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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. MIKE KING THIELEMANN, Defendant and Appellant.	B234017 (Los Angeles County Super. Ct. No. GA081594)

Appeal from a judgment of the Superior Court of Los Angeles County, Dorothy L. Shubin, Judge. Affirmed with directions.

Ann Bergen, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Paul M. Roadarmel, Jr. and Nima Razfar, Deputy Attorneys General, for Plaintiff and Respondent.

I. INTRODUCTION

A jury convicted defendant, Mike King Thielemann, of two counts of assault by means of force likely to produce great bodily injury. (Pen. Code,[1] § 245, subd. (a)(1).) He was sentenced to three years in state prison. Defendant assaulted two acquaintances—Patricia Gault (count 1) and Todd Dickey (count 2). Defendant asserts the trial court violated his confrontation rights under the federal Constitution as to count 2. Defendant challenges an order admitting into evidence a recording of a non-testifying victim's telephone call to an emergency operator. Defendant's argument on appeal relates solely to the aggravated assault on Mr. Dickey. Mr. Dickey did not testify at trial. We conclude Mr. Dickey's statements were nontestimonial and therefore admissible. We further conclude even if there was error, it was harmless. We affirm the judgment but direct, upon remittitur issuance, the abstract of judgment be corrected.

II. THE EVIDENCE

1. Ms. Gault

On November 4, 2010, Ms. Gault, Mr. Dickey and defendant were working with Rick Thielemann. Mr. Thielemann is defendant's father. They were cleaning Mr. Thielemann's Burbank residence. Mr. Thielemann was preparing to show the house for sale. Defendant had been drinking alcohol and seemed to Ms. Gault to be a little agitated. Ms. Gault was in the kitchen with defendant. He said something to her. Ms. Gault did not understand what defendant meant. She was confused and frightened. Ms. Gault said to defendant: "Please don't talk to me. Leave me alone. You scare me." Defendant said, "I'll give you something to be scared of." He grabbed her by the neck with his hands and picked her up five feet off the ground. Defendant was choking

[1] All further statutory references are to the Penal Code except where otherwise noted.

Ms. Gault. He threw her onto an upholstered chair and continued to choke her. Ms. Gault could not talk or breathe. Defendant applied a lot of pressure to her neck. Ms. Gault thought she was going to die. He choked her for about 55 seconds, but, to Ms. Gault, it felt like forever. Mr. Dickey was screaming for defendant to stop. Mr. Dickey tried to get defendant off Ms. Gault. Ms. Gault tried to use her feet to kick defendant. She kicked out a window. When defendant let go, Ms. Gault arose and ran outside. As she ran, she saw out of the corner of her eye defendant approaching Mr. Dickey. She saw defendant cocking his fist. Ms. Gault testified: "It looked like there was punches being thrown. I just did not see the physical contact."

Ms. Gault ran across the street and told a neighbor, Joan Santon, to call the police. Ms. Gault returned to Mr. Thielemann's house. Upon returning, she saw Mr. Dickey on his knees on the ground. Defendant had Mr. Dickey in a headlock. Defendant had Mr. Dickey by the neck with both hands. Ms. Gault testified, "He was using both hands and was ready to, like, pull his neck, like snap his neck." Mr. Thielemann was begging defendant to stop. He was yelling at defendant, "[S]top it." Defendant had his arms and hands around Mr. Dickey's neck. Mr. Gault left and went across the street. She saw Mr. Dickey run out of Mr. Thielemann's house to the street. Mr. Dickey ran around the corner.

2. Joan Santon

Ms. Santon was in the backyard with Mr. Thielemann and a potential buyer when they heard arguing, scuffling and struggling. Ms. Santon saw Ms. Gault's foot come through a nearby window, breaking it. Mr. Thielemann told Ms. Santon to call the police. Mr. Thielemann looked very scared. Ms. Santon went to the front yard with the potential buyer and his real estate agent. Ms. Santon assisted Ms. Gault in calling the police. She saw Mr. Dickey run out of the house. Then Mr. Thielemann came out of the house. He was drenched in sweat and exhausted. Mr. Thielemann staggered out and collapsed on the neighbor's lawn. He laid there gasping for air.

