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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 SEVEN

THE PEOPLE, Plaintiff and Respondent, v. MARK ANTHONY LITTLE, Defendant and Appellant.	B265699 (Los Angeles County Super. Ct. No. TA133341)

APPEAL from a judgment of the Superior Court of Los Angeles County, Kelvin D. Filer, Judge. Affirmed in part and reversed in part; remanded for resentencing.

Robert E. Boyce, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris and Xavier Becerra, Attorneys General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Paul M. Roadarmel, Jr., Joseph P. Lee, Rene Judkiewicz and David Wildman, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted Mark Anthony Little of first degree murder of his ex-girlfriend Deborah Ann Treptor. In addition, with respect to five separate prior acts of domestic violence, Little was convicted of two counts of corporal injury to a spouse or cohabitant, two counts of assault by means of force likely to produce great bodily injury, dissuading a witness from reporting a crime, misdemeanor battery and making criminal threats.

On appeal Little contends that the admission of Treptor's hearsay statements to police officers and a social worker violated his Sixth and Fourteenth Amendment right to confrontation as set forth in *Crawford v. Washington* (2004) 541 U.S. 36 [124 S.Ct. 1354, 158 L.Ed.2d 177] (*Crawford*). We find the statements by Treptor to police officers as to the prior incidents were testimonial; we find Treptor's statements to the social worker were not. We also consider whether Little forfeited his right to confrontation by his wrongful act making Treptor unavailable under the doctrine of forfeiture by wrongdoing. We find the doctrine does not apply here because there is insufficient evidence Little killed Treptor to prevent her from reporting the abuse or testifying against him. However, we find that admission of some of the statements was harmless error. Accordingly, we affirm in part and reverse in part, and remand for resentencing.

FACTUAL AND PROCEDURAL BACKGROUND

A. *The Information*

Little was charged in an information with murder (Pen. Code, § 187, subd. (a); count 1),[1] three counts of corporal injury to a spouse or cohabitant (§ 273.5, subd. (a); counts 2, 5 and 7); two counts of assault by means of force likely to produce great bodily injury (§ 245, subd. (a)(4); counts 3 and 8); dissuading a witness from reporting a crime (§ 136.1, subd. (b)(1); count 4); and making criminal threats (§ 422, subd. (a); count 6).[2]

The information specially alleged that Little personally used a deadly weapon, a knife, in the commission of the murder (§ 12022, subd. (b)(1)). It also alleged that Little suffered two prior convictions of a serious felony, which constituted strikes within the meaning of the three strikes law (§§ 667, subds. (a)(1), (b)-(i), 1170.12) and two prior convictions for which he served prison terms (§ 667.5, subd. (b)). Little pleaded not guilty and denied the special allegations.

B. *Evidence at Trial*

1. *The People's Case*

The prosecution presented evidence relating to six prior incidents of domestic violence by Little, five of which were charged as separate crimes. The facts were presented through

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[1] Statutory references are to the Penal Code unless otherwise stated.

[2] Little was also charged with making criminal threats (§ 422, subd. (a); count 9) and rape (§ 261, subd. (a)(2); count 10), as to alleged victim Lynette Davenport. He was acquitted on both counts.

the testimony of the nurses, police officers and a social worker to whom Treptor made statements at the hospital. Treptor's housemates and responding police officers testified to the events surrounding her murder on May 15, 2014.

a. *October 26, 2012 Assault* (*Evid. Code, § 1109 Uncharged Conduct*) *and May 18, 2013 Jail Call*

Treptor called 9-1-1 at 2:00 a.m. on October 26, 2012. She told the operator she was in a fight, she could not move her hand and her jaw hurt.[3] The call was then cut off. The 9-1-1 operator called back, and heard a recording: "Hello, you've reached Mark. Sorry I'm unable to answer your call at this time."

On May 18, 2013 Little called Treptor from jail. He told her he "talked to the psych," and "[t]hey say I'm crazy. They say I got a little bit of everything. And I told him about I be getting a pissed off a little easy, and I be trying—I be taking it out on you, and you been trying to help me and shit. And he says, 'Well, it sounds like your girl really, you know, cares about you and shit. She's good for you.' I was like, 'Yeah, and I feel bad 'cause I'm always flashing on her for fucking no reason,' you know?"

b. *August 1, 2013 Incident* (*Corporal Injury to Cohabitant; Count 7*)

On the evening of August 1, 2013 Treptor went to the emergency room at Los Angeles County + USC Medical Center (County-USC). At 9:12 p.m., as part of the triage process,

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[3] Little does not contend on appeal that admission of Treptor's statements on this and another 9-1-1 call was in error.

emergency room nurse Rosalina Salvador spoke to Treptor. Treptor told Salvador that her boyfriend hit her with a cell phone and with an open fist or hand in the face, back and neck.[4] Treptor complained of "pain everywhere," with shooting pain down her right arm and numbness and tingling to her arm, as well as nausea, vomiting and blurry vision. Salvador noted deficits on one side of Treptor's arm and that she was wearing a soft neck collar. Treptor said the collar was for a prior spinal injury, but she did not provide details as to that injury. Salvador, as a mandated reporter of domestic violence, notified the Los Angeles County Sheriff's Department office at County-USC.

At 10:30 p.m. that evening Los Angeles Police Department (LAPD) Officer Ruben Rosas responded to a radio call for a domestic violence victim being treated at the hospital. When Rosas first spoke to Treptor, she was scared and fearful to report the incident. Eventually, she told him about the incident that occurred that evening where Treptor and Little lived.

In response to Rosas's questions, Treptor provided Little's name, date of birth and physical characteristics. She also stated that they had been living together for about a year and were in an intimate relationship. Rosas asked Treptor if there was a history of domestic violence with Little, and she responded, "yes."

Treptor told Rosas that at around 6:30 p.m., when Little went to the bathroom, Treptor took his phone and started going through it. When Little returned to their bedroom, he became enraged by her going through the phone, and punched Treptor with a closed fist, causing her to fall off the bed and onto the

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[4] Little does not contend on appeal that admission of Treptor's statements to nurses at the hospitals was in error.

floor. Little then kicked her on the left side of her face. Little left, and 20 minutes later Treptor called Little's father to drive her to the hospital. Rosas observed swelling on Treptor's nose. Rosas offered Treptor a restraining order, but she refused.

At approximately 1:00 p.m. the following day, based on a referral from the hospital staff, County-USC social worker Jessica Burpee spoke to Treptor at the hospital. Burpee met with Treptor to examine her and make an assessment of risk factors, including for mental health and domestic violence. Treptor appeared to be sad, worried and anxious. She said she and Little were living together and had been together for about a year. Treptor said that she got in an argument with Little about his phone, and he hit her in the face with his hands, then smashed the phone into her face, dragged her off the bed by her ankles and kicked her in the back several times. Treptor acknowledged past incidents of domestic violence, including that Little had previously threatened to kill her by slitting her throat, and he told her she would only leave him in a body bag.

