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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. JOHN MOSE CAUDILLO, Defendant and Appellant.	H026166 (Santa Clara County Super. Ct. No. CC127061)

Defendant John Mose Caudillo appeals after conviction, by jury trial, of one count of shooting at an occupied motor vehicle (Pen. Code, § 246)[1] and two counts of assault with a firearm (§ 245, sud. (a)(2)). The jury found true allegations that defendant personally used a firearm (§ 12022.5, subd. (a)(1)) in committing both assault counts, but found untrue allegations that the offenses were committed for the benefit of a criminal street gang (§ 186.22, subd. (b)). The trial court found true allegations that defendant had one prior serious felony conviction (§ 667, subd. (a)), one "strike" (§ 667, subds. (b)-(i)) and two prior prison terms (§ 667.5, subd. (b)). Defendant was sentenced to a 16-year prison term.

On appeal, defendant contends the trial court erred by failing to grant a "for cause" challenge to a juror and by admitting a 911 call as a spontaneous utterance. He further contends that admission of the 911 call violated his right to confrontation. We conclude that the trial court did not abuse its discretion by denying defendant's challenge to the

[1] Unspecified section references are to the Penal Code.

juror or by admitting the 911 call under Evidence Code section 1240, and that admission of the 911 call did not violate defendant's right to confrontation. We will therefore affirm the judgment.[2]

I. BACKGROUND

A. Assaults and Shooting

David Cabrera, Jose Doval, and Leonides Morales are all admitted members of the Sureño gang "Sur Por Vida" (SPV). About 6:30 p.m. on November 3, 2001, the three men drove to a 7-Eleven store in San Jose. Doval entered the store while Cabrera and Morales waited in the car.

A Lincoln "low-rider" pulled into the 7-Eleven parking lot. The driver was later identified as Jimmy Serrano and the passenger was later identified as defendant. They appeared to be members of a Norteño gang.

Cabrera and Morales exited their car. Defendant and Serrano approached the Sureños. Defendant asked, " 'Where are you from?' " Cabrera responded, "SPV." Defendant said something like "You're in the wrong neighborhood, get the fuck out of here." Cabrera told defendant, " 'What's up,' " which means "[t]here's going to be a conflict."

Defendant pulled out a gun and told the Sureños to "get the fuck out of there." Cabrera and Morales got into their car and drove away. As they were driving away, they heard some gunshots. They looked back and saw defendant standing in the parking lot, pointing the gun at their car.

Doval heard the gunshots from inside the 7-Eleven. Cabrera and Morales returned to the 7-Eleven to pick him up. Meanwhile, someone called 911 and reported "men with

[2] Defendant has also filed a petition for writ of habeas corpus, which we agreed to consider together with his appeal. We have disposed of that petition by separate order issued this day.

guns" at the 7-Eleven. The anonymous caller provided a license plate number and a description of the Lincoln. She also described the Sureños' car.

About 14 minutes after the shooting, an officer stopped the Sureños' vehicle. Officer Fabian Torrico arrived shortly thereafter. The police interviewed Doval, Cabrera, and Morales, who described the Norteños and the Lincoln.[3]

About 8:20 p.m. that same evening, Officer Torrico responded to a 911 call reporting domestic violence at a residence on Guanacaste Court. At that residence, he observed a Lincoln matching the description of the Norteños' car. He detained a number of Hispanic men who were standing around the Lincoln. He then transported Cabrera and Morales to make identifications. Cabrera recognized the car but could not positively identify any of the men. Morales identified Serrano as the driver of the car, and he identified defendant as the shooter.

No shells or casings were found in the 7-Eleven parking lot area, and no guns or ammunition were found in defendant's residence. Gunshot residue tests were performed on defendant's hands and clothes. "[P]articles commonly associated with gunshot residue" were found on each of defendant's hands and "[o]ne lead particle commonly associated with gunshot residue" was found on defendant's shoe.

Officer Jorge Gutierrez interviewed defendant on November 6, 2003, after defendant waived his *Miranda* rights. (*Miranda v. Arizona* (1966) 384 U.S. 436.) Defendant denied that he and Serrano ever stopped at the 7-Eleven. He claimed the gunshot residue was from "snap caps" that he had been playing with.

B. Charges, Trial, and Sentencing

Defendant was charged, by information, with one count of shooting at an occupied motor vehicle (§ 246) and two counts of assault with a firearm (§ 245, sud. (a)(2)). The

[3] Morales provided a false name at the time of the stop and at the preliminary hearing.

information alleged personal firearm use (§ 12022.5, subd. (a)(1)) as to both assault counts, and criminal street gang enhancements (§ 186.22, subd. (b)) as to all three counts. The information further alleged that defendant had one prior serious felony conviction (§ 667, subd. (a)), one "strike" (§ 667, subds. (b)-(i)) and two prior prison terms (§ 667.5, subd. (b)).

At trial, a criminalist testified that the particles found on defendant's hands and shoes could not have come from the "snap caps" that defendant claimed he had been playing with that day.

