COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

NORFOLK COUNTY 2020 SITTING

No. FAR-_____

COMMONWEALTH OF MASSACHUSETTS,
Appellee,

v.

ROY C. RAND,
Appellant.

ON APPEAL FROM JUDGMENTS OF THE NORFOLK SUPERIOR COURT

COMMONWEALTH'S APPLICATION FOR FURTHER APPELLATE REVIEW

REQUEST FOR FURTHER APPELLATE REVIEW

The Commonwealth requests further appellate review by the Supreme Judicial Court, for substantial reasons affecting the public interest or interests of justice.

First, in ruling that the victim's statements in her 911 call and to police were testimonial, the Appeals Court improperly relied on a theory not argued by the defendant below. That court ruled that the victim's statements that the defendant had punched her in the face, caused her to lose consciousness twice, and strangled her did not amount to grounds for a reasonable person to believe that her injuries

were serious or life-threatening. That argument "falls outside" what the defendant raised before or during trial, Commonwealth v. Grady, 474 Mass. 715, 725 (2016), and so contrary to the Appeals Court, the defendant did not preserve it for appellate review.

Second, information known to the 911 operator and the police that the victim had lost consciousness twice as a result of blows to the head, strangulation, or both, did create reasonable grounds to believe that her injuries were serious or life-threatening. Where a victim reports that she has lost consciousness due to a blow to the head or strangulation, a reasonable person would believe that there is an ongoing medical emergency.

Finally, the Appeals Court's expectation that a trial judge should be able to listen to a 911 call or other recording and parse each sentence is impractical. The judge properly found that the primary purpose of the victim's statements in to the 911 dispatcher and police were to resolve the ongoing emergency.

PRIOR PROCEEDINGS

In October 2015, a Norfolk County grand jury returned seven indictments alleging that on July 25, 2015 in Braintree, the defendant attempted to murder the victim by strangling her; intimidated her as a witness; strangled her (two counts); assaulted and beat her by means of a dangerous weapon, a floor; and assaulted and

beat her (two counts). (No. NOCR-2015-616-001/007; RA 3, 16-22.)[1]

The Commonwealth moved in limine to admit the victim's excited utterances in a 911 call and to police, both of which the defendant opposed. (SA 16-20, 21-27; RA 23-27.) At a hearing at which he listened to the 911 call (Tr. 5/12/16 at 8), Justice Raymond J. Brassard ruled that the victim's statements in it were excited utterances and were not testimonial. (Id. at 12-23.) After taking voir dire testimony from two police officers (Tr. 5/13/16 at 4-46), the judge ruled that the victim's statements to them at her apartment were admissible as excited utterances and were not testimonial (id. at 46-49).

Between May 17 and 20, 2016, the case was tried before Justice Brassard and a jury. (RA 8-11.) The victim invoked her Fifth Amendment right and did not testify. (Tr. 5/12/16 at 50-52; I/14; Tr. II/26-27, 115-116.) On May 20, 2016, the jury found the defendant guilty of strangulation with his hands (003) and assault and battery with his fist (006); it acquitted him of attempted murder (001) and strangulation with his knee (004). (RA 10-11; SA 46-49; Tr. V/4-6.)[2] On May 27,

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[1] The Appeals Court's rescript and decision are appended to this application, Mass. R. App. P. 27.1(b), cited by the page of the slip opinion as "App. *__." As to the Appeals Court record, the Record Appendix is cited "RA __"; the Supplemental Record Appendix, "SA __"; the defendant's brief, "D. Br. __"; the trial transcript, by volume and page; and other hearings, by date and page.

[2] The jurors were deadlocked in their deliberations on assault and battery with his elbow (007); the Commonwealth entered a nolle prosequi of that indictment and two on which it did not move for trial for witness intimidation (002) and assault

2016, the judge sentenced the defendant for strangulation (003) to two years in the House of Correction, and for assault and battery (006) to four years' probation, to begin immediately and run concurrently with the committed sentence and for two years thereafter. (RA 12-13; Tr. 5/27/16 at 40-45.) On June 2, 2016, the defendant filed a timely notice of appeal. (RA 13, 55.)

On appeal (A.C. No. 18-P-845), the defendant argued that the victim's statements in the 911 call were testimonial because any emergency ended when the defendant left the victim's apartment (D. Br. 15, 18-19), and her injuries were not "life-threatening" because she was not bleeding and did not ask for an ambulance (D. Br. 20). He conceded that at her apartment she told police that he had punched her and elbowed her in the face and strangled her to unconsciousness, but maintained that the police could not have believed there was an ongoing medical emergency because they called for an ambulance before she made some of the statements. (D. Br. 24-25, 27-28.) The defendant did not argue that the victim's loss of consciousness due to strangulation and one or more blows to the head was not grounds for a reasonable person to believe her injuries were serious or life-threatening.

On July 9, 2019, the Appeals Court heard oral argument, and on June 29, 2020, it issued its opinion ruling that the trial judge improperly admitted the vic-

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and battery by means of a dangerous weapon (005). (RA 10; Tr. V/7, 11.)

tim's excited utterances because some of her statements to the 911 dispatcher and all of her statements to police were testimonial, and a reasonable person would not have believed that her injuries were serious or life-threatening. (App. *12-*16.) No party is seeking reconsideration or modification in the Appeals Court, see Mass. R. App. P. 27.1(b).

STATEMENT OF FACTS

The Appeals Court's opinion correctly summarizes the evidence adduced at the hearing on the Commonwealth's motions in limine and at trial, including the 911 call and the victim's statements to the first-responding officers, Braintree Officers Philip Yee and John Connolly. (App. *4-*6). The following additional facts are relevant to the appeal, see Mass. R. App. P. 27.1(b).