Treptor told Burpee she had no friends or family in California and that she was interested in staying in a domestic violence shelter. Treptor also told Burpee that she was not prepared to point Little out in a police lineup because she did not feel safe.

c. *October 11, 2013 Incident* (*Misdemeanor Battery and Making Criminal Threats; Counts 5 and 6*)[5]

Treptor returned to the County-USC emergency room on October 12, 2013. She told Salvador, "My boyfriend beat me up last night, and a couple days ago." She said he punched her in the chest and kicked her in the back, neck and tailbone. Treptor complained of pain "pretty much everywhere." Salvador noted that Treptor was limping at times, her arm was bruised and she had a very rapid heart rate. Salvador again reported the matter to the sheriff's department.

At 3:30 a.m. the next morning LAPD Officer Ryar De La Torre responded to a call from the hospital and spoke to Treptor while she was in a hospital bed. Treptor told De La Torre that on October 11 at 11:00 p.m. Little, her live-in boyfriend, called her "bitch," "fat" and "whore." He punched her approximately eight times in the face, arms and upper torso. She fell to the floor, and he stomped on her multiple times.

Treptor said Little told her, "I'm going to kill you." She feared for her safety and, when De La Torre asked whether she believed he would carry out the threat to kill her, she responded, "yes." Treptor said there had been approximately six prior incidents of domestic violence with Little. De La Torre observed a 4-inch by 2-inch bruise on Treptor's left arm, and she complained of pain in her chest, back, face and arms.

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[5] Little was charged with corporal injury to a spouse or cohabitant (§ 273.5, subd. (a)), but the jury found him guilty on the lesser offense of misdemeanor battery (§ 243, subd. (e)(1)).

De La Torre offered Treptor an emergency protective order. The police report did not reflect whether one had been issued. He canvassed the area around Treptor's home to look for Little, but did not find him.

d. *December 16, 2013 Incident* (*Corporal Injury to Cohabitant; Count 2*)

Treptor went to the County-USC emergency room again on the afternoon of December 16, 2013. At approximately 2:15 p.m. she told nurse Cynthia Mitchell that she had left her boyfriend due to prior abuse, but he found her. He screamed at her, hit her in her back and face and stomped on her back. Treptor was crying and complaining of pain in her hand. Mitchell observed Treptor's hand was swollen, and she had limited movement of her hand due to pain. Treptor's shoulder was bruised, and her back was red and tender. Mitchell reported the incident to the sheriff's department.

LAPD Officer Eric Dapello, working as a patrol officer, interviewed Treptor at the hospital at about 2:00 a.m. the following day. Treptor recounted to him that on the prior day between 11 a.m. and noon her boyfriend, whom she identified as Little, physically attacked her. Dapello asked Treptor for a description of Little, the location of the incident and what happened. She told him that she had been living with Little for approximately a year. Little accused her of cheating, and she tried to calm him down. He got angry and punched her in the face, shoulder and stomach. He grabbed her legs, pulled her off the bed and stomped on her back. Treptor acknowledged a history of domestic violence with Little, but did not elaborate.

Dapello observed a cut on Treptor's nose and purple-brown bruises on her shoulder and stomach. Treptor was wearing a cast and complained of back pain. Dapello offered Treptor an emergency restraining order, but she refused.

Burpee also came to see Treptor at the hospital. Treptor told Burpee that Little had moved in with her a few days earlier. Treptor did not want to talk about the domestic violence. She appeared to be sad, anxious and upset.

e. *December 25, 2013 Incident* (*Aggravated Assault and Dissuading a Witness from Reporting a Crime; Counts 3 and 4*)

Treptor went to the emergency room at Harbor-UCLA Medical Center on the evening of December 25, 2013. Nurse practitioner Paulyne Ramundo spoke with Treptor at about 7:18 p.m. Treptor described an incident with her boyfriend Little that occurred at around noon that day. They had an argument, and he hit her on the left side of her face with a plastic bottle three times and slapped her. He then grabbed her by the hair and dragged her out of bed, causing her to hit her head on the wall and the floor. She said the assault "bent my neck in a weird way." She was dizzy and nauseated for about 15 minutes after the assault and had pain on the left side of her face and both sides of her neck. She told Ramundo she had a cast on her arm due to a previous assault by Little.

Ramundo observed red specks behind Treptor's left ear that Ramundo indicated are usually caused by a forceful blow, as well as contusions on Treptor's face and neck. Treptor had tenderness on the back of her neck and left side of her face. By the time

Ramundo met with Treptor, the incident had been reported to the police.

LAPD Officer Garrion Orr, a patrol officer working as a single-man report-writing unit that evening, responded to a call from the hospital at around 8:30 p.m. that evening. He spoke to Treptor after she had just been X-rayed. Treptor told him she received a call from a friend on Little's phone, and he demanded that she hang up. When she called her friend back, Little began arguing with her and hit her in the head three or four times, after which she started "seeing stars." He picked up a half-full plastic juice bottle and hit her in the left ear so hard that the bottle exploded and Treptor heard ringing in her ear. He grabbed her by the hair, dragged her onto the floor and struck her several more times in the head. Treptor began screaming, hoping that someone would help her or call the police. Little stood over her and told her he would kill her if she called the police.

f. *April 29, 2014 Incident* (*Aggravated Assault; Count 8*)

Shortly before 1:00 a.m. on April 29, 2014 Treptor called 9-1-1 from a pay phone "to report an assault and a robbery." After telling the operator that she needed paramedics and the police, she stated: "My ex-boyfriend assaulted me. He peed on me. He stole my phone. My credit cards. My I.D." She stated that her ex-boyfriend, whom she identified as Little, was currently walking away from her. Treptor said her neck and thumb were "a little bloody" and her lip was "busted."

Treptor was taken to Memorial Hospital of Gardena. At about 1:10 a.m. LAPD Officer Travis Curtin responded to the pay phone, but he learned Treptor had been taken to the hospital. He

proceeded to the hospital and spoke to Treptor there. Treptor described an incident that had occurred at 12:30 a.m. at her home where she lived with her ex-boyfriend, Little. She told Curtin that she and Little had been arguing about her plan to visit her family; Little did not want her to go. At about 12:30 a.m. Treptor was lying on the floor trying to go to sleep, and Little stood over her and urinated on her. She started yelling at him, and Little bent down, picked her up and slammed her onto the floor a couple of times. He reached down, grabbed her by the neck and then punched her several times with his fist. He then walked away.

She could not find her cell phone, so she left the residence and walked to a pay phone to call the police. Little followed her and, while she was on the phone, he took the receiver out of her hand and attempted unsuccessfully to disable the phone by pulling out the cord. He then fled on foot.

Curtin observed that Treptor had scratches on her neck and face and swelling to her forehead, nose and mouth. There was a red mark on her thumb that Treptor described as a bite mark. Treptor complained of pain to the swollen areas, and she was upset that defendant had urinated on her. Curtin's partner took photos of Treptor's injuries.