Dave Miranda testified as a gang expert. According to Miranda, the California Department of Corrections had "validated" defendant as a member of the Norteño gang. Miranda further testified that in his opinion, defendant was a member of the Norteño gang, based on (1) the police reports that detailed how he fired shots at Sureños while identifying himself as a Norteño and (2) his tattoos, which included two Huelga birds, a five-pointed star, the word "Norteno," the words " 'West Side,' " and the letters " 'e-n-e.' "

Defendant's mother and wife denied that defendant was involved with gangs. Defendant's wife claimed that defendant and Serrano had been at their home during the time of the alleged shooting.

The jury found defendant guilty of all three substantive charges and found the two personal firearm use allegations true, but it found the criminal street gang allegations untrue. In a bifurcated proceeding, the trial court found true the prior serious felony, "strike" and prior prison term allegations.

At sentencing, the trial court imposed a term of six years (a doubled middle term) for count 2 (one of the assaults) plus four years for the associated firearm enhancement. It imposed concurrent terms for the other assault and associated firearm enhancement. It stayed the term for shooting at an occupied vehicle pursuant to section 654. It imposed a

five-year term for the prior serious felony, and a one-year term for one of the prior prison terms. The aggregate sentence was 16 years.

II. DISCUSSION

A. Challenge to Juror

1. Jury Voir Dire

Jury selection began on March 4, 2003 and continued on March 5, 2003 with a second panel of venire members. After defendant exhausted his final peremptory challenge, Panel No. 2, Prospective Juror No. 13 was summoned. As explained below, this juror eventually became Juror No. 8.

Juror No. 8 was an attorney who worked for the San Jose City Attorney's Office. He recalled defending some *Pitchess* motions (*Pitchess v. Superior* Court (1974) 11 Cal.3d 531) that trial counsel had filed, and he acknowledged knowing trial counsel in a professional capacity. The trial court asked if there was "anything about that acquaintanceship that would prevent you from being fair and impartial in this case?" Juror No. 8 replied, "Well, I mean, it's been uncomfortable." He reiterated that he had opposed trial counsel on *Pitchess* motions. When the trial court repeated the question, Juror No. 8 replied, "I don't know." He expounded: "I would try not to have it affect my decision-making process, but I can't tell you 100 percent that it wouldn't."

The trial court reminded Juror No. 8 that trial counsel was not on trial, and that the jury would have to set aside any feelings of antipathy or sympathy for counsel. Juror No. 8 said he would "try to do that." The trial court stated, "You'll be taking an oath to judge the case on the evidence and the instructions on the law. Will you abide by that oath?" Juror No. 8 replied, "I will do my best to abide by the oath, yes."

Through further voir dire, Juror No. 8 indicated that he would find defendant not guilty if the evidence did not satisfy him beyond a reasonable doubt. He asserted that he would "keep an open mind" until all the evidence and instructions were submitted. The trial court asked, "Do you know of any reason why you would not be a fair and impartial

juror?" Juror No. 8 responded, "Other than my work and the experiences from my work, no."

Trial counsel then addressed Juror No. 8, stating, "[W]e've known each other professionally for some time, and you're also aware that I was, at one time, in the City Attorney's Office as well." Juror No. 8 indicated he had "actually forgotten" about that. Trial counsel referred to the *Pitchess* cases that they had litigated for their respective clients and asked whether Juror No. 8 could be "fair and even-keeled on your decision making" in light of their professional history. Juror No. 8 responded, "I don't know. I don't know. In all fairness to the defendant, I mean, because we have a professional relationship – I know you have a number of [pending] cases with the office." Juror No. 8 noted that he often heard discussions about pending cases among the attorneys in his office. He continued: "And I recognize the professional separation and all that, but it still has some influence. I'm not 100 percent sure. I will definitely try."

Trial counsel confirmed that he had current cases filed against the City of San Jose. He indicated he had concern about Juror No. 8's "objectivity, fairness and impartiality."

The prosecutor asked Juror No. 8 if he understood the presumption of innocence. Juror No. 8 responded, "I understand the way the rules are supposed to work, yes." The prosecutor reminded Juror No. 8 that, as an attorney, he had taken an oath to uphold the state and federal Constitutions. The prosecutor then asked Juror No. 8 whether he could set aside his personal feelings and experiences and decide the case based on the evidence. Juror No. 8 replied, "I fully understand. I also understand, though, that, unlike many of the other jurors here, I know the defense counsel. And I deal, have dealt and seen and heard a lot of talk about San Jose police officers and the various reports and incidents that come through. [¶] I should also say, because there was a lot of questions about gangs, that I did most of the briefing on the Acuna vs. City of San Jose case which was a

California Supreme Court case which upheld the City's right to get injunctions against gangs in the Roxbury area." (See *People ex rel. Gallo v. Acuna* (1997) 14 Cal.4th 1090.)

The prosecutor again asked Juror No. 8 if he could set aside his personal beliefs and decide defendant's guilt based on the evidence presented at trial. Juror No. 8 responded, "Well, and we all bring our life circumstances to bear, too, which is why you do some of this questioning process and why I'm bringing up some of the issues that I think may affect my ability to do that." Juror No. 8 continued, "I certainly understand what I'm supposed to strive for and what I will hopefully be able to achieve, but my background and experience certainly influences my thoughts and feelings and, when I hear the evidence, the way I interpret that evidence."