3. Mr. Thielemann

Mr. Thielemann was uncomfortable testifying against defendant. Mr. Thielemann testified he was outside when he saw a boot go through a window, breaking it. He went into the den at the rear of the house. Mr. Thielemann asked defendant what had happened. But defendant did not respond. At first, Mr. Thielemann denied seeing Mr. Dickey or Ms. Gault with defendant. Mr. Thielemann subsequently testified to seeing defendant and Mr. Dickey. Defendant's arm was around Mr. Dickey's shoulder. The back of defendant's elbow was at the back of Mr. Dickey's neck. Defendant's right bicep was pressing on Mr. Dickey's neck. They both looked exhausted. Mr. Dickey was out of breath. Mr. Thielemann denied defendant had Mr. Dickey in a choke hold. Mr. Thielemann asked defendant, "What's going on?" Defendant did not say a word. Mr. Thielemann said: "Come on, Mike. Let's get out of here. Let's go." Mr. Thielemann pleaded with defendant to let Mr. Dickey go. Mr. Thielemann told Mr. Dickey to get out of the house and go to a nearby park. Mr. Thielemann admitted that at the time of the incident he used drugs on an almost daily basis. This almost daily drug usage involved both Mr. Dickey and Ms. Gault. Defendant was a regular drinker. His drinking had recently increased, after his grandmother died.

When cross-examined, Mr. Thielemann once again denied seeing Mr. Dickey upon entering the house after the window broke. At a later point, Mr. Thielemann saw Ms. Gault outside. He described the encounter: "[She was] ranting and raving and she said that she had two bags in the house, her purse – she said that Mike attacked her or something. And she really sincerely looked scared, and I said, 'Get the hell out of here then. Whatever he did to you is not worth you being here or whatever,' you know. [¶] And she was more concerned with two black bags that I had in my possession in the master bedroom. She wanted me to go back and get them, and I said, 'Get out of here.'" Mr. Thielemann testified, "[Ms. Gault] gave me an indication that she was scared for her life . . . ." She may have said defendant choked her. Mr. Thielemann returned indoors and saw defendant chasing Mr. Dickey from one end of the house to the other. They both

slammed against the front door. Mr. Thielemann described the posture: "[Defendant's right arm was] down over the right front of his chest. Just down. [Mr. Dickey] moved his arm a little bit. It was a hey-buddy-how-you-doing type thing." Mr. Dickey slowly sank to the floor. Panting, Mr. Dickey asked defendant to stop three or four times. Defendant removed his arm. Mr. Dickey left the house. Mr. Thielemann asked defendant, "What's going on." Defendant was "kind of in a daze" according to Mr. Thielemann Mr. Thielemann "absolutely" denied observing defendant holding Mr. Dickey in a choke hold.

4. Officer Andrey Starkov

Officer Starkov spoke with Mr. Thielemann following the incident. Mr. Thielemann told Officer Starkov the following. After Mr. Thielemann saw a foot come through the window, he immediately went inside the house. Mr. Thielemann saw defendant holding Mr. Dickey in a choke hold. Mr. Thielemann used the words "choke hold" to describe how defendant was grasping Mr. Dickey. Defendant's right arm was around Mr. Dickey's neck. Mr. Thielemann told Officer Starkov that defendant's right bicep was pressing on the right side of Mr. Dickey's neck. Defendant's right forearm was pressing on the left side of Mr. Dickey's neck. Defendant's right elbow was pointing down toward the ground and was in line with Mr. Dickey's chin. Mr. Thielemann started begging defendant to stop and let Mr. Dickey go. Mr. Thielemann specifically used the word "begging" to describe his exhortations. Eventually, defendant released Mr. Dickey. Mr. Thielemann told Mr. Dickey to get out of the house and go to a nearby park. Officer Starkov also observed defendant who did not appear to be under the influence of alcohol. He appeared to be sober.

5. Officer Cindy Guillen

Officer Guillen interviewed Mr. Dickey at Verdugo Park, at the intersection of California Street and Clark Avenue in Burbank. The park was about two blocks from

Mr. Thielemann's home. Officer Guillen described Mr. Dickey's demeanor: "He was excited. He was sweating. You could tell his adrenaline was going. . . . He had scratch marks." Officer Guillen testified Mr. Dickey's: face was scratched; ear had redness around it; chest and neck were also red; left ear was bloody and scratched Officer Guillen also observed Ms. Gault at the scene. Ms. Gault had slight redness on both sides of her neck.