The prosecution introduced evidence of two Facebook messages Little sent Treptor one week later on May 7, 2014. One stated, "just want to say sorry. I told you not to fuck no other nigger in that bed." The other said, "Am I evil? Yes I am."

g. *May 15, 2014 Stabbing* (*Murder; Count 1*)

At the beginning of 2014 Little and Treptor were living in one bedroom on the first floor of a house they shared with other people. Little moved out on April 29, but Treptor continued to

live in the bedroom. Aahmad Garner, his girlfriend Roxana Sibrian and their two children lived in the other first floor bedroom.

Garner arrived home early in the evening on May 14, 2014 and saw Treptor and Sibrian talking together. Between 8:00 and 9:00 p.m. Treptor said good night, went into her bedroom and shut the door.

Tanya Davis and her child lived upstairs, as did Maria Theresa Lopez and her three children, including Santiago and Daniella. At 8:47 p.m. Little texted Davis and asked her to "[l]et me know ASAP is [Treptor] up now."

Garner was a student, and that night he stayed up late doing homework in the living room. Sometime after midnight Little entered the house and asked Garner, "Where is she, is she here?" Garner responded that he thought Treptor was in her room. Little went into Treptor's bedroom and was there for about 10 to 15 minutes. Then Garner saw Little run out of the house "pretty fast," "like running for a marathon." Garner thought Little might have had a knife in his hand, but he was not sure because he was focused on his homework.

As Little was running out, Garner heard sounds like someone banging on the walls of Treptor's bedroom. Little kept running. Garner then woke Sibrian and asked her to check on Treptor. Sibrian went into Treptor's room, and she started screaming that there was blood everywhere. At 12:54 a.m. Garner called 9-1-1.

Sibrian's screams woke Santiago and Daniella. Santiago woke Lopez, and Daniella told her that Little had stabbed Treptor. Lopez, a certified nursing assistant trained in CPR, went to check on Treptor. Lopez saw blood on the bed, walls and

carpet. Treptor was naked, bleeding all over and motionless; Lopez could not detect a heartbeat.

Garner went into the backyard so that he could hear the 9-1-1 operator. He saw an unidentified man in the backyard. Garner asked the man who he was and what he was doing there. The man said his name was Isaac and kept repeating, "They're after me." He said he was running from the police. The man eventually hopped over the fence and left. Garner could tell this was not Little. Santiago had seen the man enter the yard; he did not see any blood or a knife on the man. Neither was there blood in the backyard where the man had been.

Garner told the 9-1-1 operator that he found a man in his backyard. He also told the operator that Lopez was a nurse, and the operator directed her to perform CPR. When Lopez laid Treptor down to begin CPR, Treptor made gurgling noises and her eyes rolled back. Lopez could not detect a pulse.

LAPD Sergeant Jesus Garcia arrived at the house and saw Sibrian out front screaming. She said someone was hurt and dying inside. Garcia went in and saw Lopez performing chest compressions on Treptor. He observed a puncture wound on Treptor's neck. There was a pool of blood at the entrance to the room, blood spatter around the room, and bloody clothing, furniture and carpeting.

Treptor suffered two stab wounds to her neck. The first of these severed her carotid artery, causing her death from exsanguination. The second wound was parallel to the first, suggesting that Treptor was stationary when she was stabbed.

Police found blood on the water meter outside Treptor's house and a trail of blood leading away from the house in a westerly direction. Nearby, they found blood spatter on the

sidewalk and two blue gloves matching those found in a box of gloves in Treptor's room. Treptor's blood was on the outside of the gloves and Little's DNA was found inside the gloves. Video from a nearby surveillance camera showed a man running west at 12:52 a.m.

Little turned his cell phone on at 1:33 a.m., and he immediately received multiple text messages from Faye Randolph, his sister-in-law.[6] According to Randolph, Little was sitting on the porch where she could not see him, so she texted him to find out where he was.

Little was arrested on the morning of May 15. While he was sitting alone in an interview room at the police station, he said, "I just want to know if the bitch died." LAPD Detective Mark Hahn interviewed Little later that morning. He asked Little if he knew what happened to Treptor, and Little said he did not. Little told Hahn about the April 29 incident.

Hahn interviewed Randolph about a week later. She said that prior to the murder she had advised Little to apologize to Treptor. She had also heard Little sharpening a knife. She initially denied, then subsequently admitted, that her husband had coached her prior to the interview and told her not to say anything incriminating about Little.

h. *Expert Testimony*

Gail Pincus, Executive Director of the Domestic Abuse Center in Van Nuys, testified regarding the patterns and cycles of domestic violence. She explained that battered women may

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[6] Randolph considered herself to be the common-law wife of defendant's brother, Robert Little III.

leave and return to their abusers multiple times before leaving for good. Once that occurs, there is a dramatic increase in the danger to the victim, and leaving may trigger a homicide.

Pincus also explained that a victim may become used to a certain level of abuse and feel no one can help her. If an incident then occurs that the victim perceives as life threatening, "there is a trauma window that opens." At that point, the victim may call 9-1-1 or go to a hospital emergency room or domestic violence shelter. "[T]he story that is obtained at that moment by emergency room personnel or law enforcement, if they're in the emergency room, is a spontaneous spinning out of the victim because they are telling you I can't handle what's going on."

2. *The Defense Case*

a. *Robert Little III's Testimony*

Little's brother, Robert Little III (Robert III), testified that after Little moved out of the home he shared with Treptor, Little moved into the home that Robert III and Randolph shared with Little's father Robert Little, Jr. (Robert Jr.) and his girlfriend, Renita Washington. Robert III, Randolph and Little all slept in the front room. According to Robert III, Little was at home the night of May 14, 2014, was asleep at 12:20 a.m. the next morning on the couch near him, and was still asleep when Robert III woke up at 4:00 a.m. Robert III is a light sleeper and would have awakened if Little had left.

Robert III helped Little move out of Treptor's home, and at that time Little and Treptor were on friendly terms. Robert III had never seen Little threaten or hit Treptor.[7]

Robert III acknowledged that he probably told Randolph not to say anything incriminating about Little. In a recorded jailhouse conversation with Little, Robert III said he told Randolph they had the right to remain silent. He also told Little, "And if the judge makes 'em give an answer, give 'em a fucked up answer that they don't want."

Robert III denied knowing anything about Randolph texting Little during the early morning on May 15. In a recorded phone conversation from the jail, Little asked Robert III to write down his booking number. Robert III responded, "Hold on. Faye[, b]ring me a pen. Write this booking number down. All your texts you deleted?" Robert III explained that he asked Randolph about deleting the text messages "because I got a girl and all girls read the text messages. Delete the text messages. It's all part of my clowning" designed to lift Little's spirits.

b. *Little's Testimony*

Little lived with Treptor for about two years. He was never violent with her. He became engaged to Treptor, but he broke off the engagement because of events occurring on April 29, 2014.

On April 29 Little was playing video games. Treptor told him she was having an anxiety attack and started masturbating.

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[7] Robert Jr. similarly testified that Little was home when he went to bed at 11:30 p.m. and when he woke up at 4:30 a.m. Robert Jr. never saw Little yell at Treptor or hit her, and he saw Little and Treptor talking and laughing with one another about a week prior to the killing.

