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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

RUSTIN WILLIAM BANGHAM,

Defendant and Appellant.

H038975

(Santa Clara County

Super. Ct. No. C1115284)

The Sixth Amendment's Confrontation Clause bars admission of a witness's unfronted testimonial statements in criminal trials. But when a defendant engages in wrongdoing intentionally causing the witness to be unavailable to testify, the doctrine of forfeiture by wrongdoing provides an exception to this bar. (*Giles v. California* (2008) 554 U.S. 353 (*Giles*)). This case concerns the application of that doctrine to statements of a witness who refused to testify after a court-appointed attorney advised her not to testify.

Police arrested defendant Rustin William Bangham for two alleged incidents of domestic violence against his girlfriend, Rebecca Maxim. After defendant was taken into custody, Maxim inculcated him in statements to the police. But she also stated she would not testify, and she refused to cooperate with law enforcement. Defendant subsequently communicated with Maxim from jail through phone calls and letters. He repeatedly

pressed her to recant her statements and proclaim his innocence to the prosecutor and the court.

Although defendant was represented by the public defender, he consulted separately with a private lawyer—Dennis Alan Lempert—who advised him the prosecution would be unable to convict him if Maxim did not testify. Lempert proposed to represent Maxim, whereupon defendant relayed the advice to Maxim and arranged for her to meet with Lempert. Lempert then advised Maxim not to testify. But after defendant and Maxim failed to pay Lempert’s fees, he no longer represented her.

When the prosecution called Maxim to testify at the preliminary hearing, the trial court appointed counsel from the Alternate Defender’s Office to represent her. The alternate defender independently advised Maxim not to testify, whereupon she invoked the Fifth Amendment and refused to testify notwithstanding an offer of immunity. At trial, Maxim once again refused to testify. The trial court found her in contempt but imposed no penalty. Under the doctrine of forfeiture by wrongdoing, the court admitted into evidence Maxim’s out-of-court statements, including inculpatory statements she made to police.

The prosecution charged defendant with six counts: Counts One and Two—inflicting corporal injury on a cohabitant; Count Three—criminal threats; and Counts Four, Five, and Six—attempting to dissuade a witness. The jury found defendant guilty on Counts One, Five, and Six, but acquitted him on Counts Two, Three, and Four. On Count Two, the jury found him guilty of the lesser included offense of misdemeanor battery on a cohabitant. In a bifurcated trial, the court found true two prior serious felony convictions, nine prior strike convictions, and a prior prison term. The court sentenced defendant to a total term of 109 years to life in prison.

Defendant raises numerous issues on appeal. Chief among them are claims that the admission of Maxim’s out-of-court statements violated the Sixth Amendment and state law hearsay rules. We hold the admission of Maxim’s testimonial statements

violated the Confrontation Clause because the prosecution failed to establish by a preponderance of the evidence that defendant caused Maxim to be unavailable to testify. Because the Attorney General cannot show this error was harmless beyond a reasonable doubt, we will reverse the judgment. We do not reach defendant's remaining claims.

## **I. FACTUAL AND PROCEDURAL BACKGROUND**

### *A. Facts Underlying the Charges and Evidentiary Rulings*

In 2011, defendant, who was then 42 years old, lived in various hotels in Milpitas with Maxim, his girlfriend of 11 months.<sup>1</sup> Defendant also maintained a relationship with a childhood friend, Dineen "Nina" Anderson—a frequent cause of arguments between defendant and Maxim.

The charged conduct occurred in three time periods. Count One alleged a domestic violence incident occurring on June 26. Counts Two, Three, and Four concerned a second alleged domestic violence incident on September 4.<sup>2</sup> Police took defendant into custody on September 4, but he and Maxim communicated through letters and jailhouse phone calls during the pretrial period. Defendant's conduct during this period formed the basis for Counts Five and Six—attempting to dissuade a witness—as well as the basis for the trial court's ruling of forfeiture by wrongdoing.

#### *1. The June 26 Domestic Violence Incident*

On the morning of June 26, Milpitas Police Officer John Muok saw a pickup truck blocking a handicapped spot in the parking lot of the Executive Inn hotel. As Officer Muok was placing a citation on the windshield of the truck, he saw Maxim lying asleep inside the truck. After he banged on the door and window, Maxim awoke and sat upright. Officer Muok saw dried blood around her mouth, and her lip appeared to be cut.

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<sup>1</sup> All dates refer to 2011 unless otherwise stated.

<sup>2</sup> We refer to the September 4 incident as an "alleged domestic violence incident" because the jury acquitted defendant on the charges related to that incident.

After Maxim opened the door, Officer Muok asked her if she needed medical attention; she said she did not.

Maxim told Officer Muok she had been at a local bar called the Galaxy the night before, where another woman had attacked her in the parking lot. Officer Muok sought details, but Maxim said she could not recall details because she was intoxicated at the time of the attack. Maxim said she had a “major headache,” whereupon Officer Muok requested medical assistance, and Maxim was taken to the hospital.

After Maxim was taken to the hospital, police found defendant and another man—Ryan Runswick—asleep in a room at the Executive Inn. Police separated the two men and Officer Muok questioned them. Both men gave the same version of events that Maxim gave Officer Muok. Officer Muok examined the hands of both men, but saw no injuries.

At the hospital, Maxim told the treating physician she had been hit by another woman outside a bar. Maxim had suffered a laceration to the inside and outside of her lower lip, requiring nine sutures to repair. She had some swelling over her right brow, and some abrasions on her face. Her injuries were consistent with being assaulted or punched. She tested positive for alcohol, methamphetamines, and amphetamines. Officer Muok re-interviewed Maxim at the hospital, and she again stated that a woman had attacked her at the bar the night before.

## *2. The September 4 Alleged Domestic Violence Incident*

On September 4, defendant and Maxim were staying at the Best Value Inn, another Milpitas hotel. At around 1:15 a.m., Maxim called 911 and reported that defendant had attacked her. An audio recording of the call was played for the jury.

### *a. The 911 Call*

Early in the call, a male voice was audible in the background. Maxim told the dispatcher that defendant had just taken her car keys and had fled from the hotel room. After eliciting a physical description of defendant, the dispatcher asked Maxim whether

she needed medical attention. Maxim said she did not. Maxim said she did not think she was injured, but that defendant had hit her earlier, and that he had just hit her again.

Maxim said defendant had drunk a beer earlier, but she did not know if defendant had been using drugs that night. She said that, earlier in the day, defendant slapped her in the face, kicked her in her ribs, pushed her several times, and tried to choke her. She said he also threatened to chop her head off and bury her in the hills. When the dispatcher asked why she did not call earlier, Maxim stated that she loved defendant and did not want to see him get in trouble. After taking Maxim's name and phone number, the dispatcher told Maxim that the police had detained defendant.

The dispatcher again asked Maxim if she had suffered any injuries. Maxim said defendant had "hurt my thumb, kinda dislocated it," and that she had thrown her back out. She said she also had a bump on her head and some bruises and red marks. She said defendant had slapped her in the face, choked her, pushed her, and grabbed her by the neck, throwing her onto the bed. The dispatcher then repeated that the police had detained defendant and would soon contact her.

b. *Officer Jamison's Interview of Maxim*

Milpitas Police Officer Tyler Jamison and his partner were dispatched in response to Maxim's 911 call. As the police arrived at the hotel, they spotted defendant driving out of the parking lot, whereupon they detained him. Five or ten minutes later, Officer Jamison questioned Maxim in the hotel room while his partner detained defendant. Maxim was crying hysterically, and she appeared scared and startled. She was complaining of back and neck pains, so Officer Jamison requested medical assistance.

Officer Jamison then questioned Maxim about the incident. She gave the following account: Maxim and defendant had been dating for about 11 months, and they had been hopping from hotel to hotel with each other. In the afternoon of the day before, they got into an argument, and defendant told her to get off the bed. She did not get off

the bed, so defendant kicked her in the thigh. After arguing some more, defendant left the hotel room.

Maxim then said that defendant returned to the hotel room at around 12:45 a.m., shortly before the 911 call. She said they began arguing again, and defendant threatened to chop off her head and bury her in the hills. As they continued to argue, defendant spat in her face. He pushed her down onto the bed, and got on top of her. He started choking her, "squeezing really hard," for about five seconds. Maxim then attempted to pick up the hotel phone to call 911, but defendant hung the phone up and pulled the phone cord out of the wall. At that point, defendant grabbed the phone, and hit Maxim on the head with it. He then left the hotel room.

Officer Jamison touched the back of Maxim's head and felt a golf-ball size knot. He also saw some dried blood on the bed sheet. Maxim said the blood came from an earlier incident in which defendant slapped her in the face, causing her nose to bleed. Officer Jamison did not observe any injuries to Maxim's thigh or neck, and she did not have any bruises or redness on her face. He did not observe any injuries consistent with a dislocated thumb or being kicked in the ribs.

Officer Jamison then questioned Maxim about the June 26 incident. Maxim told Officer Jamison she had lied to Officer Muok when she told him she had been attacked by another woman at a bar. She said that it was defendant who had punched her and beat her up. Officer Jamison later relayed this information to Officer Muok.

Officer Jamison also examined defendant, but did not observe any injuries on him. Defendant's clothes were not torn or disheveled in any manner. Police photographs of the hotel room showed it to be in an orderly condition; there was nothing strewn about or broken.

*c. Officer Muok's Re-Interview of Maxim on September 7*

After Officer Muok heard about the September 4 incident from Officer Jamison, Officer Muok decided to re-interview Maxim in a recorded telephone call on September 7. At trial, an audio recording of the phone call was played for the jury.

Officer Muok began the call by identifying himself as the officer who had found Maxim in the truck on June 26. He then asked Maxim about her statement to Officer Jamison on September 4 and whether she had previously lied to him (Officer Muok) about the June 26 incident. Maxim responded, "Yeah."

Maxim stated she was not afraid of defendant, and that she did not want him to go to jail because she believed he needed drug treatment. She explained that defendant had been a "wonderful, sweet, caring, just awesome guy" until he started injecting methamphetamine, which caused him to "change into a completely different person." She repeated that she did not want defendant to go to prison because she believed he would not get the drug treatment he needed in prison.

Regarding the incident on June 26, Maxim stated that she, defendant, Anderson (defendant's female friend), and Runswick (the man sleeping in the room at the Executive Inn) had been at the Galaxy bar drinking alcohol the night before. Maxim had at least four double shots of tequila, so when they left the bar, she was "slammed." She then stated: "I guess when we got to that Executive Inn I don't even remember what happened. I remember being in Rusty's truck and I think I told him to take me home. And—and I was having issues about [Anderson]. And the next thing I know he punched me right in the face." She said defendant punched her "twice that I remember," and that she had two concussions and bruised ribs. She continued to explain that defendant had been "great" toward the beginning of their relationship, but that once he started injecting methamphetamine, "a hair trigger sets him off."

Maxim then gave the following account of the September 4 incident: Defendant had been gone all day trying to find money to keep paying for the hotel room. He had

been doing drugs that day and the night before. They had been arguing on the phone about how to pay for the room, and when defendant arrived back at the hotel, he was “amping up for an argument.” Defendant wanted the bed to himself, and he asked Maxim to sleep elsewhere. Defendant wanted Anderson to come to the hotel and “intervene,” but Maxim refused, “Because I can’t stand her.” Defendant then threatened to call the police. The fight escalated until defendant began slapping Maxim and pushed her down onto the bed. He put his arm around her throat, and when she tried to grab the telephone, he ripped it out of the wall. Maxim then called 911 from her cell phone, at which point defendant left the room. Maxim stated that he had also slapped her in the face earlier that day.

Maxim again stated that she did not want to press charges because she believed defendant needed help getting off drugs. She said she had called the prosecutor and told him she did not want to press charges. Officer Muok then informed Maxim, “But you know, you know, you’re gonna have to go to court and testify [*sic*] all this, right?” Maxim responded, “Yeah, but not if I don’t press charges, I can refuse, can’t I?” Officer Muok told Maxim, “that’s your choice,” but added that he thought defendant would kill her.

d. *Roberta Maxim*

Roberta Maxim, Rebecca Maxim’s mother, testified for the prosecution.<sup>3</sup> Roberta had picked up Maxim from the hospital after the June 26 incident. Maxim had black eyes, her lip was split, and she had bruises on several parts of her body. Maxim said “a couple of big women beat her up in a parking lot” at the Galaxy Bar. Roberta was not convinced and asked Maxim whether defendant was responsible. Maxim swore that defendant did not hurt her, but Roberta did not believe Maxim. Roberta saw defendant

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<sup>3</sup> We refer to Roberta Maxim as “Roberta” to avoid confusion. We intend no disrespect.

later that day; his explanation of Maxim's injuries was consistent with Maxim's explanation.

After the September 4 incident, Maxim told Roberta that defendant had "hit her with a lamp or something, or thrown a lamp at her, and then tried to choke her with the telephone cord." Other than being choked with the telephone cord, Maxim did not say anything else about being strangled or choked. Roberta did not see any injuries on Maxim. Maxim also told Roberta that defendant was the one who hurt her in the June 26 incident. But Maxim has since told Roberta that that was not true, and Maxim said again that she was jumped at a bar by two women.

Roberta testified that Maxim has stated several different versions of what happened between her and defendant. At the time of her testimony, Roberta did not know what to believe. She did not know if defendant hurt Maxim, or if Maxim made the entire thing up. She testified that when Maxim said defendant hit her, she was upset with him. When she was not upset with defendant, she said he did not hurt her. Maxim gets very angry when she does not get attention from defendant. She wants to be at the center of defendant's world. Roberta also testified that when Maxim does not get the attention she desires from defendant, she gets angry and claims he hurts her. Maxim also has a drug problem. Sometimes she is not in her right mind, and she says things that are not true, which makes it difficult for Roberta to trust what she says.

Roberta testified about a prior incident between defendant and Maxim. Defendant and Maxim had been arguing. Maxim was throwing clothes at defendant and trying to push him out of the room. When Roberta walked in the room, defendant had a clenched fist raised, but he was nowhere near Maxim.

Roberta testified that defendant was "the greatest guy in the world" when he took his medications, but added: "When he goes off of them he gets angry at a lot of things." Roberta never saw defendant exhibit any physical violence towards Maxim.

After defendant's preliminary hearing, around February 24, 2012, the prosecutor contacted Roberta and played her a recording of defendant talking with another woman over the jailhouse phone. In the call, defendant told the woman that Maxim had threatened to call the police and that she had hit herself on the head with a telephone. Roberta told Maxim about the phone call, but Maxim was still insistent that she would refuse to testify against defendant.

e. *William Freitas*

William Freitas, who had previously dated Maxim, testified for the defense. Freitas and Maxim first met as coworkers in 1986. Freitas started dating Maxim after his wife died in 2002. The relationship between Freitas and Maxim "started going bad" around 2002 or 2003, whereupon Freitas broke up with Maxim and started dating another woman. In 2003, Maxim came to Freitas' house and threatened to kill herself. She grabbed a knife and tried to slice her wrists. After another incident in 2004, Freitas got a restraining order against Maxim. Maxim broke his leg and fractured his hip, requiring a titanium rod extending from his knee to his pelvis and a second rod in his hip.

Maxim threatened to plant drugs in Freitas' apartment. She made false allegations against Freitas and threatened to call the police all the time, but she never actually called the police.

In January 2006, Maxim stole \$12,000 from Freitas by using his debit card information. She also stole his deceased wife's wedding rings. Maxim pleaded guilty to felony theft and violating the restraining order.

On one night in April 2006, Maxim called Freitas 45 or 50 times and left voicemail messages threatening to kill him and his current girlfriend. In several of the messages, Maxim threatened to break into his house, plant narcotics, and call the police. The tone of the messages alternated. In some of the messages, Maxim was talking calmly and lovingly; in others, she was yelling hatefully at Freitas. When Freitas arrived home that evening, Maxim was parked in front of his house waiting for him. Freitas

turned around and drove away, but Maxim followed him while driving close behind him and honking her horn. Freitas testified that this was something that “happened every once in a while.” Later that evening, the police found Maxim parked at the end of Freitas’ driveway. Maxim told the police that Freitas had drugs hidden in several places in his house. Freitas gave police consent to search his house, but they found no drugs. Police saw that one of the kitchen windows had been broken, and it appeared that someone had climbed through the window. Police took Maxim into custody for violating the restraining order.

In February 2007, while the restraining order was still in effect, Freitas came home and found Maxim sitting on a couch in his living room. Maxim was sitting in the dark with a knife. She grabbed Freitas’ keys and cell phone off the kitchen counter. When Freitas tried to get his keys from her, she stumbled and hit her head on the counter, injuring her face. The Los Gatos police were then called to the residence.

At defendant’s trial, a Los Gatos officer testified about the incident as follows. When the police arrived at Freitas’ house, Maxim was hiding in the closet. She had knife injuries on her wrists, and bruising around her right eye. Maxim claimed that the injury to her face was caused when Freitas put her in a head lock and rammed her head into the wall. Freitas told police he was trying to get his phone and keys from Maxim when she slipped and hit her head on a table. Police took them both into custody. At the police station, Maxim recanted her explanation of the injury and gave a statement consistent with Freitas’ statement. Maxim said she lied because she was upset at Freitas for calling the police on her.