In his opposition to the Commonwealth's motions in limine to admit the victim's excited utterances both in the 911 call and to police, the defendant argued that their admission would violate his constitutional right of confrontation, maintaining that "there is no indication that [the victim was] in immediate harm." (RA 26-27.) At the hearing on the motion in limine to admit the 911 call, defense counsel argued at length that the victim's statements in it did not qualify as excited utterances because she engaged in a "dialogue" with the dispatcher (Tr. 5/12/16 at 9); the 911 call was "incomplete" and its admission would deprive the defense of the opportunity to cross-examine her about whether she was intoxicated, whether

she was crying because the defendant left her, and about her subsequent statement to police that her sister also hit her (id. at 10-11); and there was no ongoing emergency because the victim said that the defendant had "left," and the possibility that he might return was "just speculation" (id. at 13-15). Asked by the judge if the victim's need for medical care made her statements nontestimonial, defense counsel argued that they were testimonial because she did not affirmatively ask for an ambulance or say she was dying. (Id. at 16.) When the judge countered that her statement "he tried to kill me" was "to a significant degree unsolicited," defense counsel claimed, "people say that all the time"; it "certainly has nothing to do with trying to meet a medical emergency"; and it showed she was "engaging law enforcement to come here." (Id. at 17-19.) He maintained that "everything about that call is testimonial" because the victim called 911 rather than a hospital or a fire station, so she must have known police would respond. (Id. at 19-20.) Defense counsel never argued that loss of consciousness due to a blow to the head or strangulation did not give rise to a reasonable belief that the victim had serious or life-threatening injuries.

After discussion of other motions in limine and issues about jury selection (id. at 31-57), at the end of the day's hearing, this exchange took place:

> [DEFENSE COUNSEL]: I forgot to object to the ruling earlier about the excited utterances. So just for the record –
>
> THE COURT: No need to object, counsel. All of your rights are fully

protected there.[3]

(Id. at 57.)

The next day, after voir dire of the two police officers (Tr. 5/13/16 at 4-46), the judge ruled that the victim's statements to them at her apartment were admissible as excited utterances and were not testimonial (id. at 46-49). During that hearing, defense counsel argued that if the excited utterances came in, he would elicit from police that the victim also told them that she had been "drinking all day with her sister"; the judge ruled, "technically that would be hearsay," but he would permit it. (Id. at 47-48.) Defense counsel also said that he wanted to elicit from police the victim's statements that she hit her head or fell off the bed, and the judge said he would allow that, too. (Id. at 49-50.) Once again, defense counsel never argued that loss of consciousness from a blow to the head or strangulation was not serious or life-threatening.

During trial, defense counsel did not object when the 911 call was played. (Tr. II/40.) Nor did he object when the first police witness, Officer Yee, testified to the victim's statements that the defendant beat her up and choked her with his hands and strangled her with his knee across her throat until she lost consciousness. (Id. at 86.) In fact, on cross-examination of Officer Yee, defense counsel re-elicited that the victim had said that the defendant had choked her with two hands

[3] The Appeals Court misquotes the judge as having said "here." (App. *3.)

around her neck. (Id. at 109.)

When the prosecutor asked the second police witness, Officer Connolly, about the victim's statements, defense counsel said: "Objection, just for the record"; the judge overruled the objection. (Tr. III/46-47.) Officer Connolly then testified that the victim had said that the defendant punched and elbowed her in the face multiple times and strangled her to unconsciousness. (Id. at 47.)[4] Again, defense counsel never argued that the victim's statements that she had been hit in the head and strangled and lost consciousness did not amount to grounds for a reasonable person to believe her injuries were serious or life-threatening.

STATEMENT OF THE POINTS WITH RESPECT TO WHICH FURTHER APPELLATE REVIEW IS SOUGHT

1. As grounds for his claim that the victim's statements in her 911 call and to police were testimonial, the defendant never argued below that information that she had been punched in the face and twice strangled to unconsciousness would not have caused a reasonable person to believe her injuries were serious or life-threatening. The Appeals Court ruled that the defendant's argument was "unavailing" that the victim's 911 call was testimonial because she was not bleeding and did not ask for an ambulance. (App. *15.) But then that court ruled that her statements to police were testimonial because a reasonable person would

[4] On cross-examination of a paramedic, defense counsel elicited that the victim said, "He choked me and hit me in the face with his fist and elbow," and she denied that she had struck her head at any point. (Tr. III/115, 117; RA 32.)

not believe her injuries were serious or life-threatening – blows to the head, strangulation, and twice being rendered unconscious. The Appeals Court erred in finding that the defendant preserved that issue.

2. Alternatively, the Appeals Court erred in ruling that a reasonable person would not believe, based on information that the victim had been repeatedly struck in the head, strangled, and twice rendered unconscious, that her injuries were serious or life-threatening.

3. Finally, the Appeals Court improperly burdened trial judges by requiring them to parse each line of a 911 call. In determining whether the primary purpose of the victim's statements to the 911 dispatcher and first-responding police officers was testimonial, the judge properly considered the entire conversation.

WHY FURTHER APPELLATE REVIEW IS APPROPRIATE

I. THE DEFENDANT DID NOT PRESERVE FOR APPELLATE REVIEW THE GROUNDS ON WHICH THE APPEALS COURT RULED: THAT THE VICTIM'S REPORTS THAT SHE HAD BEEN REPEATEDLY HIT IN THE HEAD, STRANGLED, AND TWICE RENDERED UNCONSCIOUS DID NOT AMOUNT TO REASONABLE BASIS TO BELIEVE HER INJURIES WERE SERIOUS OR LIFE-THREATENING.

In Grady, 474 Mass. at 724-725, decided two months after this trial, the Court ruled that in future a pretrial objection at the motion in limine stage will preserve a defendant's appellate rights, whether or not the objection is on constitutional grounds. Grady cautioned: "as has always been the case, the preservation of ap-

pellate rights will apply only to what is specifically addressed in those proceedings." Id. at 725. This Court has since ruled that Grady does not apply retroactively. See Commonwealth v. Moore, 480 Mass. 799, 813 & n.12 (2018). The Appeals Court ruled that because the defendant opposed the Commonwealth's motions in limine on the same "constitutional ground" as he raised on appeal, he preserved the claim. (App. *7 & n.6.)

