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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

DAVID GERARD SOTO,

Defendant and Appellant.

A129474

(San Francisco City and County
Super. Ct. Nos. 211296, 211653)

Defendant David Gerard Soto appeals from his conviction of multiple counts alleging that he assaulted, and made a criminal threat to, his girlfriend, Martha Santana, subsequently attempted to dissuade her from testifying, and contacted her in violation of a protective order. He was sentenced to a three-year term in state prison for the assault, with several three-year terms to run concurrently for his other felony convictions, and to concurrent one-year terms in county jail with credit for time served for the misdemeanor convictions. Defendant argues that the trial court erred repeatedly in admitting evidence that was prejudicial. We agree that the trial court erred, but conclude the errors were harmless, both individually and cumulatively, in all but one respect.

Defendant argues at length that the trial court violated his right under the Sixth Amendment of the federal Constitution to confront a witness—Santana—when it admitted her oral and written statements to police about the incident because they were “testimonial” in nature under *Crawford v. Washington* (2004) 541. U.S. 36 (*Crawford*). We conclude that two of the three categories of challenged statements were properly admitted, and the admission of the third, a written statement, was harmless error.

Defendant also argues the trial court improperly admitted hearsay evidence of statements by Santana to defendant, and statements by an unidentified Spanish speaker to Santana, contained in phone recordings from jail, and also abused its discretion under Evidence Code section 352 in admitting some of these calls. Defendant further argues his trial counsel provided ineffective assistance of counsel regarding the use of these calls at trial and that the cumulative effect of the trial court's errors requires reversal.

Defendant is correct that the trial court should not have admitted the hearsay statements of Santana and the unidentified Spanish speaker. Only the latter was prejudicial, however, requiring reversal of defendant's conviction for count 12, for violation of a protective order. Otherwise, defendant's arguments for reversal are without merit. Therefore, we affirm the remainder of the judgment.

BACKGROUND

In April 2010, the San Francisco County District Attorney charged defendant by amended information with numerous counts, including assault by means of force likely to produce great bodily injury (Pen. Code, § 245, subd. (a)(1);¹ count 1), criminal threats (§ 422; count 2), misdemeanor vandalism of a cellular phone (§ 594, subd. (b)(2)(A); count 6), three counts of attempting to prevent and dissuade Santana from causing an information to be prosecuted (§ 136.1, subd. (b)(2); counts 7-9), and three misdemeanor violations of a protective order (§ 166, subd. (c)(1); counts 10-12). Defendant was found guilty of these counts after a jury trial.

Santana's Statements to Police

The Recording of Santana's 911 Call

The evidence presented at trial indicated that on November 29, 2009, at 1:06 a.m., Santana called 911 to report that her boyfriend, defendant, had just choked and beaten her approximately five minutes before and that she "thought" he left her residence on foot, possibly towards certain streets. In the course of the recorded call,² the 911 operator said

¹ All further statutory references are to the Penal Code unless otherwise indicated.

² The record contains an audio recording and transcript of the 911 call, both of which we have reviewed.

she was going to contact medical personnel for Santana. Santana indicated she was not sure where he was, and said at one point, “He’s around here.” She provided defendant’s name and his physical description. The operator asked, “So he, ah, is outside? He may have gone, okay, down the street.” Santana responded, “Yeah.” She said her jaw was “messed up,” her neck had strangle marks, and her teeth and jaw hurt; she did not have trouble breathing.

The operator indicated she would stay on the line until she knew Santana was with the officers; then told Santana that the officers had detained defendant and were coming to the residence. She asked Santana if she was “all right,” to which Santana responded, “No, I’m not but I’ll be okay,” and “[t]hank God that he’s gone.” After the operator asked if defendant lived with Santana, Santana said they had too much to drink at her grandchild’s birthday party, argued and, when she said things about defendant’s children that she “shouldn’t have said,” defendant “went crazy on her.” The operator clarified how much defendant had to drink (which Santana said was “a lot”), told Santana “it looks like they have one detained,” indicated police were going to talk to her, and disconnected the call.

Santana’s Oral Statements to Officer Sullivan

San Francisco Police Officer Matthew Sullivan testified that he was dispatched to the scene. On his way to Santana’s residence, he saw a man walking along the street who “possibly matched” the physical description he had received. Sullivan stopped defendant and left him with two other officers.

Sullivan further testified that he and another officer arrived at Santana’s residence at 1:15 a.m., where he found Santana to be “very frantic,” “tearful, and extremely distraught.” As he spoke with her, she was “crying,” and “visibly shaken,” and her hands were shaking. Santana said she and defendant had been in the kitchen cleaning up after a birthday party when defendant told her that “her children were ugly and no good.” Defendant repeated his remarks while following her into her bedroom. Santana then told defendant his children were “ugly losers.” At that point, around 1:00 a.m., defendant grabbed her around her throat pulled her onto the bed, choked her, and hit her left cheek

and jaw about four times with a closed fist. He told her, “Bitch, talking bad about my kids, I’ll kill you,” which so frightened Santana that she urinated in her pants. When defendant released his grip, she reached for her cell phone to call 911, but defendant broke the phone in half. Santana then ran downstairs to call 911. When she came back upstairs, defendant was gone.

Sullivan testified that he noticed wetness on Santana’s clothing and smelled the odor of urine. Her left jaw and cheek area were swollen. The left side of her face exhibited redness and swelling, and her neck was scratched. Santana said there was pain on the left side of her neck, left cheek and jaw area, and that her throat felt hoarse when she spoke. Photographs of Santana, her clothes, her cell phone, and the scene were admitted into evidence.

Sullivan also testified that he asked Santana for a picture of her boyfriend, and that she gave him a photograph and his name, which was the name of defendant. When he observed the photograph and recognized it to be of David Soto, the man he had detained on the street, Sullivan contacted the officers detaining Soto and told them to take him to the police station.

Sullivan further testified that about 10 minutes after his first contact with Santana, paramedics responded to the residence to evaluate Santana at the request of one of the officers on the scene.