### *3. The In-Custody, Pretrial Period*

Defendant remained in custody after his arrest on September 4. However, he and Maxim engaged in numerous communications. These included dozens of telephone conversations held between September 8 and the start of defendant’s preliminary examination in December. The phone calls, initiated by defendant at the Santa Clara

County Main Jail, were automatically recorded, and the audio was entered into the record. (People’s Exhibits 11, 11A-11Z, 11AA, 11DD, 11QQ.) Some, but not all, of the calls were played for the jury. Defendant also called Anderson from jail on numerous occasions. Maxim frequently became enraged at defendant for calling Anderson before calling her.

Defendant and Maxim also communicated through numerous handwritten letters. (People’s Exhibits 11-18; Defense Exhibits L-T, LA-LT.) Not all of Maxim’s letters were actually mailed to defendant. On February 9, 2012, police executed a search warrant on Maxim’s residence and seized several letters she had addressed to defendant but never mailed.

a. *September 2011*

The first phone call between defendant and Maxim occurred on September 8, four days after defendant’s arrest. Early in the call, defendant stated: “I’m so sorry this happened and I’m so sorry I pushed you.<sup>[4]</sup> I panicked ‘cause [Anderson] was coming down and, you know, but God you can’t do this to me though. This could put me away for life.” Maxim responded: “I know and I tried to talk to the DA today and that cop from the—that Executive Inn, you know the one where all that other shit happened, he called and we talked about all that. And I don’t know if he called that DA, but now the DA’s fucking like got a hard-on for you.”

Defendant then urged Maxim to recant, even if it meant she would be put in jail for lying to the police:

“[DEFENDANT:] [Y]ou got to do a couple of days for lying baby. You know what I mean? I’m worth that; right?”

“[MAXIM:] I’m not—I’m not doing it—yeah, but I’m not—they’re not going to—

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<sup>[4]</sup> Defendant later apologized for “pushing” Maxim to call the police.

“[DEFENDANT:] I’m just saying if it comes down to that. Because [Anderson] said that you couldn’t recant everything because they said that they would put you in jail.

“[MAXIM:] No, they didn’t say that. They didn’t tell me they were going to put me in jail.

“[DEFENDANT:] Well that’s what I was told that—that you would—if you recanted everything. You didn’t recant everything?

“[MAXIM:] Yeah, I—I told—I told them I said—well I told the DA, I said look. I said um, ‘We were both fucked up.’ And uh, I said, ‘We’d been arguing and some things were said.’ I said, ‘It’s just as much as my fault as his.’ I said, ‘So I exaggerated about you know everything.’ ”

Later in the call, defendant again urged Maxim to recant:

“[DEFENDANT:] [I] don’t care if what—if you got to recant completely. And then if they tell you look uh, we’re going to get you for lying and that, you know, it’s better to just do a couple days then [*sic*] take me down for life, you know?

“[MAXIM:] It won’t be a couple days for me, Rusty, though. If I violate my probation, I get two years so. . .

“[DEFENDANT:] All right. Well you—you exaggerate. We were high. We were high and exaggerated it—

“[MAXIM:] Yeah.

“[DEFENDANT:] —that’s all.

“[MAXIM:] That’s what I’m going to say, that’s exactly what I’m going to say.

“[DEFENDANT:] You know but I never put my hands—I never put my hands on you and I never threatened to cut your head off.

“[MAXIM:] Yeah.”

On September 9, Maxim handwrote an eight-page letter to defendant stating, among other things, “once you find out who the judge is I need his name & address so I can write him a letter. I’m gonna write the DA but the guy has it in for you. [. . .] I told

him I would not press charges or testify against you and I think he thinks I will change my mind. But he doesn't know how much I love you and how sorry I am that I took things this far. I shouldn't have said that you wanted to take me to the hills to kill me. I should have told them the truth & that you just wanted to get me somewhere so I wouldn't get us kicked out of our room with my arguing. I was just so hurt & angry that you said you had talked to the police about me that I figured you didn't care about us anymore. The blood they found on the pillow was from the scratch on my arm from shaving and the bruise on my arm is from when you tried to put my purse outside and I was trying to grab it from you."

Defendant called Maxim twice on September 10. Maxim told defendant about her eight-page letter, which was apparently forthcoming at the time: "But um, the letter that I'm sending you, you should—it—I clarified some of the things, so you might want to show it to your attorney." In an argument about Maxim's communications with the prosecutor, defendant stated: "Look here's the truth, the fact is, I didn't put my fuckin' hands on you and you hit yourself with the phone that night. Did you not?" In response, Maxim threatened to hang up.

Defendant called Maxim again on September 11. They argued about defendant's relationship with Anderson, whereupon defendant accused Maxim of threatening to go to the prosecutor:

"[DEFENDANT:] I called you to say, hello. And the first words I hear is what's up with baby, now that you've got [Anderson] and fuckin' blah-blah—you know, and then if I don't conform to you, you threaten me with [ . . . ] the DA again.

"[MAXIM:] I already talked to the DA, that's why he dropped it against you, by the way.

"[DEFENDANT:] Well, I'm sure that's a big part of it. What do you want me to do? You want me to erect a shrine to you? You shouldn't've [*sic*] called, you shouldn't've called in the first place.

“[MAXIM:] Yes, I should have, I was scared.

“[DEFENDANT:] Oh come on, you shouldn’t’ve [*sic*] called in the first place.

“[MAXIM:] No, you should have fuckin’ kept your hands off me. Is what (inaudible).

“[DEFENDANT:] Oh give—I didn’t put my hands on you. Would you stop it.”

Defendant told Maxim he would have to say unfavorable things about her in his defense, whereupon Maxim reacted negatively:

“[DEFENDANT:] I said that they might bring things up about why I’m in jail and I might have to say things that you won’t like.

“[MAXIM:] Well, why don’t you try backing me up and, and—

“[DEFENDANT:] Backing you up? Becky? Backing you up? You called the police on me.

“[MAXIM:] Yeah, I did.

“[DEFENDANT:] And you hit yourself in the head with the phone.

“[MAXIM:] And you slapped me across the face.”

Defendant was arraigned on September 12. Defendant called Maxim to express his dismay. She stated that she would refuse to testify, but defendant again urged her to recant:

“[DEFENDANT:] They arraigned me on all your charges and I’m washed up.

“[MAXIM:] They, they can’t if I don’t testify.

“[DEFENDANT:] “Uh, they can. You’d have to recant everything. That means everything.

“[MAXIM:] I did.

“[DEFENDANT:] No, everything.”

Maxim stated that she would write to the judge, but defendant insisted that would not be sufficient:

“[MAXIM:] I’m gonna write a letter to the judge.

“[DEFENDANT:] No, no, it can’t be a letter. It needs to be a complete recant.

You know, just—

“[MAXIM:] I’m gonna tell him that.

“[DEFENDANT:] Complete everything.

“[MAXIM:] I know baby.

“[DEFENDANT:] Even if they threaten you with jail time.

“[MAXIM:] Oh, then so I have to [*sic*] jail for two years to get you out?

“[DEFENDANT:] No, you wouldn’t go to jail for two years.

“[MAXIM:] Yes, that’s what they—that’s what they told me.

“[DEFENDANT:] Look, all I’m saying is that you’d have to recant completely.

Otherwise, I’m washed up.”

Defendant then promised Maxim that if she recanted and raised the possibility of her testifying, he would stay with her forever:

“[DEFENDANT:] The only way is a total recantation. Or to say that you’ll get on the stand and you’ll deny it all.

“[MAXIM:] I will, I will Rusty.

“[DEFENDANT:] Becky, if you ever—if you ever loved me, if you ever loved me.

“[MAXIM:] You know I love you. I love you more than anything.

“[DEFENDANT:] If you save my life, I will stay with you forever, I promise.

“[MAXIM:] I don’t believe that for a minute. But I’ll see what I can do.

“[DEFENDANT:] No, it’s not do what you can—Save my life Becky, please.”

Maxim authored another letter to defendant that day. She promised to write to the prosecutor and the judge explaining the statement she gave to Officer Muok on the telephone concerning the June 26 incident: “I’m gonna write a letter to the Judge and the DA. That cop that was there the night I got jumped got me so worked up that I ended up saying it was you instead of those chicks just because he had me convinced that you’re

out to kill me when you didn't lay a hand on me except to keep me from hurting myself. We were both so drunk that I just went overboard & told them things that had a little spin on it." As to the September 4 incident, she wrote that she had only called the police on defendant because he had called the police on her first, and she again stated that she would refuse to testify: "When you said you talked to [the police] I thought I'll show you and called 911. What an idiot! You have to make your attorney see that. I will not testify against you ever so they will only have what the officers said I told them and I was lit but I told them I only had one beer. I wasn't even crying so I was just trying to get back at you for saying you talked to [the police]. We need to get away from all this mess once you're free. Well [*sic*] see if my PO will let me move somewhere else."

In a phone call on September 14, defendant told Maxim that Anderson would help Maxim make a video recanting her statements to the police. Defendant instructed Maxim on what to say in the video:

"[DEFENDANT:] All you gotta do is say, you know, say the truth. Just say, 'Hey look, I was high, I was a little drunk. You know, on the night of—' And give the date. And uh—

"[MAXIM:] Well, yeah.

"[DEFENDANT:] And uh, and uh, you know, I've never put my hands on you. And I never threatened your life you know."

In the same call, defendant told Maxim he had arranged for Anderson to give her \$500 for her car payments.

On September 16, defendant suggested that Maxim write to Judge Manley, who was overseeing defendant's parole supervision at the time, to tell the judge she had "made a mistake." Defendant told Maxim: "You know, you have the power of God right now, you know, over my life." He again suggested that Maxim contact the prosecutor to tell him "You got it wrong," and defendant suggested various statements Maxim could make to explain or disavow her prior statements to the police. He added that "they can't

threaten you with jail, 'cause you can't get in trouble for making, you know, making a mistake or making false statements under duress or while you were intoxicated or, or high." Maxim said she had called the prosecutor twice and left messages for him. She also said she had told defendant's parole officer that "it was a big mistake."

On September 18, defendant called Anderson. Defendant asked if Anderson and Maxim had made the video they discussed: "So she did do a video? [¶] Recanting everything?" Anderson responded affirmatively. Defendant then called Maxim, who confirmed that she and Anderson had made the video. Maxim then complained that Anderson had only given her \$270. Maxim also told defendant she had written a letter to Judge Manley.

At trial, the prosecutor played Maxim's video for the jury. In the video, Maxim described the September 4 incident as follows: She and defendant had been "up for a couple days" and were a "little intoxicated." They had been bickering over the hotel room and its bed, when defendant claimed he had called the police. Defendant threatened to have Maxim arrested if she did not leave the room. Maxim "took that as him not caring" and thought "I'd show him" by calling the police herself. Maxim said the statements she gave the police "were kind of exaggerated" and embellished. She said defendant had not choked her, but was merely restraining her so that she would not hurt herself or him. She said that although defendant had told her he would take her up into the hills, he only meant that he wanted her to be able to scream loudly without disturbing other hotel guests. As to the June 26 incident, Maxim said again that she had been "jumped by a couple girls in a bar in Milpitas."

In her letter to Judge Manley, Maxim gave a similar account of the two incidents: "The night of September 3 Rusty and I had an altercation that I'm afraid I blew way out of proportion. We were both intoxicated and hadn't slept in a couple of days and just let stupid stuff get out of hand. Rusty never struck me or threatened me. Upon reading the police report I realized I embellished many things probably just because I wasn't sober

enough to realize the repercussions or consequences that my statements would have. Mr. Huang, the District Attorney in this case, thinks I am in some kind of ‘Victim Denial’. Anyone who knows me knows that I am by no means any man’s victim and certainly never have and never will put myself in any position where I would be physically abused or threatened. Rusty really did not put his hand around my neck to choke [*sic*] me. I was becoming hysterical with him and he was afraid I was going to do something to hurt either him or myself so he took my arms and pinned me back on the bed with his forearm across my upper chest to keep me from hurting either of us and to give us a chance to have a ‘time out’ and to try to get a handle on things. I kept yelling at him and he said why don’t I just drive us up to the hills and you can scream at me all you want till you get it out of your system and we can come back after you get it all out of your system because otherwise I’m afraid they are going to kick us out of the room. I said no so he said he had talked to a couple of Milpitas police officers [. . .] about me and said they told him that since the room was in his name that if he wanted me to leave I had to or I would be arrested. When I heard that I thought that if he really had spoken to them about me and I felt that if he didn’t care if I went to jail because I wouldn’t do what he wanted, then I would call 911 on him. When I went to call he hit the hang up button to disconnect me. Then I went to call again and he grabbed the phone cradle and cord and pulled. I had the phone handset in my hand and I also pulled back so hard that I ended up striking myself on the head and he got the blame for that as well.”

Regarding the June 26 incident, Maxim’s letter stated: “As for the incident on June 26th, I don’t even know why I told the Officer that [defendant] was involved and honestly don’t remember saying that he was. The only thing Rusty did that night was try to take care of me and I wouldn’t hardly let him do that which is my own fault not his. When I got the call at my home on September 6 by someone asking me about that night I honestly thought it was one of Rusty’s friends that he had told to call and ask me questions to see what I would say so I really went for broke and played up acting like he

was the one who beat me up and not the two girls outside the Galaxy Bar. Little did I know it was a real police officer who would then contact the DA to implicate Rusty and not one of his buddies. I stand by my original statement regarding the June 26th incident and retract any statements made after the fact that may be used to prosecute Rusty for something that he had no part in.”

Maxim attached the letter she wrote to Judge Manley to an email she sent to the district attorney’s office on September 19. In the body of the email, she asked the district attorney’s office to stop prosecuting defendant, whom she described as innocent.

Defendant called Maxim again on September 19. Defendant suggested that Maxim come to his next court appearance, stand up in court, and proclaim his innocence. Maxim responded that the prosecutor had subpoenaed her, but that she called the district attorney’s office and told them that “there was a misunderstanding,” that “I won’t testify against him,” and that “I won’t do anything to facilitate the prosecution of my boyfriend.”

In a second phone call later that day, defendant told Maxim he had talked with a private attorney, Dennis Alan Lempert. Defendant initially wanted Lempert to represent him, but Lempert advised defendant to stay with his public defender. Lempert suggested that he represent Maxim, for which he would charge \$2,500. Defendant told Maxim that Lempert gave him the following advice: “He says as—as long as you don’t testify and they got no witnesses against me, they got nothin’.” Defendant stated that he would try to convince Anderson to pay for Lempert. Maxim asked defendant why she would need an attorney. Defendant responded, “Because he says—he says in case they try to jam you up for not cooperating, he says, you know, if they see that you have an attorney too, they’re not even gonna go forwards.” Defendant gave Maxim Lempert’s phone number and told her to call him.

Defendant and Maxim spoke about Lempert again the next day, September 20. Defendant again gave Lempert’s advice to Maxim:

“[DEFENDANT:] [Lempert] says, ‘As long as she doesn’t testify, they got nothin’ on you. As long as that doctor’s—she said to the police or the—what she talked to—said to the police is inadmissible.’

“[MAXIM:] That’s what that—I did call that attorney today.

“[DEFENDANT:] Yeah I know and he said—she—he said, ‘Look, what she said to the police is inadmissible except in the prelim. But it’s inadmissible in trial.’ The only thing that’s admissible is the doctors report.”

[. . .]

“[DEFENDANT:] So the only thing they can do is get you to testify, and if anything, you could get up on the stand and say uh, you know, ‘I plead the Fifth.’

“[MAXIM:] Yeah.

“[DEFENDANT:] But that’s probably self-incrimination and that looks kind of bad. Or you could fuckin’ plea uh- uh, in the civil code, civil proceedings, 1219, which uh—uh, you don’t have to say anything.<sup>[5]</sup> You know? A right to remain silent. You know? But he says that’s the only thing and he says I’m overthinkin’ it. But, you know, I do worry. I do worry that—that you’ll, you know, you’ll get frustrated or somethin’ and you, you know, it scares me.”

Defendant then stated again that he would try to convince Anderson to pay for Lempert. Maxim responded that Lempert told her she could ask the court to have him appointed:

“[MAXIM:] Oh he—he told me that if I—if they—if we go to court and they put me on the stand that all I have to do is say—at that point don’t answer one little question other than my name. They don’t even want me to ans—he doesn’t even want me to

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<sup>[5]</sup> Under Code of Civil Procedure section 1219, subdivision (b), “no court may imprison or otherwise confine or place in custody the victim of a sexual assault or domestic violence crime for contempt when the contempt consists of refusing to testify concerning that sexual assault or domestic violence crime.”

answer if they say, 'Is this Rusty and he's a nice guy.' Don't say anything. Immediately say, 'Look, I want a lawyer.'

“[DEFENDANT:] That's right.

“[MAXIM:] And I can't afford it so I need the court to um, allow me to, you know, I need the court to provide one that I'd like to choose.

“[DEFENDANT:] Oh.

“[MAXIM:] See? Then he said he would do that.

“[DEFENDANT:] Oh,

“[MAXIM:] That it'll be on their fee. Uh, he said he would be willing to do that for me.