6. The Emergency Operator Call

The parties stipulated, "Deborah Allen, employed by the Burbank Police Department as a 911 dispatcher, . . . if called and sworn and duly sworn and testified, will tell you that the 911 call you're about to hear was received on November 4th, 2010, at or near 12:00 o'clock p.m. and that it is a true and accurate representation of the call she received." Mr. Dickey's conversation with Ms. Allen was as follows: "[Ms. Allen]: Good afternoon Burbank police[.] [¶] [Mr. Dickey]: Hello? [¶] [Ms. Allen]: Can I help you? [¶] [Mr. Dickey]: Operator? [¶] [Ms. Allen]: Yes. [¶] [Mr. Dickey]: I was just attacked by someone in my resident at 717 North Fairview. [¶] [Ms. Allen]: Okay where are you right now? [¶] [Mr. Dickey]: I'm at Clark and uh . . . , Clark and California. [¶] [Ms. Allen]: And who attacked you? [¶] [Mr. Dickey]: Mike Thielemann, Mike Thielemann. He's a mental . . . [unintelligible]. [¶] [Ms. Allen]: And how did he attack you? [¶] And how did he attack you? [¶] [Mr. Dickey]: He grabbed me by the head and slammed me into the wall and threw me to the floor and choked me to death. He also grabbed Patty Gault, Patricia Gault, and choked her she couldn't even scream. [¶] [Ms. Allen]: Okay what's your name? [¶] [Mr. Dickey]: My name's Todd. T-O-D-D. Last name Dickey. D-I-C-K-E-Y. [¶] [Ms. Allen]: I'm sorry Todd, and your last name was Dickey? [¶] [Mr. Dickey]: Dickey. D-I-C-K-E-Y. [¶] [Ms. Allen]: Do you need paramedics? [¶] [Mr. Dickey]: I, I don't think so . . . I uh, I uh . . . ." [¶] [Ms. Allen]: Okay, can you stay right, I have officers on the way to the house. Can you

stay right there and they'll contact you? [¶] [Mr. Dickey]: Sure sure sure. [¶] [Ms. Allen]: Alright wait right there okay? [¶] [Mr. Dickey]: Okay."

III. DISCUSSION

A. The Admissibility Of Mr. Dickey's Statements During A Telephone Conversation With An Emergency Operator

1. United States Supreme Court authority

a. *Crawford*

Testimonial out-of-court statements by a non-testifying witness are inadmissible under the confrontation clause unless the declarant is unavailable and there was a prior opportunity to conduct cross-examination. (*Crawford v. Washington* (2004) 541 U.S. 36, 53-54, 59 (*Crawford*); *People v. Cage* (2007) 40 Cal.4th 965, 969.) Only testimonial statements cause the declarant to be a "witness" within the meaning of the confrontation clause. (*Davis v. Washington* (2006) 547 U.S. 813, 821 (*Davis*); *People v. Gonzales* (2012) 54 Cal.4th 1234, ___ [144 Cal.Rptr. 3d 757, 795]; *People v. Cage, supra,* 40 Cal.4th at p. 970.) In *Crawford,* the statements were made during a formal police interrogation and were clearly testimonial. The United States Supreme Court therefore found it unnecessary to define "testimonial." (*Crawford, supra,* 541 U.S. at pp. 51-53, 68; see *People v. Geier* (2007) 41 Cal.4th 555, 597-598.)

b. *Davis*

In *Davis,* the United States Supreme Court considered the application of *Crawford* in the context of an emergency telephone call. (*Davis, supra,* 547 U.S. at pp. 821-834.) A domestic violence victim spoke to an emergency operator. This occurred while the victim's former boyfriend was assaulting her with his fists. The victim identified her

former boyfriend and their location. The victim then advised the operator the former boyfriend was leaving the location. (*Davis, supra,* 547 U.S. at pp. 817-818.) The United States Supreme Court defined "testimonial," not exhaustively, but for purposes of the case before it: "Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." (*Id.* at p. 822, fn. omitted.) With respect to the emergency operator call at issue in *Davis*, the Supreme Court held: "The inquiries of a police operator in the course of a 911 call are an interrogation in one sense, but not in a sense that 'qualifies under any conceivable definition.'" (*Id.* at p. 823, fn. omitted.) The United States Supreme Court considered, "[W]hether, objectively considered, the interrogation that took place in the course of the 911 call produced testimonial statements." (*Id.* at p. 826.) The court noted, "A 911 call . . . is ordinarily not designed primarily to 'establis[h] or prov[e]' some past fact, but to describe current circumstances requiring police assistance." (*Id.* at p. 827.) The court observed that in *Davis*: the victim was speaking about events as they happened, not describing past occasions; the victim was facing an ongoing emergency; "[her] call was plainly a call for help against bona fide physical threat"; the elicited statement were necessary to resolve a present emergency, not simply to learn what happened in the past; and the victim spoke frantically, in a non-tranquil, unsafe environment. (*Ibid*.) The United States Supreme Court concluded: "[T]he circumstances of [the victim's] interrogation objectively indicate its primary purpose was to enable police assistance to meet an ongoing emergency. [The victim] was not acting as a *witness*; she was not *testifying*. What she said was not 'a weaker substitute for live testimony' at trial . . ." (*Id.* at p. 828.) The United States Supreme Court recognized that during the conversation between the victim and the operator, the emergency appeared to end when the assailant fled. The court held: "This presents no great problem. Just as, for Fifth Amendment purposes, 'police officers

