testimony happens to fall within some broad, modern hearsay exception, even if that exception might be justifiable in other circumstances." (*Crawford, supra*, 124 S.Ct. at p. 1367, fn. 7.) Where out-of-court statements are of a testimonial nature, mere reliability is not enough to satisfy the Confrontation Clause -- to afford the accused the procedural right that he is guaranteed by the Confrontation Clause, no jury can consider an extrajudicial statement at trial unless it has been tested by the "adversary process." (*Id.* at pp. 1370-1371.)

The court found the statement in *Crawford* to be testimonial because it was obtained during police interrogation after a *Miranda* warning following the arrest of the witness's husband. (*Crawford, supra,* 124 S.Ct. at p. 1357.) The court commented that the statement there was "testimonial" under any definition of that term. (*Id*. at p. 1370.)

ii. The Other Authorities

The following decisions are helpful in determining when a hearsay statement is "testimonial."

In *U.S. v. Nielsen* (9th Cir. 2004) 371 F.3d 574 (9th Cir., June 9, 2004, No. 03-30347), the defendants' girlfriend made statements to the police that incriminated the defendant during the service of a search warrant at their mutual residence. (*Id*. at p. 578.) On appeal, the *Nielsen* court held that statements were testimonial. (*Id*. at p. 581, fn. 1.)

In *U.S. v. Saner, et al*. (S.D.Ind. 2004) 313 F.Supp.2d 896, an Antitrust Division Justice Department attorney and a paralegal had an hour-long interview with defendant Vogel at his home prior to the institution of a prosecution for anti-competitive conduct within the meaning of the Sherman Act. Vogel made incriminating statements about his and Saner's conduct, which showed they had engaged in price-fixing. At trial, the prosecution proposed to admit Vogel's statements as statements against penal interest against both he and Saner. Vogel was unavailable as a witness because he was exercising his privilege against self-incrimination. (*U.S. v. Saner, et al*., *supra,* 313 F.Supp.2d at pp. 897-898.) The court held that Vogel's statement was testimonial because the prosecutor conducted Vogel's interview to assemble evidence against the defendants "'with an eye toward trial.'" It found that the lack of custody was an irrelevant consideration under *Crawford*. (*Id*. at pp. 901-902.)

In *People v. Griffin* (2004) 33 Cal.4th 536, 579, fn. 19 (July 19, 2004, S029174), the court held a deceased child victim's preoffense hearsay statement to a school friend to be nontestimonial where the defendant had sexually molested the child and the child told her school friend that she would confront the defendant if he did it again.

In *People v. Cervantes* (2004) 118 Cal.App.4th 162, review denied August 11, 2004, S125228, one of three defendants convicted of murder made a postoffense statement to a neighbor, a surgical assistant, when he sought her out for medical treatment. He told her that his injuries were obtained during a gang confrontation which resulted in murder. The court held the statement was nontestimonial because the unavailable witness was the mother of his former girlfriend, the unavailable witness lived

in the defendant's gang neighborhood, and the defendant would have had no expectation that his statement would be repeated to the authorities.

In *People v. Corella* (2004) 122 Cal.App.4th 461, petition for review filed October 13, 2004, S128178 (*Corella*), the defendant was charged with corporal injury to a spouse. The police were dispatched after the defendant's wife telephoned 911 to the motel where the defendant and his wife were living. When the officers arrived, the wife was crying and distraught and appeared to be in physical pain. She told Officer Diaz that the defendant had punched her three times, and Officer Diaz and a paramedic observed a bump on her head. The wife said that the defendant had hit her after she tried to take his keys from him to prevent him from driving after he had been drinking. She told the police the same story during her earlier 911 call and subsequently when she spoke to the paramedics after telling Officer Diaz what had occurred. (*Id*. at pp. 465, 467.)