“[DEFENDANT:] Really?

“[MAXIM:] Yes.

“[DEFENDANT:] Well that's fuckin' . . .

“[MAXIM:] What?

“[DEFENDANT:] That's cool. You know? I mean I didn't know that, that—I was wonderin' about that, you know, that they have to prov—if you ask for a lawyer on the stand, they have to provide one for you, if you—if you. . .

“[MAXIM:] Yeah.

“[DEFENDANT:] . . . can't afford it.

“[MAXIM:] Right.”

“[DEFENDANT:] Perfect. Hey, but what happens if they try to jam you? See that's what I'm tryin' to say is you have to stay out of trouble.”

Later in the call, defendant again advised Maxim to stay out of trouble, or “lay low,”—i.e., to avoid getting arrested so that the prosecution could not pressure her to testify:

“[DEFENDANT:] Okay? I need you to fuckin' lay low.”

“[MAXIM:] Yeah.

“[DEFENDANT:] During this time. If you lay low, and—and give ’em nothin’ that they can jam you on. . .

“[MAXIM:] Yeah.

“[DEFENDANT:] . . .there’s nothin’ they can jam—you’d never turn on me would you?

“[MAXIM:] No baby. You know that.

“[DEFENDANT:] You—you promise that you would never. . .

“[MAXIM:] That’s (unintelligible).

“[DEFENDANT:] . . .you would never send me no matter what they tried to do to you or say to you?

“[MAXIM:] No.

“[DEFENDANT:] ’Cause. . .

“[MAXIM:] And they can’t do that. That judge said that—that. . .

“[DEFENDANT:] That’s what the attorney even says. The attorney said—he says they can’t threaten you with jail time or whatever to try to get you to talk.

“[MAXIM:] Yeah [unintelligible].

“[DEFENDANT:] Then we have nothin’—hey, then we have nothin’ to worry about.”

The trial court held a hearing the next day, September 21, at which the court considered the prosecutor’s subpoena for Maxim’s medical records. Lempert entered a special appearance for Maxim. The same day, Maxim authored another letter to defendant. She wrote: “[Lempert] doesn’t want me talking to anyone and he doesn’t want me to come to your court dates unless I am subpoena [*sic*] to do so. I gotta ask him about that one thing that I want to get rescinded but it looks more promising. We may get through this in one piece babe. That [assistant district attorney] Huang asked me if I was OK and if I felt threatened or pressured. I almost said, ‘only by you.’ He’s hating me right now. I did tell him I want my boyfriend out of jail . . . .”

In a phone call the same day, defendant told Maxim to talk to the prosecutor again. Maxim stated that Lempert told her not to talk to the prosecutor again and advised her not to go to defendant's court appearances. Maxim added that "if they can't get me the fuckin' um, testify then there's nothin' they can use on you." Defendant responded: "If they ever put you on the stand just ask for an attorney."

They discussed the September 21 hearing in another phone call the next day:

"[MAXIM:] That [assistant district attorney Huang], he's pissed as fuck that—that my lawyer won't even let me answer a question where I was injured on my mouth.

"[DEFENDANT:] Yeah.

"[MAXIM:] The lawyer said—the lawyer, when we were in the elevator that fuckin', um, [assistant district attorney Huang], you know tried to give me an answer. Questioned me in the hall and, um, [Lempert] said, ah, just come down the elevator. And so, he starts asking me some questions and [Lempert] just shook his head. And I go, 'So you'd rather me not answer anything?' He goes, 'Exactly.' So I'm like, 'Okay, I can't answer anything.'

"[DEFENDANT:] Yeah.

"[MAXIM:] And so then he was pissed and then fuckin' [assistant district attorney Huang] comes up. He goes, 'Um, how you doing Rebecca?' I go—he said, 'Are you feeling pressure or, um, threatened?' I go, 'Only by you.' "

Later in the call, Maxim told defendant that, based on Lempert's advice, defendant would not be convicted because she would refuse to testify. Maxim also said defendant's public defender had refused to talk to her because she was represented, and Lempert had instructed her not to talk to anyone.

On September 22, Maxim began writing another letter, which she continued to write over the next several days. She asked whether defendant had spoken to his parole officer about what would happen if the charges were dropped, and she added that "I don't see how they can violate your parole since you didn't do anything to cause the police

contact.”<sup>6</sup> Maxim then wrote about her hatred towards Anderson and expressed her anger that defendant continued to communicate with Anderson. Maxim wrote: “I’d rather see you rot in jail forever than help you get out to be with her. Remember when I told you that I can take a punch but God help you if you hurt my feelings or break my heart? Your [sic] about to find out how true that is. I loved Bill [Freitas] for 23 years but when he fucked me over for that skinny bitch I was out for blood.”

Defendant and Maxim spoke by phone again on September 24. Defendant told Maxim to “get me out of here” and said they would run away to New Orleans to get married. He told her to come to his next court appearance and that “I’m gonna write you and say what you need to say in court.” Maxim responded: “Oh, they don’t want me to say anything.”

In a phone call on September 28, Maxim and defendant got into another argument over his relationship with Anderson. Defendant complained about Maxim’s recent letter, in which she threatened to let him rot in prison rather than let him be with Anderson. Defendant told Maxim: “You put me here.” Maxim responded: “Cause you were gonna kill me. That’s why.” When defendant denied it, Maxim added: “Bullshit Rusty. You almost did the last time.” In another call later that day, they discussed whether their letters were being monitored. Maxim told defendant that his letters to her did not appear to have been opened when she received them. She added: “They only open the incoming mail, they don’t open the outgoing mail.”

On September 30, defendant and Maxim again discussed payment for Lempert. Maxim said Lempert would represent her at an upcoming court hearing on her hospital records, even though he had not been paid yet. Defendant told Maxim, that under victims’ rights laws, she had the right to make a statement in court. But he immediately added that if Lempert advised her not to do so, she should stay quiet.

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<sup>6</sup> This statement was redacted from the version of the exhibit admitted at trial.

b. *October 2011*

On October 1, defendant and Maxim discussed his upcoming court dates. Maxim said she would be present at one of the hearings because Lempert had advised her she could appear to request a change to the restraining order. Defendant again asked Maxim to approach the prosecutor, adding: “I know Lempert’s gonna say no.” Defendant then told Maxim to ask Lempert whether she should release her medical records from the June 26 incident. Maxim responded that Lempert wanted to review them first. Defendant told Maxim to speak out in court: “You need to stand up and just say, ‘Hey, this never happened.’ Talk to Lempert and see what he thinks is gonna happen.” In a follow-up phone call, defendant told Maxim again to ask Lempert what he thought would happen at the preliminary hearing. Defendant said Lempert had informed him the police reports alone would be enough to get the prosecution through the preliminary hearing.

On October 5, defendant and Maxim discussed the fact that defendant was facing the potential of a long prison sentence based on his strike priors. Defendant said his public defender had advised him that he faced as much as 325 years to life. Defendant said he raised with his public defender the possibility of having Maxim testify for him, but Maxim said Lempert advised her not to do so:

“[DEFENDANT:] I even told [my public defender] that you, you know, that you, you know, I go, ‘What if she says, you know, she says she’ll get on the stand, like, and say that she, you know, she lied about everything, that it was fuckin’ . . . .’ ”

“[MAXIM:] Well then I, then, that’s what Lempert says I risk fuckin’, he says he’d rather have me just not go up and say anything.

“[DEFENDANT:] Yeah. . . .

“[MAXIM:] And that’s what he’s trying to get—get to happen, is, me not go up and say anything, that’s why I need him apparently. But I don’t know how we’re gonna pay him if, he actually wants money, because you know?

“[DEFENDANT:] Yeah, I don’t know, man, I can’t think, you know, I’m in for the long haul, it looks like.”

In a phone call on October 13, Maxim complained about her poor financial status, to which defendant responded: “Well, you shouldn’t have put me in jail.” Maxim responded: “Well you shouldn’t have beat me up.” Defendant denied doing so, and stated: “I am not gonna call you again. You’re gonna be saying that shit on this phone. Just tryin’ to fuckin’—are you trying to fuckin’ bury me?”

On October 15, defendant and Maxim again discussed his upcoming court dates. Defendant told Maxim to ask the court if she could make a statement, and to tell the judge that defendant was innocent. Again on October 17, defendant asked Maxim to appear at his upcoming court hearing and make a statement to the judge. Defendant said he would write a statement for her beforehand.

In a phone call on October 23, they discussed the facts of the September 4 incident. Maxim stated that she was the one who had pulled the phone cord out of the wall. Defendant then stated that Maxim had hit herself on the head with the phone multiple times, and Maxim corrected him:

“[DEFENDANT:] You know, I don’t know why you didn’t just tell them straight up that—you know you—you hit yourself multiple times with the phone. Uh, you know, I don’t know if you even. . . .

“[MAXIM:] Well no it was just one time, but it was really hard.

“[DEFENDANT:] No you didn’t, you hit yourself like four or five times in the back of the head. Four—and that’s when I was recording too and that. You did and I—I was like do you—when you were doing it, I was like you know I’m recording right? You know and fucking yeah you smacked yourself—but you gave it one good one and I think that’s where you got a goose egg, the cop said on the back of your head or something.

“[MAXIM:] Yeah.”

c. *November 2011*

In a phone call on November 4, defendant again complained about Maxim having called the police on him, leading to the following exchange:

“[MAXIM:] What am I supposed to do Rusty. . . .

“[DEFENDANT:] This is what I was. . . .

“[MAXIM:] Wait for something bad happens [*sic*]?

“[DEFENDANT:] Listen—hey listen this is what—what’d you just—hold on. . . .

“[MAXIM:] (Unintelligible).

“[DEFENDANT:] What’d you just say?

“[MAXIM:] I said what am I supposed to do wait for something really bad to happen? Or you know wait till—till you lose control one day and stuff? It’s like. . . .

“[DEFENDANT:] Like you do every fucking time?

“[MAXIM:] Uh, I’m not gonna say anything, because it’s being recorded. But I don’t lose control like you lose control Rusty.

“[DEFENDANT:] Yeah, but I’ve never focused it towards you. Just because I get fucking pissed or whatever and I get angry or I yell or whatever, that’s—you know I mean that doesn’t mean call the fucking police and make up all this shit. And then—you know[,] I mean[,] and then now you—you—granted you have tried to fucking take it back. And I am so thankful that you have fucking come forward and done that.”

On November 6, defendant told Maxim that “we’re gonna change our attitudes; we’re gonna be proactive.” Defendant told Maxim that he would sell a motorcycle, which would let him give her \$500 or \$600, and that he would sell his truck to give her another \$500. He then urged her again to be proactive:

“[DEFENDANT:] But I was thinking, you know what I mean, you should be proactive and—I mean you should do whatever you want to do—I don’t want to tell you what to do, you know, on that but—and just start calling—start calling them, start talking

to—and you know what, and if not him, his boss, you know, the D—you know, [assistant district attorney] Huang’s boss.

“[MAXIM:] Yeah.

“[DEFENDANT:] You know, and tell him, man, they got it wrong, you know, fuckin’—and that. Just start a phone campaign, you know, I mean it—it can’t hurt, you know, just get a bug in their ear, I mean it’s up to you, I mean it’s what you want to do and that, but it’s time to be proactive.”

Maxim responded that she planned to email the prosecutor, but defendant urged her to speak with him directly, adding, “But it’s up to you.”

In several phone calls over the following two weeks, defendant repeatedly urged Maxim to speak to the prosecutor or his supervisor. On November 24, defendant asked Maxim to write a letter to the judge for his next court appearance on December 1. In a second phone call the same day, defendant again asked Maxim to appear in court and make a statement to the judge.

*d. December 2011*

In relation to a hearing held on December 1, Maxim wrote a letter to Judge Emede of the Santa Clara County Superior Court stating defendant’s innocence. Among other things, Maxim wrote that the September 4 incident was “an altercation that got blown way out of proportion” and that defendant had never struck, choked or threatened her. As to the June 26 incident, Maxim stated again that defendant had never struck her, and that her injuries were caused by two women who had attacked her outside the Galaxy bar.

Minutes of the December 1 hearing show that Maxim appeared in court, but Lempert did not. The court ordered Maxim to appear for the preliminary hearing on December 13. In a phone call later that day, defendant thanked Maxim for appearing in court and said that he was proud of her. He added: “I’ll be even prouder when you step up and speak your mind at the prelim . . .” Defendant again urged Maxim repeatedly to talk to the prosecutor and “bug the shit out of him” to drop the charges.

The last phone call included in the record occurred on December 2. However, it appears Maxim and defendant continued to communicate by phone, as Maxim's subsequent letters referred to phone calls that do not appear in the record.

On December 7, Maxim began writing one of the unsent letters that police seized in their search of her residence. The letter is dated December 7 at the top, with another entry dated December 8 several pages into the letter. Maxim began the letter by expressing her anger at defendant for failing to call or write to her. She wrote: "I don't know what I did or what you are trying to prove but if that's what you want then fine you don't have to write or call and I won't make any effort to visit and I'll go to court when they subpoena me and that's all. I'm not gonna stand up and make statements to the judge or DA or write any more letters begging for your freedom, I won't talk to our friends to have them volunteer as character witnesses or make sure everyone has their story straight." She added: "I feel guilty every day you're in there whether you think so or not. But you don't feel the slightest twinge of guilt over the things you've done to me."

Maxim then wrote: "That DA investigator came back today and I thought it was to question me. (I was gonna refuse on the basis that I didn't want him to help provide them with any further information to help prosecute my fiancé) but he was actually there to give me a subpoena for next week." She added: "As far as that charge that you tried to dissuade me from pressing charges or testifying, if you recall I called [the district attorney's] office and told him I didn't want to press charges and that I wouldn't testify against you and I did that before I ever got to talk to you after you went in so they should have that recording of me calling him."

In the section of the letter dated December 8, Maxim again complained that defendant had not called or written her recently: "Well here it is another day, no letter, no call. Whatever your problem is, it's making me want to go do all these things that I'm not supposed to do so I hope you're getting the results you're looking for." She then

speculated that he was communicating with other women who were sending him pictures and “who you think will treat you better. And I’m sure they will for a while just like I did until you started beating the shit out of me any time you felt like it. Apparently you’ve got a great case of selective memory when it comes to that. But let me refresh your memory because if you think it’s only been twice you’re way off. It started the night I went and picked you up from Santa Rita and got worse. Like the morning in the motel 6 or the night I paid for the room @ Milpitas Inn, when we were staying @ the Milpitas Inn in August and another couple of times at the motel w/the hot tub. Then on top of that the 26th and the 4th.” She added: “So when you sit there telling me I betrayed you by doing what I swore I would never do, look how many times you betrayed me when you swore you would never put your hands on me again after the night I picked you up from Santa Rita. [. . .] All that shit that you put me thru that you have conveniently forgotten about because I guess being high gives you a license to be a fucking monster I forgave you for.”

On the next page, she wrote: “The fact that I am lying to save your ass and potentially get my ass in trouble for you, you seem to think that you have a right to that . . . .” She added: “I’ve only told a few close friends what an abusive, hateful monster you are when your [*sic*] high.” Several pages later, she wrote: “I’m not responsible for your ugly mood swings but I’m not gonna allow you to be abusive to me because you were in a fucked up state of mind. I tried everything to avoid a conflict with you that night and you wanted someone to be your victim that night and unfortunately it was me. You are guilty and just the fact that I’m fighting this hard for you should mean everything to you but since you want to blame me for you beating on me then I don’t mean a fucking thing to you other than the key for you to get out and then I’m sure you will leave me all alone because your love and loyalty only seems to last as long as you’re locked up.”

On December 9, Maxim wrote defendant another letter, which she actually sent. She thanked defendant for calling that evening to let her know he had been unable to call her for some time because he had been “sent to the hole.” She apologized because she had become angry at his failure to communicate, which she had thought he did deliberately to hurt her: “My mind is a monster when I don’t hear from you. I assume or imagine the worst and I react and lash out at you and I realize that I’ve been unnecessarily vicious before I hear an explanation. When I hadn’t gotten a call or letter all week I assumed you were punishing me . . . .” Maxim then wrote that, in her anger, she had written—but did not mail—a letter that “would have been bad because I pretty much called you on every disagreement we’ve had in the last few months in great detail just because I allowed myself to believe that you had abandoned me when you hadn’t done a thing.”

She further wrote: “I don’t understand how they can say you tried to dissuade me from anything when right from the beginning before I even talked to you after your arrest I had decided myself that I wouldn’t testify and I didn’t want to press charges and I called [assistant district attorney] Huang sometime before the 19th when I emailed my letter to Judge Manley to the DA’s office and they should have me on record talking to Huang saying I wouldn’t testify because that’s when he started yelling at me saying I was in Victim Denial. So obviously I had already made up my mind and nobody dissuaded me because I dissuaded myself.” She added: “But I’m calling Huang today to inform him that I want an attorney appointed before I answer any questions at the prelim.”