The prosecutor asked whether Juror No. 8 would have "any problems" finding defendant not guilty if he did not believe that the prosecutor had proved the case beyond a reasonable doubt. Juror No. 8 replied, "No, if that's the conclusion I reach based on the evidence I heard. But the way I accept that evidence is, of course, going to be filtered through my experiences, who I know." He reiterated the fact that his office defended San Jose police officers, but he conceded that he might disbelieve a police officer who testified at trial.

Again, the prosecutor asked Juror No. 8 if he could be "fair and impartial and decide whether or not the defendant is guilty or innocent based upon the evidence that we've heard in this courtroom?" Juror No. 8 responded, "I will. Yeah, I can try to do that, yeah. But again, there are these other issues. I guess you have to decide whether you're comfortable proceeding with that."

Juror No. 8 noted that his past history gave him "a set of biases and beliefs and ideas" that might "color" how he viewed the evidence. He reiterated that he was "very involved with the gang abatement stuff."

The prosecutor once more asked Juror No. 8 if he believed he could be fair and impartial and decide defendant's guilt based on the evidence presented. Juror No. 8 replied, "I would certainly – you know, I certainly will try to be fair and impartial, yeah."

Trial counsel asked Juror No. 8 whether he considered himself something of an expert on gangs in the area. Juror No. 8 responded, "I don't know if I'd go so far as to say an expert, but I became fairly familiar with it during that process." He noted that he had read many police officer declarations and that he had spoken to some of the officers. However, he was "involved more at the appeal level." Juror No. 8 was not familiar with the investigating officer in defendant's case. Juror No. 8's work on the *Acuna* case had been around 1994, 1995 and 1996.

Trial counsel asked, "Given our relationship, do you feel that you can be fair in deliberating and weighing evidence on behalf of [defendant] here, being able to set aside your and my relationship, which you've heard from other attorneys about how I handle cases and whatnot?" Juror No. 8 replied, "Yeah. I certainly would try to do that." Trial counsel asked, "Do you feel that you can do that?" Juror No. 8 responded, "I can't say 100 percent that it's not going to influence how I view perhaps certain evidence that might come up. I'm not comfortable saying that."

Trial counsel then asked, "If you had a brother who was on trial today and there was another attorney sitting in your position with like understandings and bias between the two of us, would you want to have your brother have that attorney sit on this jury?" Juror No. 8 responded, "No. I'd rather have somebody who's removed and unfamiliar with any of the attorneys or parties sitting on the case, most definitely." He continued, "I would prefer to have somebody sitting on a jury who didn't know any of the attorneys, who didn't have any contact with the police department, who was doing it, and probably had less knowledge about gang activity and the San Jose Police Department's involvement in the gang activity than I have."

Juror No. 8 further stated, "No one wants to sit here and say they're not going to be unfair or impartial. I would certainly try, but I can't say beyond any doubt that none of my – that none of my background would influence how I would view the case and the evidence."

At that point, trial counsel requested that Juror No. 8 be removed "for cause." The trial court asked Juror No. 8 whether his views would "diminish the requirement of proof beyond a reasonable doubt on the part of the prosecutor?" Juror No. 8 asserted that he would not require less proof: "I know the standard would be the same. I guess how you get to the standard is all dependent on how you evaluate the evidence. So, no, definitely, I understand what the standard is."

After Juror No. 8 affirmed that he would abide by the oath to decide the case based on the evidence and instructions, the trial court denied trial counsel's request for a "challenge for cause." The jury was then sworn and the alternates were selected.

2. Analysis

Defendant contends the trial court erred by denying his "for cause" challenge to Juror No. 8. We first address the People's claim that defendant waived this issue by failing to object below.

"To preserve a claim of error in the denial of a challenge for cause, the defense must either exhaust its peremptory challenges and object to the jury as finally constituted or justify the failure to do so. [Citations.]" (*People v. Kirkpatrick* (1994) 7 Cal.4th 988, 1005.) Here, defendant did exhaust his peremptory challenges, immediately before Juror No. 8 was summoned. However, defendant did not object after the trial court swore in the jury. Nevertheless, we find no waiver under the circumstances. During the voir dire of Juror No. 8, trial counsel specified that he was concerned about Juror No. 8's "objectivity, fairness and impartiality." At the end of the voir dire, trial counsel asked the trial court to remove Juror No. 8 "for cause." The trial court denied the challenge. Immediately thereafter, the jury was sworn. By raising concerns about Juror No. 8's

ability to be impartial, and by specifically requesting a challenge for cause, defendant informed the trial court of his objection to Juror No. 8. Because the jury was sworn immediately after the trial court declined to excuse Juror No. 8 for cause, an objection at that point would have been, as defendant argues, "redundant and pointless."

We proceed to consider the merits of defendant's claim that Juror No. 8 should have been removed from the jury.