Santana’s Examination by a Paramedic

Paramedic Brett Lynch testified that he and a partner arrived at the scene at 1:27 a.m. and first visually assessed Santana to identify her injuries. Santana could track him with her eyes, and looked “disheveled.” He did a neurological assessment, a “C spine check,” and found Santana to be neurologically stable. He observed “a pattern of contusions around her neck in the form of a hand,” and that her neck was red. He assessed her neck as having soft-tissue injuries. He did not observe swelling in her cheek. Santana told him she was attacked. She said she was strangled in her bed. She classified her level of pain as 2 out of 10. She declined transport to the hospital for further evaluation.

Santana's Written Statement

Sullivan further testified that after the paramedics left, approximately 20 minutes after he initially contacted Santana, Santana agreed to make a written statement at his request. She wrote that defendant “went crazy and choked and punched me on my jaw and said, ‘Bitch, I will kill you, talking bad about my kids.’ ” She concluded, “I have fear he threaten my life and threatens me with his family. I want to press charges.”

The evidence at trial also indicated that defendant was served in open court with a criminal protective order prohibiting him from having any contact, including telephonic contact, with Santana. Phone calls recorded at the jail were played for the jury that indicated defendant subsequently made several phone calls to Santana on December 9, 11, 17, and 27, 2009, and January 2, 2010, and that on January 4, 2010, a Spanish speaker called Santana and indicated that he was calling on defendant’s behalf. The content of these calls indicated defendant sought to persuade Santana not to testify against him.

Defendant was sentenced to three years in state prison for the assault conviction and concurrent three-year terms for the criminal threat and dissuading a witness convictions, and to one year in county jail with credit for time served on the misdemeanor convictions, which were all concurrent. A timely notice of appeal was filed.

DISCUSSION

I. The Court's Admission of Santana's Statements

Defendant first argues that the trial court erred in admitting Santana’s oral statements to the 911 operator and Sullivan, and her written statement, because all of them were testimonial in nature and, therefore, their admission violated his Sixth Amendment right to confront Santana pursuant to *Crawford, supra*, 541 U.S. 36. We conclude Santana’s oral statements were nontestimonial, admissible statements. We agree the court should not have admitted her written statement because it was testimonial in nature, but conclude the court’s error was harmless.

A. *The Proceedings Below*

1. *The Trial Court's Ruling*

Before trial, the prosecutor sought admission of certain oral and written statements by Santana, including those she made on the night of the incident to police, under the spontaneous statement exception to the hearsay rule; the prosecutor argued these were nontestimonial in nature and, therefore, were not subject to exclusion based on *Crawford*. The prosecutor further argued that defendant waived any *Crawford* challenge under the forfeiture by wrongdoing doctrine, based on the evidence that defendant sought to convince Santana not to testify against him.

Defendant sought to exclude statements by Santana, including her oral statements in the 911 call and to Sullivan, and her written statement, as violative of her Sixth Amendment rights to confront Santana pursuant to *Crawford*.

At the motion hearing, the trial court tentatively ruled that it would admit the 911 recording, subject to a foundation being laid. The trial court found that Santana's statements in her 911 call were excited utterances that "ha[d] the characteristics or indicia of reliability," and were nontestimonial in nature: "They were made shortly after the incident occurred, and the circumstances indicate there was still an emergency taking place. They lack the formality of interrogation, and there is nothing about them that suggests that they were done to prepare for trial."

The trial court also tentatively ruled that it would admit Santana's oral statements to Sullivan for the same reasons. The court, noting the statements were made within minutes of the 911 call, stated "there is no indication that these statements were made by the officer in preparing for trial. They were not made in a formally structured setting or interrogation, and they were more in the nature of the officer, as a first respondent, trying to deal with the emergency."

The trial court also tentatively ruled that Santana's written statement to Sullivan was an excited utterance that came under the spontaneous statement exception to the hearsay rule, and was essentially a contemporaneous statement that lacked the formality of testimonial evidence. The court stated, "It was made . . . within no more than 15

minutes, at most, 20 minutes of when this occurred And they have all the characteristics of an indicia of reliability that the [L]egislature was looking toward when it enacted Evidence Code 1240. For that reason, I will allow it.” The court explained that the police were “trying to determine most likely whether to arrest someone” and what charges to make, and that it could “imagine that the complaining witness was still visibly shaken, upset, maybe crying.”³

At trial, defendant waived the foundational requirements of the 911 recording, and it was admitted into evidence over his objection based on Sixth Amendment grounds. The court stated, “We discussed this, and the court [has] ruled that it’s admissible, and there is a record of those discussions.” The jury listened to the recording and was also given a transcript of the call. Sullivan’s testimony and Santana’s written statement were also admitted over defendant’s objections based on Sixth Amendment grounds.

B. Analysis

1. Legal Standards

In *Crawford, supra*, 541 U.S. at page 68, the United States Supreme Court held that, pursuant to the Confrontation Clause of the Sixth Amendment of the United States Constitution, a hearsay statement that is “testimonial” in nature cannot be used against a criminal defendant unless the declarant is available to testify at trial or has been available previously for defendant’s cross-examination, regardless of a judicial determination about its reliability. (*Crawford*, at pp. 61–68.)

The Supreme Court subsequently provided further explanation regarding a court’s determination of whether statements are testimonial or nontestimonial. Courts are to conduct a review that is of a “context-dependent nature,” (*Michigan v. Bryant* (2011) 562 U.S. ___ [131 S.Ct. 1143, 1159] (*Bryant*)). “Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing

³ The court trial excluded an investigative report prepared approximately one hour and 45 minutes to two hours after the attack by an inspector that also included statements by Santana, finding these statements were testimonial in nature.

emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.” (*Davis v. Washington* (2006) 547 U.S. 813, 822 (*Davis*)). “The existence of an ongoing emergency must be objectively assessed from the perspective of the parties to the interrogation at the time, not with the benefit of hindsight. If the information the parties knew at the time of the encounter would lead a reasonable person to believe that there was an emergency, even if that belief was later proved incorrect, that is sufficient for purposes of the Confrontation Clause. The emergency is relevant to the ‘primary purpose of the interrogation’ because of the effect it has on the parties’ purpose, not because of its actual existence.” (*Bryant*, at p. ___ [131 S.Ct. at p. 1157, fn. 8].)