Maxim then wrote about her feelings of jealousy and “ugly mood swings. I go from wanting to rape you to wanting to run you over, from loving you to leaving you . . . .” Maxim again confessed her paranoia that he was communicating with other women and wrote: “I’m glad I waited to fire off that letter cause it was a doozie and you know what? That’s what they want! They want me to think the worst of you so that I’ll do something vindictive because that’s been my pattern and if they can manipulate the

situation to get me to play into their hands then they won't have to work at nailing you to the cross because they thought I'd hand you over on a silver platter because they don't care that you're innocent. They want me to turn on you because then I'll do something spiteful because my hurt feelings rule my head when my love for you should be ruling my heart."

#### 4. *Maxim's Refusal to Testify at the Preliminary Hearing*

Defendant's preliminary hearing began December 13. Maxim appeared, but there is no record of Lempert entering an appearance. When the prosecution called Maxim to testify, she asked the court to appoint an attorney to represent her. When the court asked her on what basis she needed an attorney, Maxim responded: "Because I made statements to the police that weren't true, and now I'm trying to correct all that, and I am afraid I might get myself into trouble. So I need legal counsel before I do." The prosecutor then offered to give Maxim use immunity for statements she would make at the hearing. At the court's request, the prosecutor explained use immunity to Maxim. Maxim testified that she understood the prosecutor's explanation, but added: "I think it is still in my best interest to have an attorney appointed for me." The court then ordered an attorney from the Alternate Defender's Office be appointed to represent Maxim. Maxim was thereafter represented by alternate defender David Epps.

Later in the hearing, the prosecution again called Maxim to the stand, and she again refused to testify, adding: "That is what I was advised to do." When the court inquired, Epps informed the court that he had spoken with Maxim and that he was acting as her counsel. The court then found that the prosecution had offered Maxim use immunity, whereupon the prosecutor requested the court to hold her in contempt. On Maxim's behalf, Epps asserted her Fifth Amendment privilege not to testify.

The court then held an in camera hearing with Maxim and Epps in chambers. Epps informed the court that, based on his discussion with Maxim, he believed she had a Fifth Amendment privilege against self-incrimination because she had given false

statements to the police. Maxim confirmed Epps' statement and further told the court that she and defendant were "very much in love," that she was at fault, and that "I am in no fear of Rustin." Maxim acknowledged that the prosecutor had offered her immunity, but reasserted her refusal to testify nonetheless.

At the conclusion of the preliminary hearing, the court found that Maxim understood the concept of use immunity and that she had made a decision not to testify. The court advised Maxim of the possibility she would be held in contempt and set a later date for the contempt hearing to give Maxim "time to think this through and to provide any additional information after further discussion with counsel."

#### *5. Maxim's Contempt Hearing*

The trial court held a contempt hearing on December 16 regarding Maxim's refusal to testify. Maxim was again represented by Epps. Epps informed the court that, since the prior hearing, he had received additional information supporting Maxim's assertion of the Fifth Amendment. Epps stated that Maxim was on formal felony probation, and that her testimony could lead her to incriminate herself with respect to the terms of her probation. The prosecutor then opined that his offer of immunity would protect Maxim from probation revocation in addition to criminal charges. Epps concurred. Maxim still refused to testify, whereupon the court found her in contempt and deemed her to be an unavailable witness. However, the court imposed no fine or any other punishment. Instead, the court asked Maxim to attend counseling.

#### *6. Subsequent Letters Written by Maxim*

On December 17, Maxim authored another of the unsent letters seized by police during the search of her home. She began the letter by complaining about defendant's phone call to her at 7:30 A.M.<sup>7</sup> She then wrote about her contempt hearing: "I think Lara [(defendant's defense attorney)] was gonna ask for a dismissal because I took the

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<sup>7</sup> The phone call referenced by Maxim is not contained in the record.

contempt of court charge and refused to testify.” She added: “Nothing really went in [assistant district attorney] Huang’s favor so you would have been happy about that and I didn’t get a \$1000 fine. If you call we can’t discuss this court stuff anymore. My attorney said that since they record all the phone calls even you telling me to testify looks bad because you say the same thing over and over and you don’t let me have a say when I know what I’m doing. If I don’t say anything they can’t use any inconsistent statements or anything. If I would testify under the use immunity I couldn’t pick and choose what to answer & then just plead the 5th, I’d have to answer all questions regardless. You think I’m doing this so I don’t get in trouble but that’s so far from the truth it’s not funny cause my PO already knew I got beat up outside the bar and if he wanted to he could have gotten me long ago and they didn’t find drugs or test me so that would just be speculation. I’m only doing what I do to make it impossible for them to use my statements against you. I hope you realize that I’m only concerned with what’s best for you. I hadn’t even given much thought to myself and that should be obvious since I was willing to take the contempt of court charge no matter what.” In apparent reference to the September 4 incident, she wrote: “That night I called the cops I wasn’t jealous by the way. I was pissed and we both know why even tho we won’t or can’t discuss it.”

On December 30, Maxim wrote to defendant: “You still haven’t said that you finally see that I did the right thing. I really need to hear that from you. I would never make such a serious decision unless I was 99% sure I was doing the right thing and I did give it a lot of thought. I only have you foremost in my thought & decisions I hope you know that and it would be nice to have your support and love and verify that I made the right choice for us in the long run.”<sup>8</sup>

On January 21, 2012, Maxim wrote to defendant: “You should have your attorney contact my ex & I’m sure he can tell her how unlikely it is that I would let a man hurt me

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<sup>8</sup> This statement was redacted from the portion of the exhibit admitted at trial.

since when he tried it he ended up with a shattered hip & femur and had to get a hip replacement & a metal rod in his leg.” Maxim complained about “the DA trying to make me look like a punk bitch who would just roll over & let some dude just whoop ass on me w/out putting up a fight. (He obviously has no idea, right?) If it would have been one girl jumping me instead of two blindsiding me, I guarantee that would have turned out decided [*sic*] different & we wouldn’t be in this predicament.” Maxim advised defendant not to take a plea deal because “[y]ou’ve already paid too much of your freedom for something you are completely innocent of and it wouldn’t be any kind of justice for you to do a minute more.”

On February 9, 2012, police served the search warrant on Maxim’s residence, seizing several of her unsent letters as described above. Two days later, she wrote another letter to defendant complaining about the search and informing him the police had seized his letters to her, as well as letters she had written to him but never mailed. She wrote: “Those cocksuckers trashed my room & took all the letters you wrote to me, all the letters I started to write to you when I was mad and one where it was right after I was done w/you on September 4 when I made up all kinds of shit that you didn’t do & I was gonna send cause I knew they were monitoring your mail & I was gonna throw you under the bus because I thought we would never get back together again. It was all lies but I was so angry. I don’t know why I didn’t throw that bullshit away.” She expressed concern that the prosecutor’s investigators were “trying to get leverage” on her to testify against defendant, and added: “I know they think those letters are gonna say you tried to dissuade me from testifying but they were either sexy letters or you trying to talk me into testifying!”

The same letter contained another section dated February 13, 2012. In that section of the letter, Maxim once again expressed her anger at defendant for failing to call her. She wrote about how he had frequently called her in the past to express his love for her,

and added: “[B]ut after we went to court and I refused to testify, you just fucking threw that all away because you wanted me to testify & didn’t think I knew what I was doing.”

#### *7. Refusal to Testify at Trial*

At trial, Maxim again refused to testify. On March 7, 2012, the trial court held a hearing under Evidence Code section 402 at which Maxim was still represented by Epps. In response to inquiry from the court, Maxim declined to state her reasons for refusing to testify. The court informed her that she had been given immunity and explained what that meant, but she still refused to testify. The court informed Maxim that all her hearsay statements would be admitted into evidence even if she did not testify, but Maxim still refused to testify. The trial court then held Maxim in contempt and found her unavailable to testify under Evidence Code section 240, subdivision (a)(6).

#### *B. Procedural Background*

The prosecution charged defendant in the first amended information with six counts: Counts One and Two—inflicting corporal injury on a cohabitant on June 26 and September 4 respectively (Pen. Code, § 273.5, subd. (a)); Count Three—making criminal threats on September 4 (Pen. Code, § 422); Count Four—attempting to dissuade a witness from reporting a crime on September 4 (Pen. Code, § 136.1, subd. (b)(1)); Count Five—attempting to dissuade a witness from testifying (Pen. Code, § 136.1, subd. (a)(2)); and Count Six—attempting to dissuade a witness from prosecuting a crime (Pen. Code, § 136.1, subd. (b)(2).) The information alleged an enhancement for great bodily injury as to Count One. (Pen. Code, §§ 12022.7, subd. (e), 1203, subd. (e)(3).) The information further alleged that defendant had suffered two prior serious felony convictions (Pen. Code, § 667, subd. (a)), ten prior strike convictions (Pen. Code, §§ 667, subds. (b)-(i), 1170.12), and two prior prison terms (Pen. Code, § 667.5, subd. (b)).

The jury found defendant guilty on Counts One, Five, and Six. The jury acquitted defendant on the remaining counts, but found him guilty on the lesser included offense of

misdemeanor battery against a cohabitant as to Count Two. (Pen. Code, § 243, subd. (e)(1).) The jury also found true the allegation of great bodily injury as to Count One.

In a bifurcated portion of the trial, the court found allegations of two prior serious felony convictions, nine prior strike convictions, and a prior prison term to be true. (Pen. Code, §§ 667, subds. (a)-(i), 1170.12, 667.5, subd. (b).) The court sentenced defendant to a total term of 109 years to life in prison as follows: Count One—25 years to life consecutive to 10 years for two prior serious felonies and four years for the enhancement; Count Five—25 year to life consecutive to 10 years for two prior serious felonies; and Count Six—25 years to life consecutive to 10 years for two prior serious felonies. The court ordered these terms to run consecutively. The court also imposed a concurrent term of six months for the lesser included offense under Count Two.

## **II. DISCUSSION**

On appeal, defendant contends: (1) admission of Maxim's out-of-court statements under the doctrine of forfeiture by wrongdoing violated the Sixth Amendment and state law rules of evidence; (2) the convictions on Counts Five and Six must be reversed because the trial court failed to provide adequate instructions in response to a question from the jury; (3) the court erred in denying defendant's motion for a new trial based on new evidence and prosecutorial misconduct; and (4) resentencing on Counts Five and Six is required by Penal Code section 654 and the trial court's erroneous imposition of consecutive sentences.

We conclude the admission of out-of-court testimonial statements violated defendant's right of confrontation under the Sixth Amendment. Because these statements are inadmissible under the federal constitution, we need not consider their admissibility under state law hearsay rules. Furthermore, we conclude reversal is required because the Attorney General cannot show the error to be harmless beyond a reasonable doubt. We do not reach defendant's remaining claims.

### A. *Admission of Maxim's Statements Under Forfeiture by Wrongdoing*

The trial court admitted five categories of out-of-court statements: (1) Maxim's 911 call on September 4; (2) Officer Jamison's interview of Maxim immediately following the 911 call; (3) Officer Muok's re-interview of Maxim on September 7; (4) the jailhouse phone calls between defendant and Maxim; and (5) Maxim's letters to defendant.

Defendant argues that none of these statements were admissible under hearsay rules, and that some of the statements—the 911 call and Maxim's statements to the police—were testimonial and therefore inadmissible under the Confrontation Clause. He further contends that Maxim's statements were so unreliable that their admission violated his constitutional due process rights. The Attorney General argues that all of these statements were admissible under both the Constitution and state law evidence rules through the doctrine of forfeiture by wrongdoing or other hearsay exceptions.

After reviewing the relevant procedural background and legal principles, we consider which of Maxim's statements were testimonial for Sixth Amendment purposes. We conclude Maxim's statements to Officers Jamison and Muok—but not the 911 call—were testimonial, thereby implicating the Confrontation Clause. We will then consider whether the trial court erred when it admitted those two testimonial statements under the doctrine of forfeiture by wrongdoing. Finally, we will consider whether any errors were prejudicial such that reversal of defendant's conviction is required.

#### 1. *Procedural Background*

The prosecution moved in limine for admission of Maxim's out-of-court statements under *Giles* and Evidence Code section 1390 (section 1390). The prosecution argued that Maxim's statements were admissible under the doctrine of forfeiture by wrongdoing because defendant had engaged in or aided and abetted wrongdoing intended to procure Maxim's unavailability. Specifically, the prosecution argued that defendant, in his phone calls to Maxim, urged her to recant her statements and arranged an attorney

for her to prevent her from testifying. The prosecution also argued that Maxim's letters to defendant were admissible under Evidence Code section 1250 because evidence of her state of mind corroborated defendant's intent to dissuade her from acting as a witness.

In addition to asserting state law hearsay rules, defendant lodged objections under the Sixth and Fourteenth Amendments based on his right of confrontation, the right to a fair trial, and his due process rights. Specifically, defendant objected to the admission of Maxim's out-of-court statements on the ground that the record did not support an exception under forfeiture by wrongdoing because the prosecution had not established any wrongdoing. Defendant argued, among other things, that his statements to Maxim urging her to recant did not constitute wrongdoing because he was asking her to tell the truth. Defendant also argued that Maxim had been independently advised by counsel not to testify, and that Maxim had refused to testify on her own volition. Defendant further argued that Maxim's statements were inherently unreliable given her contradictory claims and prior criminal record. Defendant proposed holding a hearing under Evidence Code section 402 to take testimony from Epps, but the court denied the request. Defendant also lodged a continuing objection to the admission of the evidence.

The trial court granted the prosecution's motion and admitted Maxim's out-of-court statements under *Giles* and section 1390. The trial court based its rulings on transcripts of a subset of the recorded jailhouse telephone calls between Maxim and defendant. The prosecution provided the court with the audio of the calls, but the court had not listened to the audio at the time of its ruling. Nor did the court read Maxim's letters to defendant.

The trial court made the following findings of fact: (1) Defendant told Maxim she had to recant; (2) defendant told Anderson to insist to Maxim that she had to recant; (3) defendant told Anderson to tell Maxim he would make it up to her; (4) defendant arranged for an attorney to assist Maxim in not testifying; (5) it was defendant who contacted Lempert and arranged for him to advise Maxim; (6) defendant promised to

marry Maxim when he got out; and (7) defendant blamed Maxim for being in jail and for his facing life in prison. Based on these historical facts, the court found by a preponderance of the evidence that Maxim was unavailable to testify as a result of wrongdoing by defendant that was intended to render her unavailable. The trial court also found that Maxim's statements to police and her statements in the jailhouse calls were trustworthy and reliable based on the circumstances under which she made them.

## 2. *Legal Principles*

The Confrontation Clause of the Sixth Amendment provides that “[i]n all criminal prosecutions, the accused shall enjoy the right [ . . . ] to be confronted with the witnesses against him.” (U.S. Const., 6th Amend.) The Confrontation Clause thereby bars “admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination.” (*Crawford v. Washington* (2004) 541 U.S. 36, 53-54 (*Crawford*)). This bar applies only to *testimonial* statements; admission of nontestimonial statements—while still subject to hearsay rules—does not violate the Confrontation Clause. (*Id.* at p. 53.)

Generally, statements made to police 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 emergency. [Statements to police] 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, fn. omitted (*Davis*)).

However, even testimonial statements may be admissible under certain exceptions to the Confrontation Clause. The United States Supreme Court has reaffirmed a historical common law exception to this bar where the witness “was ‘detained’ or ‘kept away’ by the ‘means or procurement’ of the defendant.” (*Giles, supra*, 554 U.S. at

p. 359.) This exception—commonly referred to as “forfeiture by wrongdoing”—is applicable when the defendant *causes* the witness to be unavailable to testify with the *intent* to cause the witness’s unavailability. (*Id.* at pp. 359-361.) The prosecution bears the burden of showing forfeiture by wrongdoing by a preponderance of the evidence. (*People v. Banos* (2009) 178 Cal.App.4th 483, 503, fn. 12 (*Banos*).)

### 3. *Standards of Review*

We review *de novo* whether a statement is testimonial and therefore implicates the Confrontation Clause. (*People v. Nelson* (2010) 190 Cal.App.4th 1453, 1466.) “We evaluate the primary purpose for which the statement was given and taken under an objective standard, ‘considering all the circumstances that might reasonably bear on the intent of the participants in the conversation.’ ” (*Ibid.* [citing *People v. Cage* (2007) 40 Cal.4th 965, 984].)

With respect to the exception under forfeiture by wrongdoing, a “mixed question of law or fact” affecting a defendant’s rights under the Confrontation Clause is subject to *de novo* review. (*People v. Cromer* (2001) 24 Cal.4th 889, 901 (*Cromer*) [establishing *de novo* review to determine whether a prosecution’s failed efforts to locate an absent witness are sufficient to justify an exception to the Confrontation Clause]; *People v. Seijas* (2005) 36 Cal.4th 291, 304 [applying *de novo* review to ruling on a witness’s assertion of the privilege against self-incrimination].) The application of this standard as set forth in *Cromer* is instructive. There, the California Supreme Court set forth a two-step analysis for applying the standard of review. First, the reviewing court examines a trial court’s findings of historical fact under a deferential substantial evidence standard if those facts are in dispute. (*Cromer, supra*, at pp. 900, 902.) *Cromer*’s definition of “historical fact” is derived from *Thompson v. Keohane* (1995) 516 U.S. 99, and *Townsend v. Sain* (1963) 372 U.S. 293. Under these cases, deference is accorded to the trial court’s findings of “what are termed basic, primary, or historical facts: facts ‘in the sense of a recital of external events and the credibility of their narrators.’ ” (*Ibid.* at

p. 310, fn. 6 [quoting *Brown v. Allen* (1953) 344 U.S. 443, 506].) The reviewing court then applies “an objective, constitutionally based legal test to the historical facts” as found by the trial court to independently review whether “the prosecution’s failed efforts to locate an absent witness are sufficient to justify an exception to the defendant’s constitutionally guaranteed right of confrontation at trial.” (*Cromer, supra*, at p. 901.)