"Assessing the qualifications of jurors challenged for cause is a matter falling within the broad discretion of the trial court. [Citation.]" (*People v. Weaver* (2001) 26 Cal.4th 876, 910.) "In according deference on appeal to trial court rulings on motions to exclude for cause, appellate courts recognize that a trial judge who observes and speaks with a prospective juror and hears that person's responses (noting, among other things, the person's tone of voice, apparent level of confidence, and demeanor), gleans valuable information that simply does not appear on the record. [Citation.]" (*People v. Stewart* (2004) 33 Cal.4th 425, 451.) " '[T]he manner of the juror while testifying is oftentimes more indicative of the real character of his [or her] opinion than his [or her] words. That is seen below, but cannot always be spread upon the record. Care should, therefore, be taken in the reviewing court not to reverse the ruling below upon such a question of fact, except in a clear case.' " (*Wainwright v. Witt* (1985) 469 U.S. 412, 428, fn. 9.)

"A trial court should sustain a challenge for cause when a juror's views would 'prevent or substantially impair' the performance of the juror's duties in accordance with the court's instructions and the juror's oath. [Citations.] On appeal, we will uphold a trial court's ruling on a challenge for cause by either party 'if it is fairly supported by the record, accepting as binding the trial court's determination as to the prospective juror's true state of mind when the prospective juror has made statements that are conflicting or ambiguous.' [Citations.]" (*People v. McDermott* (2002) 28 Cal.4th 946, 981-982.)

The rule requiring an appellate court to accept the trial court's determination when a juror has made conflicting statements about his or her impartiality was applied in *People v. Maury* (2003) 30 Cal.4th 342. The defendant in a death penalty case brought a "for cause" challenge to a juror who said that he would not be able to keep an open mind about the penalty if he were to find beyond a reasonable doubt that the defendant committed " 'three heinous, premeditated, deliberate killings.' " (*Id.* at p. 381.) However, the juror later asserted that he could be open-minded and "that the appropriate punishment would depend on the circumstances, the defendant's state of mind at the time of the crime, and the evidence presented, and that he would follow the instructions." (*Ibid.*) The trial court denied the challenge, and the Supreme Court found the ruling to be "amply supported by the record." (*Ibid.*)

The same rule was applied in *People v. Kaurish* (1990) 52 Cal.3d 648. There, a juror "gave conflicting testimony as to her ability to be unbiased. On the one hand, she stated that she had several relatives employed as police officers and might tend to give greater credence to the testimony of such officers. On the other, she stated her intention to 'try to be an impartial juror.' " (*Id.* at p. 675.) Because her answers were conflicting, the Supreme Court explained, it was required to uphold the trial court's determination that the juror was not biased. (*Ibid.*)

In this case, Juror No. 8's comments about his ability to be fair and impartial are aptly described as both " 'conflicting' " and " 'ambiguous.' " (*People v. McDermott, supra,* 28 Cal.4th at p. 982; see also *People v. Beardslee* (1991) 53 Cal.3d 68, 103.) Often, he did not directly answer the questions put to him about his ability to be fair and impartial. The trial court and prosecutor had to repeat the questions over and over. Juror No. 8's answers included: "I don't know," "I would try," and "I will do my best." However, Juror No. 8 also stated that he would "keep an open mind" and that he would abide by the oath to decide the case based on the evidence and instructions. Notably, Juror No. 8 was an attorney, considered an officer of the court, who had taken an oath to

"support the Constitution and laws of the United States and of this state." (Bus. & Prof. Code, § 6068.)

The trial court was in the best position to evaluate Juror No. 8's sincerity and credibility regarding his potential bias. We confront a cold record, whereas the trial court observed Juror No. 8's tone of voice and demeanor. After listening to Juror No. 8's ambiguous and conflicting responses and observing his manner, the trial court determined that Juror No. 8 would be able to " 'faithfully and impartially apply the law.' " (*People v. Weaver, supra,* 26 Cal.4th at p. 910.) Substantial evidence supports this determination: Juror No. 8 stated that he could keep an open mind and that he could abide by the oath to decide the case based on the evidence and instructions. In sum, the transcript of voir dire does not show a "clear case" of bias. (*Wainwright v. Witt, supra*, 469 U.S. at p. 428, fn. 9.) Therefore, we defer to the trial court's determination that Juror No. 8 was not biased. (*People v. McDermott, supra,* 28 Cal.4th at pp. 981-982.)

We conclude the trial court did not abuse its discretion in denying defendant's "for cause" challenge to Juror No. 8. (*People v. Weaver, supra,* 26 Cal.4th at p. 910.)

B. Admission of 911 Tape and Transcript

In limine, the People sought to introduce the anonymous 911 call reporting "men with guns" and describing defendant and his vehicle pursuant to Evidence Code section 1240, which provides: "Evidence of a statement is not made inadmissible by the hearsay rule if the statement: [¶] (a) Purports to narrate, describe, or explain an act, condition, or event perceived by the declarant; and [¶] (b) Was made spontaneously while the declarant was under the stress of excitement caused by such perception."

Defendant objected to the admission of the 911 tape and transcript. Defendant argued that the statements were not spontaneous, because there was "interrogation going on between both the dispatcher and the person making the report."