Little offered to have sex with her, but she declined. Little became "testy" and told her, "'If that's the case, bang your head against the fucking wall.' And that's what she started doing." Little let Treptor hit herself four or five times before grabbing her and pulling her away to keep her from hurting herself. After yelling at one another, Little put his hands in the air and walked out the door.

At that point Little decided to leave Treptor because he did not "want to stay there no more under them conditions with her tripping the way she was." She had a place to live, so he could leave her without her ending up on the street. He went to his father's house, and the following day his father took him back to Treptor's home so he could retrieve his belongings.

On the evening of May 14 Little was at his father's house watching basketball on television with Robert III, Randolph and Washington. He received text messages from Davis regarding her son, to whom Little was like a big brother. He texted Davis to ask if Treptor was awake because he "just wanted to know" what she was doing.

About 1:00 a.m. Little probably received some text messages from Randolph asking where he was. He was probably in the bathroom at the time. Because he was still in the house, he did not think it necessary to text her back.[8] He went to sleep about 1:00 a.m. and woke up about 6:00 a.m. He regularly deleted his text messages because he sold drugs.

Little denied stabbing Treptor and testified that he did not own a pocket knife. He denied the other charges and testified

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[8] Little later testified that he never saw that he had text messages from Randolph.

that no one had ever contacted him about Treptor's allegations of domestic violence. He did not know anything about the blue gloves in Treptor's room.

Little acknowledged the Facebook messages to Treptor. The words, "Am I evil? Yes I am" were from a Metallica song. At the time Little felt evil because he left Treptor in what might have been "a bad place."

When Little was arrested, the officer transporting him to the police station only told him he was a suspect in the murder of a woman. Little's comment in the interrogation room, "I just want to know if the bitch died," meant he just wanted to know if the woman died, the term "bitch" being a "figure of speech" for a woman. He denied that it meant he stabbed Treptor.

C. *The Verdict and Sentence*

The jury found Little guilty of first degree murder and found true the allegation Little personally used a deadly weapon, a knife, in the commission of the murder (count 1). The jury also convicted Little on counts 2, 3, 4, 6, 7 and 8 for the multiple assaults and batteries on Treptor, for dissuading a witness from reporting a crime and making criminal threats. As to count 5, the jury found Little guilty of the lesser offense of misdemeanor battery against a person in a dating relationship (§ 243, subd. (e)(1)).

The jury found true the allegations Little had two prior convictions of a serious felony, which constituted strikes under the three strikes law, and two prior convictions for which he served prison terms. On Little's motion, the trial court struck one of the prior strike convictions for purposes of the three strikes

law based on the age of the conviction. (§ 1385, subd. (a); *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 504, 529-530.)

The court sentenced Little to a total indeterminate state prison term of 71 years eight months to life in prison. On count 1, the trial court sentenced Little to 25 years to life, doubled as a second strike to 50 years to life, plus one year for the weapon use enhancement. The court imposed consecutive terms consisting of one-third the middle term, doubled as a second strike, of two years each for counts 2, 7 and 8, and 16 months each on counts 4 and 6.[9] The court added 10 years for the two prior serious felony

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[9] The abstract of judgment reflects a one-year sentence on count 2. The trial court on remand should ensure the abstract of judgment accurately reflects the sentence imposed on each count. In addition, the trial court imposed an unauthorized sentence by designating the indeterminate term for count 1 as the base term, then running the determinate terms for counts 2, 4, 6, 7 and 8 as subordinate terms at one-third the middle term, and a concurrent term for count 3. As the court held in *People v. Neely* (2009) 176 Cal.App.4th 787, 798, "Nothing in the sentencing for the determinate term crimes is affected by the sentence for the indeterminate term crime. [¶] . . . [¶] . . . Applying section 1170.1, the court would select a base term for each of the crimes, set the crime with the greatest base term as the principal term, impose the full base term as the sentence for the principal term crime, and impose one-third of the middle term as a consecutive sentence for any subordinate term crimes. Should the court choose to run one or more of the determinate terms concurrently, it would impose the full selected base term and order it to be served concurrently with the principal term." (*Id.* at pp. 798-799.) We invited letter briefs on this sentencing error (Gov. Code, § 68081), and received a supplemental letter brief from the People. Based on the sentencing error, we remand the case for resentencing consistent with this opinion.

convictions and two additional one-year terms for the prior prison terms. The court imposed a three-year term for count 3 to run concurrent with count 2, and credited Little with time served on count 5.

DISCUSSION

A. *Proceedings Below*

The trial court at a pretrial hearing found that Treptor's statements to the hospital nurses, social worker and police officers fell within the Evidence Code section 1370 exception to the hearsay rule, were not testimonial and fell within an exception to *Crawford* for forfeiture by wrongdoing. The court stated that "the defendant has made the witness unavailable basically, and that there's forfeiture by wrongdoing exception, given that I'm satisfied by [a] preponderance of the evidence that the evidence would show that [Little] caused the declarant to be unavailable. In other words, he killed her."[10] As we discuss below, in making its ruling, the trial court relied on our Supreme Court's opinion in *People v. Giles* (2007) 40 Cal.4th 833, which was subsequently vacated by the United States Supreme Court in *Giles v. California* (2008) 554 U.S. 353 [128 S.Ct. 2678, 171 L.Ed.2d 488] (*Giles*).

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10 Defense counsel acknowledged that Evidence Code section 1370 applied and that statements made to medical personnel were nontestimonial, but he argued that Treptor's statements to the social worker and police officers were testimonial and not subject to the forfeiture by wrongdoing doctrine.

B. *The Trial Court Erred in Finding the Out-of-court Statements Made by Treptor to Police Officers at the Hospital Were Not Testimonial Under Crawford*[11]

1. *Standard of Review*

Little's claim for violation of his right to confrontation involves mixed questions of law and fact. "'We review de novo a claim under the confrontation clause that involves mixed questions of law and fact. [Citation.] Under this standard, we defer to the trial court's determination of "the historical facts"—which "will rarely be in dispute"—but not the court's "application of [the] objective, constitutionally based legal test to [those] historical facts." [Citation.]' [Citations.]" (*People v. Arredondo* (2017) 13 Cal.App.5th 950, 968; see also *People v. Cromer* (2001) 24 Cal.4th 889, 900; *People v. Giron-Chamul* (2016) 245 Cal.App.4th 932, 964.)

"We apply the substantial evidence standard to the trial court's factual findings—whether those findings are express or

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[11] The hearsay statements of Treptor to the nurses, social worker and police officers are inadmissible unless they fall within a statutory exception to the hearsay rule. (Evid. Code, § 1200, subds. (b), (c).) Little does not dispute that the exception to the hearsay rule for statements made by victims of physical violence under Evidence Code Section 1370 applies here. Evidence Code section 1370 provides an exception for out-of-court statements made to a physician, nurse, paramedic or law enforcement official where "[t]he statement purports to narrate, describe, or explain the infliction or threat of physical injury upon the declarant," the declarant is unavailable as a witness, the statement was made at or near the time of the threat or physical injury and the statement was made under circumstances that indicate its trustworthiness. (*Id.*, subd. (a)(1)-(4).)

may be inferred from the record." (*People v. Arrendondo*, *supra*, 13 Cal.App.5th at p. 968; accord, *People v. Cromer*, *supra*, 24 Cal.4th at p. 902.)

