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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE,	)	D066684
	)	
Plaintiff and Respondent,	)	(Riverside County
	)	Superior Court No.
v.	)	RIF1105594)
	)	
RUTHETTA LOIS HOPSON,	)	
	)	
Defendant and Appellant.	)	
	)	

PETITION FOR REVIEW

From the Judgment of the Court of Appeal of the State of California,
Fourth Appellate District, Division One

(Opinion filed June 24, 2015)

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By Appointment of the Court of
Appeal Under the Appellate Defenders
Independent Case System

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PETITION FOR REVIEW

TO THE HONORABLE TANI G. CANTIL-SAKAUYE, CHIEF JUSTICE, AND THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA:

Appellant Ruthetta Lois Hopson respectfully petitions this court to grant review pursuant to rule 8.500 of the California Rules of Court in the above-entitled matter. The Court of Appeal, Fourth Appellate District, Division One filed its opinion, not certified for publication, on June 24, 2015.[1]

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[1] A copy of the Court of Appeal's decision (hereafter Opn.) is attached as Exhibit "A" to the original and court copies of this petition.

ISSUES PRESENTED

1. Whether Ms. Hopson's right of confrontation under the Sixth Amendment was violated when one of the detectives testified about implied statements which Ms. Hopson's deceased codefendant made to him in connection with showing the detectives the location where the murder weapon was later found.

2. Whether Ms. Hopson's right of confrontation under the Sixth Amendment was violated when the trial court permitted the prosecution to introduce out-of-court statements made by her deceased codefendant during which he confessed to his role in the murder of the decedent and described the role which Ms. Hopson played in the murder.

3. Whether the cumulative effect of the errors which occurred in the trial in this case such that a reasonable person could doubt whether the trial was fair and impartial, so as to deny Ms. Hopson her Fourteenth Amendment rights to due process and a fair trial.

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STATEMENT OF THE CASE AND FACTS

For purposes of this petition, with the exception noted in the next paragraph, Ms. Hopson adopts the "FACTUAL AND PROCEDURAL BACKGROUND" section of the Court of Appeal's opinion. (Opn. 5-15.) No petition for rehearing was filed in this case. (Cal. Rules of Court, rule 8.504(b)(3).)

Ms. Hopson does not adopt the following sentence in the opinion: "The steering wheel of the van yielded traces of Hopson's DNA, as well as Brown's, but none from Thomas." (Opn. 12.) The facts with regard to DNA were established by a stipulation. The sentence concerning whether Ms. Brown's or Ms. Hopson's DNA was found in the van was as follows: "The major donor profile matches Laverna Brown's reference DNA profile, and Ruthetta Hopson's reference DNA profile is included as a *possible* minor donor." (2 RT 196, italics added.)

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ARGUMENT

I. MS. HOPSON'S RIGHTS UNDER THE CONFRONTATION CLAUSE OF THE SIXTH AMENDMENT WERE VIOLATED WHEN THE TRIAL COURT PERMITTED THE PROSECUTION TO PRESENT THE TESTIMONY OF DETECTIVE COBB CONCERNING THE IMPLIED STATEMENTS WHICH JULIUS THOMAS MADE TO THE POLICE, WHICH CONNECTED BOTH THOMAS AND MS. HOPSON TO THE MACHETE USED IN THE MURDER.

A. Introduction

The Sixth Amendment to the United States Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." (U.S. Const., 6th Amend.) The United States Supreme Court has held that the confrontation clause forbids admission of testimonial statements of a witness who does not appear at trial unless the witness is unavailable to testify and the defendant has had a prior opportunity to cross-examine the witness. (*Crawford v. Washington* (2004) 541 U.S. 36, 68-69 (hereafter *Crawford*).)

In the case before this court, "[e]vidence was presented to show that [deceased codefendant Julius] Thomas participated with Hopson in attempting to rob Brown of any travel money she might have obtained for her plan to leave town, but Brown was killed in the attempt." (Opn. 18.) Following the arrests of Ms. Hopson and Thomas, "he confessed to detectives and led them

to the location of one of the weapons used in the killing, a machete. Six weeks later, he committed suicide in jail." (Opn. 18.)