The defendant never raised below the specific grounds on which the Appeals Court ruled: that the 911 dispatcher and police supposedly did not have a reasonable basis to believe that the victim's injuries were serious or life-threatening, based on her reports that the defendant had repeatedly hit her in the face, strangled her, and twice rendered her unconscious. If the defendant had made those arguments below, the 911 dispatcher and the police would have explained that it is common knowledge among first responders that loss of consciousness, particularly from blows to the head and strangulation, is a serious injury that requires immediate medical attention. See https://www.familyjusticecenter.org/wp-content/uploads/2017/11/Strangulation-Infographic-v6.24.19-B.pdf.

At the end of the first of two days of hearings on the motions in limine, defense counsel began re-arguing his objection to the 911 call that he had made at length earlier. (Tr. 5/12/16 at 9-20, 57.) The judge told him, "No need to object, counsel. All of your rights are fully protected there." (Id. at 57.) The Appeals

Court interprets that exchange as the judge having "interrupted" defense counsel and "assuring him there was no need to object further." (App. *3.) In the context of defense counsel's lengthy argument earlier (Tr. at 5/12/16 at 9-20), the judge simply meant that he had heard enough for the day. The judge's comment should not be interpreted to absolve defense counsel from the duty to object on the specific issue the Appeals Court reached: whether there was a reasonable basis to believe that the victim's injuries were serious or life-threatening based on information that she had been repeatedly struck in the head, strangled, and twice rendered unconscious. Indeed, the judge had not even ruled yet on the admissibility of the victim's statements to police. The judge's comment did not preserve an objection on a ruling he had not yet made.

At trial, the defendant did not object to the 911 call or to Officer Yee's testimony to the victim's statements. (Tr. II/40, 86.) His perfunctory objection during Officer Connolly's testimony (Tr. III/46) did not preserve the specific issue reached here: that supposedly multiple blows to the victim's head, strangulation, and her twice being rendered unconscious did not amount to serious or life-threatening injuries. See Grady, 474 Mass. at 725.

In sum, the defendant never claimed below that strangulation and blows to the head that twice rendered the victim unconscious did not amount to reasonable grounds to believe that she had serious or life-threatening injuries. Thus, under

Grady, that claim was not preserved.

II. BASED ON INFORMATION THAT THE VICTIM HAD BEEN STRUCK IN THE HEAD, STRANGLED, AND TWICE RENDERED UNCONSCIOUS, A REASONABLE PERSON WOULD BELIEVE THERE WAS AN ONGOING EMERGENCY AND SHE HAD SERIOUS OR LIFE-THREATENING INJURIES.

Even if the error had been preserved, the trial judge did not abuse his discretion in admitting the victim's statements in the 911 call and to police, which were excited utterances and were not testimonial. See L.L. v. Commonwealth, 470 Mass. 169, 185 n.27 (2014). A reasonable person would have grounds to believe that her injuries were serious or life-threatening, based on information that she had been struck in the head, strangled, and twice rendered unconscious.

In Commonwealth v. Beatrice, 460 Mass. 255, 260 (2011), the Court ruled that although the victim reported that she had "just" been beaten by her boyfriend and she wanted an ambulance, the Commonwealth had not proven by a preponderance of the evidence that there was an ongoing emergency, because there was "no suggestion that her injuries were serious or life threatening." In Beatrice, unlike in this case, there was no information that the victim had been hit in the head, strangled, or lost consciousness.

Losing consciousness, particularly from head trauma or strangulation, is a circumstance that "would lead a reasonable person to believe that there was an emergency," Beatrice, 460 Mass. at 259. Here, the victim told the 911 dispatcher

that the defendant "knocked me out a couple of times" and "punched me in the face." (App. *20.) She told Officers Yee and Connolly that he had punched her several times in the head, choked her with his hands, elbowed her in the face, and knelt on her throat. (Tr. II/86-87; III/47-48, 115.) She said that she had lost consciousness twice and urinated on herself. (Tr. II/86, 88; III/18, 50.) Based on that information, a reasonable person would perceive that the victim had serious or life-threatening injuries, Beatrice, 460 Mass. at 260. Given those injuries, the officers certainly could not have just left the victim in her apartment without calling an ambulance.

Rather than apply the Beatrice standard of whether police had reason to believe the victim's injuries "were serious or life threatening," 460 Mass. at 260, the Appeals Court considered whether her injuries "appeared serious or life threatening" (App. at *16). The choice of verb is telling. Head trauma and strangulation injuries are by their nature internal injuries. Every football fan knows that head trauma causing loss of consciousness amounts to serious or life threatening injury, including possibly long-term neurological damage. See J.P. Kelly, Loss of Consciousness: Pathophysiology and Implications in Grading and Safe Return to Play, 36(3) J. Athl. Training 249 (2001) (available at https://www.ncbi.nlm.nih.gov/pmc/articles/PMC155414/). In domestic violence cases, strangling a victim to unconsciousness is a strong predictor of future lethality. See N. Glass et al., Non-Fatal

Strangulation Is an Important Risk Factor for Homicide of Women, 35(3) J. Emergency Medicine 329 (2007) (available at https://www.researchgate.net/publication/5883869_Non-fatal_Strangulation_is_an_Important_Risk_Factor_for_Homicide_of_Women). See, e.g., Commonwealth v. Fernandes, 485 Mass. 172 (2020) (three days before scheduled trial for strangling victim to unconsciousness, defendant again strangled victim until she urinated and then died).