2. *The Confrontation Clause*

In *Crawford*, the United States Supreme Court held that the admission of testimonial statements by a non-testifying witness without a prior opportunity for cross-examination violates the defendant's right to confrontation under the Sixth Amendment. (*Crawford*, *supra*, 541 U.S. at p. 68.) Although "leav[ing] for another day any effort to spell out a comprehensive definition of 'testimonial,'" the court in *Crawford* clarified that "it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations . . . with closest kinship to the abuses at which the Confrontation Clause was directed." (*Ibid*.) The court found that the statements by an unavailable witness during police questioning while in custody at the police station as a possible suspect were testimonial, and were improperly admitted. (*Ibid*.)

In *Davis v. Washington* (2006) 547 U.S. 813 [126 S.Ct. 2266, 165 L.Ed.2d 224] (*Davis*), decided with *Hammon v. Indiana* (No. 05-5705) (*Hammon*), the United States Supreme Court explained that "[s]tatements 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." (*Davis*, *supra*, at p. 822, fn. omitted.)

The court found that statements in *Davis* to a 9-1-1 operator in which the witness told the operator that her boyfriend was "here jumpin' on me again" and that "[h]e's usin' his fists" were not testimonial. (*Davis*, *supra*, 547 U.S. at pp. 817, 828.) The court distinguished the 9-1-1 call from the police interrogation at the station in *Crawford*, as follows:

"In *Davis*, [the witness] was speaking about events *as they were actually happening,* rather than 'describ[ing] past events.' [Citation.] [Crawford's] interrogation, on the other hand, took place hours after the events she described had occurred. Moreover, . . . the 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 (as in *Crawford*) what had happened in the past." (*Davis*, *supra*, 547 U.S. at p. 827.) In addition, the court contrasted the level of formality in *Crawford*, in which Crawford was responding calmly at the station house to questions, with the frantic answers the witness gave to the 9-1-1 operator in *Davis*. (*Davis*, *supra*, at p. 827.)

By contrast, the court found that the statements made in *Hammon* were testimonial. There, police responded to a domestic disturbance call and talked to Amy Hammon on the front porch. (*Davis*, *supra*, 547 U.S. at p. 819.) She told them that ""nothing was the matter,"" and allowed the police into the home where they saw a gas heating unit with the glass front shattered on the floor. The police officers separated Hammon and her husband, and then one of the officers asked Hammon what had happened and had her fill out a battery affidavit. (*Id.* at pp. 819-820.)

The court found that there was no emergency in progress, but rather, "the primary, if not indeed the sole, purpose of the interrogation was to investigate a possible crime." (*Davis*, *supra*, 547 U.S. at p. 830.) The court held as to domestic disputes that "'[o]fficers called to investigate . . . need to know whom they are dealing with in order to assess the situation, the threat to their own safety, and possible danger to the potential victim.' [Citation.] Such exigencies may *often* mean that 'initial inquiries' produce nontestimonial statements. But in cases like this one, where [Hammon's] statements were neither a cry for help nor the provision of information enabling officers immediately to end a threatening situation, the fact that they were given at an alleged crime scene and were 'initial inquiries' is immaterial." (*Id*. at p. 832.)

In *Michigan v. Bryant* (2011) 562 U.S. 344 [131 S.Ct. 1143, 179 L.Ed.2d 93], the court further clarified the primary purpose test in considering whether statements made to responding police officers by a man who had been shot and was bleeding on a gas station parking lot were testimonial. The court held: "The existence of an emergency or the parties' perception that an emergency is ongoing is among the most important circumstances that courts must take into account in determining whether an interrogation is testimonial because statements made to assist police in addressing an ongoing emergency presumably lack the testimonial purpose that would subject them to the requirement of confrontation. As the context of this case brings into sharp relief, the existence and duration of an emergency depend on the type and scope of danger posed to the victim, the police, and the public." (*Id*. at pp. 370-371, fn. omitted.)

In finding the statements were not testimonial, the court likened the encounter with police to the informal 9-1-1 call in *Davis*, in that at the time the police spoke to the wounded man, they did not know why, where or when the shooting had occurred nor the location of the shooter. The questions they asked were necessary to assess the situation and determine the threat to their own safety, the victim and the public. (*Michigan v. Bryant*, *supra*, 562 U.S. at pp. 375-377.)

In *Ohio v. Clark* (2015) ___ U.S. ___ [135 S.Ct. 2173, 192 L.Ed.2d 306], the court considered statements made by a child to his teacher in response to suspected child abuse. When the teacher saw red marks on the three-year-old, she asked him, ""Who did this"" (*id.* at p. ___ [135 S.Ct. at p. 2178]), and the child in response identified defendant Clark. The court found that the statements were not testimonial, holding: "There is no indication that the primary purpose of the conversation was to gather evidence for Clark's prosecution. On the contrary, it is clear that the first objective was to protect [the child]." (*Id.* at p. ___ [135 S.Ct. at p. 2181 and fn. 2].) The court also noted that statements to persons other than law enforcement officers "are much less likely to be testimonial than statements to law enforcement officers." (*Ibid.*)

Our Supreme Court applied the primary purpose test as articulated in *Davis* in *People v. Cage* (2007) 40 Cal.4th 965 (*Cage*), in which the court held that "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." (*Id.* at p. 984, fn. omitted.)

In *Cage*, a deputy sheriff responded to a report of a family fight, but after speaking with the family found that there was no reason to believe that a crime had been committed. About an hour later he responded to a report of an injured person and found Cage's son John with a large cut to his face. After John was taken to the emergency room, while awaiting treatment, the deputy asked him, "'what had happened,'" and John recounted that his mother cut him with a piece of glass. John was then examined, and in response to the doctor's question as to what happened, he again stated that his mother had cut him with the glass. (*Cage*, *supra*, 40 Cal.4th at pp. 971-972.)

The court found that the statement by John to the deputy was testimonial, noting that the injury had occurred over an hour earlier and John was no longer in danger of further violence, but rather, the deputy's "clear purpose in coming to speak with John at this juncture was not to deal with a *present emergency,* but to obtain a fresh account of *past events involving* [*the*] *defendant* as part of an inquiry into possible criminal activity." (*Cage*, *supra*, 40 Cal.4th at p. 985.) By contrast, the sole objective of the doctor in asking John what had happened was to determine the nature of the wound and the correct mode of treatment. (*Id.* at p. 986.)