The trial court asked whether the license plate number given by the anonymous caller matched the license plate number of Serrano's brown Lincoln. Told that there was

a match, the trial court ruled: "Since that does furnish corroboration of what was made on the 911 tape, the Court does find that it was a report made under stress and does apply to the facts in this case and is admissible."

Defendant objected after this ruling. He renewed his objection during trial, when the trial court admitted the tape and transcript into evidence. He now complains that the trial court erred in admitting the 911 call as an excited utterance. He further contends the admission of the tape and transcript violated his confrontation rights.

1. Evidence Code section 1240

Generally, the decision whether to admit hearsay under the Evidence Code section 1240 exception lies within the sound discretion of the trial court. (*People v. Hines* (1997) 15 Cal.4th 997, 1034.) Defendant argues that in this case, the trial court did not properly exercise its discretion because it failed to determine whether the 911 call met the requirements of Evidence Code section 1240. Defendant claims that instead, the trial court erroneously decided the call's admissibility based on the corroboration of the license plate number.

The People point out that the trial court made a specific finding that the 911 call was "a report made under stress," and that this finding reflected one of the requirements of Evidence Code section 1240. The record supports the People's position that the trial court did not base its ruling exclusively on the corroboration of the license plate number. Moreover, "it is axiomatic that we review the trial court's result, not its rationale. [Citation.]" (*People v. Campbell* (1994) 23 Cal.App.4th 1488, 1494.)

We proceed to review, for abuse of discretion, whether the 911 call met the requirements of Evidence Code section 1240. The fact that the statements were prompted by questioning does not mean the trial court could not have found them to be spontaneous. The California Supreme Court has specified that "spontaneous" as used in Evidence Code section 1240 is not to be construed literally so as to require the statement be voluntary and initiated by the declarant. (*People v. Farmer* (1989) 47 Cal.3d 888, 903

(*Farmer*).) Rather, Evidence Code section 1240 requires a spontaneous statement to be one that "describe[s] actions undertaken without deliberation or reflection." (*Farmer, supra,* 47 Cal.3d at p 903.)

In *Farmer*, a shooting victim gave a statement in response to questions from a 911 dispatcher. The victim was "distraught and in severe pain" during the conversation. (*People v. Farmer, supra*, 47 Cal.3d at p. 904.) The dispatcher's questions were not suggestive, and the victim's answers were not self-serving. Under the circumstances, the California Supreme Court concluded that the victim's statement was admissible as a spontaneous utterance. (*Ibid*.)

In *People v. Poggi* (1988) 45 Cal.3d 306, the victim's statements were made in response to a police officer's questions. The evidence established that the victim was still under the influence of the attack (she had been stabbed in the chest) and the police officer's questions were simple and non-suggestive. Thus, although the victim gave her statement 30 minutes after she had been assaulted, at a time when she had become calm enough to speak coherently, the court held it was a spontaneous utterance. (*Id*. at p. 319.)

In *People v. Roybal* (1998) 19 Cal.4th 481, the victim's husband called 911 within minutes of discovering his wife's body. Although his statements were made in response to the dispatchers' questions, they "could reasonably have been taken to represent his spontaneous reactions to the discovery." (*Id.* at p. 516.)

Defendant contends that the instant case is distinguishable from the above cases, in that the caller "was neither a victim nor a victim's relative" but rather "a disinterested citizen informant who had witnessed the shooting." He argues, "Unlike one whose life is directly threatened or impacted by an incident, a disinterested third party witness is exactly the type of person whose excitement would tend to quickly wane, thus depriving her statements of the requisite spontaneity." We decline to find this distinction dispositive. In *People v. Gutierrez* (2000) 78 Cal.App.4th 170, the court held that a license plate number written by an anonymous witness was admissible under Evidence

Code section 1240. Likewise, in *People v. Gallego* (1990) 52 Cal.3d 115, 175, the court held that a third party witness's description of "a startling event" was admissible.

Defendant further notes that the questioning in this case "involved considerable detail." However, the detail elicited during the 911 call was comparable to the detail elicited in *Farmer*. (*People v. Farmer, supra,* 47 Cal.3d at pp. 899, 903.)

We have reviewed both the audio tape and the transcript of the 911 call. As the People point out, the caller made the call immediately after witnessing the shooting. The caller could still see the Lincoln nearby. Although she had left the scene by the end of the call, she indicated that she was still afraid by stating that she did not want to give her cell phone number and did not want to "drive back by." She was clearly excited and stressed by the incident. In light of the cases cited above, the trial court's decision to admit the 911 call as an excited utterance under Evidence Code section 1240 was not an abuse of discretion. (*People v. Hines, supra,* 15 Cal.4th at p. 1034.)