The Appeals Court ruled that that the victim's spontaneous statement in the 911 call "He tried to kill me" (App. *22) was "'not relevant to resolving the emergency'" and thus was testimonial. (App. *14, quoting Simon, 456 Mass. at 300.) The court was troubled that "the only statements by [the victim] that the defendant strangled her came in the form of inadmissible testimonial statements" testified to by Officers Yee and Connolly. (App. *17.) But her statements that the defendant tried to kill her and she lost consciousness from being strangled is exactly what gave rise to a reasonable belief for an ongoing medical emergency, and thus made her statements nontestimonial. By the Appeals Court's logic, the Commonwealth could never try a domestic violence case without the victim's testimony, and the mere fact that a statement is inculpatory would automatically make it testimonial. That is not what this Court's precedents hold. See, e.g., Commonwealth v. Galicia, 447 Mass. 737, 745 (2006); Commonwealth v. Nesbitt, 452 Mass. 236, 248 (2008).

The Supreme Judicial Court should rule that head trauma, strangulation, and

loss of consciousness are serious or life-threatening injuries that give rise to an ongoing emergency.

III. THE APPEALS COURT SET NEW PRECEDENT IMPRACTICAL FOR TRIAL JUDGES TO APPLY.

The Appeals Court ruled that testimonial statements were "interwoven" with nontestimonial ones, and the trial judge erred in not having parsed each statement separately. (App. *12-*15.) That sort of line-by-line analysis contravenes precedents directing trial judges to consider whether the "primary purpose" of the questioning is to enable police to meet an ongoing emergency. See Davis v. Washington, 547 U.S. 813, 822 (2006); Commonwealth v. Middlemiss, 465 Mass. 627, 634-635 (2013).

At the in limine hearing, the judge listened to the audio of the 911 call. (Tr. 5/12/16 at 8.) He commented that parts of the 911 call were "not easy to understand," and disputed defense counsel's representation about whether the victim had said that the defendant had left before or after she called 911. (Id. at 14.) Unlike the Appeals Court, the judge did not have the benefit of a transcript of the 911 call. Cf. Commonwealth v. Kozec, 399 Mass. 514, 523 n.15 (1987) (unlike appellate judges, trial judges do not have opportunity for "leisurely review" of transcript). Thus, as a practical matter, the Appeals Court's holding would be exceedingly difficult for trial judges to apply.

As to the 911 call, the judge ruled that the "primary purpose" of the dispat-

cher's questions and the victim's answers was to enable police to respond to an on-going emergency. (Tr. 5/12/16 at 22, quoting Davis v. Washington, 547 U.S. at 822, and Middlemiss, 465 Mass. at 634-635.) He did not abuse his discretion. Applying the primary purpose analysis, it is nonsensical to rule that during that short 911 call the victim's statements went from nontestimonial, to testimonial, back to nontestimonial, then back again to testimonial. (App. *12-*15.) Either the primary purpose was to meet an ongoing emergency, or it was not.

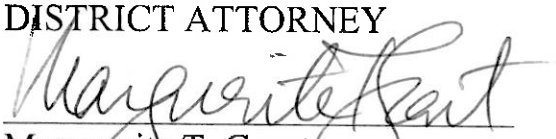
The Court should rule that in determining whether a statement is testimonial, a trial judge should consider the primary purpose of the entire statement, rather than parsing it line by line.

CONCLUSION

The Commonwealth's application for further appellate review should be allowed. It is founded upon substantial reasons affecting the public interest or the interests of justice, and so the case should be determined by the Supreme Judicial Court.

Respectfully Submitted,

MICHAEL W. MORRISSEY
DISTRICT ATTORNEY

by: 
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Dated: July 20, 2020

APPENDIX

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Commonwealth of Massachusetts

Appeals Court for the Commonwealth

At Boston

In the case no. 18-P-845

COMMONWEALTH

vs.

ROY RAND.

Pending in the Superior

Court for the County of Norfolk

Ordered, that the following entry be made on the docket:

Judgments reversed.

Verdicts set aside.

By the Court,

Joseph F. Stanton, Clerk

Date June 29, 2020.

COMMONWEALTH vs. ROY RAND.

No. 18-P-845.

Norfolk. July 9, 2019. - June 29, 2020.

Present: Henry, Sacks, & Ditkoff, JJ.

Constitutional Law, Confrontation of witnesses. Practice, Criminal, Hearsay, Confrontation of witnesses. Evidence, Hearsay, Testimonial statement, Spontaneous utterance.

Indictments found and returned in the Superior Court Department on October 13, 2015.

The cases were tried before Raymond J. Brassard, J.

Geraldine C. Griffin for the defendant.
Marguerite T. Grant, Assistant District Attorney (Elizabeth Walston McLaughlin, Assistant District Attorney, also present) for the Commonwealth.

HENRY, J. Following a jury trial in the Superior Court, the defendant, Roy Rand, was convicted of assault and battery in violation of G. L. c. 265, § 13A, and strangulation in violation

of G. L. c. 265, § 15D.[1] The principal question on appeal is whether it was error to admit in evidence the 911 call made by the defendant's girlfriend, Susan,[2] or parts of that call, and the statements she made to the police officers who responded to the call. We conclude that while some of the statements were admissible as nontestimonial excited utterances, many were not. Because we are not convinced beyond a reasonable doubt that the evidence admitted against the defendant in violation of his right to confrontation -- under the Sixth Amendment to the United States Constitution[3] and art. 12 of the Massachusetts Declaration of Rights -- did not contribute to his convictions, we reverse.

Background. Shortly after the defendant was arraigned, Susan stopped cooperating with the Commonwealth. Anticipating that Susan would not be available to testify at trial, the Commonwealth filed two motions in limine: one to admit Susan's

[1] The jury found the defendant not guilty of attempted murder in violation of G. L. c. 265, § 16, and a second count of strangulation in violation of G. L. c. 265, § 15D. The jury could not reach a verdict on a second count of assault and battery, and the Commonwealth filed a nolle prosequi.

[2] A pseudonym.