As in *Cromer*, the trial court’s findings of historical fact in this case, set forth above, are not in dispute and substantial evidence supports them. Thus, application of the doctrine of forfeiture by wrongdoing in this instance is in large part a legal exercise requiring us to assess the applicability of the exception under the facts of this case—i.e., whether forfeiture is justified where the unavailable witness had been independently advised by counsel not to testify. Accordingly, we will review de novo whether forfeiture by wrongdoing justified an exception to the Confrontation Clause.

The dissent would conflate *Cromer*’s two-step analysis and apply a one-step substantial evidence test to both the trial court’s factual findings and its application of those findings to the mixed question of fact and law. (Dissenting opn. at pp. 9-10.) But in doing so, the dissent cites no authority for the proposition that a finding of causation constitutes a “historical fact” as defined by *Cromer* and its antecedents. Instead, the dissent discusses various doctrinal theories underlying the causation element. (Dissenting opn. at p. 12.) This illustrates the largely *legal nature* of the causation analysis. We are not persuaded that a one-step substantial evidence test is appropriate in this case and will apply the two-step analysis set forth in *Cromer*.

#### 4. *Whether Maxim’s Statements Were Testimonial*

Defendant argues that Maxim’s statements to law enforcement—including the 911 call on September 4—were testimonial and therefore implicate the Confrontation Clause.<sup>9</sup> The Attorney General contends Maxim’s statements in the 911 call and her

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<sup>9</sup> Although the record holds evidence suggesting that certain statements Maxim made in the jailhouse phone calls and in her letters to defendant were directed at the

statements to Officer Jamison immediately following the call were nontestimonial. We conclude the 911 call was nontestimonial, as it concerned an on-going emergency. However, subsequent statements to the police were testimonial under *Crawford* and *Davis* because the statements concerned past events and were taken primarily for non-emergency, investigative purposes.

The United States Supreme Court considered whether victims' reports of domestic violence to the police are testimonial for Confrontation Clause purposes in *Davis, supra*, 547 U.S. 813, which consolidated two cases: *Davis v. Washington* and *Hammon v. Indiana*. In *Davis v. Washington*, a domestic violence victim called 911 to report an ongoing incident. (*Id.* at p. 817.) The victim told the operator that her former boyfriend was “ ‘here jumpin’ on me again’ ” and “ ‘usin’ his fists.’ ” The victim subsequently told the operator that her boyfriend had left in a car, after which the operator continued to question the victim about the identity of the boyfriend and the circumstances of the attack. The police arrived shortly thereafter and observed the victim in a frantic state with fresh injuries on her forearm and face. In *Hammon v. Indiana*, police responded to a domestic violence call and found the victim alone on the front porch of her home. (*Davis, supra*, 547 U.S. at p. 834.) She appeared “ ‘somewhat frightened’ ” but claimed nothing was wrong. Upon entering her house, police saw a heating unit with broken glass and found the victim's husband in the kitchen. Police kept the couple in separate rooms and questioned the victim. She signed an affidavit stating that her husband had hit her and shoved her into the broken glass of the heating unit, among other things.

The high court held that the victim's statements in the 911 call in *Davis v. Washington* were nontestimonial, but that the victim's statements to police officers in

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police or prosecutor, defendant does not argue that any of these statements were testimonial. Accordingly, we will assume for the purposes of this opinion that all of Maxim's statements in the phone calls and letters were nontestimonial communications to defendant.

*Hammon v. Indiana* were testimonial. (*Davis, supra*, 547 U.S. at pp. 828, 829-830) The court distinguished between these cases on the basis that the statements in *Davis* were taken primarily for the purpose of resolving an ongoing emergency, while *Hammon* involved statements taken for the purpose of investigating past criminal activity. The court observed that the victim in *Davis*, while facing an ongoing emergency, was speaking about events as they were actually happening, rather than describing past events. (*Id.* at p. 827.) By contrast, in *Hammon*, the victim’s interrogation took place hours after the events she described had occurred and the emergency had passed. (*Ibid.*) The court further observed that police interrogations may “ ‘evolve into testimonial statements’ ” as questions change from those needed to “address the exigency of the moment” to those designed to “ ‘elicit testimonial evidence.’ ” (*Id.* at pp. 828-829.) The high court instructed trial courts to redact witness statements to remove the testimonial portions.

a. *The 911 Call on September 4 Was Nontestimonial*

Applying the above principles to Maxim’s 911 call on September 4, we conclude her statements in that call were nontestimonial. The circumstances surrounding the call were largely indistinguishable from those in *Davis*. Like the victim in *Davis*, Maxim was reporting an ongoing emergency, and the circumstances of the call suggest that the operator’s questioning was intended to address that emergency. Many of the operator’s questions concerned Maxim’s physical state and whether she needed emergency medical care. Defendant argues that Maxim’s statements concerned past events and the emergency was no longer ongoing because he had left the hotel room. But the dispositive fact is that the operator’s primary purpose was to deal with a contemporaneous emergency, including the potential need for medical care. (*People v. Cage, supra*, 40 Cal.4th at p. 984.) These facts meet the definition of a nontestimonial statement as set forth in *Davis*.

b. *Maxim's Statements to Officer Jamison Were Testimonial*

By contrast, we conclude Maxim's subsequent statements to the police were testimonial. As described above, Officer Jamison interviewed Maxim when police arrived at the hotel following the 911 call. The interview occurred five to 10 minutes after police had detained defendant outside the hotel; there was no danger defendant could harm Maxim at that point. On the other hand, Maxim was crying and appeared scared. Officer Jamison requested medical assistance after she complained of neck and back pain. Arguably, then, some of Officer's Jamison's initial questions appeared to be intended, in part, to assess Maxim's medical condition. But Maxim's description of the preceding events began with defendant's behavior during their 11-month relationship, and she then discussed his conduct and whereabouts on September 3, the day before the 911 call. These statements concerned events that were hours old or older. Maxim then described her fight with defendant later that evening, shortly before the 911 call. Except for the bump on the back of Maxim's head, Officer Jamison did not observe any injuries consistent with Maxim's narrative of the fight she said had occurred before the 911 call. Moreover, many of Maxim's statements about the latter part of that evening had nothing to do with injuries she might have suffered.

Officer Jamison's interrogation also covered the June 26 incident. At this point in the interview, Maxim's statement, if not already testimonial in nature, had "evolved" into a testimonial statement. (*Davis, supra*, 547 U.S. at p. 828.) The June 26 incident had occurred months before the interview, and there was no ongoing emergency or exigency arising from that incident. Officer Jamison's questions concerning this incident could only have served a prosecutorial purpose.

These facts show that once the interrogation turned to defendant's past conduct, the primary purpose was investigative. The trial court could have redacted Maxim's statements to admit only those limited portions relevant to determining whether Maxim required emergency medical care, but the bulk of the questioning concerned events that

had passed long ago and were not related to an ongoing emergency. Thus, we conclude the statement was testimonial under *Davis, supra*, 547 U.S. at pages 829-830.

*c. Maxim's Statements to Officer Muok on September 7 Were Testimonial*

For the same reasons, Maxim's statements to Officer Muok on September 7 were testimonial. By that time, the events of September 4 were days old, and the events of June 26 were months old. There was no ongoing emergency, and Maxim had already been medically examined for both incidents. Defendant had been in custody for several days, and the sole purpose of Officer Muok's interview was to obtain evidence for use in the prosecution. The trial court should have found this statement to be testimonial under *Davis, supra*, 547 U.S. at pages 829-830.

*5. No Exception Was Justified Under the Doctrine of Forfeiture by Wrongdoing*

We next determine whether the trial court erred when it applied the doctrine of forfeiture by wrongdoing to admit Maxim's testimonial statements to Officers Jamison and Muok. We conclude it was error to admit these statements because the prosecution did not show by a preponderance of the evidence that defendant *caused* Maxim to be unavailable to testify. First, although the evidence establishes that defendant pressured Maxim to recant her statements, this alone does not show he caused her *not to testify*. Second, as set forth in detail below, Maxim had decided of her own volition not to testify after defendant was taken into custody. And although defendant arranged for Maxim to meet with Lempert, his involvement was temporary. Thereafter, defendant actually encouraged Maxim to testify, but a court-appointed alternate defender advised her to invoke the Fifth Amendment. This evidence does not support any finding of a causal link between defendant's conduct and Maxim's unavailability.

*a. Urging Maxim to Recant Did Not Make Her Unavailable*

First, we consider the issue of recantation. The Attorney General places great emphasis, as did the trial court, on defendant's efforts to convince Maxim to recant. The

record leaves no doubt that defendant repeatedly pressured Maxim to recant and proclaim his innocence to the prosecutor and court. Defendant continually engaged in several forms of conduct intended to further this goal, including emotional manipulation, promises of monetary assistance, promising to marry Maxim, and conspiring with Anderson to assist Maxim in recanting, e.g., with the making of the video.

Defendant argues that this conduct did not constitute wrongdoing because he was actually urging Maxim to tell the truth, and that forfeiture could only be based on a presumption of guilt—i.e., that he was guilty of the domestic violence charges and that he urged Maxim to make false statements about the incidents. Defendant derides this reasoning as circular. But six Justices of the United States Supreme Court in *Giles* acknowledged and accepted the circular nature of such an analysis. (*Giles, supra*, 554 U.S. at p. 374, fn. 6 (plur. opn. of Scalia, J.); *id.* at p. 379 (conc. opn. of Souter, J.)) The court may exercise its power to make such pretrial evidentiary rulings provided the court includes the element of intent to make a witness unavailable in its analysis. (*Ibid.*)

But even if defendant pressured Maxim to make false statements to law enforcement and the court, this conduct would not support a finding of forfeiture by wrongdoing. A core element of forfeiture by wrongdoing is the requirement that the defendant's wrongdoing must *cause* the witness to be *unavailable* to testify. (*Giles, supra*, 554 U.S. at p. 358.) At the most basic level, unavailability means that the witness does not testify, whether due to inability, refusal, or some other reason for the witness's absence. (*Id.* at p. 360; Evid. Code, § 240.) Urging a witness to make false statements, while undoubtedly wrong, is legally distinct from preventing the witness from testifying altogether. The Attorney General cites no authority finding forfeiture by wrongdoing on the basis that a defendant urged a witness to make false statements. Accordingly, even assuming defendant was urging Maxim to lie for him, the prosecution must still show by a preponderance of the evidence that defendant *caused* Maxim *not to testify*.

b. *Whether Arranging Counsel for a Witness Constitutes Wrongdoing*

In the typical case involving forfeiture by wrongdoing, the defendant prevents a witness from testifying by killing the witness before trial. (See, e.g., *Giles, supra*, 554 U.S. at p. 356; *Banos, supra*, 178 Cal.App.4th at p. 485; *United States v. Jackson* (4th Cir. 2013) 706 F.3d 264, 265; *United States v. Gray* (4th Cir. 2005) 405 F.3d 227, 243; *United States v. Dhinsa* (2d. Cir. 2001) 243 F.3d 635, 652; *United States v. Cherry* (10th Cir. 2000) 217 F.3d 811, 814-815; *United States v. Emery* (8th Cir. 1999) 186 F.3d 921, 926; *United States v. White* (D.C. Cir. 1997) 116 F.3d 903, 911; *United States v. Thai* (2d Cir. 1994) 29 F.3d 785, 814.) But murder is not the only form of wrongdoing justifying an exception to the Sixth Amendment; such conduct includes threats, intimidation, and bribery. (*People v. Jones* (2012) 207 Cal.App.4th 1392, 1399 [finding exception to Confrontation Clause where witness failed to appear due to threat of violence].)

Here, the Attorney General does not argue that defendant intimidated or threatened Maxim into refusing to testify. Rather, she contends defendant caused Maxim not to testify by arranging for an attorney who advised that defendant could not be convicted if Maxim did not testify. This presents an unusual scenario. We are aware of only two cases—both from other jurisdictions—concerning forfeiture by wrongdoing under comparable circumstances.

The Attorney General cites *Steele v. Taylor* (6th Cir. 1982) 684 F.2d 1193 (*Steele*), disapproved on another ground by *Burns v. Estelle* (5th Cir. 1983) 695 F.2d 847. In *Steele*, a pre-*Crawford* case, a judge hired two men to kill his wife. (*Steele, supra*, 684 F.2d at p. 1197.) The prosecution jointly tried the judge and the two hired killers. One of the prosecution's key witnesses, Carol Braun, had been a prostitute for one of the hired killers. She had overheard several conversations between the two hired killers while they were planning the murder, and one of the men told her about the killing afterwards. Prior to trial, she gave a signed statement to FBI agents, but she later rekindled her relationship

with one of the defendants. The defendants, utilizing “a combination of tactics,” sought to prevent Braun from testifying at trial. (*Id.* at p. 1198.) Among other tactics, they hired an attorney to represent Braun, and one of the defendant’s attorneys acted as cocounsel for Braun. Braun’s lawyer informed the trial court that Braun would refuse to testify, whereupon she so refused. The court found Braun in contempt and sentenced her to six months in jail. The court further found that “the defendants bear a major responsibility for the unavailability of the witness” and thereafter admitted Braun’s out-of-court statements implicating the three defendants under the doctrine of forfeiture by wrongdoing. (*Id.* at pp. 1199-1201.)

On habeas review, the Sixth Circuit Court of Appeals found no error in the trial court’s admission of Braun’s statements. The Court of Appeals observed: “Wrongful conduct obviously includes the use of force and threats, but it has also been held to include persuasion and control by a defendant, the wrongful nondisclosure of information, and a defendant’s direction to a witness to exercise the fifth amendment privilege.” (*Steele, supra*, at p. 1201, fn. omitted.) The Court of Appeals held that the trial court reasonably could have inferred that the defendants “jointly planned a strategy” to use their influence and control over Braun to prevent her from testifying. (*Id.* at p. 1203.) The Court of Appeals based its analysis in part on the fact that one of the defendants hired an attorney for Braun, who advised her not to testify. The court further observed that Braun was afraid of the defendant who had hired the attorney for her. However, the court also based its holding largely on the conclusion that Braun’s out-of-court statements bore sufficient indicia of reliability and guarantees of trustworthiness as was required under *Ohio v. Roberts* (1980) 448 U.S. 56, abrogated by *Crawford, supra*. The court held: “*Although it is questionable whether Braun’s statement is admissible under the confrontation clause in the absence of a finding that the defendants wrongfully caused the witness’s unavailability, we note [ . . . ] that the statement has indicia of reliability in addition to those required for the admissibility of prior inconsistent*

statements [under a traditional hearsay exception].” (*Steele*, at pp. 1203-1204, italics added.) Accordingly, the court in this pre-*Crawford* case concluded that the admission of Braun’s statements did not violate the Sixth Amendment. (*Id.* at p. 1204.)

But another federal court reached a different result in *United States v. Williamson* (M.D. Ga. 1992) 792 F.Supp. 805 (*Williamson*), affd. (11th Cir. 1992) 981 F.2d 1262, judg. vacated on other grounds (1994) 512 U.S. 594. Fredel Williamson and Reginald Harris were indicted on drug related charges. (*Williamson, supra*, at p. 806.) After Harris was arrested, he made statements to a DEA agent implicating Williamson. After Williamson was arrested, he instructed Harris: “ ‘ . . . just hang in there, don’t say nothing. If it takes my very last dime I’m going to get you out.’ ” (*Id.* at p. 810.) Williamson then paid for two defense attorneys to represent Harris. The prosecution tried Harris and Williamson separately and subpoenaed Harris to testify at Williamson’s trial. But Harris invoked his Fifth Amendment privilege and refused to testify notwithstanding a compulsion order. The trial court found Harris to be unavailable and admitted into evidence Harris’ out-of-court statements to the DEA agent.

On remand from an appeal to the Eleventh Circuit Court of Appeals, the trial court held a hearing to determine whether Williamson had forfeited his right of confrontation by procuring Harris’ absence. (*Williamson, supra*, 792 F.Supp. at p. 810.) The court found the government had failed to show that Williamson had caused Harris’ absence notwithstanding Williamson’s payment of Harris’ legal fees and the instruction to Harris to stay silent. The court held: “For the government to establish that Williamson waived his confrontation right, it would either have to demonstrate an agreement between Harris and Williamson that Williamson would pay Harris’s legal fees if Harris remained silent or a conspiracy to keep Harris from testifying involving Williamson [and Harris’ attorneys].” (*Ibid.*) The court found no conspiracy existed because the evidence did not establish that Harris knew Williamson was paying his attorney fees as part of agreement to stay silent. The government argued that Williamson caused Harris not to testify by

hiring his lawyers for that purpose, but the court found no direct evidence that Williamson instructed the lawyers to keep Harris from testifying. The court also found that Harris may have had his own motives for not testifying. The court concluded the government had failed to prove that Williamson had caused Harris not to testify. (*Id.* at p. 810.) The court further found Harris not to be a credible witness.