2. Confrontation Clause

In his opening brief, defendant argued that admission of the 911 call violated his right to confrontation, guaranteed by the federal Constitution. (U.S. Const., 6th Amend.) He based his argument on his allegation that the trial court admitted the 911 call because it was corroborated by other evidence. He pointed out that the United States Supreme Court had rejected the notion "that evidence corroborating the truth of a hearsay statement may properly support a finding that the statement bears 'particularized guarantees of trustworthiness.' " (*Idaho v. Wright* (1990) 497 U.S. 805, 822.) "To be admissible under the Confrontation Clause, hearsay evidence used to convict a defendant must possess indicia of reliability by virtue of its inherent trustworthiness, not by reference to other evidence at trial." (*Ibid.*)

After defendant's opening brief was filed, the United States Supreme Court decided *Crawford v. Washington* (March 8, 2004, No. 02-9410) ___ U.S. ___ [124 S.Ct. 1354] (*Crawford*), which effected a "paradigm shift in confrontation clause analysis."

(*People v. Cage* (2004) 120 Cal.App.4th 770, 777.) In his reply brief, defendant relies on *Crawford* to bolster his Confrontation Clause claim.

"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…. [¶] In this case, for example, the hearsay exception for spontaneous statements is firmly rooted [citation]; hence, any hearsay admissible under section 1240 was admissible under the confrontation clause." (*People v. Cage, supra,* 120 Cal.App.4th at p. 777.)

"In *Crawford*, the United States Supreme Court decided that an out-of-court testimonial statement made by a witness to law enforcement officials is barred by the Sixth Amendment's Confrontation Clause – even if there has been a judicial determination that the statement bears particularized guarantees of trustworthiness – unless the defendant had a prior opportunity to cross-examine the witness and the witness is unavailable to testify at trial." (*People v. Pirwani* (2004) 119 Cal.App.4th 770, 774 (*Pirwani*).)

In *Pirwani*, this court described the "factual and procedural context" of *Crawford* as follows: "There, the defendant was charged with assault but claimed self-defense. The police interrogated both defendant and his wife, Sylvia. Sylvia's tape-recorded statement subtly undermined her husband's defense. At trial, Sylvia did not testify because defendant invoked the state marital privilege. [Citation.] The prosecution then offered her taped statement to police as a statement against her penal interest. The defendant objected on Confrontation Clause grounds, but the Washington state trial court found the statements trustworthy and admissible under *Ohio v. Roberts* [(1980) 448 U.S. 56]. On appeal, the intermediate appellate court reversed, citing various factors that, in its view, rendered Sylvia's statement unreliable under *Ohio v. Roberts.* The Washington Supreme Court overturned the Court of Appeal, finding that Sylvia's statement did not fall under a 'firmly rooted' hearsay exception, but it was nonetheless reliable under *Roberts* because it 'interlocked' with the defendant's statement. [Citation.] The United

States Supreme Court 'granted certiorari to determine whether the State's use of Sylvia's statement violated the Confrontation Clause.' [Citation.]

"After examining the historical origins of the Clause, the nation's high court repudiated the *Ohio v. Roberts* framework of 'open-ended balancing tests' in favor of a 'categorical' rule that requires 'unavailability and a prior opportunity for cross-examination' with respect to 'core testimonial statements that the Confrontation Clause plainly meant to exclude.' [Citation.]

"The *Crawford* court declined to 'spell out a comprehensive definition of "testimonial." ' [Citation.] But it did not leave lower courts totally without guidance." (*Pirwani, supra*, 119 Cal.App.4th at pp. 784-785.)

Crawford's guidance about what constitutes a "testimionial" statement follows: "[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. It was these practices that ... English law's assertion of a right to confrontation was meant to prohibit; and that the founding-era rhetoric decried. The Sixth Amendment must be interpreted with this focus in mind. [¶] . . . [¶]

"This focus also 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. On the other hand, *ex parte* examinations might sometimes be admissible under modern hearsay rules, but the Framers certainly would not have condoned them.

"The text of the Confrontation Clause reflects this focus. It applies to "witnesses" against the accused—in other words, those who "bear testimony." 1 N. Webster, An American Dictionary of the English Language (1828). "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. The constitutional text, like the history underlying the common-law right of confrontation, thus reflects an especially acute concern with a specific type of out-of-court statement." (*Crawford, supra,* __ U.S. at p. __ [124 S.Ct. at pp. 1363-1364].)

The Supreme Court set forth three potential tests for determining whether a particular statement comes within the "core class of 'testimonial' statements": (1) " '*ex parte* in-court testimony or its functional equivalent—that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially' "; (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.)

Several California cases have applied *Crawford,* and considered whether various statements are "testimonial." In *Pirwani, supra,* 119 Cal.App.4th at page 786, this court considered whether the Confrontation Clause permitted admission of a videotaped statement made by an elderly victim to law enforcement officials. Because it was "reasonable to anticipate its use at trial" and it "was 'knowingly given in response to structured police questioning,' " we found that the statement " 'qualifies under any conceivable definition' as an inadmissible testimonial statement to law enforcement officials under *Crawford*. [Citation.]" (See also *People v. Adams* (2004) 120 Cal.App.4th 1065, 1075, petition for review filed Aug. 24, 2004 [assault victim's statements to sheriff's deputies were testimonial].)