In *Corella*, on appeal, the defendant contended that the use at trial of his wife's statements to the 911 operator and to the police officer after the police response to the couple's residence amounted to a denial of his federal constitutional right to confrontation. (*Corella, supra*, 122 Cal.App.4th at p. 467.) It was conceded that the defendant's wife was unavailable as a witness at the defendant's trial and there was no opportunity to cross-examine her. (*Id*. at pp. 461, 467.) The Court of Appeal observed that the wife's extrajudicial statements to the 911 operator and to Officer Diaz about taking the defendants keys and as to the events leading to her violent injury were properly admitted in evidence as spontaneous statements pursuant to section 1240. (*Corella*, at p. 466.) Additionally, the Court of Appeal concluded that the wife's 911 statements and her statements to Officer Diaz immediately upon the police response were made without reflection or deliberation due to the stress of excitement immediately after the assault. In

these circumstances, the statements were nontestimonial and admissible in evidence within the parameters of the *Crawford* decision. (*Id*. at pp. 467-469.)[6]

In *Leavitt v. Arave* (9th Cir. 2004) 371 F.3d 663, statements made by a victim to the police on the telephone were held to be nontestimonial. The court reasoned that the statement was nontestimonial because the victim's call was made to seek help to end a frightening intrusion into her home.

In *State v. Barnes* (2004) ___ Me.___, 854 A.2d 208, motion for reconsideration denied August 10, 2004, 854 A.2d 208, the Maine Supreme Court, based on a factual analysis of the circumstances surrounding the complaint, held that a hysterical report that the defendant had just assaulted her was testimonial where it was made by the defendant's mother in person after she drove to the police station. (*Ibid*.)

In Texas, with respect to statements made to an officer during police investigations, the cases are conflicting. In *Cassidy v. State* (Tex.Ct.App. 2004) ___ S.W.3d ___ (Tex.App. Austin May 20, 2004, No. 03-03-0098-CR, no petn. [designated for publication]), the court held that statements obtained during the interview of a witness by a police officer at the hospital an hour after an assault did not constitute "interrogation" as the term is used in *Crawford*. It concluded that the statement was nontestimonial. In a subsequent Texas decision, *Wall v. State* (Tex.Ct.App. 2004) ___ S.W.3d ___ (Tex.App. Corpus Christi Aug. 19, 2004, No. 13-02-636-CR) the court rejected the decision in *Cassidy* and held under almost identical circumstances that a police officer conducting an interview of a witness at a hospital was engaged in "structured police questioning," which amounted to an "interrogation" under *Crawford.*

There are also a number of decisions discussing the testimonial nature of 911 calls that are helpful by analogy to deciding the testimonial nature of Sanchez's statement.

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6 On October 13, 2004, the California Supreme Court granted review in *People v. Adams* (2004) 120 Cal.App.4th 1065 (S127373) and in *People v. Cage* (2004) 120 Cal.App.4th 770, (S127344), cases presenting similar issues to those raised here.

The New York courts are split with regard to the testimonial nature of statements made during 911 calls. In *People v. Moscat* (2004) 3 Misc.3d 739, 777 NYS.2d 875 (*Moscat*), the New York Supreme Court concluded that a statement made during a 911 call is "fundamentally different" from a situation in which the government undertakes to collect evidence; it is a situation in which the victim initiates the contact in the urgent desire to be rescued from immediate peril. (*Id*. at p. 744.) The court explained that statements made during 911 calls -- usually a hurried and panicked conversation between an injured victim and a 911 operator -- are nontestimonial. It commented that a 911 call for help "simply is *not* [the] equivalent to a formal pretrial examination" by a justice of the peace -- typically, the woman is trying to save her life, not contemplating being a witness in a future proceeding. (*Id*. at p. 746.)

In *People v. Conyers* (2004) 4 Misc.3d 346, 777 NYS.2d 274, 276-277, the New York Supreme Court held a statement made during a 911 call that occurred in the midst of the assault itself was nontestimonial because there was no opportunity for the complaintant to reflect and to falsify her account.

After these two decisions, in a scholarly opinion disclosing further information about the historical underpinnings of the right of confrontation, the New York Supreme Court in *People v. Cortes* (2004) 4 Misc.3d 575, 781 NYS 2d 401, held statements made during 911 calls were testimonial. The *Cortes* court said that "[w]hen a 911 call is made to report a crime and supply information about the circumstances and the people involved, the purpose of the information is for investigation, prosecution, and potential use at a judicial proceeding; it makes no difference what the caller believes. [¶] The 911 statement is made orally, but it is recorded as would a statement made to a police officer, a prosecutor or a prosecutor's stenographer who then writes it down. The statements on the 911 tapes are preserved as official documents. . . . The preserved conversations on tape are available by subpoena. . . . The tapes must be given to the defense if they contain exculpatory information. [¶] The 911 call reporting a crime preserved on tape is the modern equivalent, made possible by technology, to the depositions taken by magistrates or [justices of the peace] under the Marian committal statute. Like the

victims and witnesses before the King's court an objective reasonable person knows that when he or she reports a crime the statement will be used in an investigation and at proceedings relating to a prosecution." (781 NYS.2d at pp. 415-416.)