Furthermore, our review of the circumstances may extend beyond an evaluation of whether there is danger posed by an unrestrained assailant to the medical condition of the victim. “The medical condition of the victim is important to the primary purpose inquiry to the extent that it sheds light on the ability of the victim to have any purpose at all in responding to police questions and on the likelihood that any purpose formed would necessarily be a testimonial one. The victim’s medical state also provides important context for first responders to judge the existence and magnitude of a continuing threat to the victim, themselves, and the public.” (*Bryant, supra*, 562 U.S. at p. ___ [131 S. Ct. at p. 1159].)

In *People v. Cage* (2007) 40 Cal.4th 965 (*Cage*), the California Supreme Court articulated certain basic principles it derived from *Davis*. The court indicated that, “though a statement need not be sworn under oath to be testimonial, it must have occurred under circumstances that imparted, to some degree, the formality and solemnity characteristic of testimony.” (*Id.* at p. 984.) The challenged statement “must have been given and taken *primarily* for the *purpose* ascribed to testimony—to establish or prove some past fact for possible use in a criminal trial,” which primary purpose “is to be determined ‘objectively,’ considering all the circumstances that might reasonably bear on the intent of the participants in the conversation.” (*Ibid.*) “[S]ufficient formality and

solemnity are present when, in a nonemergency situation, one responds to questioning by law enforcement officials, where deliberate falsehoods might be criminal offenses”; however, “statements elicited by law enforcement officials are not testimonial if the primary purpose in giving and receiving them is to deal with a contemporaneous emergency, rather than to produce evidence about past events for possible use at a criminal trial.” (*Id.* at p. 984.) Our Supreme Court has also made clear that “statements are not testimonial simply because they might reasonably be used in a later criminal trial.” (*People v. Romero* (2008) 44 Cal.4th 386, 422 (*Romero*).

Here, where the facts and circumstances are not in dispute, we independently review the trial court’s determination that an out-of-court statement is nontestimonial and its admission not a violation of defendant’s Sixth Amendment rights. (*People v. Johnson* (2007) 150 Cal.App.4th 1467, 1477-1478; *People v. Seijas* (2005) 36 Cal.4th 291, 304.)

2. *The Admissibility of Santana’s Oral Statements*

We conclude the circumstances objectively indicate that Santana made her statements as she, the 911 operator, and Sullivan acted to resolve what could reasonably be viewed as an ongoing emergency based on what they knew at the time, and which was not fully resolved until after Santana was examined by the paramedic. Therefore, Santana’s statements were nontestimonial in nature, and admissible under the excited utterance exception to the hearsay rule.

a. *Santana’s Statements in the 911 Call*

Defendant argues Santana’s statements in the 911 call were testimonial in nature because no ongoing emergency existed after defendant left the residence, that Santana had no present fear of an additional assault, and Santana’s statements and actions, and those of the 911 operator, objectively indicate their primary purpose was to establish or prove past events, not enable police assistance to meet an ongoing emergency. We disagree.

As defendant acknowledges, courts have recognized that an emergency can continue even though the victim and suspect have separated. For example, in *People v. Brenn* (2007) 152 Cal.App.4th 166 (*Brenn*) the victim was stabbed by Brenn at a group

home for people with mental health and/or substance abuse problems. (*Id.* at pp. 169-170.) The victim left the house and went next door, where he called 911, and emergency personnel were dispatched to the scene. (*Id.* at p. 170.) In the course of the 911 call, the victim indicated he had been stabbed and was in shock, identified his attacker and his location, gave some further details, and stated that he wanted to press charges; the dispatcher contacted paramedics, asked some questions about the attacker and the incident, and indicated help was on the way. (*Id.* at pp. 171-172.)

The *Brenn* court found the victim's 911 call statements were admissible, nontestimonial evidence. (*Brenn, supra*, 152 Cal.App.4th at pp. 176-177.) Among other things, the court pointed out that “[t]here was nothing formal, solemn or structured about the colloquy,” and that “the dispatcher was primarily concerned with what was happening at the moment, as opposed to what had happened in the past. The dispatcher was eliciting information in an attempt to assess the present situation and help [the victim] and the responding officers, not secure a conviction in a court of law.” (*Id.* at p. 177.) Even though the victim indicated during the 911 call that he wanted to press charges, it did not appear “that his *primary purpose* during the call was to establish past facts for use in a criminal trial, or that the 911 operator was concerned about that issue.” (*Ibid.*) Quoting *Cage, supra*, 40 Cal.4th at page 984, footnote 14, the court observed that “ ‘the proper focus is not on the mere reasonable chance that an out-of-court statement might be later used in a criminal trial. Instead, we are concerned with statements, made with some formality, which *viewed objectively*, are for the *primary purpose* of establishing or proving facts for possible use in a criminal trial.’ ” (*Brenn*, at p. 177.)

We agree with the analysis in *Brenn* and, based on it, as well as *Crawford, Davis*, and *Cage*, we conclude the court properly admitted Santana's statements in the 911 call because they were nontestimonial in nature. Defendant's arguments are built on a self-serving view of the facts in hindsight. Objectively considered, the contents of the 911 call, and the larger record, indicate Santana reasonably feared defendant throughout, and the operator's inquiries indicate she was focused on Santana's safety and condition. Santana's statements were nontestimonial under these circumstances.

Specifically, Santana indicated to the 911 operator that she had been punched and choked only a few minutes before the call, that defendant was outside, and that Santana only “thought” he had left. Responding to the operator’s questions, Santana speculated on where he could be and said, “He’s around here.” Given his violent, potentially even fatal (as indicated by the choking) attack, and his uncertain location, Santana and the operator had every reason to be concerned that defendant would attempt to harm Santana further.

Thus, it is not until near the end of the call, when the operator told Santana it looked like defendant had been detained, Santana said, “Thank God that he’s gone.” Even after this however, when the operator also told Santana the police were on the way and asked if she was “all right,” Santana replied, crying, that she was not, stating only that she would “be okay.” This negative reply indicates she did not believe the emergency was over and remained in crisis. It was reasonable for her to think so in light of defendant’s attack and what Santana told Sullivan a few minutes later—that defendant had threatened to kill her.

Also, the substance of the 911 call makes plain that Santana had sustained injuries that required further evaluation. She told the operator that her jaw was “messed up,” that her neck had strangle marks, and that her teeth and jaw hurt. The operator indicated that she was going to contact medical personnel.