In *People v. Sisavath* (2004) 118 Cal.App.4th 1396, 1402, petition for review denied September 15, 2004, the Fifth District held that a child sexual abuse victim's statement to a police officer "was testimonial under *Crawford*." The *Sisavath* court

further held that the child's statement to a trained interviewer at a county facility also 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.]" (*Ibid.*, fn. omitted.) Underlying this conclusion were the following facts: "[The victim's] interview took place after a prosecution was initiated, was attended by the prosecutor and the prosecutor's investigator, and was conducted by a person trained in forensic interviewing." (*Id.* at p. 1403.)

In *People v. Cervantes* (2004) 118 Cal.App.4th 162, petition for review denied August 11, 2004, the issue was the admissibility of a codefendant's statement to his neighbor. The neighbor was a medical assistant who spoke to the codefendant about his obvious injuries. The neighbor reported the codefendant's admissions to the police, and those admissions were introduced at trial. Division Three of the Second District held that the statement was not testimonial, noting that the codefendant "sought medical assistance from a friend of long standing who had come to visit his home" and made the statement "without any reasonable expectation that it would be used at a later trial." (*Id.* at p. 174.)

In *People v. Cage* (2004) 120 Cal.App.4th 770, petition for review filed August 24, 2004, Division Two of the Fourth District considered three statements made by the victim of an assault. The People conceded that one statement, given during a "classic station-house interview," was testimonial. (*Id.* at p. 781.)

The *Cage* court found that a second statement, made by the victim to a doctor at the emergency room, was *not* testimonial. The court explained that "*Crawford* repeatedly emphasized the significance of government involvement in a testimonial hearsay statement," and that the doctor "was not a police officer or even an agent of the police." (*People v. Cage, supra,* 120 Cal.App.4th at p. 781.) The court further noted: "No reasonable person in [the victim's] shoes would have expected his statements to [the doctor] to be used prosecutorially, at defendant's trial. This is true even if he thought the doctor might relay his statements to the police." (*Id.* at p. 782.)

Finally, the *Cage* court considered the admissibility of the victim's emergency room statement to the sheriff's deputy. The court began its analysis by noting: "*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,* --- U.S. at p. ----, 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.)" (*People v. Cage, supra,* 120 Cal.App.4th at p. 783.) The *Cage* court further noted that "*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." (*Ibid*.)

The *Cage* court then applied *Crawford* as follows: "We cannot believe that the framers would have seen a 'striking resemblance' between [the deputy's] interview with [the victim] at the hospital and a justice of the peace's pretrial examination. There was no particular formality to the proceedings. [The deputy] 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. [The deputy] did not summon [the victim] 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 [the victim] to tell his story. The interview was not recorded. There is no evidence that [the deputy] 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." (*Id*. at p. 784.) Ultimately, the court concluded that the victim's emergency room statement to the deputy "was not testimonial within the meaning of *Crawford*." (*Id.* at p. 785.)

Several cases from New York have considered whether a 911 call is "testimonial" as defined by *Crawford*. The People rely on one of those cases, *People v. Moscat* (2004) 777 N.Y.S.2d 875. In *Moscat*, a domestic assault case, the victim-complainant made a 911 call for help. The court held that "[a] 911 call for help is essentially different in nature than the 'testimonial' materials that *Crawford* tells us the Confrontation Clause was designed to exclude." (*Id.* at p. 879.) The court explained: "The 911 call—usually, a hurried and panicked conversation between an injured victim and a police telephone operator—is simply *not* equivalent to a formal pretrial examination by a Justice of the Peace in Reformation England. If anything, it is the electronically augmented equivalent of a loud cry for help. The Confrontation Clause was not directed at such a cry. [¶] Moreover, a 911 call can usually be seen as part of the criminal incident itself, rather than as part of the prosecution that follows. Many 911 calls are made while an assault or homicide is still in progress. Most other 911 calls are made in the *immediate* aftermath of the crime. Indeed, the reason why a 911 call can qualify as an 'excited utterance' exempt from the rules of evidence barring hearsay is that very little time has passed between the exciting event itself and the call for help; the 911 call qualifies as an excited utterance precisely because there has been no opportunity for the caller to reflect and falsify her (or his) account of events. [¶] The Confrontation Clause spells out the right of defendant to confront the 'witnesses' against him. A person who gives a formal statement, or deposition, or affidavit is conscious that he is bearing witness, and that his words will impact further legal proceedings. That is not usually the case with a 911 call. Typically, a woman who calls 911 for help because she has just been stabbed or shot is not contemplating being a 'witness' in future legal proceedings; she is usually trying simply to save her own life." (*Id.* at p. 880.)

Defendant argues that the 911 call in this case is distinguishable from the call considered by the court in *Moscat*. He points out that the caller in this case called for the specific reason of providing the police with information identifying the shooter so as to

help in his apprehension and potential prosecution. He further points out that the caller was a third party witness, rather than the victim, arguing that the call was not part of the criminal incident itself.