Both *Steele* and *Williamson* are pre-*Crawford* cases turning partly on the credibility of the out-of-court statements at issue. And given *Crawford*'s abrogation of *Ohio v. Roberts*, it is not clear that reliance on those portions of the courts' legal analyses is still appropriate. Nonetheless, apart from making credibility determinations, both *Steele* and *Williamson* establish that hiring an attorney for a witness to prevent the witness from testifying *may* constitute forfeiture by wrongdoing. However, both cases also establish that the prosecution must show the defendant, by hiring the attorney, *caused* the witness to be unavailable. (*Steele, supra*, 684 F.2d at pp. 1203-1204; *Williamson, supra*, 792 F.Supp. at p. 810.)

*c. Lack of Causation*

A chronology of the events in this case establishes that defendant's interactions with Lempert ultimately did not cause Maxim to be unavailable. As set forth below, soon after defendant was arrested, Maxim decided of her own volition not to testify. Defendant then met with Lempert. Although defendant, based on Lempert's advice, agreed with Maxim that she should not testify, Lempert subsequently ceased representing Maxim. Defendant then changed his mind and urged Maxim to testify in his favor. But based on the independent advice of a court-appointed alternate defender, Maxim maintained her refusal to testify. This sequence of events is set forth in the record as follows.

The record shows Maxim's refusal to testify was entirely volitional. In her September 7 interview with Officer Muok—conducted before Maxim had spoken with defendant in jail—Maxim said she had already called the prosecutor's office and left a

message stating she did not wish to press charges. She repeated her desire not to press charges and indicated she would refuse to testify. In response, Officer Muok advised her, “that’s your choice.”

Then, before she spoke with defendant for the first time following his arrest, Maxim told the prosecutor she would refuse to testify. In her letter of September 9, she wrote: “I told [the assistant district attorney] I would not press charges or testify against you and I think he thinks I will change my mind.” In another subsequent letter, Maxim reminded defendant about the phone message she left telling the prosecutor she would not testify. She advised defendant to obtain the recording to defend against the charges of dissuasion.

Defendant initially raised the possibility of Maxim testifying in a phone call on September 12. First, he urged Maxim to recant because he would be “washed up” if she did not. Maxim indicated she would refuse to testify, but defendant insisted that would not be sufficient, and he again urged her to “recant everything.” Defendant then told Maxim: “The only way is a total recantation. *Or to say that you’ll get on the stand and you’ll deny it all.*” (Italics added.) In a letter written later that day, Maxim wrote: “I will not testify against you ever so they will only have what the officers said I told them . . . .” After the prosecutor subpoenaed Maxim to testify, she again called the prosecutor’s office to tell them she would refuse to testify. All these refusals to testify came solely from Maxim; the record holds no evidence that defendant pressured or encouraged her to do so prior to meeting Lempert. To the contrary, during this period, defendant urged Maxim to speak to law enforcement and he explicitly raised the possibility of her testifying by recanting her prior statements.

Defendant did not raise the possibility of Maxim *refusing* to testify until September 19, after he spoke with Lempert. The record makes clear that Lempert was the source of the advice and the primary impetus for the plan. Defendant had initially contacted Lempert to seek representation for himself; it was Lempert who proposed to

represent Maxim instead. Lempert suggested that the prosecution might attempt to pressure Maxim into testifying, but he advised they would not be able to do so if she had an attorney. He told defendant the prosecution would not have sufficient evidence to convict him if Maxim did not testify. Defendant's initial involvement consisted of relaying this advice to Maxim and arranging for her to meet with Lempert.

Over the course of the following two or three weeks, defendant encouraged Maxim to follow Lempert's advice not to testify. But Maxim's responses show she needed no encouragement, and she followed Lempert's lead in all respects. For example, when defendant urged Maxim once again to contact the prosecutor, Maxim refused to do so because Lempert had advised her not to speak to anyone. Defendant also urged Maxim to come to court, but Lempert advised her not to do so unless she was subpoenaed. Maxim adhered to Lempert's advice during this period, even when it contradicted defendant's requests.

In early October, Lempert informed defendant that the prosecution could succeed at the preliminary hearing based solely on the police reports. Around the same time, defendant's public defender advised him that he faced up to 352 years to life if he were convicted. At this point, defendant changed his mind about Maxim refusing to testify. He proposed to his public defender that Maxim "get on the stand, like, and say that she, you know, she lied about everything." But Maxim rejected this idea based on Lempert's advice that she "just not go up and say anything."

It soon became apparent that defendant would be unable to pay for Lempert's services. Lempert advised Maxim that the court could appoint him to represent her. But the court never appointed Lempert, and he ceased representing Maxim at some point in October or November. Defendant and Maxim then stopped mentioning Lempert in their phone calls, and when she appeared in court on December 1, Lempert was absent. He entered no subsequent appearances.

On December 2, the prosecutor amended the complaint to add two counts of attempting to dissuade a witness. In her letter of December 9, Maxim expressed her dismay over the additional charges. She pointed out that she had decided not to testify before she had spoken with defendant after his arrest, adding: “So obviously *I had already made up my mind and nobody dissuaded me because I dissuaded myself.*” (Italics added.) As set forth above, the record repeatedly corroborates Maxim’s statement.

We are mindful that abusive relationships typically include an element of inherent psychological coercion, and that acts of domestic violence are often designed to intimidate victims into silence. As the Supreme Court recognized in *Giles*, “Acts of domestic violence often are intended to dissuade a victim from resorting to outside help, and include conduct designed to prevent testimony to police officers or cooperation in criminal prosecutions.” (*Giles, supra*, 554 U.S. at p. 377.) At the same time, the high court held that the mere fact that a defendant is charged with an offense of domestic violence is insufficient to justify an exception to the Confrontation Clause. “Domestic violence is an intolerable offense that legislatures may choose to combat through many means—from increasing criminal penalties to adding resources for investigation and prosecution to funding awareness and prevention campaigns. But for that serious crime, as for others, abridging the constitutional rights of criminal defendants is not in the State’s arsenal.” (*Id.* at p. 376.) Accordingly, *Giles* makes clear that even in domestic violence cases the prosecution must still put forth affirmative evidence establishing the core elements of forfeiture by wrongdoing, including causation.

Here, the facts of Maxim’s relationship to defendant show that he exerted psychological pressure on her to engage in all sorts of conduct, but her decision to refuse to testify was not the product of coercion, fear, or intimidation. In her September 7 interview with Officer Muok—a statement that the trial court found credible—Maxim set forth her reasons for opposing defendant’s prosecution. She stated she was not motivated

by fear; rather, she believed defendant needed drug treatment, and she did not believe he would get the necessary treatment in jail. She subsequently stated numerous times that she wanted defendant to be freed so that they could be reunited. Given the poisonous nature of their relationship, the record leaves no doubt that it would have been highly inadvisable for Maxim to reunite with defendant. Nonetheless, the record does *not* show that Maxim's refusal to testify was caused by defendant. To the contrary, the record shows that once Lempert was no longer involved, defendant repeatedly urged Maxim to testify on his behalf. But she resisted.

On December 1, for example, defendant urged Maxim to "speak your mind at the prelim . . . ." And on December 17, Maxim wrote to defendant that "*even you telling me to testify* looks bad because you say the same thing over and over and you don't let me have a say when I know what I'm doing." (Italics added.) She then explained why she believed it would be best for her not to testify. Her language suggests that defendant was unhappy with her decision: "You think I'm doing this so I don't get in trouble but that's so far from the truth it's not funny . . . ." Similarly, on December 30, she wrote: "You still haven't said that you finally see that I did the right thing. *I really need to hear that from you.* I would never make such a serious decision unless I was 99% sure I was doing the right thing and I did give it a lot of thought." (Italics added.) On February 9, 2012 she referred to defendant's letters, describing them as "you trying to talk me into testifying!" Then again on February 13, 2012, she wrote to defendant that "after we went to court and I refused to testify, you just fucking threw that all away *because you wanted me to testify* & didn't think I knew what I was doing." (Italics added.) These letters show Maxim ultimately refused to testify *in spite of* defendant's efforts, not because of them.

It is not surprising that Maxim did not wish to take the stand. The record shows she had several strong motives not to testify apart from anything defendant said or did. For example, she repeatedly expressed concern about violating her probation, which she

believed could result in two years of jail time. Although she was subsequently promised immunity, she had made clear her distrust of assistant district attorney Huang such that she may not have trusted that his promises of immunity would be honored, despite the court's explanations. She also faced the prospect of a difficult cross-examination concerning her past conduct, including her criminal record and her relationship with William Freitas.

The final and most decisive factor in our analysis is the involvement of an independent, court-appointed attorney who advised Maxim consistently with her refusal to testify. The presence of independent counsel is ultimately what distinguishes this case from the scenario presented in *Steele*. In *Steele*, the defendants hired attorneys who continued to represent the witness up until the point at which the witness refused to testify. Here, defendant never actually retained Lempert, and Lempert stopped representing Maxim in advance of her refusal to testify at the preliminary hearing. Instead, the trial court appointed David Epps from the Alternate Defender's Office—an office established for the purpose of providing advice independent from other defendants' attorneys to avoid legal conflicts. There is no evidence in the record that defendant or his attorney ever colluded or conspired with Epps in any fashion to keep Maxim from testifying. Nonetheless, Epps advised Maxim to assert her Fifth Amendment privilege, whereupon she did so. Thus, even assuming defendant had engaged in a “conspiracy [with Lempert] to keep [Maxim] from testifying,” *Williamson*, 792 F.Supp. at page 810, there is no evidence that such a conspiracy existed at the time Maxim actually refused to testify. Given this critical distinction, in addition to the facts showing Maxim's preexisting decision not to testify, we conclude the prosecution did not establish by a preponderance of the evidence that defendant caused Maxim to be unavailable to testify.

The dissent expresses concern that our “narrow construction of the forfeiture by wrongdoing doctrine is not consistent with the principles behind the doctrine.” (Dissenting opn. at p. 13.) We respectfully disagree with this characterization of our

analysis. As we made clear in our discussion of *Steele* and *Williamson, supra*, we agree that forfeiture by wrongdoing may apply when the defendant is part of a conspiracy to make the witness unavailable, or when the defendant aids and abets in the wrongdoing that causes the witness's unavailability. But the record in this case does not support a finding of causation under either of these theories. Instead, as required by *Cromer*, after reviewing the extensive record in this matter and accepting the trial court's findings of historical fact, we independently reviewed the trial court's application of the legal doctrine and concluded the trial court erred because defendant did not cause Maxim's unavailability.

The prosecution identifies no other constitutional grounds for the admission of Maxim's testimonial statements to Officers Jamison and Muok. Accordingly, the admission of Maxim's testimonial statements violated defendant's right of confrontation under the Sixth Amendment.

#### 6. *The Erroneous Admission of Maxim's Statements Was Prejudicial*

Defendant contends the admission of Maxim's out-of-court testimonial statements requires reversal because the error was not harmless beyond a reasonable doubt. The Attorney General argues that even if the trial court erred in admitting testimonial statements, the error was harmless because the prosecution proved defendant's guilt beyond a reasonable doubt with nontestimonial statements.

Both parties agree that prejudice must be evaluated under the standard set forth in *Chapman v. California* (1967) 386 U.S. 18. Under the *Chapman* standard, the error would be harmless only if we could conclude "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." (*Id.* at p. 24.) "The State bears the burden of proving that an error passes muster under this standard." (*Brecht v. Abrahamson* (1993) 507 U.S. 619, 630.) Applying *Chapman*, we conclude the error was not harmless.

The Attorney General argues the error was harmless because the jury would have convicted defendant based solely on Maxim’s nontestimonial statements—the 911 call and the jailhouse conversations. But the 911 call solely concerned the September 4 incident, charged in Counts Two, Three, and Four. Maxim made no mention of the June 26 incident during that call, so the jury could not have convicted defendant on Count One based on this evidence. Nor could the 911 call have formed the sole basis for Counts Five and Six, which alleged attempted dissuasion of a witness between September 7 and December 13. As to Counts Two, Three, and Four, the jury acquitted defendant on these counts as charged. Thus, the prosecution cannot show beyond a reasonable doubt that the jury would have convicted defendant on Counts One, Five and Six based on the 911 call.

As to the jailhouse conversations between defendant and Maxim, we first note that it is unclear whether these hearsay statements were admissible. As nontestimonial statements, they were not barred by the Sixth Amendment, but the prosecution was required to establish hearsay exceptions for these statements under state law rules of evidence. The trial court admitted them under section 1390, which creates a hearsay exception based on forfeiture by wrongdoing. But this hearsay exception, like the constitutional doctrine, requires proof by a preponderance of the evidence showing a causal connection between the wrongdoing and the witness’s unavailability. Section 1390 provides, in relevant part: “Evidence of a statement is not made inadmissible by the hearsay rule if the statement is offered against a party that has engaged, or aided and abetted, in the wrongdoing that was intended to, *and did*, procure the unavailability of the declarant as a witness.” (Evid. Code § 1390, subd. (a), italics added.) Based on our analysis in Section A.5 above, were it necessary to decide this issue, we would conclude that this hearsay exception does not apply.

The Attorney General argues alternatively that the in-custody communications would have been admissible under Evidence Code sections 1220 (admission of a party) and 1250 (statement of declarant’s then-existing mental or physical state). Evidence

Code section 1220 would allow for the admission of defendant's statements, but Maxim was not a party, so her statements were not admissible under this exception. As for section 1250, the Attorney General does not argue that Maxim's mental state would have been relevant to Counts One through Four. Rather, the Attorney General contends certain statements Maxim made were relevant to Counts Five and Six because they showed her reasons for refusing to testify. We disagree.

As demonstrated above, Maxim's statements regarding her state of mind actually show that she made her own decision not to testify regardless of defendant's conduct. Second, the prosecutor charged defendant under the *attempt* provisions of Penal Code 136.1 in Counts Five and Six, thereby avoiding the burden of having to prove that defendant *caused* Maxim not to testify. Instead, the prosecution only had to prove that defendant maliciously tried to prevent or discourage her from testifying or cooperating with the police. Thus, Maxim's state of mind was not relevant to whether defendant attempted to dissuade her.

In any event, we need not decide whether Maxim's nontestimonial statements were admissible under state law hearsay rules. Even assuming the nontestimonial statements were properly admitted, the Attorney General cannot show that admission of the testimonial statements was harmless. The Attorney General downplays the importance of this testimonial evidence, but the record shows that Maxim's statements to Officers Jamison and Muok were central to the prosecution's case. The September 4 statement to Officer Jamison was made immediately following the incident in question. And her September 7 telephone call with Officer Muok, while made three days later, was recorded and played for the jury as People's Exhibit 2. The jury was able to hear the tone of Maxim's voice and evaluate her demeanor. Maxim displayed no animosity or anger towards defendant during that call; to the contrary, she stated that she did not wish for defendant to be prosecuted and expressed concern for his ability to get drug treatment.

Thus, the jury reasonably could have concluded that the testimonial statements made by Maxim were credible.

By contrast, the jury could have concluded that the statements Maxim made in the phone calls and letters lacked credibility for several reasons. First, Maxim's allegations were typically coupled with displays of intense jealousy and anger towards defendant based on his failure to contact her or due to his relationship with Anderson. Second, the statements were highly contradictory, alternating between accusations and exonerations, sometimes in the same letter or call. As to the phone calls, Maxim made several general allegations of harm or abuse not specific to any date or incident. Maxim made similarly general allegations in the letters. Only one letter—written on December 7 and 8, but never mailed—specified the dates of the incidents. Maxim made clear in that letter that she intended to harm defendant based on his failure to write or call her. And as she expressed in a letter disavowing these accusations, she was in the midst of an “ugly mood swing,” wherein “I go from wanting to rape you to wanting to run you over, from loving you to leaving you . . . .”

In contrast to the letters and phone calls, Maxim's statements to Officers Jamison and Muok were comparatively consistent and credible. The Attorney General cannot show beyond a reasonable doubt that the jury did not rely on them in reaching their verdicts.

As to Counts Five and Six (attempted dissuasion of a witness), much of the evidence supporting these charges came from defendant's own statements in the jailhouse phone calls—the admissibility of which he does not contest. However, the jury was instructed that it was required to find, as an element of both counts, that Maxim was the “victim” of a crime committed or attempted against her. The jury was further instructed that a person is a “victim” if there is “reason to believe that a federal or state crime is being or has been committed or attempted against her.” So evidence showing that

Maxim was a victim of domestic violence was relevant and probative to defendant's liability on Counts Five and Six.

Moreover, in closing argument, the prosecution emphasized that evidence of the domestic violence incidents provided proof of "reason to believe" that Maxim was a "victim" with respect to Counts Five and Six. Because the jury may have relied on inadmissible evidence to conclude defendant was guilty on the domestic violence charges—and hence that there was "reason to believe" Maxim was a "victim" as to Counts Five and Six—the Attorney General cannot show the error was harmless beyond a reasonable doubt as to Counts Five and Six.