can and will distinguish almost instinctively between questions necessary to secure their own safety or the safety of the public and questions designed solely to elicit testimonial evidence from a suspect,' [citation], trial courts will recognize the point at which, for Sixth Amendment purposes, statements in response to interrogations become testimonial. Through *in limine* procedure, they should redact or exclude portions of any statements that have become testimonial . . . ." (*Id.* at p. 829.)

c. *Bryant*

(i) The *Bryant* holding

In *Michigan v. Bryant* (2011) 562 U.S. __, __ [131 S.Ct. 1143,1150-1167] (*Bryant*), the United States Supreme Court considered whether admission of a victim's statements to police officers violated the Confrontation Clause. Police officers found the victim lying on the ground next to his car at a gas station. He had been mortally shot in the abdomen. The officers asked the victim what had happened and who had shot him. The victim identified the defendant and said the shooting had occurred about 25 minutes earlier. (*Id.* at p. __ [131 S.Ct. at p. 1150].) The United States Supreme Court held the primary purpose of the interrogation was to enable law enforcement to meet an ongoing emergency. (*Id*. at p. ___[131 S.Ct. at p. 1156].) The high court identified several factors that inform the primary purpose determination: whether there was an ongoing emergency; the formality of the encounter; and the statements and actions of both the declarant and the interrogator. (*Id.* at pp. 1160-1161.) The United States Supreme Court explained: "To determine whether the 'primary purpose' of an interrogation is 'to enable police assistance to meet an ongoing emergency,' *Davis*, 547 U.S., at 822, which would render the resulting statements nontestimonial, we objectively evaluate the circumstances in which the encounter occurs and the statements and actions of the parties. [¶] . . . [¶] An objective analysis of the circumstances of an encounter and the statements and actions of the parties to it provides the most accurate assessment of the 'primary purpose of the

interrogation.' The circumstances in which an encounter occurs—*e.g.*, at or near the scene of the crime versus at a police station, during an ongoing emergency or afterwards—are clearly matters of objective fact. The statements and actions of the parties must also be objectively evaluated. That is, the relevant inquiry is not the subjective or actual purpose of the individuals involved in a particular encounter, but rather the purpose that reasonable participants would have had, as ascertained from the individuals' statements and actions and the circumstances in which the encounter occurred." (*Bryant, supra*, 562 U.S. at p. __ [131 S.Ct. at p. 1156, fn. omitted].)

ii. ongoing emergency factor

With respect to the existence of an ongoing emergency, *Bryant* held: "As our recent Confrontation Clause cases have explained, the existence of an 'ongoing emergency' at the time of an encounter between an individual and the police is among the most important circumstances informing the 'primary purpose' of an interrogation. See *Davis*, 547 U.S. at 828-830; *Crawford*, 541 U.S. at 65. The existence of an ongoing emergency is relevant to determining the primary purpose of the interrogation because an emergency focuses the participants on something other than 'prov[ing] past events potentially relevant to later criminal prosecution.' *Davis*, 547 U.S. at 822. Rather, it focuses them on 'end[ing] a threatening situation.' *Id.*, at 832. Implicit in *Davis* is the idea that because the prospect of fabrication in statements given for the primary purpose of resolving that emergency is presumably significantly diminished, the Confrontation Clause does not require such statements to be subject to the crucible of cross-examination." (*Bryant, supra*, 562 U.S. at p. __ [131 S.Ct. at pp. 1156-1157, fns. omitted].) The Supreme Court held, "[W]hether an emergency exists and is ongoing is a highly context-dependent inquiry." (*Id.* at p. 1158 [131 S.Ct. at pp. 1156-1157].) A footnote to the opinion discusses the objective assessment of whether an ongoing emergency exists: "The existence of an ongoing emergency must be objectively assessed from the perspective of the parties to the interrogation at the time, not with the benefit of

hindsight. If the information the parties knew at the time of the encounter would lead a reasonable person to believe that there was an emergency, even if that belief was later proved incorrect, that is sufficient for purposes of the Confrontation Clause. The emergency is relevant to the 'primary purpose of the interrogation' because of the effect it has on the parties' purpose, not because of its actual existence." (*Id.* at p. 1157, fn. 8.)