Defendant also argues the interaction between Santana and the 911 operator was more formal than informal. However, we fail perceive much, if any formality. Santana speaks in upset and sometimes frantic tones and cries at times, as the 911 operator asks questions that focus on determining where defendant might be located and the nature of Santana’s injuries. Both the tone and content of the call indicate both are focused on resolving the present emergency, similar to the circumstances in *Brenn* that we have described. Furthermore, Sullivan’s evaluation of Santana when he arrived at her residence a few moments after the 911 call was that Santana was both emotionally distraught and physically injured, further indicating defendant’s contention lacks merit.

b. *Santana's Oral Statements to Sullivan*

Defendant argues that Santana's oral statements to Sullivan also were for the primary purpose of establishing or proving past events for a potential criminal prosecution. Once more, we disagree, based on the discussion in *Crawford, Davis, Cage, Brenn, and other case law*.

The circumstances objectively indicate that Sullivan's initial interview with Santana lacked any real formality and solemnity, but instead was conducted as part of an effort to resolve the emergency, including regarding Santana's uncertain physical condition. (See *Brenn, supra*, 152 Cal.App.4th at p. 177 [lack of formality significant]; *Bryant, supra*, 562 U.S. at p. ___ [131 S. Ct. at p. 1159] [“[t]he medical condition of the victim is important to the primary purpose inquiry to the extent that it sheds light on the ability of the victim to have any purpose at all in responding to police questions”].) Moments after the 911 call, Sullivan and another officer arrived at Santana's residence to find a very frantic, tearful, and extremely distraught Santana, who was physically shaking and smelled of urine. Sullivan testified that he asked Santana what happened because he “was trying to determine what happened to her, if she needed medical evaluation and to determine if a crime had been committed.” He further testified, “I wanted to know that if the person that we had detained was, in fact, the suspect that was described in the dispatch call, and if it was the person that committed the crime.” His discussion with Santana lasted only about 10 minutes, when the paramedics arrived.

These circumstances are very similar to those in *Brenn*, which led that court to conclude the victim's statements to a responding police officer were nontestimonial. As we have already discussed, the victim called 911 from next door to a group home, where he had been stabbed by defendant. A responding officer arrested defendant outside the group home and went next door to talk to the victim, who was just finishing up the 911 call; the victim “appeared shocked, confused and in pain. [The officer] questioned him briefly, and he said he had been stabbed next door.” (*Brenn, supra*, 152 Cal.App.4th at p. 170.) The officer testified that he was there “ ‘to check on the medical condition of the victims and look for suspects.’ He said he only had time to ask [the victim] a few

questions before paramedics arrived. [The victim] seemed befuddled and in agony, saying only that someone had stabbed him next door with a kitchen knife.” (*Id.* at p. 172.)

The *Brenn* court noted the officer asked the victim only a few general questions during the few minutes before paramedics arrived. (*Brenn, supra*, 152 Cal.App.4th at p. 177.) “ ‘Preliminary questions asked at the scene of a crime shortly after it has occurred do not rise to the level of an “interrogation.” Such an unstructured interaction between officer and witness bears no resemblance to a formal or informal police inquiry that is required for a police “interrogation” as that term is used in *Crawford*. [Citations.] [Citation.] Because of the informality, brevity and unstructured nature of the exchange . . . we find [the victim’s] statements to the officer were nontestimonial.” (*Id.* at p. 178.)

Similarly, in *Romero, supra*, 44 Cal.4th 386, our Supreme Court concluded that *Crawford* did not bar the prosecution’s introduction of testimony by a police officer of victim statements made both before and after the detention of the defendant. The officer testified that in response to a call, he went to a building, where the victim, the building’s manager, approached him, upset and with a bleeding cut on the little finger of his left hand. (*Romero*, at p. 421.) The victim said he had confronted two men spraying graffiti on the building and one had attacked him with an ax before the two fled. (*Ibid.*) A few minutes later, the police found two men hiding in some bushes down the street, including defendant, who was holding an ax. The victim identified the two men as his attackers, approximately five minutes after the officer had arrived. (*Ibid.*)

Our Supreme Court concluded the victim’s statements, including his identification of the defendant after police discovered him hiding in some bushes, were not testimonial. (*Romero, supra*, 44 Cal.4th at p. 422.) The court, noting that the police were “responding to an emergency call, encountered an agitated victim of a serious assault The statements provided the police with information necessary for them to assess and deal with the situation, including taking steps to evaluate potential threats to others by the perpetrators, and to apprehend the perpetrators. The statements were not made primarily for the purpose of producing evidence for a later trial and thus were not testimonial. The

same is true of the statements pertaining to identification. The primary purpose of the police in asking [the victim] to identify whether the detained individuals were the perpetrators, an identification made within five minutes of the arrival of the police, was to determine whether the perpetrators had been apprehended and the emergency situation had ended or whether the perpetrators were still at large so as to pose an immediate threat.” (*Ibid.*) (See also *People v. Johnson, supra*, 150 Cal.App.4th at p. 1479 [an officer who found a man at a residence with blood on his hands and a woman with a bloody, broken nose and asked the woman what happened was interrupting an ongoing emergency, and her statement to him was nontestimonial].)

Brenn and *Romero* are directly relevant to the present case. Clearly, Sullivan, when he first encountered Santana, was still assessing what occurred in order to determine how to proceed. He asked Santana what had occurred and for a photograph of defendant, and only after reviewing the picture did he instruct his fellow officers detaining defendant on the street to take him to the police station. These facts indicate that Sullivan was still attempting to determine what had occurred in order to resolve the emergency when he questioned Santana. There is no indication he asked questions intended to build a case against defendant during the 10 minutes he spoke to Santana before the paramedics arrived.

The record also does not indicate Santana was initially motivated to provide information for potential use in a criminal prosecution. To the contrary, she was frantic, distraught, shaking, and injured. Defendant does not contend that Santana said anything about pressing charges before she prepared her written statement, after the paramedics had examined her.