The trial court permitted Detective Cobb to testify about the search for the machete, without referencing Ms. Hopson or directly implicating her as a participant. (Opn. 16.) Ms. Hopson has challenged the admission of Thomas's out-of-court statements on appeal, as she did in the trial court, on the ground that they constituted "implied statements," which were testimonial in nature, and which harmed her defense and violated her right to confront Thomas, who was unavailable as a witness. (Opn. 3, 18-19, 25.)

The Court of Appeal, while agreeing that Thomas's statements "must be characterized as testimonial in nature," held that the testimony of Detective Cobb, recounting how the officers found the machete, based on the information they received from Thomas, was admitted for a nonhearsay purpose—showing how the police investigation proceeded—and thus did not violate Ms. Hopson's rights under the confrontation clause. (Opn. 12, 16-17, 23.) For the reasons Ms. Hopson now explains, such a broadly applicable exception to the hearsay rule undermines the purposes of that rule and deprives defendants of the protection the confrontation clause is meant to ensure. The Court of Appeal's holding presents an issue worthy of this court's review.

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B. The Admission of Thomas's Implied Statements to Police About the Whereabouts of the Murder Weapon Violated Ms. Hopson's Right to Confront Witnesses Against Her.

The Court of Appeal correctly held that Thomas's statements to police were "testimonial" and thus, if they were hearsay, were subject to the strictures of the Confrontation Clause, as interpreted in *Crawford* and its progeny. (Opn. 2-4, 15-16.) The court explained that "it is clear on this record that Thomas's statements to detectives, created during a postarrest, more or less formalized interview, must be characterized as testimonial in nature." (Opn. 16.)

According to the Court of Appeal, however, the evidence of Thomas's statements to the police was not hearsay, because it was admitted at trial for "nonhearsay purposes." (Opn. 4.) With regard to Thomas's statements to Detective Cobb about the location of the machete used in killing Ms. Brown, the court opined that "Cobb's account of the interview with Thomas was admitted into evidence not for the truth that Thomas put the weapon there, but to show the course of the investigation." (Opn. 21; see also Opn. 19 ["Thomas's ability to lead detectives to the location of the machete was offered not to show the truth that he knew where it was, but to show how the investigation proceeded"].)

The Court of Appeal relied heavily on this court's decision in *People v. Livingston* (2012) 53 Cal.4th 1145. (Opn. 4, 19-20, 22.) *Livingston* held,

as the Court of Appeal noted, that the introduction of evidence of a particular out-of-court statement did not violate the confrontation clause. (Opn. 22; *Livingston*, at pp. 1162-1164.) A witness (Perry) testified that he and others ran away when someone said that the defendant ("Goldie") was in a Cadillac which, according to Perry's testimony and other evidence, was involved in a shooting a short time later. (*Livingston*, at pp. 1150, 1162.) After defense counsel objected, the trial court told the jury that the statement was "'offered to merely explain conduct. And it is not for the truth of the matter asserted.'" (*Id.* at p. 1162.)

Quoting a 1981 Court of Appeal decision which, in turn, quoted Justice Jefferson's *California Evidence Benchbook*, *Livingston* stated that this evidence was "an example of '"one important category of nonhearsay evidence—evidence of a declarant's statement that is offered to prove that the statement imparted certain information to the hearer and that the hearer, believing such information to be true, acted in conformity with that belief. The statement is not hearsay, since it is the hearer's reaction to the statement that is the relevant fact sought to be proved, not the truth of the matter asserted in the statement."'" (*People v. Livingston*, *supra*, 53 Cal.4th at p. 1162, quoted in Opn. 19-20.)