The Indiana and North Carolina courts have taken a narrower view with respect to what is "testimonial." In *State v. Forrest* (N.C.Ct.App. 2004) ___ N.C. ___, 596 S.E.2d 22, the court addressed the testimonial nature of a statement spontaneously made to police immediately after a police rescue. The court held that just as with a 911 call, such a statement can be considered "'part of the criminal incident itself, rather than as part of the prosecution that follows.'" *(Id.* at p. 27.) It also commented that a spontaneous statement made "immediately after a rescue from a kidnapping at knifepoint is typically not initiated by the police." (*Ibid*.)

In *Fowler v. State* (Ind.Ct.App. 2004) ___ Ind.App.4th ___, 809 N.E.2d 960, rehearing denied, August 9, 2004, the Indiana Court of Appeals explained that police "'interrogation'" is not the same as, and is much narrower than, police "'questioning.'" (*Id*. at p. 963.) It said: "Whatever else police 'interrogation' might be, we do not believe that word applies to preliminary investigatory questions asked at the scene of a crime shortly after it has occurred. Such interaction with witnesses on the scene does not fit within a lay conception of police 'interrogation,' bolstered by television, as encompassing an 'interview' in a room at the stationhouse. It also does not bear the hallmarks of an improper 'inquisitorial practice.'" The Court of Appeals held that a statement made during a preliminary police investigation was nontestimonial. (*Id*. at pp. 963-964.)

In another Indiana Court of Appeal case, *Hammon v. State* (Ind.Ct.App. 2004) ___ Ind.App.4th ___, 809 N.E.2d 945, rehearing denied August 9, 2004, a police officer responded to a call. At the location, he separated the man and the woman involved. The woman told him that the man, the defendant, had physically attacked her, thrown her into shattered glass, and punched her chest. (*Id*. at pp. 947-948, fn. 1.) The woman filled out an affidavit for the officer stating the facts of the battery. The Court of Appeal held that

the initial oral statement to the officer was nontestimonial; however, the court surmised in a footnote that the affidavit was testimonial. (*Id*. at pp. 951-953, fn. 5.)

With regard to statements made during 911 calls and to responding police officers, Richard D. Friedman and Bridget McCormack commented in *Dial-in Testimony*, 150 University of Pennsylvania Law Review 1171 (April 2002) (Friedman), as follows:

"A reasonable person knows [that he or] she is speaking to officialdom -- either police officers or agents whose regular employment calls on them to pass information on to law enforcement, from whom it may go to the prosecutorial authorities. The caller's statements may therefore serve either or both of two primary objectives -- to gain immediate official assistance in ending or relieving an exigent, perhaps dangerous, situation, and to provide information to aid investigation and possible prosecution related to that situation. In occasional cases, the first objective may dominate -- the statement is little more than a cry for help -- and such statements may be considered nontestimonial, at least to the extent that they are not offered to prove the truth of what they assert. But as [our prior discussion] has shown, these statements are often more detailed, providing significant information that the police do not need for immediate intervention but that may be useful to the criminal justice system. A reasonable person in the position of the declarant would realize that such information would likely be used in a criminal investigation or prosecution. Accordingly, such a statement should be considered testimonial, and the confrontation right should apply to it." (Friedman, *supra*, 150 University of Pa. L.Rev., at p. 1242, fn. omitted.)

These law review commentators also suggest that if any significant time has elapsed from the event, a statement made to a police officer is "probably testimonial." (Friedman, *supra*, 150 University of Pa. L.Rev., at p. 1242.)

C. The Analysis

With the principles of *Crawford* in mind, as well as the additional authorities we have set out, we conclude that the extrajudicial statement Sanchez made to Officer

Acosta is testimonial.[7] The parties did not dispute Sanchez's unavailability within the meaning of section 240. The parties agree on appeal that appellant was never afforded the opportunity for cross-examination. The statement was made on the street when the officers responded to Sanchez's 911 call, and appellant was not present when Sanchez made her statement to the officer. At the time, Officer Acosta's function was partially to rescue the victim, but he was also acting in an investigative and prosecutorial role within the meaning of the criteria in *Crawford*. There was a delay following Sanchez's argument with appellant in which appellant drove off and later returned. There was a cooling period following the argument, and in Sanchez's 911 call, she had already once reported the argument and appellant's conduct to the police. The complained-of conduct appellant engaged in was illegal and so dangerous that Sanchez reasonably was aware that her complaint to the officers would lead to appellant's arrest and prosecution.