Sullivan’s testimony also indicates the officers focused significantly on Santana’s condition until the paramedics arrived. Defendant argues there was no medical emergency because, for example, Santana indicated her pain was only 2 out of 10. However, Sullivan also observed redness and swelling on Santana’s left cheek, and red scratches or lacerations on her neck and throat. Santana reported that defendant had choked her, punched her four times in the jaw, and that her throat was hoarse. Santana’s

shirt and pants appeared to be wet, and that there was an odor of urine. According to Sullivan, an officer on the scene called for paramedics, indicating a concern about her physical condition. Sullivan did not ask Santana if she wanted to prepare a written statement until after Lynch had completed his examination of her physical condition.

Defendant contends there was no ongoing emergency because of the type of weapon he used, namely his fists, based on the *Bryant* court's conclusion that when an assailant used his fists, removing the victim to a separate room ended the emergency. (*Bryant, supra*, 562 U.S. at p. ___ [131 S.Ct. at p. 1158].) This ignores that defendant had threatened to kill Santana. Therefore, prior to the police decision to arrest defendant, Santana could reasonably fear his release from detention could endanger her further and, therefore, that the emergency had not yet ended prior to his arrest.

Defendant also contends that Sullivan first asked Santana for a photograph and radioed to officers that defendant be taken to the station house *before* conducting the bulk of his interview with her. The record does not support this assertion. Early in Sullivan's direct examination, the prosecutor asked, "How, if at all, did you identify her boyfriend, the person who had choked her?" Sullivan responded that he asked Santana for her boyfriend's photo and his name, and contacted the officers detaining him and told them to take him to the station house. However, this does not establish *when* in the interview Sullivan reviewed this photograph or instructed his fellow officers to take defendant to the station house (or when photographs were taken at the scene). Defendant, therefore, has failed to meet his appellate burden of affirmatively showing error based on this contention. (See *Lennane v. Franchise Tax Bd.* (1996) 51 Cal.App.4th 1180, 1189.) In any event, Sullivan's testimony indicates that he was generally attempting to determine what had occurred in order to resolve the situation, including regarding Santana's physical condition prior to the paramedics arrival about 10 minutes after Sullivan's arrival.

In short, Sullivan, in response to a 911 call, went to the scene of the incident and encountered a "very frantic," "extremely distraught" woman suffering from as yet unexamined injuries as a result of an attack that had occurred minutes before, prior to

police determining whether they had detained her alleged attacker, whether or not to arrest the person detained, and what medical attention Santana required. Santana like the victim in *Romero*, was “an agitated victim of a serious assault” (*Romero, supra*, 44 Cal.4th at p. 422) who spoke briefly with police about the attack and her injuries as the police ascertained what further steps to take to deal with the immediate situation. These circumstances objectively indicate that the emergency was not resolved entirely until after defendant was arrested *and* the paramedics determined that Santana had not suffered an injury that required further attention. Sullivan’s statements prior to this complete resolution were nontestimonial in nature and, therefore, properly admitted by the trial court.

3. *Santana’s Written Statement*

We agree with defendant that Santana’s written statement was testimonial in nature. However, we conclude its admission was harmless.

The record indicates that by the time Sullivan asked Santana if she wanted to prepare a written statement, the paramedics had left and Sullivan had notified the officers detaining defendant to take him to the police station, approximately a half an hour after the attack. Sullivan asked Santana if she “wouldn’t mind writing [her statement] down in her own words.” On the one hand, according to Sullivan, Santana was still “pretty shaky,” had a “very distraught look about her,” watery eyes, and “seemed uneasy.” However, Sullivan agreed during cross-examination that he provided a form to her “for potential use by her or others, if the matter later proceeded to court.” Among other things, Santana wrote, “I want to press charges,” and signed the statement under penalty of perjury. Given these circumstances, we conclude the primary purpose of this written statement was “to establish or prove some past fact for possible use in a criminal trial” and, therefore, was testimonial in nature. (*Cage, supra*, 40 Cal.4th at p. 984.) It should not have been admitted.

Nonetheless, the admission of this written statement was harmless regarding counts one and two, which alleged defendant had assaulted Santana and made a criminal threat against her. Santana’s 911 call statements, Sullivan’s testimony about her oral

statements to him and his observations of her, and Lynch’s testimony were strong evidence that defendant assaulted Santana. Santana’s written statement did not provide any new information regarding this assault. Santana’s written statement also essentially repeated the criminal threat that Santana orally told to Sullivan, i.e., her written statement indicated defendant said, “Bitch, I will kill you, talking bad about my kids,” while Sullivan testified Santana reported defendant said, “ ‘Bitch, talking bad about my kids, I’ll kill you.’ ” Therefore, we conclude the admission of Santana’s written statement was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.) In light of our conclusion, we have no need to, and do not, address the People’s argument that defendant forfeited any *Crawford* challenge under the forfeiture by wrongdoing doctrine.

II. *The Admission of Hearsay Statements in Phone Recordings*

Defendant argues the trial court erred in admitting hearsay statements by Santana in six recorded jail phone calls, all but one of which were with defendant, as well as statements by an unidentified Spanish speaker in the remaining call under the business records exception to the hearsay rule, Evidence Code section 1271, and to show a basis for defendant’s future course of conduct. The admission of Santana’s statements, defendant asserts, was prejudicial to defendant’s assault and criminal threat convictions (counts one and two) because these statements increased her credibility to the jury; the admission Spanish speaker’s statements were prejudicial to one of defendant’s convictions for count 12, for misdemeanor violation of a protective order, because it was the only evidence for this count. The People disagree with all of defendant’s arguments.

We agree with defendant that the court erred in admitting hearsay statements by Santana and the Spanish speaker for the truth of the matters asserted. We conclude the admission of Santana’s statements was harmless error, but conclude the admission of the Spanish speaker’s statement was prejudicial, requiring reversal of defendant’s conviction for count 12.

A. The Proceedings Below

1. Admission of the Challenged Phone Recordings

Deputy Sheriff Donald Garcia testified for the prosecution regarding the foundational requirements of the business records exception. Garcia, the custodian of records with regard to recording and extracting of inmate jail phone calls, testified that every jail call was run through a phone system and recorded. When he received a request from an outside agency, such as the district attorney's office, he determined whether there were any phone calls made within the identified time frame to the specified phone numbers. He then downloaded the phone calls and transferred them onto a CD. He personally prepared a CD for this case and gave it to the prosecutor.