What the Court of Appeal in the instant case neglected to mention was a very important caveat which this court wrote shortly after that quotation: "The nonhearsay purpose must be relevant for the statement to be admissible for that purpose." (*People v. Livingston*, *supra*, 53 Cal.4th at p. 1162.) In fact, this court expressed doubt as to whether the out-of-court statement at issue satisfied that criterion:

> In this case, the fact that the statement was made was not very probative, although it may have been relevant for the jury to understand why Perry and the others ran across the street. The reference to "Goldie" did have some prejudicial effect because the evidence established that defendant went by that name. But under the circumstances, including the court's prompt admonition to the jury, any error in permitting this fleeting reference to the statement was harmless. Substantial other evidence, including Perry's own testimony, established that the Cadillac involved in the shooting belonged to defendant. It is not reasonably probable the verdict would have been more favorable to defendant had Perry not testified that an unidentified person saw Goldie before the shooting. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

(*People v. Livingston*, *supra*, 53 Cal.4th at pp. 1162-1163.)[2]

This court went on to reject the defendant's federal claims regarding that evidence. (*People v. Livingston*, *supra*, 53 Cal.4th at pp. 1163-1164.) The

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[2] The *Livingston* court invoked the *Watson* standard because, presumably, at that point in the opinion, it was examining the admissibility of the statement under the California law of hearsay evidence. Elsewhere in its opinion, this court articulated and applied the different harmless-error standard applicable to confrontation clause errors. (*People v. Livingston*, *supra*, 53 Cal.4th at pp. 1159-1160.)

court held that the introduction of the statement did not violate the confrontation clause, for two reasons: "First, 'there are no confrontation clause restrictions on the introduction of out-of-court statements for *nonhearsay* purposes.' [Citation.] Second, the statement was clearly nontestimonial for confrontation purposes." (*Ibid.*)

As it pertains to the instant argument, *Livingston* differs from this case in two very significant ways, but it is similar to this case in another very significant way. The differences are: First, as the Court of Appeal held, Thomas's statements to the police about the location of the machete *were* "testimonial" for confrontation clause purposes. (Opn. 2-4, 15-16.) Second, the disputed evidence in this case did not involve a "fleeting statement" by Thomas which was of little consequence because the point it made, with regard to the defendant's guilt, was firmly established by other evidence. (*People v. Livingston*, *supra*, 53 Cal.4th at p. 1163.) The jury learned that the police found the machete used in the killing because Thomas, Ms. Hopson's boyfriend, told them where to find it. That evidence tied Ms. Hopson to the murder in a way that no other evidence did.[3]

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[3] The Court of Appeal declined to reach the question whether any confrontation clause error by the trial court was harmless. (Opn. 17.) Accordingly, Ms. Hopson does not address that question in this petition. In the event that review is granted, Ms. Hopson will, of course, include harmless-

(continued...)

The important similarity between *Livingston* and the instant case is that the out-of-court statement in dispute, if considered only for the purported "nonhearsay" purpose, "was not very probative" as to whether or not the defendant committed the charged crime. (*People v. Livingston*, *supra*, 53 Cal.4th at p. 1162.) Granting the Court of Appeal's premise that the fact Thomas told the police where to find the machete was relevant "to show the course of the investigation" (Opn. 21), the prosecution was not charged with proving the course of the investigation. It was not an element of the crime with which Ms. Hopson was charged, nor had Ms. Hopson raised any dispute about the investigation to which the evidence in question might have been responsive.

Indeed, this court has rejected the purported nonhearsay purpose of showing the course of a police investigation, where the court has found that the investigation was not truly in dispute. In *People v. Page* (2008) 44 Cal.4th 1, a murder defendant sought to admit into evidence a police report stating that a police sergeant had made contact with a witness who was sure that she had seen the murder victim at a particular time and place. The sergeant could not remember the incident or identify the witness. (*Id.* at pp. 34-35.) The trial

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[3](...continued)
error analysis in her briefing, as she did in the Court of Appeal. (AOB 52-57, 72-74; ARB 6-11, 13-14.)

court ruled that the defendant could introduce evidence as to what the police had done, "but not what the asserted witness had said, because her statement was hearsay and was not admissible under any exception." (*Id.* at p. 35.)