The conclusion that the statement is testimonial is required by the lapse of time from the assault and the absence of any evidence that Sanchez's statement was uttered

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[7] Appellant's only objection in the trial court was on grounds of section 352. Nevertheless, we reject the Attorney General's claim that appellant has forfeited his *Crawford* contention on appeal. "Reviewing courts have traditionally excused parties for failing to raise an issue at trial where an objection would have been futile or wholly unsupported by substantive law then in existence." (*People v. Welch* (1993) 5 Cal.4th 228, 237-238.) At the time of trial, two decisions had rejected constitutional attacks on section 1370 on grounds of confrontation. (See *People v. Hernandez* (1999) 71 Cal.App.4th 417, 423-424; *People v. Kons* (2003) 108 Cal.App.4th 514, 520-523.) A pre-*Crawford* objection on testimonial grounds would have been futile given the controlling precedent in *Ohio v. Roberts, supra*, 448 U.S. 56. Accordingly, the lack of an objection on confrontation grounds does not preclude review. Further, we have discretion to review constitutional claims without an objection in the trial court. (*People v. Blanco* (1992) 10 Cal.App.4th 1167, 1172-1173; see *Hale v. Morgan* (1978) 22 Cal.3d 388, 397.)

Although *Crawford* was not decided until after appellant was tried and sentenced, that decision nevertheless applies to defendant's direct appeal. (See *Griffith v. Kentucky* (1987) 479 U.S. 314, 328 ["[A] new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final . . . ."].)

spontaneously in the heat of her previous engagement with appellant. Further, California police officers are well trained in the investigative techniques that are to be used where a victim has been subjected to physical or sexual abuse. In such cases, the victims of the assault commonly recant and are likely to be later unavailable as witnesses. Accordingly, the officers have been trained to be vigilant in recording complete statements of the encounters and to record the witnesses' statements in their reports so that the statements may later support a victimless prosecution.

Further, there can be no doubt from the tone and the nature of Sanchez's complaint that at the time, she was well aware that the information she conveyed to the officer was likely to be used in a criminal investigation or prosecution. (*Crawford, supra*, 124 S.Ct. at p. 1364.) The statement is directly analogous to the statements the *Cortes* court found to be testimonial. Further, the statement in this case can be distinguished on its facts from the statements in question in *Corella*. We decline to adopt the narrower view adopted by the Indiana and North Carolina courts. Because Sanchez's statement was testimonial, its use in evidence without an opportunity for cross-examination denied appellant his constitutional right to confrontation.

D. Prejudicial Error

Having found error, we consider whether it is prejudicial. (*Coy v. Iowa* (1988) 487 U.S. 1012, 1021 [denial of face-to-face confrontation is subject to harmless error review]; see also *Lilly v. Virginia* (1999) 527 U.S. 116, 139-140.) Here, the issues of guilt concerned whether appellant was exercising dominion and control of the handgun that was found under the seat of the Toyota. Apart from Sanchez's out-of-court statement, the other evidence of dominion and control did not overwhelmingly establish guilt. In this context, Sanchez's statement was a critical piece of circumstantial evidence that tended to prove that the handgun found in the Toyota belonged to appellant. We cannot conclude that a rational jury would have reached the same verdict in the absence of the error, and a reversal is required.

E. Disposition of the Other Contentions

Because we are reversing the judgment, it is unnecessary for us to reach the appellant's other contentions. We do observe for the benefit of the trial court upon retrial that we found a testimonial statement within the meaning of *Crawford* within the confines of the record presented to us. We were limited to deciding the admissibility of the hearsay statement on the facts submitted to the trial court by a tacit agreement between the parties. However, on retrial, nothing we state in this opinion precludes the prosecutor from having the trial court determine the testimonial nature of the statement based upon the actual testimony from the witnesses. Further, the prosecutor also may seek to have admitted any hearsay statements Sanchez made to the 911 operator because, depending on the circumstances, they may not be testimonial. (Cf. *People v. Clark* (1990) 50 Cal.3d 583, 623-624.)

DISPOSITION

The judgment is reversed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.

ASHMANN-GERST

We concur:

_____, P. J.

BOREN

_____, J.

NOTT