According to Garcia, recorded calls are maintained and relied on in the regular course of business at the investigative services unit of the sheriff's department. He used his individual password to access the system, and the terminals were kept in secured areas behind locked doors. The calls on the CD were recorded at the time they were made, and he was confident the recordings were accurate. In his four years as an investigator, Garcia had never encountered a situation where a phone call had been tampered with, or where there was technical difficulty and only part of a phone call was recorded.

Based on Garcia's testimony and a line of cases cited to the court involving the admission of business records (see *People v. Ervin* (2000) 22 Cal.4th 48, 96-97 [jail record memorializing a prisoner's suspension of jail privileges]; *People v. Hove* (1999) 76 Cal.App.4th 1266, 1274 [probation officer's memorandum and attached Medi-Cal report]; *People v. Jones* (1998) 17 Cal.4th 279, 307-308⁴ [bank microfiche records showing someone had tried to withdraw money from two automated teller machines]; *Lopez v. Baca* (2002) 98 Cal.App.4th 1008⁵), the prosecution sought admission of the

⁴ The record mistakenly cited this case as "14 Cal.4th 279."

⁵ It is unclear why the prosecutor cited this case, since it indicates evidence was excluded at trial, which ruling was not challenged on appeal. (*Lopez v. Baca, supra*, 98 Cal.App.4th at pp. 1012-1015.)

phone recordings as a business record pursuant to Evidence Code section 1271. Although the prosecutor did not indicate how the prosecution intended to use the recordings, her statements regarding the accuracy of the recordings indicated her intention to refer to the contents of the calls themselves.

Defense counsel objected to the recordings' admission into evidence on several grounds. First, he argued they did not qualify under the business records exception rule for lack of foundation, that their authenticity had not been established, and that "the content has various levels of hearsay." He also objected specifically on Sixth Amendment and hearsay grounds to the admission of Santana's statements.

The trial court overruled the objections and admitted the recorded phone calls. The trial court stated there were "sufficient facts presented to the court that would lead to . . . a rational finding of fact that the tape recording is authentic." Regarding the Sixth Amendment and hearsay objections to the admission of Santana's statement, the court overruled them because the statements "explain the future course of conduct of [defendant]."

There were some redactions made of the recordings. The court instructed the jury of this fact, pursuant to a stipulation between the parties, including the instruction not to assume anything from the redactions, but to instead, "[j]ust take the contents for what they are." The court did not otherwise instruct the jury about any limitations in their use of the recordings. The jury listened to the six recordings and also was given a transcript of the calls. We now summarize representative portions of these calls in which matters related to defendant's case were discussed.

2. The Challenged Phone Recordings

a. December 9, 2009 Recording

Defendant called Santana and asked her what she was going to do. When Santana answered, "Not to talk to anybody," defendant said, "Okay, that's my girl." Defendant told her, "I'm going to beat this case man, I'll be out soon. You know I go to court Friday. What did the DA tell you? They didn't tell you nothing?" Santana responded, "I'm not talking to anybody, I told you, I don't answer phone calls when I see restricted, I

don't answer it." After defendant told her, "Just tell them to stop harassing you," Santana said, "I'm going to tell them I don't want nothing to do with it no more, I don't want no problem and I don't want to press charges, I just want to be left alone." Defendant explained to Santana, "[I]f I go to trial I won't be able to win my case if you're—only if you're not there." Santana responded, "I'll say I don't remember nothing."

b. December 11, 2009 Recording

Defendant brought up his court date in the following week. Defendant told Santana, "You should call the DA, you've got to call. I told you to write a letter but you didn't." Santana said, "I will tell them—I will tell them that I don't want nothing to do with this but I'm not going to lie. I'm not going to lie, I'm sorry, I'm not lying, not on paper." Defendant told Santana to call his attorney to tell him that she does not want to press any charges. Santana responded, "All right."

c. December 17, 2009 Recording

Defendant told Santana that if the district attorney was unable to serve her within 10 days, the judge would dismiss the case and said the district attorney would try to subpoena her starting the following day. Defendant told Santana to call his attorney to tell him that she did not want to have anything to do with the case. Santana said that when she called the district attorney, she planned to say, "Take me to court and I'm going to say I don't remember nothing, I plead the 5th because I don't remember." Defendant responded, "Exactly, that's all you've got to say babe, that's a good girl, now we're talking. Now I'm getting somewhere with you, all right." Santana also said that she was scared.

d. December 27, 2009 Recording

Defendant asked Santana, "Yea? You waiting for me to get out of here?" Santana responded, "Yes, David but I want—I'm scared, I'm afraid of you." Santana asked, "Please don't do that again to me David." She also said, "It's the hate in your eyes that doesn't go away." At the end of the conversation, Santana told defendant, "I love you too David but I'm afraid of you."

e. January 2, 2010 Recording

Santana said she was “stressing,” and told defendant, “I just hope nobody comes over here and tries to arrest me.” When Santana said that a subpoena was left in her mailbox, defendant told her to “rip it up” and throw it away. Defendant also said that she must be personally served with a subpoena for it to be valid. Defendant appears to instruct Santana to rip up a subpoena that she said had been left in her mailbox.

f. January 4, 2010 Recording

A Spanish speaker called Santana and indicated that he was calling on behalf of defendant. He told her that if she was personally served with a subpoena, she would have to go to court. He also told Santana to change her telephone number so that the district attorney would not know that she and defendant were talking to one another.

3. The Prosecution’s Use of the Recordings

As defendant points out, regardless of the court’s statement of the reasons for admitting the recordings, the prosecution referred to portions of Santana’s statements on these recordings to prove aspects of the assault and criminal threat charges against defendant.⁶ The prosecution argued Santana’s statements in some of the recordings that she would not lie, supported her credibility and that her statements in two of the recordings that she was scared of defendant supported the “sustained fear” element of the criminal threat charge.