Furthermore, the record suggests the jury understood this logical connection and relied on evidence of the domestic violence charges in assessing Counts Five and Six. In its first note to the court, the jury asked: "Counts 4, 5, 6: Is it illegal to interfere with a witness (pressure not to testify or to say a suggested thing) even if the defendant is trying to get the alleged victim to act truthfully?" (Underline in original.) The court responded by referring the jury back to the instructions defining the elements of the offenses. Of course, if defendant, by urging Maxim to proclaim his innocence, was "trying to get the alleged victim to act *truthfully*," that would imply he was innocent of the domestic violence charges. By connecting this premise to the dissuasion charges, the jury's question suggests that if the jury had acquitted defendant on the domestic violence charges, they might also have acquitted him on Counts Five and Six.

Finally, we respectfully disagree with the dissent's conclusion that the trial court's erroneous admission of Maxim's testimonial statements was harmless as to Counts Two, Five, and Six. We agree that the proper standard for review is *Chapman's* beyond a reasonable doubt standard. But the dissent does not discuss whether the wrongly admitted evidence contributed to the jury's verdict as required under *Chapman*. Instead, the dissent cites to examples of what it considers "very strong" evidence of defendant's guilt on these counts. With respect to Count Two, for example, the dissent would

conclude that “the evidence that defendant committed a battery on Maxim was very strong, even without Maxim’s out-of-court testimonial statements.” (Dissenting opn. at p. 14.) And with respect to Counts Five and Six, the dissent would conclude that “the evidence very strongly showed that Maxim was the victim of a crime on the night of September 4, 2011.” (Dissenting opn. at p. 18.) These facts might support the dissent’s conclusions if the test for harmless error here were an exercise in reviewing the strength of the evidence. But *Chapman* requires that the prosecution prove “beyond a reasonable doubt that the error complained of did not *contribute* to the verdict obtained.” (*Chapman*, *supra*, at p. 24, italics added.) As we have explained, that burden was not met.

Accordingly, we conclude the erroneous admission of Maxim’s testimonial statements was not harmless under *Chapman*.

### III. DISPOSITION

The judgment is reversed.

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Márquez, J.

I CONCUR:

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Grover, J.

BAMATTRE-MANOUKIAN, ACTING P.J., Dissenting

I respectfully dissent. I would conclude that the trial court did not err by determining that Rebecca Maxim's prior testimonial statements were admissible under the forfeiture by wrongdoing doctrine (see Evid. Code, § 1390; *Giles v. California* (2008) 554 U.S. 353 (*Giles*)) because the record contains substantial evidence to support the trial court's factual determination that defendant caused Maxim to be unavailable at trial. I would further conclude that even if Maxim's testimonial statements should not have been admitted, the error was harmless as to three of defendant's four convictions.

## I. BACKGROUND

### A. *June 26, 2011 Incident*

On June 26, 2011, at about 7:30 a.m., Officer John Muok found Maxim in a pickup truck in the parking lot of the Executive Inn. Defendant—Maxim's boyfriend—was asleep in a hotel room.

Maxim had cuts and dried blood around her mouth, black eyes, a split lip, and bruises on her legs, shoulder, and kidneys. Maxim denied that defendant was responsible for her injuries. Maxim told Officer Muok that she had been attacked by "an unknown female." Maxim told her mother that "a couple of big women beat her up in a parking lot."

### B. *September 4, 2011 Incident*

On September 4, 2011, Maxim called 911 at about 1:15 a.m. While on the phone with the dispatcher, Maxim said that defendant had hit her, choked her, slapped her, kicked her, pushed her, and threatened to kill her.

Officer Tyler Jamison responded to the Best Value Inn. He stopped defendant, who was driving out of the parking lot. Another officer "stood by" with defendant while Officer Jamison went to speak with Maxim, who was in a hotel room. Officer Jamison asked if Maxim needed any medical attention. Maxim complained of "back and neck pains," so the officer called for emergency medical responders.

Officer Jamison then spoke with Maxim about the incident. Throughout the interview, Maxim was crying and “acting somewhat hysterical.” Maxim described how defendant had kicked her and slapped her during an argument. Defendant had threatened to kill Maxim, spat on her face, pushed her down, got on top of her, and choked her. When Maxim tried to call 911, defendant hung up the phone and pulled the jack out of the wall, then hit her with the phone.

Maxim told Officer Jamison that defendant had punched her in the face in June of 2011, but that she had lied to the police about that incident. A few days later, Maxim also told her mother that defendant was in fact responsible for her June 26, 2011 injuries. She said that defendant “had hit her with a lamp or something, or thrown a lamp at her, and then tried to choke her with the telephone cord.”

On September 7, 2011, Maxim was interviewed by Officer Muok over the telephone.<sup>1</sup> She repeated her description of the September 4, 2011 incident and she stated that defendant had been responsible for her injuries on June 26, 2011. She described how defendant had punched her twice on June 26, 2011 and how she went to the hospital and got 17 stitches. However, Maxim told Officer Muok that she had called the District Attorney and said that she did not want to press charges. Maxim said she wanted to be with defendant and believed that he could “get help to be who he was before.”

### ***C. Letters and Phone Calls***

Defendant was arrested and booked into jail after the September 4, 2011 incident. He called Maxim from jail numerous times between September 8, 2011 and December 2, 2011.

During a September 8, 2011 conversation, defendant apologized for pushing Maxim but told her, “you can’t do this to me though.” He indicated that Maxim should “recant completely,” even though she might “do a couple days” for lying. In subsequent

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<sup>1</sup> An audio CD of this interview was played for the jury.

phone calls, defendant similarly urged Maxim to recant, even if it meant she would have to go to jail. He suggested that Maxim should say that she had been high and drunk.

On September 10, 2011, defendant told Maxim, “[Y]ou told the fuckin’ police on me. You fuckin’ got me in jail.” Defendant asserted that he had not put his hands on her and that she had hit herself with the phone. The next day, when defendant said that Maxim should not have called the police on him, Maxim said she had called the police because she was frightened, and that defendant should have kept his hands off of her.

On September 14, 2011, defendant told Maxim to “get me out,” asking her to make a video recording saying that she had been high and drunk. Defendant urged her to “you know, say the truth.” In the same conversation, defendant complained about not receiving any letters from Maxim and when Maxim said she had sent letters, defendant told her, “Okay, you better have, or I’m gonna kick your butt. Oh, I better watch out. I better not say that.”

On September 19, 2011, defendant told Maxim that he had spoken to an attorney who could represent her “in case they try to jam you up for not cooperating.” Defendant provided Maxim with the attorney’s phone number and passed along advice he had gotten from the attorney: that without Maxim’s testimony, there was no evidence against him, and that she could refuse to testify on the basis of the Fifth Amendment.

The next day, September 20, 2011, defendant told Maxim that she should give the prosecution “nothin’ ” and asked if she would ever “turn on [him].” Defendant later told Maxim to ask for an attorney if she was put on the stand. Maxim told defendant that she had called the attorney he had recommended and that the attorney said that he could be appointed for her.

Defendant and Maxim had similar exchanges during later phone calls. Maxim sometimes accused defendant of having hit her, and defendant continued to ask Maxim to help him get out of jail by recanting or refusing to testify.

Maxim also wrote letters to defendant while he was in jail, some of which she did not send. In one letter, she noted that defendant was trying to convince people that he was innocent and that he did not feel guilty about what he had done to her. In another letter, she referred to him “beating the shit out of [her]” and how she was “lying to save [his] ass.” She also wrote, “You are guilty . . . .” In yet another letter, Maxim noted she was willing to take a contempt charge for him.

Maxim also sent letters and emails to the prosecution and trial court, in which she proclaimed defendant’s innocence and asked that the charges against defendant be dropped. In one letter to the prosecution, Maxim wrote that she wanted to have appointed counsel and that she would not testify without an attorney.

***D. Charges***

The first amended information alleged as follows:

On June 26, 2011, defendant inflicted corporal injury on a spouse or cohabitant (count 1; Pen. Code, § 273.5, subd. (a)<sup>2</sup>) and inflicted great bodily injury under circumstances involving domestic violence (§§ 1203, subd. (e)(3), 12022.7, subd. (e)) in the commission of that offense.

On September 4, 2011, defendant inflicted corporal injury on a spouse or cohabitant (count 2; § 273.5, subd. (a)), made criminal threats (count 3; § 422), and attempted to dissuade a victim or witness from reporting a crime (count 4; § 136.1, subd. (b)(1)).

Between September 7, 2011 and December 13, 2011, defendant attempted to dissuade a victim or witness from testifying (count 5; § 136.1, subd. (a)(2)) and attempted to dissuade a victim or witness from causing the prosecution of a crime (count 6; § 136.1, subd. (b)(2)).

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<sup>2</sup> All further statutory references are to the Penal Code unless otherwise indicated.

Defendant had two prior serious felony convictions (§ 667, subd. (a)) and ten prior strike convictions (§§ 667, subds. (b)-(i), 1170.12), had served a prior prison term (§ 667.5, subd. (b)), and was on parole at the time of the offenses (§ 1203.085, subd. (b)).

***E. Maxim's Refusal to Testify***

At the preliminary hearing, Maxim asked to have an attorney appointed for her, explaining that she had “made statements to the police that weren’t true.” An attorney was appointed to represent her. Maxim then refused to testify, saying, “That is what I was advised to do,” even after the prosecution offered her immunity and even after being informed she could be found in contempt of court. The magistrate subsequently found Maxim in contempt and suggested she attend a domestic violence support class so that she could “get an education about why it is necessary to file these charges and why it would be to your benefit to testify in the future . . . .”

During an Evidence Code section 402 hearing held at trial, Maxim refused to testify and refused to explain why. The trial court reminded Maxim that she was being offered immunity. Maxim indicated that nothing would change her mind. She then asked the trial court to allow defendant to have “peaceful contact” with her, but the trial court imposed a no contact order, explaining that it had concerns about defendant trying to influence Maxim during the trial proceedings.

***F. Hearing on Admissibility of Maxim's Statements***

During motions in limine, the prosecution sought to introduce Maxim’s prior statements, which included the 911 call, her statements to the officers, the phone conversations with defendant, and the letters she wrote to defendant. The prosecution argued that her prior statements were admissible under the forfeiture by wrongdoing doctrine, codified by Evidence Code section 1390, and that Maxim’s letters were admissible under Evidence Code section 1250 as state of mind evidence.

Defendant sought to have the same statements excluded, arguing that they were “testimonial in nature.”

The trial court ruled that Maxim's out-of-court statements were all admissible pursuant to Evidence Code section 1390. The trial court found that throughout the "entire series of conversations," defendant had put "a great deal of pressure" on Maxim. The trial court found, by a preponderance of the evidence, that defendant "tried to and succeeded in preventing M[s]. Maxim from being a witness," by repeatedly telling her to recant, by arranging for an attorney to help her not testify, by blaming her for him being in jail, and by promising to marry her when he got out of jail.

**G. Verdicts**

As to the June 26, 2011 incident, the jury found defendant guilty of inflicting corporal injury on a spouse or cohabitant (count 1; § 273.5, subd. (a)) and found that he inflicted great bodily injury under circumstances involving domestic violence (§§ 1203, subd. (e)(3), 12022.7, subd. (e)) in the commission of that offense.

As to the September 4, 2011 incident, the jury found defendant not guilty of inflicting corporal injury on a spouse or cohabitant (count 2; § 273.5, subd. (a)), but it found him guilty of misdemeanor battery on a cohabitant (§ 243, subd. (e)(1)), a lesser-included offense.<sup>3</sup> The jury also found defendant not guilty of making criminal threats (count 3; § 422), and not guilty of attempting to dissuade a victim or witness from reporting a crime (count 4; § 136.1, subd. (b)(1)).

As to the time period of September 7, 2011 to December 13, 2011, the jury found defendant guilty of attempting to dissuade a victim or witness from testifying (count 5; § 136.1, subd. (a)(2)) and attempting to dissuade a victim or witness from causing the prosecution of a crime (count 6; § 136.1, subd. (b)(2)).

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<sup>3</sup> The majority refers to the September 4, 2011 incident as an " 'alleged domestic violence incident,' " reasoning that "the jury acquitted defendant on the charges related to that incident." (Maj. opn., p. 3, fn. 2.) Although the jury acquitted defendant of the charged felony offense, it did find defendant guilty of a misdemeanor *domestic violence* offense.

## **H. Sentencing**

At the October 22, 2012 sentencing hearing, the trial court imposed an aggregate prison term of 75 years to life consecutive to 34 years. For counts 1, 5, and 6, the court imposed consecutive indeterminate terms of 25 years to life plus determinate 10-year terms for the two prior serious felonies. The court also imposed a consecutive determinate term of four years for the great bodily injury enhancement.

## **II. DISCUSSION**

The majority concludes that the trial court erred by admitting Maxim's out-of-court testimonial statements under the forfeiture by wrongdoing doctrine.<sup>4</sup> (See Evid. Code, § 1390; *Giles, supra*, 554 U.S. 353.) The majority holds that "the prosecution did not show by a preponderance of the evidence that defendant *caused* Maxim to be unavailable to testify." (Maj. opn., p. 47.) As explained below, I would conclude that substantial evidence supports the trial court's finding that defendant caused Maxim's unavailability.

### **A. The Forfeiture by Wrongdoing Doctrine**

"[T]he rule of forfeiture by wrongdoing . . . extinguishes confrontation claims on essentially equitable grounds." (*Crawford v. Washington* (2004) 541 U.S. 36, 62.) "That is, one who obtains the absence of a witness by wrongdoing forfeits the constitutional right to confrontation." (*Davis, supra*, 547 U.S. at p. 833.)

In California, the forfeiture by wrongdoing doctrine is codified as an exception to the hearsay rule in Evidence Code section 1390 ("section 1390"). Section 1390, subdivision (a) provides: "Evidence of a statement is not made inadmissible by the

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<sup>4</sup> I agree with the majority that Maxim's September 4, 2011 911 call was not testimonial. (See *Davis v. Washington* (2006) 547 U.S. 813, 828 (*Davis*).) I also agree that her September 7, 2011 interview was testimonial. Additionally, I agree that while Maxim's September 4, 2011 interview was initially non-testimonial, it became testimonial after the officer began to ask her about the incident. (See *People v. Cage* (2007) 40 Cal.4th 965, 985.)

hearsay rule if the statement is offered against a party that has engaged, or aided and abetted, in the wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness.”<sup>5</sup>

Section 1390, subdivision (b) specifies the procedure for introducing a statement under the forfeiture by wrongdoing doctrine. At a foundational hearing, the party seeking to introduce a statement has the burden of showing, “by a preponderance of the evidence, that the elements of subdivision (a) have been met.” (§ 1390, subd. (b)(1).) “[A] finding that the elements of subdivision (a) have been met . . . shall be supported by independent corroborative evidence.” (*Id.*, subd. (b)(2).) The judge may exclude a statement if he or she concludes it is not “trustworthy and reliable.” (*Id.*, subd. (b)(4).)

In *Giles, supra*, 554 U.S. 353, the United States Supreme Court addressed the development and scope of the forfeiture by wrongdoing doctrine. The issue in *Giles* was whether a statement is admissible under the forfeiture by wrongdoing doctrine any time the defendant’s wrongful act renders the witness unavailable, or whether “the exception applie[s] only when the defendant engaged in conduct *designed* to prevent the witness from testifying.” (*Id.* at p. 359.) The court concluded that the forfeiture by wrongdoing doctrine does contain a “purpose requirement” – i.e., that its application depends on whether the defendant’s wrongful act was intended to make the witness unavailable. (*Id.* at p. 361.)

Under *Giles*, “forfeiture by wrongdoing is implicated not only when the defendant intends to prevent a witness from testifying in court but also when the defendant’s efforts were designed to dissuade the witness from cooperating with the police or other law enforcement authorities.” (*People v. Banos* (2009) 178 Cal.App.4th 483, 501 (*Banos*).)

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<sup>5</sup> Section 1390 is similar to Federal Rules of Evidence, rule 804(b)(6), which provides: “A statement offered against a party that wrongfully caused—or acquiesced in wrongfully causing—the declarant’s unavailability as a witness, and did so intending that result.”

**B. Standard of Review**

The trial court applies the preponderance of the evidence standard when making the factual determinations underlying the application of the forfeiture by wrongdoing doctrine. (§ 1390, subd. (b)(1); *United States v. Dinkins* (4th Cir. 2012) 691 F.3d 358, 383 (*Dinkins*)). On appeal, we determine if there is substantial evidence to support the trial court’s express or implied findings as to those factual issues. (See *Banos, supra*, 178 Cal.App.4th at p. 502; *People v. Cromer* (2001) 24 Cal.4th 889, 902 (*Cromer*) [“the trial court’s resolution of disputed factual issues . . . is reviewed deferentially on appeal under the substantial evidence standard”].)

In applying the forfeiture by wrongdoing doctrine, factual issues to be resolved by the trial court include: (1) whether the defendant rendered a witness unavailable to testify and (2) whether the defendant intended to render the witness unavailable. (See *Banos, supra*, 178 Cal.App.4th at p. 502.)