[3] "The confrontation clause bars the admission of testimonial out-of-court statements by a declarant who does not appear at trial unless the declarant is unavailable to testify and the defendant had an earlier opportunity to cross-examine [her]." Commonwealth v. Simon, 456 Mass. 280, 296, cert. denied, 562 U.S. 874 (2010).

statements made during her 911 call, and one to admit her statements made to the police officers who responded to her call. The defendant opposed both motions. The judge listened to the 911 call and ruled that he would admit the call in its entirety. Defense counsel started to object to the ruling and the judge interrupted, assuring him there was no need to object further and that "[a]ll of your rights are fully protected here."

In addition, the two responding police officers testified at a voir dire hearing. Officer John Connolly testified that while they were waiting for medical help to arrive, Susan explained to them what had happened. The officers spoke to Susan for "medical purposes because she was presenting with obvious injuries, and also because [they] didn't know where her alleged attacker was." Sergeant Philip Yee testified that the officers tried to speak with her initially "to find out if she was hurt and why [the police] were there." The motion judge, who also was the trial judge, ruled that they could testify about Susan's statements until she left her home to be transported in an ambulance, "but without any detail because [the motion judge] understood the officers to say there was no detail." The motion judge excluded testimony by the officers about any of Susan's statements in the ambulance or hospital.

The jury could have found the following facts. The defendant and Susan had an off-and-on dating relationship for approximately five years. They had a child together and the defendant visited regularly.

On July 25, 2015, at approximately 12:45 A.M., Susan called 911. The jury heard the 911 call, which was approximately five minutes and twenty seconds long.[4] The call started with Susan saying, "I need somebody to come to my house," and, sobbing, "My boyfriend just beat me up." The dispatcher asked whether the boyfriend was still present and dispatched police. She asked the caller's name and the name of her boyfriend. Susan named the defendant and said that he had left but she did not know what kind of car he was driving. The dispatcher announced on the police radio, "Boyfriend's no longer on scene. He fled in an unknown vehicle."

The dispatcher asked, "What exactly happened tonight?" Susan stated that her boyfriend had arrived at midnight and that her sister "was causing trouble and stuff like that." Susan stated that she instructed her boyfriend to remove her sister from the house, but he took her sister's side and "knocked

[4] While no transcript of the 911 call was offered in evidence, the Commonwealth provided one in its appellate brief. With one exception noted below, the defendant agrees with the transcript. We have listened to the recording and attach a transcript of the conversation with minor notations as an Appendix to this opinion.

[Susan] out a couple of times." The dispatcher then communicated with police officers. After the dispatcher finished, Susan added, "And then he punched me in the face."

The dispatcher asked Susan, "He punched you in the face?" When Susan confirmed this, the dispatcher immediately asked Susan if she needed an ambulance, and she answered, "I don't know." When asked if she was bleeding, Susan answered, "No. But my face is swollen." The dispatcher sent an ambulance.

When the dispatcher informed Susan that she had called an ambulance, Susan said that her sister left with her boyfriend "[a]fter he beat me up and stuff." The dispatcher then asked questions about when the boyfriend left, to which Susan replied, "Like two minutes ago, since I called you guys."[5] The dispatcher next asked questions about Susan's residence. Susan then volunteered, "He tried to kill me."

Two police officers arrived at Susan's home and found her on the telephone with the dispatcher. Susan did not seem to realize who they were, and the dispatcher had to tell her to hang up. The officers found Susan very upset, hysterical, and sobbing uncontrollably. Officer Connolly testified that he saw swelling on Susan's face and he noticed her eyes were bloodshot.

[5] The defendant contends that Susan could have said ten rather than two. What is material is that she said that the defendant left since she placed the 911 call, which was approximately three and one-half minutes before this statement.

Sergeant Yee noted that her eyes were red, bloodshot, and "veiny," although he did not observe facial swelling.

In the context of the judge's ruling that what Susan said at the apartment was admissible, the prosecutor asked the open-ended question, "And then what happened?" Sergeant Yee testified that they asked Susan "what's was going on, what happened" and why she needed them to respond. She responded that her boyfriend, the defendant, whom she identified as "Roy," had beaten her. When the officers asked how Roy beat her up, Susan said that he had punched her several times in the head and choked her with his knee, causing her to lose consciousness, hit the back of her head, and urinate on herself. When she regained consciousness, the defendant again hit her and choked her, this time with his hands. Susan also told the officers that her sister slapped her face two or three times. Susan complained of pain so Yee also called for an ambulance.

Officer Connolly testified next. He testified that when the officers saw Susan's injuries, Yee requested an ambulance. The prosecutor asked what Susan told the officers in the apartment. Connolly repeated Susan's statement that the defendant attacked her and all of the aforementioned details.

The jury saw photographs of Susan's injuries and heard testimony about them. The injuries to her face were consistent with her having been struck by a fist, arm, elbow, or object,

"[s]omething more than a slap." The redness near her throat was consistent with a person's hands or other objects having been on her throat.

Susan had broken blood vessels in her eyes, which were consistent with strangulation rather than intoxication. At the hospital, she had urine on her pants and was hoarse. Incontinence, hoarseness, and lost consciousness are additional signs of a person having been strangled.

Discussion. 1. Standard of review. The defendant opposed the Commonwealth's motions in limine on the constitutional ground he raises on appeal. That was sufficient to preserve the issue. See Commonwealth v. Grady, 474 Mass. 715, 719 (2016) (defendant was not required to "object at trial to something that he . . . had previously sought to preclude on constitutional grounds").[6]

"With respect to preserved constitutional error, we must vacate the conviction unless we are satisfied that the error was harmless beyond a reasonable doubt." Commonwealth v.

[6] The Commonwealth's reliance on Commonwealth v. Moore, 480 Mass. 799, 813 n.12 (2018), for the proposition that the rule announced in Grady does not apply retroactively, is inapposite. The Supreme Judicial Court in Grady, 474 Mass. at 719, "dispense[d] with any distinction, at the motion in limine stage, between objections based on constitutional grounds and objections based on other grounds." That rule, for objections based on other than constitutional grounds, is what is not retroactive. Id.