The court found that even though the doctor was a mandatory reporter of child abuse, John's statements were not testimonial. (*Cage*, *supra*, 40 Cal.4th at p. 991.) The court held, "we cannot imagine that an informal statement to a person not affiliated with law enforcement, such as a medical doctor, solely

for the nonevidentiary purpose of diagnosis and treatment, would be deemed testimonial." (*Id.* at p. 987.)[12]

The People rely on another domestic violence case, *People v. Saracoglu* (2007) 152 Cal.App.4th 1584 (*Saracoglu*), in which the victim Rachel went to the police station with her child approximately 30 minutes after her husband attacked her and threatened, "'[d]on't call the police or I'll put a bullet in your fucking head.'" At the time she spoke with police, Rachel was distraught, "crying, shaking and very afraid." (*Id.* at pp. 1587, 1598.) She told an officer what had happened, and he went to her home and arrested the defendant. (*Id.* at p. 1587.)

The court found that Rachel's trip to the police station was the "functional equivalent" of the victim in *Davis* calling 9-1-1 and that while Rachel was in a temporary place of safety at the

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[12] More recently, in *People v. Chism* (2014) 58 Cal.4th 1266, the court held that statements to a police officer at the scene of a shooting were not testimonial given the ongoing emergency of the shooter likely armed with a gun remaining at large. (*Id.* at p. 1289.) The court analyzed six factors in applying the primary purpose test, including: "(1) an objective evaluation of the circumstances of the encounter and the statements and actions of the individuals involved in the encounter; (2) whether the statements were made during an ongoing emergency or under circumstances that reasonably appeared to present an emergency, or were obtained for purposes other than for use by the prosecution at trial; (3) whether any actual or perceived emergency presented an ongoing threat to first responders or the public; (4) the declarant's medical condition; (5) whether the focus of the interrogation had shifted from addressing an ongoing emergency to obtaining evidence for trial; and (6) the informality of the statement and the circumstances under which it was obtained." (*Ibid.*)

police station, the emergency was ongoing because the defendant had threatened to kill her if she went to the police. (*Saracoglu*, *supra*, 152 Cal.App.4th at p. 1597.) The court concluded that the primary purpose of the interrogation "was not to 'establish or prove past events potentially relevant to later criminal prosecution' [citation], but rather 'to enable police assistance to meet an ongoing emergency' . . . [citation]." (*Id.* at p. 1598.)

3. *The Primary Purpose of Treptor's Statements to Social Worker Burpee Was To Enable Burpee To Provide Services To Protect Treptor*

We find that Treptor's statements to Burpee were not testimonial. As a social worker, Burpee's purpose in obtaining information from Treptor was to enable her to offer education and services to avoid future domestic violence. With respect to Burpee's August 2, 2013 conversation with Treptor, Burpee asked Treptor questions as part of her examination and assessment of risk factors, including for mental health and domestic violence. Burpee spoke with Treptor again regarding the December 16, 2013 incident, although this time Treptor did not want to discuss the acts of domestic violence.

There is no evidence in the record to suggest Burpee's primary purpose in questioning Treptor "was to gather evidence for [Little's] prosecution. On the contrary, it is clear that the first objective was to protect [Treptor]." (*Ohio v. Clark*, *supra*, ___ U.S. at p. ___ [135 S.Ct. at p. 2181].) Moreover, as the Supreme Court has observed, statements to persons other than law enforcement officers "are much less likely to be testimonial than statements to law enforcement officers." (*Ibid.*; see also *Cage*,

supra, 40 Cal.4th at p. 984 [informal statement to medical doctor for diagnosis and treatment not testimonial].)

Accordingly, Treptor's statements to Burpee do not violate Little's rights under the Confrontation Clause. We next turn to Treptor's statements to police officers at the hospital.

4. *The Primary Purpose of the Police Officers' Interrogation of Treptor Was To Investigate Past Events, Not To Respond to an Ongoing Emergency*

a. *August 1, 2013 to December 25, 2013 Incidents*

We find that the statements made by Treptor to police officers at the hospital in 2013 were testimonial. In each instance, the police officers interviewed Treptor hours, and in one instance days, after the incident.

With respect to the August 1, 2013 incident (count 7), Rosas spoke to Treptor at the hospital at 10:30 p.m., four hours after the 6:30 p.m. incident, and after she received treatment from nurse Salvador. Rosas asked Treptor to recount what had happened earlier that evening and whether she and Little had a history of domestic violence. The fact that Rosas offered her a restraining order at the end of the interrogation does not change the fact that he was inquiring about prior events.[13]

As to the October 11, 2013 incident (counts 5 and 6), De La Torre spoke to Treptor at 3:30 a.m., four and one-half hours after the 11:00 p.m. incident, and after Salvador treated Treptor's injuries. De La Torre asked her to describe what happened the

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[13] The evidence that Rosas and the other officers asked Treptor if she wanted a restraining order also supports a finding that the officers were documenting the events that caused her injuries and placed her at risk of further harm.

night before, and then searched around Treptor's home to attempt to locate Little.

Dapello similarly spoke with Treptor 14 to 15 hours after the December 16, 2013 incident (count 2) and after Mitchell treated Treptor. With respect to the December 25, 2013 incident (counts 3 and 4), Orr spoke with Treptor eight and one-half hours after the noon incident and after Ramundo treated her injuries.

Unlike the frantic 9-1-1 call in *Davis* and the fearful wife taking her child to the police station in *Saracoglu*, it was the hospital staff as mandatory reporters who called the police in each of these incidents, not Treptor. In each instance Treptor declined the officer's offer of a restraining order.[14] While it is true that Little threatened to kill Treptor if she called the police, he had not taken any action against her in response to her prior hospitalizations. Indeed, there is no evidence that Little even knew Treptor spoke with police officers at the hospital, especially given that no restraining orders were issued.

Moreover, at the time Treptor spoke with the police officers—from four to 15 hours after the incidents—the emergencies had passed. Treptor was in the safety of the hospital, and there was no evidence that Little was seeking to harm her at the time of the interrogations.

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[14] With respect to the October 11, 2013 incident, De La Torre did not recall whether he offered Treptor an emergency protective order, and the police report did not state whether one was issued. However, De La Torre testified that he was required to offer an emergency protective order after responding to a report of domestic violence and that if he had obtained one for Treptor, he would have indicated this in his report.

We find the facts in these four incidents are more akin to those found to be testimonial in *Hammon,* in which the police responded to a call of a domestic disturbance and calmly asked the wife about what happened, and *Cage*, in which the son recounted from the safety of the hospital that his mother had cut him with glass. Thus, "the primary, if not indeed the sole, purpose of the interrogation was to investigate a possible crime." (*Davis*, *supra*, 547 U.S. at p. 830.)

b. *April 29, 2014 Incident*

The April 29, 2014 incident (count 9) differs in that Treptor called 9-1-1 from a pay phone to report the assault and to request paramedics and the police. In addition, Little followed Treptor from the residence to the pay phone and, while she was on the phone, he took the receiver out of her hand and tried to disable the phone. Curtin responded to the pay phone, but by then Treptor had been transported to the hospital, so he spoke with her at the hospital 40 minutes after the incident.