iii. formality factor

In *Bryant,* the United States Supreme Court also identified the degree of formality as bearing on the primary purpose of an encounter between a victim and police: "Another factor . . . is the importance of *informality* in an encounter between a victim and police. Formality is not the sole touchstone of our primary purpose inquiry because, although formality suggests the absence of an emergency and therefore an increased likelihood that the purpose of the interrogation is to 'establish or prove past events potentially relevant to later criminal prosecution,' [*Davis,* 547 U.S.], at 822, informality does not necessarily indicate the presence of an emergency or the lack of testimonial intent. Cf. *id,* at 826 . . . . [T]he questioning in this case occurred in an exposed, public area, prior to the arrival of emergency medical services, and in a disorganized fashion. All of those facts make this case distinguishable from the formal station-house interrogation in *Crawford*. See *Davis,* 547 U.S. at 827." (*Bryant, supra,* 562 U.S. at p. __ [131 S.Ct. at p. 1160].)

iv. statements and actions factor

Finally, the United States Supreme Court in *Bryant* discussed the statements and actions of the parties: "In addition to the circumstances in which an encounter occurs, the statements and actions of both the declarant and interrogators provide objective evidence of the primary purpose of the interrogation. See, *e.g., Davis,* 547 U.S., at 827. ('[T]he nature of what was *asked and answered* in *Davis,* again viewed objectively, was such that

the elicited statements were necessary to be able to *resolve* the present emergency, rather than simply to learn . . . what had happened in the past' . . . . [¶] . . . *Davis* requires a combined inquiry that accounts for both the declarant and the interrogator. In many instances, the primary purpose of the interrogation will be most accurately ascertained by looking to the contents of both the questions and the answers. To give an extreme example, if the police say to a victim, 'Tell us who did this to you so that we can arrest and prosecute them,' the victim's response that 'Rick did it,' appears purely accusatory because by virtue of the phrasing of the question, the victim necessarily has prosecution in mind when she answers." (*Bryant, supra,* 562 U.S. at p. __ [131 S.Ct. at pp. 1160-1161].)

d. conclusion

In *Bryant,* the United States Supreme Court held the shooting victim's statements to police officers were not testimonial and their use at trial did not violate the confrontation clause. (*Bryant, supra,* 562 U.S. at p. __ [131 S. Ct. at pp. 1166-1167.) The police did not know and the victim did not tell them whether the threat, which involved a gun, was limited to him or extended to others. The police did not know the defendant's location. The victim was in pain and had difficulty talking. He was concerned with when emergency medical services would arrive. The United States Supreme Court noted, "[W]e cannot say that a person in [the victim's] situation would have had a 'primary purpose' 'to establish or prove past events potentially relevant to later criminal prosecution.' *Davis,* 547 U.S. at 822." (*Id.* at p. 1165.) The questions the police asked—what happened, who did this, where did the shooting occur—were necessary to assess the situation and determine the threat to law enforcement personnel, the victim and the public. Although the victim said he had been shot 25 minutes earlier, he did not know where his assailant was and he did not indicate whether the perpetrator was likely to still be looking for him. Finally, the situation and interrogation were informal, the situation was fluid, and the questioning somewhat confused. "The

informality suggests that the interrogators' primary purpose was simply to address what they perceived to be an ongoing emergency, and the circumstances lacked any formality that would have alerted [the victim] to or focused him on the possible future prosecutorial use of his statements." (*Id.* at p. ___[131 S.Ct. at p. 1166].) Under all of the circumstances of the encounter the United States Supreme Court concluded the victim's identification of the defendant was not testimonial hearsay. (*Id.* at p. __ [131 S.Ct. at pp. 1166-1167].)