On appeal, the defendant asserted that "evidence indicating that the police failed to record a witness's name would have helped prove that the police 'zeroed in on' defendant and 'were going to make him fit' their predetermined view of the crime. In addition, defendant asserts that because the witness's statement assertedly was relevant to prove the character of the police investigation rather than to prove the truth of the matter stated, it was not hearsay evidence." (*People v. Page*, *supra*, 44 Cal.4th at pp. 36-37.) This court upheld the trial court's exclusion of the evidence:

> The flaw in defendant's theory is that the proffered evidence has no tendency to establish any relevant fact. The minimart evidence reflects that there may have been a witness who claimed to have seen Tahisha at 10:30 p.m., the police did not record the name of the purported witness, and the police thereafter attempted but failed to verify the purported sighting of Tahisha. . . . The possibility the police may have chosen not to follow up more thoroughly on all leads does not impeach the evidence against defendant. Because the proffered evidence has no tendency to establish any relevant fact, it properly was excluded by the trial court.

(*People v. Page*, *supra*, 44 Cal.4th at p. 37.)

Without question, there are circumstances in which evidence of a testimonial statement made to a law enforcement officer is relevant at a

criminal defendant's trial for a reason which does not depend on whether or not the statement is true. In those circumstances, evidence of the statement is not hearsay and does not implicate the confrontation clause, even if it inculpates the defendant, so long as the jury is made aware of the nonhearsay purpose for which the evidence is introduced.

In the instant case, the fact that the police found a machete which was shown by DNA evidence to have been used in Ms. Brown's murder obviously was relevant at trial, as was the fact that Darcy Timm, landlord to both Ms. Brown and Ms. Hopson, noticed that a machete she kept in the garage was missing. The fact that it was Ms. Hopson's boyfriend, Thomas, who led police to the machete also was highly relevant and incriminatory of Ms. Hopson—but only if what Thomas told police was the truth.

The Court of Appeal, in support of its holding that Thomas's statements were not offered at trial "for the truth of the matter asserted," stated: "It was not a contested matter at trial whether Thomas knew the location of the weapon or if he was telling the truth about it." (Opn. 22.) That statement would be more accurate when applied to the "nonhearsay" purpose for which the Court of Appeal posited the statements were introduced. It was not a contested matter at trial what "the course of the investigation" was (Opn. 21) or what "effect" Thomas's statements had on Detective Cobb and the other

police "listeners" (Opn. 4, 23). The fact that Thomas *truthfully* told the police that he knew the location of the weapon, however, was strong evidence that Ms. Hopson was a participant in Ms. Brown's murder, a matter which she had "contested" by demanding a trial.

The instant case is an appropriate one for this court to grant review in order to address the limits of the prosecution's use of testimonial out-of-court statements, incriminatory of the defendant, for the "nonhearsay" purpose of showing how a police investigation proceeded. As to Thomas's statements concerning the location of the machete, the Court of Appeal offered no other theory on which that evidence might be relevant independent of the truth of the statements. The exception adopted by the Court of Appeal in this case has no real limits; in essence, it would allow any testimonial statement made to a police officer, no matter how prejudicial to a defendant, to be introduced at trial as "nonhearsay" evidence of the course of the investigation, despite the declarant's being dead or otherwise unavailable for cross-examination.

Appellate courts in several jurisdictions have pointed out that such a broad exception would "swallow" the hearsay rule, at least as it pertains to out-of-court statements made to police officers. As the Appellate Court of Illinois explained:

> The reality is that it will almost always be possible to describe testimony revealing the content of conversations with the police

> as evidence offered to shed light on the investigation of the crime rather than on the crime itself. If reviewing courts allowed the mere invocation of the words "police procedure" to preclude further analysis, this limited exception would effectively swallow the hearsay rule with regard to police officers. The compelling protections that gave rise to the hearsay rules must not be so easily discarded.

(*People v. Rice* (Ill.App.Ct. 2001) 747 N.E.2d 1035, 1041; see also *United States v. Sesay* (D.C. Cir. 2002) 313 F.3d 591, 599-600 [rejecting argument that witness statement to police was offered to show officers' state of mind when they arrested defendant and others: "To accept appellant's 'state of mind' argument would be to permit a loophole in the hearsay rule large enough to swallow the rule itself"].)