Wardsworth, 482 Mass. 454, 465 (2019). It is the Commonwealth's burden to show the error was harmless beyond a reasonable doubt. Commonwealth v. Tyree, 455 Mass. 676, 701 (2010). This standard "is not satisfied simply because the erroneously admitted evidence is cumulative of other properly admitted evidence." Commonwealth v. Wilson, 94 Mass. App. Ct. 416, 432 (2018). Instead, "[w]e consider several factors to determine whether the error was harmless: 'the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case.'" Commonwealth v. Vardinski, 438 Mass. 444, 452 (2003), quoting Commonwealth v. DiBenedetto, 414 Mass. 37, 40 (1992), S.C., 427 Mass. 414 (1998). "We resolve all ambiguities and doubts in favor of the defendant." Vardinski, supra at 452-453.

2. Admissibility of Susan's statements. When the Commonwealth offers out-of-court statements made by a declarant who is not available to testify at trial, as here, there is a two-step inquiry: (1) whether the statements are admissible under the rules of evidence, typically an exception to the hearsay rule; and (2) whether admission of the statements violates the defendant's confrontation rights. Commonwealth v.

Nesbitt, 452 Mass. 236, 243 (2008). Here, the defendant concedes that Susan's statements during the 911 call and to the officers in her home were excited utterances. Id. at 246. Accordingly, we turn to whether the admission of Susan's statements violated the defendant's confrontation rights.

Whether admission of Susan's statements during the 911 call and to the officers in her home violated the defendant's right to confront the witnesses against him depends on whether the statements were testimonial or nontestimonial. "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." Davis v. Washington, 547 U.S. 813, 822 (2006).[7] If, however, there is no "ongoing emergency" and "the primary purpose of the interrogation is to establish or

[7] After the United States Supreme Court decision in Michigan v. Bryant, 562 U.S. 344 (2011), the Supreme Judicial Court "clarif[ied] that the appropriate method of analysis is the 'primary purpose' test." Wardsworth, 482 Mass. at 464 n.18. "Accordingly, statements made in response to police interrogation are not 'testimonial per se,' although they will qualify as testimonial in many cases . . . ." Id. This aligns with the analysis of whether a statement to a lay witness is testimonial in fact. A statement is "testimonial in fact," or now just testimonial, if "a reasonable person in the declarant's position would anticipate the statement's being used against the accused in investigating and prosecuting the crime." Commonwealth v. Simon, 456 Mass. 280, 297, cert. denied, 562 U.S. 874 (2010), quoting Commonwealth v. Gonsalves, 445 Mass. 1, 12-13 (2005), cert. denied, 548 U.S. 926 (2006).

prove past events potentially relevant to later criminal prosecution," the statements are testimonial. Id. "Testimonial statements are those made with the primary purpose of 'creating an out-of-court substitute for trial testimony.'" Wardsworth, 482 Mass. at 464, quoting Commonwealth v. Imbert, 479 Mass. 575, 580 (2018). "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." Commonwealth v. Beatrice, 460 Mass. 255, 259-260 (2011), quoting Michigan v. Bryant, 562 U.S. 344, 361 n.8 (2011). "'[A] conversation which begins as an interrogation to determine the need for emergency assistance' can 'evolve into testimonial statements.'" Bryant, supra at 365, quoting Davis, supra at 828. The Commonwealth bears the burden of proving the facts necessary to determination of admissibility by a preponderance of the evidence. Beatrice, supra at 259. The United States Supreme Court has included 911 calls within the rubric of police interrogation. Beatrice, 460 Mass. at 259 n.6. Also, a statement that the declarant volunteers can be testimonial. See Wilson, 94 Mass. App. Court. at 428.

Factors that help distinguish testimonial statements from nontestimonial statements include:

> "(1) whether the [declarant] was speaking about 'events as they were actually happening rather than describ[ing] past events'; (2) whether any reasonable listener would recognize that the [declarant] was facing an 'ongoing emergency'; (3) whether what was asked and answered was, viewed objectively, 'necessary to be able to resolve the present emergency, rather than simply to learn . . . what had happened in the past,' including whether it was necessary for [police] to know the identity of the alleged perpetrator; and (4) the 'level of formality' of the interview (emphasis in original)."

Commonwealth v. Galicia, 447 Mass. 737, 743-744 (2006), quoting Davis, 547 U.S. at 827. See Mass. G. Evid. Art. VIII, Introductory Note (a) (2019).

In addition, the Supreme Judicial Court, and we, have repeatedly held that "statements made during a 911 telephone call by an individual who was assaulted only a short time earlier and is seeking emergency police or medical assistance are not testimonial, even when some of those statements (including those that identify the perpetrator) are the result of questions by an agent of law enforcement who is attempting to resolve the emergency." Commonwealth v. Rodriguez, 90 Mass. App. Ct. 315, 323 (2016). However, where a 911 call delves into past events or the declarant's statements are not made for the purpose of resolving an ongoing emergency, the statements are testimonial. See Beatrice, 460 Mass. at 259-260; Commonwealth v. Simon, 456 Mass. 280, 300, cert. denied, 562 U.S. 874 (2010).

a. The 911 call. Parts of the 911 call here were admissible as nontestimonial statements and parts were not. The statements were interwoven, and the testimonial statements should not have been introduced in evidence.

The statements made during the 911 call to assess and respond to the emergency in this case were nontestimonial and admissible. The call started with a request for emergency assistance from a crying caller asking for help. The 911 dispatcher needed to determine the emergency, who was at the scene, and who the responding police officers might be dealing with, all to respond to the emergency. Accordingly, the following statements were admissible: "I need somebody to come to my house," "My boyfriend just beat me up," and the defendant's name. Those statements were not testimonial and admitting them into evidence was not error. See Rodriguez, 90 Mass. App. Ct. at 324. Susan's naming of the defendant at a time when she was seeking emergency help and police needed to know whom they might encounter also was not testimonial. See Beatrice, 460 Mass. at 263; Rodriguez, supra at 323.