B. Analysis

1. Admission of the Statements Was Error

Evidence Code section 1271 provides as follows: “Evidence of a writing made as a record of an act, condition, or event, is not made inadmissible by the hearsay rule when offered to prove the act, condition, or event if: [¶] (a) The writing was made in the regular course of a business; [¶] (b) The writing was made at or near the time of the act,

⁶ While defendant establishes he objected sufficiently to admission of the evidence, he does not otherwise indicate that he asked for limiting instructions or objected to the prosecution’s use of the evidence in closing argument. The People do not argue forfeiture, so we do not address this issue. Defendant, however, argues ineffective assistance of counsel.

condition, or event; [¶] (c) The custodian or other qualified witness testifies to its identity and the mode of its preparation; and [¶] (d) The sources of information and method and time of preparation were such as to indicate its trustworthiness.” We review a trial court ruling that a business record is admissible under an exception to the hearsay rules for an abuse of discretion. (*People v. Jones, supra*, 17 Cal.4th at p. 308.)

Defendant does not challenge that Garcia’s testimony was sufficient to establish the fact that the phone calls were made pursuant to the business records exception. Defendant also does not challenge the admissibility of his own statements (except to the extent he argues their admission was unduly prejudicial pursuant to Evid. Code, § 352). However, he argues that Garcia’s testimony was insufficient to establish the admissibility, under the business records exception, of the statements by Santana and the Spanish speaker in these recordings because neither of them were under any business duty to report the information they stated. We agree. As indicated by the cases defendant cites, recordings such as these involve questions of multiple hearsay, each level of which must be eligible for an exception. (*Alvarez v. Jacmar Pacific Pizza Corp.* (2002) 100 Cal.App.4th 1190 (*Alvarez*); *People v. Baeske*, (1976) 58 Cal.App.3d 775 (*Baeske*); and *People v. Ayers* (2005) 125 Cal.App.4th 988 (*Ayers*)).

In *Alvarez*, the trial court ruled that police computer dispatch logs for 911 calls, sought to be admitted under the business records exception, involved inadmissible multiple hearsay. (*Alvarez, supra*, 100 Cal.App.4th at pp. 1203-1204.) The appellate court agreed with the trial court, pointing out, as is true in this case, that “[t]he analytical flaw in plaintiffs’ contention that the trial court erred in disallowing the records is its failure to recognize and address the fact that the records were *multiple* hearsay. That is, the records were offered to prove two points. The first is that the 911 calls were placed to the LAPD. The second is that a particular action or crime was taking place . . . as reflected in the statements made to the 911 operator by the individual(s) who placed the phone calls. When multiple hearsay is offered, an exception for *each* level of hearsay must be found in order for the evidence to be admissible.” (*Id.* at pp. 1204-1205.)

In *Baeske*, defendant sought to admit a police report that contained the contents of a call by a civilian witness to police stating that a vehicle involved in the crime had a license plate number that was different than the number reported by the victim. (*Baeske, supra*, 58 Cal.App.3d at pp. 779-780.) The appellate court ruled the report was inadmissible hearsay because the civilian witness “was not a public employee with any duty either to observe facts correctly or to report her observations accurately to the police department.” (*Id.* at p. 781.)

In *Ayers*, forms from a shelter containing hearsay statements by the victim of spousal abuse were admitted into evidence under Evidence Code section 1271. (*Ayers, supra*, 125 Cal.App.4th at pp. 992-994.) The appellate court ruled the trial court had improperly admitted these statements for the truth of the matter asserted, since the employees who completed the forms did not have personal knowledge of the facts the victim asserted, and the victim had no official duty to observe and report the relevant facts. The court reasoned that the forms were “analogous to police reports, probation reports, psychiatric evaluations and emergency call logs, none of which qualify as business records because they contain hearsay statements made by participants and bystanders and inadmissible opinions and conclusions.” (*Id.* at p. 994.)

The People respond to the reasoning and facts of this case law with a convoluted argument that these cases involved writings, not recordings whose accuracy was established, and that Garcia, not Santana or the Spanish speaker, was the custodian of the recordings. They cite as support for the admissibility of the recordings not the cases cited by the prosecutor below, but *People v. Parker* (1992) 8 Cal.App.4th 110, 117. *Parker* provides no more support than the cases cited by the prosecution. It held out-of-court statements by a criminalist working in a laboratory were admissible under the official records exception to the hearsay rule (Evid. Code, § 1280). (*Parker*, at pp. 113-117.) It does nothing to address the issue raised by defendant: that the statements by Santana and the Spanish speaker were hearsay, for which no exception was established. The People do not explain, and we do not see any reason, why the fact that the statements were made

in audio recordings renders these statements distinguishable from the reasoning and facts in *Alvarez, Baeske, and Ayers*.

The People do not defend the trial court’s only stated rationale for the rejection of the hearsay objection—that being that the recordings were admissible because they explained “the future course of conduct of [defendant].” The People point to nothing in the record, nor have we found anything that supports the court’s rationale. We are not aware of any argument by the prosecution along these lines and, as we have discussed, it ultimately used some of the statements made in closing argument for the truth of the matters asserted. The trial court abused its discretion by admitting the hearsay statements of Santana and the Spanish speaker in these phone recordings.

2. The Error in Admitting Santana’s Statements Was Harmless

As defendant acknowledges, we review the court’s errors under the reasonable probability standard articulated in *People v. Watson* (1956) 46 Cal.2d 818, 837. We conclude admission of Santana’s statements was harmless under this standard in light of the very strong evidence of defendant’s guilt regarding the assault and criminal threat charges.

There was ample support for defendant’s assault and criminal threat convictions. From the moment Santana called 911, she was compelling and consistent in her statements that defendant had punched and choked her moments before. All of the corroborating evidence supported her account, including Sullivan’s and Lynch’s evaluation of her condition, the marks on her face and neck, and the clothes that smelled of urine. Some of defendant’s statements in the phone recordings to Santana were also very suggestive that he was guilty as charged.