The majority applies de novo review to the question of whether defendant’s conduct caused Maxim to be unavailable. (See Maj. opn., pp. 41-42, 58.) The majority distinguishes the issue of Maxim’s motivation for not testifying from other “historical facts.” (Maj. opn., p. 41.) But the question of who or what caused Maxim’s unavailability is also an issue of fact (see *People v. Roberts* (1992) 2 Cal.4th 271, 320, fn. 11 [causation is generally an issue of fact]), not a mixed issue of fact and law subject to de novo review (cf. *Cromer, supra*, 24 Cal.4th at p. 901 [de novo review applies to the question of whether prosecution’s efforts to locate an absent witness are *sufficient* to justify an exception to the confrontation clause].)

Here, the trial court determined that defendant “tried to and succeeded in preventing M[s]. Maxim from being a witness.” We must uphold the trial court’s factual finding if the record contains substantial evidence to support it—that is, evidence that is reasonable, credible and of solid value. (See *People v. Johnson* (1980) 26 Cal.3d 557, 577-578.) The substantial evidence standard “is deferential: ‘When a trial court’s factual

determination is attacked on the ground that there is no substantial evidence to sustain it, the power of an appellate court *begins and ends* with the determination as to whether, *on the entire record*, there is substantial evidence, contradicted or uncontradicted, which will support the determination . . . .’ [Citation.]” (*People v. Superior Court (Jones)* (1998) 18 Cal.4th 667, 681, fn. omitted.)

### **C. Causation**

Applying de novo review, the majority concludes that “the prosecution did not show by a preponderance of the evidence that defendant *caused* Maxim to be unavailable to testify.” (Maj. opn., p. 47.) The majority finds that “Maxim’s refusal to testify was entirely volitional” (maj. opn., p. 52) and that “the record does *not* show that Maxim’s refusal to testify was caused by defendant” (maj. opn., p. 56). The majority acknowledges that defendant “exerted psychological pressure” on Maxim and “raise[d] the possibility” of Maxim refusing to testify. (Maj. opn., pp. 55, 53.) The majority states, however, that defendant was apparently passing along advice from an attorney when he suggested that Maxim refuse to testify. The majority further points out that Maxim previously said she would refuse to testify, that defendant frequently encouraged Maxim to “testify[] by recanting her prior statements” (maj. opn., p. 53), and that Maxim received advice from two different attorneys, including one appointed by the court, before ultimately refusing to testify.

I would conclude that the record contains substantial evidence that supports the trial court’s finding that the prosecution showed, by a preponderance of the evidence, that defendant caused Maxim’s unavailability. Even though Maxim initially indicated she did not want to press charges, the record supports the trial court’s finding that defendant’s course of conduct while in jail, which had put “a great deal of pressure” on Maxim, caused Maxim to be unavailable as a witness at trial. Throughout the pretrial time period, defendant pressured Maxim to recant and to refuse to cooperate with the prosecution. Defendant also arranged for her to consult an attorney so that she could be better

prepared on how to claim the Fifth Amendment privilege against self-incrimination. (See *Steele v. Taylor* (6th Cir. 1982) 684 F.2d 1193, 1201 (*Steele*) [conduct resulting in waiver of confrontation clause claim includes “a defendant’s direction to a witness to exercise the fifth amendment privilege”].) Defendant specified that the attorney could help Maxim “in case they try to jam you up for not cooperating.” After consulting with the attorney, Maxim learned she could get a court-appointed attorney if she requested one on the stand. When Maxim told defendant about this option, defendant urged Maxim to request a court-appointed attorney if she was called to testify, and Maxim did so.

The majority concludes that the “final and most decisive factor in [its] analysis is the involvement of an independent, court-appointed attorney who advised Maxim consistently with her refusal to testify.” (Maj. opn., p. 57.) However, the record supports a finding by a preponderance of the evidence that defendant’s conduct caused Maxim to request that attorney and to subsequently refuse to testify even when offered immunity. Defendant persistently tried to persuade Maxim to help him by recanting or refusing to testify, provided her with an attorney’s advice about refusing to testify, and told her to ask for an attorney. The trial court found that through “the entire series of conversations” while defendant was in jail, defendant put “a great deal of pressure” on Maxim. The court noted that defendant had “arranged for an attorney . . . to assist her in not testifying,” blamed her for him being in jail and “facing life in prison,” and promised to marry her when he got out of jail. When Maxim refused to testify even after being granted immunity, the trial court indicated that it did not believe Maxim was refusing to testify for a valid reason but because she had been influenced by defendant’s conduct. This credibility finding was based on the trial court’s opportunity to observe Maxim’s demeanor, and we must defer to that determination. (Cf. *In re Hardy* (2007) 41 Cal.4th 977, 995.) Thus, even though Maxim may have had other reasons for not testifying, and even though Maxim later obtained advice from a court-appointed attorney before refusing

to testify, the record nevertheless supports the trial court's finding that her unavailability was "procured" by defendant. (See *Giles, supra*, 554 U.S. at p. 360.)

The forfeiture by wrongdoing doctrine can apply when there are multiple motivations for, or multiple persons who cause, a witness's unavailability or refusal to cooperate. (Cf. *United States v. Jackson* (4th Cir. 2013) 706 F.3d 264, 268, 269 (*Jackson*) [holding, under a "broad understanding of the doctrine," that the forfeiture-by-wrongdoing exception applies "even when a defendant has multiple motivations for harming a witness"].) Indeed, section 1390, subdivision (a) allows the admission of statements when the defendant is not necessarily the direct perpetrator of the wrongdoing, but has "engaged, or aided and abetted, in the wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness." (See also Fed. Rules of Evid., rule 804(b)(6) [permitting the admission of a statement "offered against a party that wrongfully caused—or acquiesced in wrongfully causing—the declarant's unavailability as a witness"].) Thus, the forfeiture by wrongdoing doctrine can apply even where the defendant was not the sole or direct cause of the witness's unavailability. For instance, in *Steele, supra*, 684 F.2d 1193, a witness refused to testify on the advice of an attorney who had been hired by one of the codefendants. The trial court had found that the defendants bore "a major responsibility for the unavailability of the witness" (*id.* at p. 1201), and the appellate court upheld that finding as part of its conclusion that the trial court had properly admitted the witness's prior statements (*id.* at p. 1203). The forfeiture by wrongdoing doctrine can also apply even when a coconspirator does not directly participate in the act that actually causes the witness to be unavailable. (E.g., *Dinkins, supra*, 691 F.3d at p. 384 [defendant was in jail at the time his coconspirators murdered the witness].)

Application of the majority's analysis will considerably limit the forfeiture by wrongdoing doctrine. If the majority opinion is construed as requiring a defendant's conduct to be the sole cause of a witness's unavailability, it will hamper many

prosecutions, particularly in domestic violence cases. Defendants will have an incentive to coerce already reluctant witnesses into refusing to testify. “While the Confrontation Clause is fundamental to our conception of a fair and just system of criminal adjudication, so also is the vigorous and candid participation of relevant witnesses.” (*Jackson, supra*, 706 F.3d at p. 269.) The majority’s narrow construction of the forfeiture by wrongdoing doctrine is not consistent with the principles behind the doctrine. (See *Giles, supra*, 554 U.S. at p. 377 [explaining how forfeiture by wrongdoing doctrine applies in domestic violence cases].)

I would conclude that in this case, the trial court was in the best position to make credibility determinations and to make, by a preponderance of the evidence, the factual finding that defendant caused Maxim to be unavailable at trial. As that finding is supported by substantial evidence in the record, I would conclude that the trial court did not err by admitting Maxim’s out-of-court statements under the forfeiture by wrongdoing doctrine.

#### ***D. Prejudice***

The majority concludes that the erroneous admission of Maxim’s out-of-court testimonial statements was prejudicial as to all counts. Although I do not believe the trial court erred by admitting Maxim’s out-of-court testimonial statements under the doctrine of forfeiture by wrongdoing, I would find any error prejudicial only as to count 1. I would find any error harmless as to counts 2, 5, and 6.

##### **1. Harmless Error Standard**

“[B]efore a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt.” (*Chapman v. California* (1967) 386 U.S. 18, 24 (*Chapman*).) Where the error involves the erroneous admission of evidence, reversal is required if, “absent the constitutionally forbidden [evidence], honest, fair-minded jurors might very well have brought in not-guilty verdicts.” (*Id.* at pp. 25-26.)

In determining the effect of a confrontation clause violation, “[t]he correct inquiry is whether, assuming that the damaging potential of the cross-examination were fully realized, a reviewing court might nonetheless say that the error was harmless beyond a reasonable doubt. Whether such an error is harmless in a particular case depends upon a host of factors, all readily accessible to reviewing courts. These factors include the importance of the witness’ testimony in the prosecution’s case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution’s case. [Citations.]” (*Delaware v. Van Arsdall* (1986) 475 U.S. 673, 684 (*Van Arsdall*).

## **2. Counts 1 and 2**

As to the incident that occurred on June 26, 2011 (count 1; § 273.5, subd. (a)), without Maxim’s out-of-court testimonial statements, the evidence would have established that Maxim was injured but there would have been little evidence showing that defendant was responsible for those injuries. Thus, I agree that as to count 1, any error in admitting Maxim’s September 4, 2011 and September 7, 2011 statements to the police was not harmless beyond a reasonable doubt. (*Chapman, supra*, 386 U.S. at p. 24.)

As to the incident that occurred on September 4, 2011 (count 2; § 243, subd. (e)(1)), however, the evidence that defendant committed a battery on Maxim was very strong, even without Maxim’s out-of-court testimonial statements. During her 911 call on September 4, 2011, which the majority and I agree was not testimonial, Maxim described how defendant had hit her, choked her, slapped her, kicked her, pushed her, and threatened to kill her. When Officer Jamison arrived at the hotel room, he observed Maxim suffering from pain and crying, and he felt a lump on her head and saw blood in the hotel room. There was also evidence of defendant’s flight from the hotel room, which showed his consciousness of guilt. Most importantly, during a September 8, 2011

recorded telephone call, defendant admitted that he had pushed Maxim, saying, “I’m so sorry this happened and I’m so sorry I pushed you. . . .”<sup>6</sup>

In addition, Maxim’s testimonial statements did not comprise a substantial portion of the evidence at trial. Maxim’s September 4, 2011 statements to Officer Jamison were described in eight pages of his direct examination, and he did not refer to any of her statements during redirect. A CD and transcript of Maxim’s September 7, 2011 statements were admitted during Officer Muok’s testimony, but he did not discuss those statements on direct examination and only two pages of his redirect examination concerned the interview. The transcript of Officer Muok’s September 7, 2011 interview of Maxim comprises 20 pages of clerk’s transcript.

Finally, although defendant was not able to cross-examine Maxim regarding her statements to the police, he was able to place before the jury a very significant amount of evidence concerning Maxim’s lack of credibility. (See *Van Arsdall, supra*, 475 U.S. at p. 684 [“the extent of cross-examination otherwise permitted” is a factor in determining whether a confrontation clause error was prejudicial].) The jury knew that Maxim had made contradictory statements to the police concerning the June 26, 2011 incident. The jury also knew Maxim used drugs, drank alcohol, and was on probation. The defense presented several witnesses for the sole purpose of impeaching Maxim’s credibility. William F. testified that while he was in a relationship with Maxim, she had threatened to falsely accuse him of domestic violence, threatened to plant drugs, stolen money and jewelry from him, stalked him, and violated a protective order. A police officer testified and corroborated much of William F.’s testimony about Maxim. Christina Danielewicz,

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<sup>6</sup> Defendant suggests that his apology for pushing Maxim could have been a reference to him having pushed her into calling the police, as opposed to physically pushing her. However, defendant admitted having “pushed” Maxim during his first phone call from jail, on September 8, 2011, at the very beginning of the conversation. It was not until nearly a week later, during a call on September 14, 2011, that defendant first described having “pushed [Maxim] to call the police.”

who had “hung out” with Maxim and defendant, testified that Maxim was untruthful and had previously threatened to make false accusations about defendant. An emergency room physician testified that Maxim told him she was hit by a woman on June 26, 2011. Indeed, the prosecutor conceded during argument to the jury that Maxim was “highly unlikeable,” that she was “a criminal,” that she “lies,” “cheats,” and “steals.”

In light of the significant amount of evidence impeaching Maxim’s credibility, the record does not establish that cross-examination of Maxim herself would have produced “a significantly different impression of [her] credibility.” (See *Van Arsdall, supra*, 475 U.S. at p. 680.) Having heard the evidence concerning Maxim’s lack of credibility, the jury had exposure to sufficient facts from which they “ ‘could appropriately draw inferences relating to the reliability of the witness.’ ” (*Ibid.*) The fact that defendant was able to effectively impeach Maxim’s out-of-court statements even without cross-examination supports a determination that any error in admitting Maxim’s testimonial statements was harmless. (See *People v. Rodriguez* (1986) 42 Cal.3d 730, 750, fn. 2.)

On this record, even if the jury did not hear Maxim’s September 4, 2011 and September 7, 2011 statements to the police, in light of the very strong evidence showing that defendant committed a battery on Maxim on September 4, 2011, any error in admitting those statements was harmless beyond a reasonable doubt as to count 2, in which defendant was convicted of misdemeanor battery on a cohabitant. (*Chapman, supra*, 386 U.S. at p. 24; *Van Arsdall, supra*, 475 U.S. at p. 684.)

### **3. Dissuading Counts (Counts 5 and 6)**

As to the dissuading counts (counts 5 & 6; § 136.1, subds. (a)(2) & (b)(2)), the majority acknowledges that most of the evidence supporting those counts came from defendant’s own statements, in which he repeatedly asked Maxim to recant or to refuse to testify. (Maj. opn., p. 56.) However, the majority concludes that without Maxim’s statements implicating defendant in the June 26, 2011 and September 4, 2011 incidents,

the jury may not have found that Maxim was a victim and thus that defendant did not dissuade a *victim*. (Maj. opn., pp. 61-62.)

The jury in this case was instructed in order to find defendant guilty of count 5, it had to find that he “maliciously tried to prevent or discourage Rebecca Maxim from attending or giving testimony at a preliminary examination and/or trial” and that “Rebecca Maxim was a crime *victim*.”<sup>7</sup> (Italics added.) The jury was further instructed on the definition of the term “victim” as follows: “A person is a *victim* if there is reason to believe that a federal or state crime is being or has been committed or attempted against her. [¶] It is not a defense that no one was actually physically injured or otherwise intimidated.” (Italics added; see CALCRIM No. 2622; § 136, subd. (3).)

As to count 6, the jury in this case was instructed that it had to find that defendant “maliciously tried to prevent or discourage Rebecca Maxim from cooperating or providing information so that an information could be sought and prosecuted and from helping to prosecute that action” and that “Rebecca Maxim was a crime *victim*.”<sup>8</sup> (Italics added.) The jury was further instructed on the definition of the term “victim” as follows: “A person is a *victim* if there is reason to believe that a federal or state crime is being or has been committed or attempted against her. [¶] It is not a defense that no one was actually physically injured or otherwise intimidated.” (Italics added; see CALCRIM No. 2622; § 136, subd. (3).)

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<sup>7</sup> Section 136.1, subdivision (a)(2) states that it is a crime when a person “[k]nowingly and maliciously attempts to prevent or dissuade any *witness or victim* from attending or giving testimony at any trial, proceeding, or inquiry authorized by law.” (Italics added.)

<sup>8</sup> Section 136.1, subdivision (b)(2) states that it is a crime when a person “attempts to prevent or dissuade another person who has been the *victim of a crime or who is witness* to a crime from” “[c]ausing a complaint, indictment, information, probation or parole violation to be sought and prosecuted, and assisting in the prosecution thereof.” (Italics added.)

For the reasons discussed in the section above, I believe that the jury would have found “reason to believe” that Maxim was a crime *victim*—i.e., that defendant committed a battery on her—even if the jury had not heard the evidence of Maxim’s September 4, 2011 and September 7, 2011 statements to the police, because the jury would still have convicted defendant of count 2 based on the 911 call, Officer Jamison’s testimony, and defendant’s statements. (See CALCRIM No. 2622; § 136, subd. (3).)

But even if the jury would not have convicted defendant of count 2, I believe the jury still would have found “reason to believe” that Maxim was a crime victim within the meaning of CALCRIM No. 2622 and section 136, subdivision (3). As the prosecutor pointed out, the jury did not need to find that Maxim was an “actual crime victim.” The evidence overwhelmingly provided “reason to believe” that Maxim was a crime victim. Even if the jury did not find defendant guilty of count 2 beyond a reasonable doubt, the evidence very strongly showed that Maxim was the victim of a crime on the night of September 4, 2011. When the police arrived, Maxim was injured and defendant had fled. Additionally, defendant apologized for pushing Maxim during their first phone conversation following the incident.

Thus, I would find that even if the jury did not hear Maxim’s September 4, 2011 and September 7, 2011 statements to the police, the admission of those statements was harmless beyond a reasonable doubt as to counts 5 and 6. (*Chapman, supra*, 386 U.S. at p. 24; *Van Arsdall, supra*, 475 U.S. at p. 684.)

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BAMATTRE-MANOUKIAN, ACTING P.J.