Defendant contends that his position is supported by another New York case, *People v. Cortes* (2004) 781 N.Y.S.2d 401. In *Cortes*, the court considered the admissibility of two 911 calls placed by third party witnesses to a shooting. The court held that "[c]alls to 911 to report a crime are testimonial under the test set out [in *Crawford*]." (*Id.* at p. 595.) The court explained: "When 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. In New York a summary copy (a sprint report) is made and preserved separately from the tape. The preserved conversations on tape are available by subpoena. The tapes must be delivered as *Rosario* material if the witness is available and testifies. If a tape is lost or improperly or prematurely destroyed, an adverse inference may be available. 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 JPs under the Marian committal statute. Like the victims and witnesses before the King's courts 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. Indeed, callers knowing how the information will be used, often refuse to disclose their identity. The caller here declined to reveal his name and said he did not want other people to know who he was. The operators do not urge the caller to disclose their name or location. In fact, technology allows the operator to see the telephone

number of the land line telephone on which the call is made and efforts are also under way to do the same with cell phones. With proper investigation declarants might be more frequently found." (*Id.* at p. 595, fn. omitted.)

A third New York case to consider the admissibility of 911 calls after *Crawford* is *People v. Conyers* (2004) 777 N.Y.S.2d 274. In *Conyers*, the caller was the defendant's mother, who called 911 and "scream[ed] for police assistance to stop a street fight she is witnessing between her son and her son-in-law." (*Id.* at p. 275.) The witness made the 911 calls "as she reacted to the life threatening crisis unfolding before her eyes." (*Id.* at p. 276.) The court held that there was no confrontation clause violation because the 911 call was not "testimonial in nature as that term is used in *Crawford v. Washington*." (*Id.* at p. 277.) Critical to the court's decision was the fact that the witness's "intention in placing the 911 call was to stop the assault in progress and not to consider the legal ramifications of herself as a witness in a future proceeding. [Citation.]" (*Ibid*.)

A few days prior to oral argument in this case, the Second District published *People v. Corella* (Sept. 16, 2004, No. B163370) __ Cal.App.4th __ [2004 WL 2065846], which addressed the admissibility of a 911 call after *Crawford*. We permitted the parties to submit supplemental briefs regarding *Corella*.

In *Corella*, the defendant's wife called 911 to report that the defendant had hit her. She described the events leading up to the assault during the 911 call. She repeated the same details to an officer who arrived in response to the 911 call, and again to a paramedic, but she recanted the allegations at trial. The court held that most of the 911 call was admissible as a spontaneous statement under Evidence Code section 1240, and that admission of the call did not violate the Confrontation Clause.[4]

[4] The court held that the portions of the caller's statements that did not " 'narrate, describe, or explain' the commission of the offense or any relevant circumstance under which the offense was committed" were not admissible. (___ Cal.App.4th at p. ___.)

The *Corella* court concluded that the 911 statements were not equivalent to a police interrogation "because they were not 'knowingly given in response to structured police questioning,' and bear no indicia common to the official and formal quality of the various statements deemed testimonial by *Crawford*. Mrs. Corella, not the police, initiated the 911 call to request assistance. . . . Not only is a victim making a 911 call in need of assistance, the 911 operator is determining the appropriate response, not conducting a police interrogation in contemplation of a future prosecution." (*People v. Corella, supra,* __ Cal.App.4th at p. __.)

After considering the facts in the case at hand and all of the case law applying *Crawford*, we conclude that the 911 call in this case does not come within the "core class of 'testimonial' statements" which is the focus of the Confrontation Clause. (*Crawford, supra,* 124 S.Ct. at p. 1364.) As we shall explain, none of the three potential definitions of the term "testimonial" provided in *Crawford* encompasses the 911 call.

First, the 911 call was not " '*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.' " (*Crawford, supra,* 124 S.Ct. at p. 1364.) The 911 call was initiated by a witness to a shooting. The declarant was speaking to a dispatcher who was attempting to obtain information to assist the police in responding appropriately, by providing assistance to any victims and apprehending the gunman to prevent any further violence. The call in this case stands in stark contrast to the statement in *Crawford*, which was made during a formal police interrogation after both the defendant and the declarant had been arrested. Here, the call occurred before any arrests were even made.

Second, the 911 call cannot be described as an " 'extrajudicial statement[] . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions.' " (*Crawford, supra,* 124 S.Ct. at p. 1364.) The 911 call was

an informal report of a recent shooting; its purpose was to advise the police of the situation so that they could take appropriate action to protect the community.

Finally, the 911 call was not " 'made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.' " (*Id.*, 124 S.Ct. at p. 1364.) This was a classic 911 call, made immediately after a crime was committed. The caller was simply requesting help from the police by describing what she saw without thinking about whether her statements would be used at a later trial.

In conclusion, we do not believe that a 911 call such as the one admitted in this case was within the contemplation of the *Crawford* court when it concluded that the Confrontation Clause of the Sixth Amendment bars introduction of "testimonial" statements. The call here was initiated by a citizen witness to a crime; it was not initiated by the government or an agent of the government. The details provided by the caller were elicited in order to facilitate appropriate police response, not to provide evidence to be used at a later trial. Under the circumstances in this case, we believe that the admission of the 911 call did not violate the Confrontation Clause.

III. DISPOSITION

The judgment is affirmed.

BAMATTRE-MANOUKIAN, J.

WE CONCUR:

PREMO, ACTING P.J.
WALSH, J.*

* Judge of the Santa Clara Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

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Trial Judge:	The Honorable Paul R. Teilh
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