2. California Decisional Authority

a. *Cage*

In *People v. Cage*, *supra*, 40 Cal.4th at pages 970-971, 984-988 (*Cage*), our Supreme Court applied *Crawford* in the context of a non-testifying victim's statements to a police officer in a hospital waiting room and to a treating surgeon. The victim, a 15-year-old boy, was assaulted by his mother. The victim did not testify at trial. However, at the hospital, the victim was interviewed by a police officer. The victim related that his mother had cut him with a piece of glass. A treating physician subsequently asked the victim, "'[W]hat happened.'" The surgeon testified it was his usual practice, followed in the present case, to ask what happened in order to determine treatment. (*Id.* at p. 972.) In response, the victim said his grandmother held him down and his mother cut him. (*Ibid.*) Our Supreme Court set forth several principles derived from *Davis*: "First, . . . the confrontation clause is concerned solely with hearsay statements that are testimonial, in that they are out-of-court analogs, in purpose and form, of the testimony given by witnesses at trial. Second, though a statement need not be sworn under oath to be testimonial, it must have occurred under circumstances that imparted, to some degree, the formality and solemnity characteristic of testimony. Third, the statement must have been given and taken *primarily* for the *purpose* ascribed to testimony—to establish or prove some past fact for possible use in a criminal trial. Fourth, the primary purpose for which

a statement was given and taken is to be determined 'objectively,' considering all the circumstances that might reasonably bear on the intent of the participants in the conversation. Fifth, sufficient formality and solemnity are present when, in a nonemergency situation, one responds to questioning by law enforcement officials, where deliberate falsehoods might be criminal offenses. Sixth, statements elicited by law enforcement officials are not testimonial if the primary purpose in giving and receiving them is to deal with a contemporaneous emergency, rather than to produce evidence about past events for possible use at a criminal trial." (*Id.* at p. 984.)

Our Supreme Court concluded the victim's statements to the police officer were testimonial. The assault had ended more than an hour previous to the conversation. The victim and his mother were geographically separated—the victim had been taken to a remote location for medical treatment. And the victim was in no danger of further violence. The officer's role was that of an investigator. The purpose of his conversation with the victim was to obtain an account of past events. (*Id.* at p. 965.) The circumstances of the interview were relatively informal, however, as our Supreme Court explained, "[T]he requisite solemnity was imparted by the potentially criminal consequences of lying to a peace officer." (*Id.* at p. 986, fn. omitted.)

Our Supreme Court reached an opposite conclusion as to the victim's statements to the treating surgeon. At the time of the doctor's inquiry, the victim was in acute need of treatment. He had suffered a five- or six-inch gash to his face and neck. The physician's purpose in asking the victim what happened was to determine the proper course of treatment. The victim identified his mother as his attacker. Thereafter, the surgeon did not pursue the subject. Our Supreme Court concluded: "Objectively viewed, the primary purpose of the question, and the answer, was not to establish or prove past facts for possible criminal use, but to help [the doctor] deal with the immediate medical situation he faced. It was thus akin to the 911 operator's emergency questioning of [the victim] in *Davis*." (*Cage, supra,* 40 Cal.4th at p. 986.)

Our Supreme Court further found the context of the conversation was not formal or solemn. It was not structured questioning by a law enforcement officer. The doctor

had no evidence-gathering aim. The victim faced no potential criminal sanction for making false statements to the surgeon. This was a private conversation between a patient and doctor for the purpose of ensuring proper treatment. (*Id.* at p. 987.) Our Supreme Court concluded the victim's statement to the doctor was not testimonial. (*Id.* at p. 991.)

b. *Brenn*

People v. Brenn (2007) 152 Cal.App.4th 166, 171-172 was decided two months after *Cage*. The case involved a stabbing victim's statements to an emergency operator. The stabbing victim left a group home where he was staying and went next door. There, the victim called an emergency operator. The call proceeded as follows: "At the outset of the call, Zupsic said he had just been stabbed in the stomach and gave the dispatcher his first name and the address of the group home. The dispatcher asked him 'who did this to you?' and Zupsic answered, 'It was Joshua (appellant), I don't know his last name, he lives at my place [where] I'm staying for mentally ill people [unintelligible]. He uh, he was attacking his girlfriend; grabbing her by the hair. I tried . . . stopping it, he . . . uh . . . he grabbed me from my throat . . . [¶] . . . [¶] . . . and uh . . . [¶] . . . [¶] . . . I defended myself.' [¶] At that point in the call, the dispatcher put Zupsic on hold and contacted the paramedics. The dispatcher then told Zupsic to keep her informed of his condition and said help was on the way. She asked Zupsic when he last saw Joshua and he said, 'In the house,' in the 'mentally ill facility.' In response to further questioning, Zupsic said Joshua was mentally ill. He said he did not know if Joshua still had the knife, because he 'took off out of the house' after he was stabbed. Zupsic then explained he was at a neighbor's house, and not where the stabbing occurred. He added, 'I've just been stabbed . . . [¶] . . . [¶] So, I'm like in shock.' [¶] The dispatcher asked if Joshua was still next door, and Zupsic said he was there with his girlfriend and several others. Asked if Joshua had any other weapons, Zupsic answered, 'I don't know. Okay, he just said [unintelligible], you're gonna call the cops on me, I said, yup.' The