We also reject defendant’s argument that Santana’s statements in the phone calls indicating that she was scared were necessary to establish she had “sustained fear” of defendant’s threat to kill her, an element of the crime (§ 422, subd. (a)).⁷ Although the

⁷ The threat must be one that “on its face and under the circumstances in which it is made, is so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the

prosecutor did refer to them in closing argument, Santana's phone statements were inconsequential in light of the evidence that defendant made his threat in the course of punching and choking Santana, the latter with enough force to leave an impression of his hand on her neck, and that it caused Santana to immediately soil herself. Santana, although she did not expressly mention the threat to the 911 operator about five minutes after the attack, indicated that defendant had gone "crazy" on her, and the transcript of the call plainly demonstrates her fear that defendant was lurking outside. Sullivan reported that Santana was "very frantic," "tearful and extremely distraught" as she related to him what had occurred 10 to 20 minutes after the attack, which account included defendant's threat to kill her. These circumstances were sufficient to meet the "sustained fear" element of the charge, as indicated by our own research. (*People v. Allen* (1995) 33 Cal.App.4th 1149, 1156 [concluding "the word 'sustained' . . . means a period of time that extends beyond what is momentary, fleeting, or transitory," and that 15 minutes of fear may be more than sufficient to constitute "sustained fear"].)

3. Defendant's Conviction for Count 12 Must Be Reversed

Defendant argues the Spanish speaker's statements were prejudicial regarding defendant's conviction for count 12, for misdemeanor violation of a protective order pursuant to section 166, subdivision (c)(1), which charge was based on the January 4, 2010 phone call. We agree. The People concede this was the only evidence in support of defendant's conviction for count 12. Therefore, it is reasonably probable he would have obtained a better result if the evidence had been excluded. (*People v. Watson, supra*, 46 Cal.2d at p. 837.) Therefore, defendant's conviction on this count must be reversed.

4. Defendant's Remaining Arguments

Defendant makes three additional arguments of prejudicial error, none of which are persuasive.

threat, and thereby causes that person reasonably to be in sustained fear for his or her own safety." (§ 422, subd. (a).)

a. Section 352

First, defendant argues the trial court prejudicially erred in admitting into evidence the content of the December 27, 2010, January 2, 2010, and January 4, 2010 phone calls under Evidence Code section 352. Defendant focuses not only on statements by Santana and the Spanish speaker, but on remarks he made that purportedly involved inadmissible propensity evidence, “tend to do nothing more than cast [defendant] in a bad light,” and only show him “to be controlling, offensive, and out to beat the system.” Defendant argues the content of these calls was irrelevant to the charges in this case and unduly prejudicial, and that it is reasonably probable he would not have been convicted of the assault and criminal threat charges if these phone calls had been properly excluded.

We disagree, if only because, as we have already discussed, the evidence of defendant’s guilt regarding counts one and two was very strong and, therefore, the admission of the phone calls was harmless error under the “reasonable probability” test articulated in *People v. Watson, supra*, 46 Cal.2d at p. 837.

We also conclude there was no error regarding the admission of defendant’s statements in these phone calls. The trial court has broad discretion to determine the admissibility of evidence pursuant to Evidence Code section 352, and its exercise of this discretion “ ‘must not be disturbed on appeal *except* on a showing that the court exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice.’ ” (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124-1125.) As the People point out, defendant was charged in counts 10 and 11 with a violation of section 166, subdivision (c)(1), for the willful and knowing violation of a protective order. Defendant’s statements in the phone calls were relevant to meet this standard.⁸ Defendant does not establish that his statements were unduly prejudicial in light of these charges. He argues that his occasional use of curse words and offensive

⁸ The trial court stated for the record that it offered in chambers to further redact the phone recordings in order to save time, but that defense counsel “wanted the entirety of the tapes to come in, and that’s why we’re playing the entirety of these tapes.” The People do not assert the court’s statement as a basis for rejecting defendant’s argument, so we do not discuss it further.

expressions had no relevance and put him in a “bad light.” Defendant does not establish that his trial counsel raised these issues specifically. In any event, we conclude these statements were not unduly prejudicial in light of the relevance of the phone calls under an abuse of discretion standard. Even assuming error, it certainly was not prejudicial in light of the strong evidence of his guilt.

b. *Ineffective Assistance of Counsel*

Second, defendant argues that he received ineffective assistance of counsel because his trial counsel failed to request limiting instructions regarding Santana’s statements in the phone calls or object to the prosecutor’s references to them in closing argument. He contends this violation of his constitutional rights was prejudicial to his conviction of counts one and two. We disagree.

“ ‘To establish a violation of the constitutional right to effective assistance of counsel, a defendant must show both that his counsel’s performance was deficient when measured against the standard of a reasonably competent attorney and that this deficient performance caused prejudice in the sense that it “so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.” [Citations.] If a defendant has failed to show that the challenged actions of counsel were prejudicial, a reviewing court may reject the claim on that ground without determining whether counsel’s performance was deficient.’ ” (*People v. Sapp* (2003) 31 Cal.4th 240, 263; *Strickland v. Washington* (1984) 466 U.S. 668.)

“In determining whether an attorney’s conduct so affected the reliability of the trial as to undermine confidence that it ‘produced a just result’ [citation], we consider whether ‘but for’ counsel’s purportedly deficient performance ‘there is a reasonable probability the result of the proceeding would have been different.’ [Citations.]” (*People v. Sapp, supra*, 31 Cal.4th at p. 263.)

We do not determine whether counsel acted in a deficient manner because, as we have indicated, any harm resulting from the admission of Santana’s statements was harmless under the “reasonable probability” standard for evaluating whether the evidence

was prejudicial. Therefore, we reject defendant’s ineffective assistance of counsel argument.

c. Cumulative Error

Finally, defendant argues the cumulative effect of the errors made at trial requires reversal. As the People correctly point out, the “litmus test” for cumulative error “is whether defendant received due process and a fair trial.” (*People v. Kronemyer* (199) 189 Cal.App.3d 314, 349.) “Accordingly, we review each allegation and assess the cumulative effect of any errors to see if it is reasonably probable the jury would have reached a result more favorable to defendant in their absence.” (*Ibid.*) In light of our conclusions herein that most of defendant’s arguments lack merit, and that the errors made by the trial court in erroneously admitting the statements by Santana in her written statement and the recorded phone calls, and by the Spanish speaker in the January 4, 2010 recorded phone call, were harmless, we reject defendant’s cumulative error claim.

DISPOSITION

Defendant’s conviction on count 12, for misdemeanor violation of a protective order pursuant to section 166, subdivision (c)(1), is reversed. Otherwise, the judgment is affirmed. The trial court shall prepare an amended abstract of judgment to reflect this disposition and forward a certified copy of it to the appropriate authorities.

Lambden, J.

We concur:

Kline, P.J.

Haerle, J.