Statements made in response to the dispatcher's asking, "What exactly happened tonight?" were testimonial. They were designed to elicit past events and are not covered by the

emergency exception. It was error to admit them.[8] See Simon, 456 Mass. at 300 ("Although much of the 911 call was not testimonial per se, five statements contained therein were testimonial per se because, viewed objectively, they would not have helped resolve the ongoing emergency or secure the crime scene"); Wilson, 94 Mass. App. Ct. at 427 (officer's request to victim for "rundown of exactly how it happened" was not in response to an ongoing emergency, and the resulting answer was testimonial). These included the narrative of how the evening developed and "he knocked me out a couple of times," as well as references to the defendant punching Susan in the face.

We note that the dispatcher's characterization of events to responding officers as "a domestic assault and battery" is inadmissible. While it is nontestimonial, as the dispatcher made the statement solely to assist the police in responding to the scene, this out-of-court statement is hearsay and inadmissible unless it is subject to an exception. See Commonwealth v. Purdy, 459 Mass. 442, 452 (2011) (out-of-court statement is hearsay, and ordinarily is not admissible, where it

[8] We recognize that a question such as "What exactly happened tonight?" may be helpful to keep a caller talking while police respond to the scene. For our purposes, the issue is what should be admissible in evidence.

is offered to prove the truth of matter asserted therein). See also Mass. G. Evid. § 801(c) (2019).[9]

The 911 call returned to a nontestimonial topic and those statements were admissible. Because of a testimonial statement that the defendant had punched Susan in the face, the dispatcher and Susan discussed whether she needed an ambulance. They also discussed that Susan's sister had left and was not on scene. "[Q]uestions and the victim's answers . . . concerned primarily with assessing the victim's medical condition and collecting as much information as possible to prepare first responders for what they would soon encounter" are not testimonial. Commonwealth v. Middlemiss, 465 Mass. 627, 636 (2013).

At that point, Susan returned to describing what had happened that night, making testimonial statements. These included the testimonial statement that Susan's sister left with Susan's boyfriend "[a]fter he beat me up and stuff" and Susan's later volunteered statement that "[h]e tried to kill me." These statements, made as the police were arriving, "were not relevant to resolving the . . . emergency" and are not admissible. Simon, 456 Mass. at 300.

[9] The Commonwealth does not contend that the dispatcher's hearsay statement was admissible for the truth of the matter asserted.

The defendant's argument that the 911 call was not admissible because Susan, the declarant, was not bleeding and did not ask for an ambulance is unavailing. The defendant is using hindsight to evaluate the call rather than the perspective of the parties to the call. See Wardsworth, 482 Mass. at 464; Beatrice, 460 Mass. at 259-260. Susan was sobbing and upset, she called when the defendant was still on scene, and she reported that she had suffered injury.

b. Statements made to the officers at the scene. When the police officers arrived at Susan's home, they knew that an ambulance was on the way, and once at the scene, Yee also called for an ambulance. Susan was hysterical and initially did not realize that the uniformed officers were there. At this point, there was no indication of a volatile scene. While Susan made statements that might have been helpful in focusing medical treatment, we are constrained by Beatrice, 460 Mass. at 260, to conclude, on the facts presented here, that once police arrived at Susan's apartment, there was not an ongoing medical emergency sufficient to permit admission of Susan's statements in evidence.

In Beatrice, the victim had "'just' been severely beaten by her boy friend . . . , but there [was] no suggestion that her

injuries were serious or life threatening."[10] 460 Mass. at 260. In that circumstance, "a reasonable person would believe there was an ongoing emergency only if there was a continuing risk to the victim," which the court concluded on those facts existed only if the assailant might resume the assault. Id. Here, the officers did not offer any testimony that once they arrived on scene, Susan's injuries appeared serious or life threatening. They asked, "[W]hat's was going on, what happened," and Susan's answers to their question were about what had happened in the past. Her statements were testimonial and should not have been admitted. See Commonwealth v. Gonsalves, 445 Mass. 1, 16-17 (2005), cert. denied, 548 Mass. 926 (2006) (where declarant was mobile and verbal, and had no obvious injuries, on record before court, her statements to officers at scene were not admissible). Contrast Bryant, 562 U.S. at 374-375 (declarant was mortally wounded when he made statements); Middlemiss, 465 Mass. at 630, 635-636 (declarant had been shot, was pleading for help, and died); Nesbitt, 452 Mass. at 240, 247 (declarant suffered over twenty stab wounds, pleaded for help, and died).[11]

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[10] By following the language in Beatrice, 460 Mass. at 260, regarding injuries, we do not mean to imply that any beating or strangulation of Susan was not itself a serious matter.

[11] Because the order at issue in this appeal was that all statements at the apartment were admissible, it is possible that "the Commonwealth or the defense will be able to elicit a more comprehensive and favorable record after remand [in this

c. Harmless error analysis. We are not "satisfied beyond a reasonable doubt that the [inadmissible] evidence did not have an effect on the jury and did not contribute to the jury's verdicts."[12] Tyree, 455 Mass. at 701. The evidence that should have been excluded contained important details of the assault and surrounding circumstances. For example, during the testimonial parts of the 911 call, the victim explained how the argument had occurred, stated that the defendant "knocked me out a couple of times," that the defendant punched her in the face, and that "[h]e tried to kill me." Similarly, the only statements by Susan that the defendant strangled her came in the form of inadmissible testimonial statements offered by the officers repeating what Susan had told them on the night in question. There was evidence of some physical injuries consistent with strangulation but also evidence of a lack of injuries to Susan's neck. The emergency room doctor did not conclude that Susan had been strangled or diagnose her with any

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matter], when further evidence may be presented." Gonsalves, 445 Mass. at 16.