dispatcher then obtained Zupsic's full name and his phone number and told him officers had arrived at the scene. She said, 'Our officers need to find out if they need to go in or not and assess the situation further, okay?' [¶] Zupsic replied, 'Right, he stabbed me, I want to press charges.' At the dispatcher's request, he then provided a description of Joshua. Getting back to the stabbing, he said Joshua 'was grabbing his girlfriend by the head so I stood up . . . .' The dispatcher told Zupsic to stay put until the officers contacted him, to which Zupsic replied, 'Okay. He stabbed me, I don't know why. Cause I [unintelligible] threatened to call the cops on him, he said you're gonna call the cops on me and he goes I'm going to stab you.' Moments later, . . . the call ended." (*Ibid*.)

Division Three of the Court of Appeal for the Fourth Appellate District held the statements were non-testimonial within the meaning of *Crawford*. (*People v. Brenn*, *supra,* 152 Cal.App.4th at pp. 169, 176-177.) The Court of Appeal explained: "[W]e conclude Zupsic's statements during the 911 call . . . were nontestimonial in nature. To begin with, the purpose and form of the statements were not the functional equivalents of trial testimony. During the 911 call, Zupsic made his statements in response to rapid-fire questioning from the dispatcher. There was nothing formal, solemn or structured about the colloquy. And unlike a criminal prosecutor, the dispatcher was primarily concerned with what was happening at the moment, as opposed to what had happened in the past. The dispatcher was eliciting information in an attempt to assess the present situation and help Zupsic and the responding officers, not secure a conviction in a court of law. [¶] At one point during the call, Zupsic did say he wanted to 'press charges.' But it does not appear that his *primary purpose* during the call was to establish past facts for use in a criminal trial nor that the 911 operator was concerned about that issue. . . . . [¶] Much of the information Zupsic provided to the 911 dispatcher pertained to who and where he was, what he was calling about, where the suspect was located, what the suspect looked like, and what he might be expected to do. Background information of this sort would be expected of anyone calling the police during an emergency situation. It is not typically grist for a prosecutor's closing argument. [¶] [Defendant] questions whether Zupsic was facing an emergency at all, given he had gone next door to call the police. This is an

argument much easier to make from a law office than from 100 feet from someone who has just stabbed you. At the time of the call, Zupsic was suffering from a fresh stab wound, [defendant] was still at large, and it was unclear whether he still had any weapons or was searching for Zupsic. It was known—as is clear from Zupsic's statements—that [the defendant] was 'mentally ill' and had attacked his girlfriend in conjunction with the stabbing episode. It is hard to construct a definition of the word 'emergency' that this scenario does not fit. [¶] Moreover, there can be little doubt the information Zupsic provided was important in terms of helping the police formulate an appropriate response to the situation. It does not appear the information was elicited or provided for the primary purpose of making a case against [the defendant] at trial. . . . For all these reasons, we find that the 911 tape was nontestimonial. [Citation.]" (*People v. Brenn, supra,* 152 Cal.App.4th at pp. 176-178, fn. omitted.)

c. *Blacksher*

Most recently, our Supreme Court considered the present issue in *People v. Blacksher* (2011) 52 Cal.4th 769, 811-819. The defendant's mother was a witness to a double murder. Officer Nicholas Nielson arrived at the mother's home. Defendant, his mother and the two murder victims shared the home. Officer Nielson arrived within four minutes of a neighbor's call to the emergency operator. The mother did not know whether the defendant was still present. The police officer asked the mother questions about the shooting and about the defendant. The conversation lasted 10 to 15 minutes. During this time, law enforcement officers attempted to assess the situation and determine the defendant's whereabouts. Our Supreme Court held the mother's statements to Officer Nielson were nontestimonial. The primary purpose of the conversation was to deal with an emergency—the objectively reasonable belief an armed killer was at large. The mother was "greatly upset" during her interaction with Officer Nielson. The discussion took place in her yard, in the presence of the neighbor, John Adams, under chaotic circumstances. (*Id.* at pp. 816-817.)