However, while Curtin responded to what objectively appeared to be an emergency in response to the 9-1-1 call, he did not describe Treptor as fearful or scared during their conversation. Instead, Curtin described Treptor as being "upset that he urinated on her and she also explained of soreness to her throat." Curtin's partner took photographs of Treptor, consistent with investigation of a crime. Although Little attempted to prevent Treptor from calling 9-1-1 by disabling the pay phone, unlike the victim in *Saracoglu*, Treptor did not state that she was in immediate fear of returning home. Neither is there evidence that Treptor requested a restraining order or that Curtin offered her one. Rather, as in *Cage*, in which the conversation with the

police officer similarly took place only one hour after the incident, Treptor spoke to Curtin from the safety of the hospital.

We find that, as in *Hammon*, while Curtin came to the hospital in response to an emergency, once he started talking with Treptor the interrogation focused on collecting facts of the prior domestic violence incident, not responding to an ongoing emergency. (See *Davis*, *supra*, 547 U.S. at p. 830.) As the Supreme Court noted, "This is not to say that a conversation which begins as an interrogation to determine the need for emergency assistance cannot . . . 'evolve into testimonial statements[]' [citation] once that purpose has been achieved." (*Id*. at p. 828; see also *People v. Chism*, *supra*, 58 Cal.4th at p. 1289 [court should consider "whether the focus of the interrogation had shifted from addressing an ongoing emergency to obtaining evidence for trial"].) We find that is what happened here.

Because we find all the statements made by Treptor to the police officers were testimonial, we next turn to the question whether they fall within the exception to *Crawford* for forfeiture by wrongdoing.

C. *The Doctrine of Forfeiture by Wrongdoing Does Not Apply Here Because There Is Insufficient Evidence Little Killed Treptor To Prevent Her from Reporting the Abuse or Testifying Against Him*

As the Supreme Court held in *Davis*, "when defendants seek to undermine the judicial process by procuring or coercing silence from witnesses and victims, the Sixth Amendment does not require courts to acquiesce. While defendants have no duty to assist the State in proving their guilt, they *do* have the duty to

refrain from acting in ways that destroy the integrity of the criminal-trial system. We reiterate what we said in *Crawford*: that 'the rule of forfeiture by wrongdoing . . . extinguishes confrontation claims on essentially equitable grounds.' [Citation.] 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.)

The Supreme Court articulated the standard for applying the forfeiture by wrongdoing doctrine in *Giles*, after reviewing the history of the doctrine at common law, holding that the doctrine applies "only when the defendant engaged in conduct *designed* to prevent the witness from testifying." (*Giles*, *supra*, 554 U.S. at pp. 359, 368.) In *Giles*, the witness reported a domestic violence incident three weeks before she was killed. The trial court concluded that Giles had forfeited his right to confront the victim because he committed the murder that made the victim unavailable to testify. (*Id*. at pp. 356-357.) Our Supreme Court affirmed.[15]

In its decision, the United States Supreme Court vacated the judgment, finding that unconfronted testimony may only be admitted where the defendant intended to prevent the witness from testifying. (*Giles*, *supra*, 554 U.S. at p. 361; see *People v. Mai* (2013) 57 Cal.4th 986, 1040, fn. 21 [doctrine of forfeiture by wrongdoing applied based on undisputed evidence that the defendant killed the officer to prevent him from appearing as a witness against him]; *People v. Streeter* (2012) 54 Cal.4th 205, 240 [finding forfeiture by wrongdoing only applies where the defendant engaged in conduct designed to prevent absent witness

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15 *People v. Giles*, *supra*, 40 Cal.4th 833.

from testifying, but declining to reach issue, instead finding admission of statements was harmless error].)

The court in *Giles* addressed application of the forfeiture by wrongdoing doctrine in the domestic violence context:

"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. Where such an abusive relationship culminates in murder, the evidence may support a finding that the crime expressed the intent to isolate the victim and to stop her from reporting abuse to the authorities or cooperating with a criminal prosecution—rendering her prior statements admissible under the forfeiture doctrine. Earlier abuse, or threats of abuse, intended to dissuade the victim from resorting to outside help would be highly relevant to this inquiry, as would evidence of ongoing criminal proceedings at which the victim would have been expected to testify." (*Giles*, *supra*, 554 U.S. at p. 377.)

Following the United States Supreme Court's decision in *Giles*, our colleagues in Division Eight of this court held in *People v. Banos* (2009) 178 Cal.App.4th 483 (*Banos*) that the court in *Giles* intended "to designate two alternative ways of satisfying the factual predicate for application of the forfeiture by wrongdoing doctrine: evidence that the defendant (1) intended to stop the witness from reporting abuse to the authorities; or (2) intended to stop the witness from testifying in a criminal proceeding." (*Id*. at p. 502.)

The court in *Banos* found that the defendant Banos intended both to stop the victim, his ex-girlfriend, from reporting the abuse and to prevent her from testifying. First, the court pointed to the statements of Banos on his ex-girlfriend's 9-1-1 call

10 months before her killing in which he stated, "'Do you want to speak to the police?'" "'Are you going to talk?'" "'Are you going to speak to the cops? Are you going to speak?'" (*Banos*, *supra*, 178 Cal.App.4th at pp. 486-487.)[16] Banos added, "'Are you going to shut up or am I going to kill you?'" (*Id*. at p. 487.) During the subsequent 10 months, Banos was arrested twice for violating a restraining order, one time just weeks before the killing. (*Id*. at p. 492)

Second, at the time Banos killed his ex-girlfriend, a hearing was scheduled for his violations of the restraining order. "The trial court reasonably could have found that [the] defendant knew he would be prosecuted for these actions and that [the victim] would testify at those proceedings." (*Banos*, *supra*, 178 Cal.App.4th at p. 503;[17] see also *People v. Jones* (2012) 207

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[16] In *Banos*, the court found that the statements by the victim on this 9-1-1 call from a phone booth and then to a police officer who responded to the phone booth, in which she told the officer she was afraid to go home because the defendant was still at the apartment, were not testimonial. (*Banos*, *supra*, 178 Cal.App.4th at p. 497.) However, the court found that prior statements to the police officers were testimonial because they described past events and the victim was either alone in the safety of her home or Banos was in custody, and therefore there was no ongoing emergency. (*Id*. at pp. 497-498.)

[17] The court also found that substantial evidence supported an implied finding that once Banos broke into the witness's apartment on the night of the killing, he knew that he would be charged with a crime and the victim was likely to testify because she had previously cooperated with the police. (*Banos*, *supra*, 178 Cal.App.4th at p. 503.) Notably, as here, the trial court did not make any express findings on whether Banos killed the victim to

Cal.App.4th 1392, 1396, 1398 [admission of statements of unavailable witness proper under forfeiture by wrongdoing doctrine where the defendant made 12 calls to witness from jail to dissuade her from testifying, implying that "'he has friends on the outside who can assist him in doing whatever is necessary'"]; *U.S. v. Cazares* (9th Cir. 2015) 788 F.3d 956, 974-975 [statements by the victim to police officer admissible under forfeiture by wrongdoing doctrine where the defendants arranged murder of the victim eight days after he reported robbery to police and the victim was killed execution style at the bus stop where he had been robbed]; *U.S. v. Johnson* (9th Cir. 2014) 767 F.3d 815, 823 [sufficient evidence the defendant caused the witness to disappear to prevent her from testifying where the witness began receiving threats one day after defense attorneys were allowed to disclose the witness lists to their clients].)