[12] We note that the Commonwealth did not argue that the admission of the testimonial statements in the 911 call and through the two police officers was harmless beyond a reasonable doubt. Rather, as to admission of the 911 call in its entirety, the Commonwealth argued only that it did not create a substantial risk of a miscarriage of justice. The Commonwealth argued that admitting Officer Connolly's recounting of Susan's statements was "harmless [error]."

other "neck injury." In fact, the officer assigned to photograph Susan's injuries the next day did not photograph her neck because he did not see any injuries to it.

Reviewing the entire record, the information contained only in the testimonial statements was a focus of the Commonwealth's case and closing argument and shaped defense counsel's trial strategy as well. As in Wilson, 94 Mass. App. Ct. at 433, "the erroneously admitted evidence was not collateral or tangential -- it went to the heart of the case." Accordingly, the judgments are reversed, and the verdicts are set aside.

So ordered.

Appendix.

The text of 911 call is set forth below. The italicized portions of the text should have been excluded. Remarks to "aside" are to responding police officers or ambulance.

Susan: "Hello?"

Dispatcher: "Braintree police dispatcher Wood, this call is recorded."

Susan: "Yes, I need somebody to come to my house."

Dispatcher: "Okay, where are you?"

Susan: "[street address]."

Dispatcher: "All right, hold on, I need you to take a deep breath for me, okay? What's your address?"

Susan: "[street address]."

Dispatcher: "[street address]? What's going on there?"

Susan: "My boyfriend just beat me up."

Dispatcher: [Aside] "A-7, [street address], female just got beat up by her boyfriend."

Dispatcher: "Are you there right now with him?"

Susan: "No, he left."

Dispatcher: "Okay, just stay on the phone with me, okay? I've got units headed your way. What's your name, honey?"

Susan: "[Susan]."

Dispatcher: "What's your boyfriend's name?"

Susan: "Roy Rand."

Dispatcher: "All right, hold on, I'm going to have to go -- go a little slow. What's his first name?"

Susan: "Roy."

Dispatcher: "Roy, R-O-Y?"

Susan: "Yes."

Dispatcher: "And spell his last name for me."

Susan: "R-A-N-D."

Dispatcher: "Okay."

Susan: "He's from Brockton."

Dispatcher: "He's from Brockton? What kind of car, what kind of car does he have?"

Susan: "I don't know."

Dispatcher: "All right, hold on one second, okay? What exactly happened tonight?"

Susan: "He came home at twelve, and then, my sister was here and she was causing trouble and stuff like that. And I blamed, will you take her out of this house because we can't have her here. And then he was just taking sides with her and stuff like that and then I talked about it and he knocked me out a couple of times."

Dispatcher: [Aside] "[street address]. Boyfriend's no longer on scene. He fled in an unknown vehicle."

Susan: "And then he punched me in the face."

Dispatcher: "He punched you in the face?"

Susan: "Yes."

Dispatcher: "Okay. Do you need an ambulance, honey?"

Susan: "I don't know."

Dispatcher: "Are you bleeding?"

Susan: "No. But my face is swollen."

Dispatcher: "All right, hold on one second, okay?"

Susan: "Yeah."

Dispatcher: [Aside] "[Inaudible] [street address] in Braintree, for a domestic assault and battery."

Dispatcher: "Okay, what I'm going to have to do is have an ambulance come, just so they can check you out, okay? I want to make sure that everything's okay. All right? But I'm going to have you stay on the phone with me until I have officers that get there, okay?"

Susan: "Yeah, and my sister left, too, with him."

Dispatcher: "Your sister left with him?"

Susan: "Yes."

Dispatcher: "Okay."

Susan: "After he beat me up and stuff."

Dispatcher: "How long ago did he leave?"

Susan: "Like two minutes ago, since I called you guys."

Dispatcher: "How long ago did he leave your house?"

Susan: "Since I called, since I was able to get my phone."

Dispatcher: "Okay, so he left a little while ago? Is there an apartment number, or is it a single-family home?"

Susan: "Three-family."

Dispatcher: "Okay, what apartment are you in?"

Susan: "Uh, one. [inaudible] They both left together."

Dispatcher: "What apartment do you live in, honey?"

Susan: "One."

Dispatcher: "You live in apartment one?"

Susan: "Yeah."

Dispatcher: "Okay, hold on one second."

Dispatcher: [Aside] "Units to [street address], the female's going to be in apartment one. She's by herself."

Susan: "He tried to kill me."

Dispatcher: [Aside] "Roger."

Dispatcher: "All right. Can you go to your door and see the police officers?"

Susan: "Yeah."

Dispatcher: "Can you go let them in?"

Susan: "I'm in here."

Dispatcher: "Okay. Do you see the police cars?"

Susan: "Yes, I see lights."

Dispatcher: "You see lights? Can you yell to them so they know where you are?"

Susan: "Yeah, I see them."

Dispatcher: "Are you with them?"

Susan: "Yeah."

Dispatcher: [Aside] "A-1-7, were you able to find her? Roger, an X-ray's en route."

Dispatcher: "All right, go talk to them, okay, honey?

Susan: "Now where did he go?"

Dispatcher: "Go talk to the police officers, okay?"

Susan: "Okay."

Dispatcher: "All right. Bye-bye."

CERTIFICATE OF SERVICE

I, Marguerite T. Grant, hereby certify that I have served the Commonwealth's application for direct appellate review on the defendant by electronic service to his attorney:

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Signed under the pains and penalties of perjury this 20th day of July 2020.

Marguerite T. Grant
Assistant District Attorney

CERTIFICATE OF COMPLIANCE

I, Marguerite T. Grant, hereby certify that the Commonwealth's application for further appellate review complies with the rules of court that pertain to its filing, including but not limited to Mass. R. App. P. 20(a) and 27.1(b). The application is in Times New Roman 14, a proportionally spaced font, using Microsoft Word 2010. Under Rule 27.1(b), the length limit for the statement of why further appellate review is appropriate is 2,000 words. That statement is 1,645 words long, computed by Microsoft Word's word-count function.

Marguerite T. Grant
Assistant District Attorney