3. Application To The Present Case

Defendant argues Mr. Dickey's statements to the emergency operator were testimonial. Defendant reasons: Mr. Dickey had moved to a place of safety, two blocks from the crime scene and was describing a past event; Mr. Dickey was not in need of medical attention; there was no weapon involved and no threat to public safety; and Mr. Dickey was told to stay and wait for police officers to respond.

We conclude Mr. Dickey's statements were nontestimonial. Viewed objectively, the circumstances indicated the conversation's primary purpose was to enable law enforcement officers to respond to an existing emergency. Mr. Dickey ran out of the Thielemann home to the street and around the corner. Mr. Dickey telephoned the emergency operator two blocks from the Thielemann residence. In response to Ms. Allen's rapid questioning, Mr. Dickey said he had "just" been attacked. He spoke about an assault he had just escaped. The colloquy was not formal or solemn. At the time of the call, Mr. Dickey was suffering from fresh injuries inflicted by defendant. Mr. Dickey spoke frantically. Defendant was still at large. As Mr. Dickey fled the Thielemann home it was unknown whether defendant would resume the assault. Ms. Allen elicited the following information from Mr. Dickey—his name, his location, who attacked him, the nature of attack, and whether he required emergency medical care. This information was necessary to meet a current emergency. Mr. Dickey's location, how the assault occurred and whether any weapon was involved was information needed to determine whether there was a present physical threat to him, the police or the public.

Even if there was error, it was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24; *Cage*, *supra*, 40 Cal.4th at p. 991-992.) Here, Ms. Gault saw defendant approach Mr. Dickey. Defendant's fist was cocked. Later, she saw Mr. Dickey on his knees. Defendant had Mr. Dickey in a headlock. Defendant's hands were on Mr. Dickey's neck. Ms. Gault testified: "He was using both hands and was ready to, like, pull his neck, like snap his neck." Mr. Thielemann was reluctant to

testify against defendant. Mr. Thielemann changed his story several times. However, Mr. Thielemann testified defendant's forearm was around Mr. Dickey's chest. According to Mr. Thielemann, the back of defendant's elbow was at the back of Mr. Dickey's neck. Defendant's right bicep was pressing on Mr. Dickey's neck. Mr. Dickey was out of breath. In a pretrial interview, Mr. Thielemann told Officer Starkov defendant held Mr. Dickey in a choke hold. Mr. Thielemann specifically used the words "choke hold." Officer Guillen interviewed Mr. Dickey at the park shortly after the assault. His ear, chest and neck were red. The injuries were fresh. Mr. Dickey's injuries were similar to those suffered by Ms. Gault when defendant choked her. This was abundant evidence defendant assaulted Mr. Dickey by means of force likely to produce great bodily injury. (See *People v. Berry* (1976) 18 Cal.3d 509, 518-519; *People v. Sanchez* (1982) 131 Cal.App.3d 718, 733; *People v. Covino* (1980) 100 Cal.App.3d 660, 667-668.) Any error was harmless beyond a reasonable doubt.

B. The Abstract Of Judgment

We asked the parties to brief the question whether the abstract of judgment must be amended to reflect: defendant was convicted by a jury rather than by plea; the trial court imposed $80 in court security fees ($40 per count) under section 1465.8, subdivision (a)(1); and the trial court imposed $60 in court facilities assessments ($30 per count) pursuant to Government Code section 70373, subdivision (a)(1). Both defendant and the Attorney General agree. Accordingly, upon remittitur issuance, the abstract of judgment must be so amended. (*People v. Mitchell* (2001) 26 Cal.4th 181, 185; *People v. High* (2004) 119 Cal.App.4th 1192, 1200; see *People v. Delgado* (2008) 43 Cal.4th 1059, 1070.)

IV. DISPOSITION

The judgment is affirmed. Upon remittitur issuance, the clerk is to amend the abstract of judgment as discussed in the preceding paragraph. The clerk must also deliver a copy of the amended abstract of judgment to the Department of Corrections and Rehabilitation.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

TURNER, P.J.

We concur:

KRIEGLER, J.

FERNS, J.*

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