In this case, there is evidence that Little threatened to kill Treptor, including on October 11, 2013 when Little told her, "I'm going to kill you," and on December 25, 2013 when Little told her he would kill her if she called the police. In addition, on August 2, 2013 Treptor told Burpee that Little had previously threatened to kill her by slitting her throat, and that she would only leave him in a body bag.

However, unlike in *Banos*, Treptor consistently refused offers for a restraining order, and she returned to Little after each instance of abuse. Although Little threatened to kill Treptor on December 25, 2013 if she called the police, as of the April 29, 2014 incident Treptor and Little were still living

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prevent her from cooperating with the police or testifying. (*Id.* at p. 503, fn. 12.)

together. Treptor called 9-1-1 to report Little's abuse on this date—just two weeks before the murder—but no restraining order was issued nor were criminal charges filed. The fact that Little attempted to prevent Treptor from calling 9-1-1 by disabling the pay phone is not sufficient to show that he killed her two weeks later to prevent her from reporting his abuse. Further, there is no evidence that at the time of the murder there was any threat of Treptor reporting additional abuse to the authorities or of any pending proceeding in which she might testify against him.[18]

Indeed, the prior threat by Little to kill Treptor if she left him and the April 29, 2014 argument about Treptor leaving to visit her family support an inference that Little killed her to prevent her from leaving him, not to prevent her from reporting his abuse.

We find there is not substantial evidence to show by a preponderance of the evidence that on May 15, 2014 Little murdered Treptor for the purpose of preventing her from reporting his abuse or testifying against him.[19] Thus, we find it

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[18] At the pretrial hearing the prosecution argued that on the day of the murder Little received a text telling him that the police were looking for him. However, the record does not reflect that evidence of a text message was introduced at trial, and this is not argued by the People on appeal.

[19] Because we find insufficient evidence to support application of the doctrine of forfeiture by wrongdoing under a preponderance of the evidence standard, we need not reach the question whether the burden of proof for application of the doctrine is a preponderance of the evidence or clear and convincing evidence. (See *Banos*, *supra*, 178 Cal.App.4th at p. 503, fn. 12 [noting that our Supreme Court in *People v. Giles* held that a preponderance

was error for the trial court to apply the forfeiture by wrongdoing doctrine.

D. *Any Error in Admitting Treptor's Statements as to Counts 1, 2, 3, 5 and 7 Was Harmless*

We find as to each of the assault and battery charges in count 2 (December 16, 2013 incident), count 3 (December 25, 2013 incident), count 5 (October 11, 2013 incident) and count 7 (August 1, 2013 incident) that admission of Treptor's testimonial statements in violation of the Confrontation Clause was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24 [87 S.Ct. 824, 17 L.Ed.2d 705]; *People v. Capistrano* (2014) 59 Cal.4th 830, 873.)

As to each of these incidents, the testimony of the police officers recounting Treptor's description of the abuse was cumulative of the admissible statements made by Treptor to nurses Salvador, Mitchell and Ramundo and social worker Burpee, as well as the description of the injuries sustained by Treptor given by the nurses and police officers.[20]

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of the evidence standard applied, but Evid. Code, § 1350 codifying the common law forfeiture by wrongdoing doctrine in part requires clear and convincing evidence].) We also need not reach Little's argument that this court should not imply findings to the trial court as to whether Little intended to prevent Treptor from reporting his abuse or testifying against him in light of the trial court's citation to the incorrect standard set forth by our Supreme Court in *People v. Giles*.

[20] For counts 2 and 7 for corporal injury to a cohabitant, the prosecution also needed to prove that Little and Treptor were or had been living together as cohabitants. (§ 273.5, subd. (b)(2).) As to the December 16, 2013 incident (count 2), Treptor told

Little also contends that his murder conviction (count 1) should be reversed because the prosecution relied on evidence of the prior incidents of domestic violence to prove that Little was the perpetrator notwithstanding evidence that an unidentified man was in the backyard at the time of the murder. However, as discussed above, there was substantial evidence of each prior instance of physical abuse as related by the nurses and Burpee that showed a pattern of abuse leading up to the May 14, 2014 stabbing of Treptor. In addition, there was substantial evidence pointing to Little as the perpetrator, including that he was in the house prior to the stabbing and ran out of the house as banging noises were coming from Treptor's room just before Sibrian discovered that Treptor had been stabbed. Also, Little's DNA was on the inside of the blue gloves found on the sidewalk; Treptor's blood was on the outside. We therefore find as to the murder count that admission of Treptor's statements to the police was harmless beyond a reasonable doubt.

However, we find as to count 4 (December 25, 2013 dissuading a witness from reporting a crime) and count 6 (October 11, 2013 criminal threats), admission of Treptor's statements to the police officers was not harmless beyond a reasonable doubt. As to the December 25, 3013 dissuading a witness charge, the only evidence that Little threatened to kill

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Burpee that Little had moved in with her a few days earlier. As to the August 1, 2013 incident (count 7), Treptor told Burpee that she and Little were living together for about one year. As to Little's conviction for misdemeanor battery against a person in a dating relationship (§ 243, subd. (e)(1)); count 5), Treptor told Salvador as to the October 11, 2013 incident that her "boyfriend" beat her up.

Treptor if she called the police came from Orr's testimony as to Treptor's statements to him at the hospital. As to the October 11, 2013 criminal threat charge, the only evidence of Little's threat to kill Treptor was De La Torre's testimony as to Treptor's statements.

Likewise, as to count 8 (April 29, 2014 assault by means likely to produce great bodily injury), Treptor only told the 9-1-1 operator that Little assaulted her and that her neck and thumb were "a little bloody" and her lip was "busted." It was Curtin who testified that Little bent down, picked Treptor up and slammed her onto the floor a couple of times, and then grabbed her by the neck and punched her several times with his fist. While Curtin described Treptor's injuries to include scratches on her neck and face, a bite mark on her thumb and swelling to her forehead, nose and mouth, we cannot say that these injuries without more would have supported a conviction of assault by means likely to produce great bodily injury, and find that admission of Treptor's statements as to this count was not harmless beyond a reasonable doubt.[21]

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[21] By contrast, as to the conviction of assault by means likely to produce great bodily injury charged in count 3, Ramundo testified in detail as to the December 25, 2013 incident in which Little hit Treptor on the left side of her face with a plastic bottle three times and grabbed her by the hair and dragged her out of bed, causing her to hit her head on the wall and the floor. Treptor told Ramundo that the assault "bent my neck in a weird way" and caused her to be dizzy and nauseated for about 15 minutes after the assault. Ramundo also observed red specks behind Treptor's left ear that she testified are usually caused by a forceful blow.

DISPOSITION

The judgment is affirmed as to counts 1, 2, 3, 5 and 7, reversed as to counts 4, 6 and 8, and remanded for resentencing.

FEUER, J.*

We concur:

PERLUSS, P. J.

ZELON, J.

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