The Court of Appeal's reasoning would not merely swallow the hearsay rule, as it pertains to evidence of statements to police by declarants unavailable at trial; it would neutralize the confrontation clause and defeat the purpose of that crucial Sixth Amendment protection for criminal defendants. If showing "the course of the investigation" (Opn. 21) were a legitimate nonhearsay purpose for introducing evidence of what police were told by unavailable, even unnamed informants, criminal defendants' right to confront the witnesses against them would quickly become illusory. This court should grant review to address the important question of the scope of such an exception.

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II. THE ADMISSION OF DETECTIVE WHEELER'S REBUTTAL TESTIMONY ABOUT ACTUAL STATEMENTS MADE BY JULIUS THOMAS, WHICH DIRECTLY IMPLICATED MS. HOPSON, VIOLATED MS. HOPSON'S RIGHTS UNDER THE CONFRONTATION CLAUSE OF THE SIXTH AMENDMENT.

A. Introduction

Ms. Hopson testified on her own behalf that Thomas had "forced her to participate in the robbery and killing, by repeatedly threatening her and her adult son." (Opn. 12.) Over defense objection, Detective Wheeler testified on rebuttal that Thomas had "told detectives that it was Hopson who planned the robbery-murder and persuaded him to participate in it, and that she was the leader in cleaning up the scene and hiding the evidence." (Opn. 23-24.)[4]

The trial court admitted the "actual" statements made by Thomas for impeachment purposes, pursuant to Evidence Code section 1202. (Opn. 24.) Ms. Hopson contended in the Court of Appeal that the trial court violated her confrontation clause protections when it admitted those statements as evidence at trial. (Opn. 23.)

The Court of Appeal held that Thomas's actual statements to the detectives were admissible for the permissible nonhearsay purpose of

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[4] In addition to the facts of this case which the Court of Appeal set forth at pages 5-14, it added additional facts taken from the cross-examination and redirect testimony of Ms. Hopson and the rebuttal testimony of Detective Wheeler, which are relevant to this argument. (Opn. 27-29.) For purposes of this argument, Ms. Hopson adopts those facts.

impeaching Ms. Hopson, on the ground that she "'opened the door'" to the admission of the testimonial, out-of-court statements of Thomas when she testified that she participated in the murder of Ms. Brown out of her fear of Thomas. Thus, the appellate court held, the admission of those statements did not violate the Sixth Amendment. (Opn. 4, 26-27, 35.)

B. The Testimony of Detective Wheeler as to Thomas's Out-of-Court Statements Violated Ms. Hopson's Sixth Amendment Right to Confront the Person Who Made Those Statements.

The *Crawford* court held that the confrontation clause "does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted." (*Crawford, supra*, 541 U.S. at p. 59, fn. 9, citing *Tennessee v. Street* (1985) 471 U.S. 409, 414 (hereafter *Street*).) The Court of Appeal relied, inter alia, on *Street* in holding that Ms. Hopson bore responsibility for opening "'the door'" to the "permissible nonhearsay uses at trial, of the reported, testimonial out-of-court statements" which Thomas made to the detectives, so that their admission did not violate the confrontation clause. (Opn. 4, 30-31, 36-37.)

The Court of Appeal's reliance on *Street* was misplaced. The rule enunciated in that decision is inapplicable to Ms. Hopson's case, because Thomas's statements *were* used to establish the truth of the matters which Detective Wheeler testified that Thomas had asserted. Thomas's statements

were not properly admitted merely for "permissible nonhearsay uses at trial." (Opn. 4.) Even if there may have also been *some* nonhearsay purposes in which the statements were used—such as to explain why Ms. Hopson "apparently continued to stay with friends of Thomas up until weeks before his death, consistently claiming a homeless man must have done the killing, and why she did not start to blame Thomas for planning the killing until she became aware he had made statements against her" (Opn. 36)—the primary use of Thomas's statements at trial was to establish that what Thomas told the officers was true.

In *Street*, *supra*, defendant Street confessed to police about the roles which he, a man named Peele, and two others played in the murder of Street's neighbor during the course of a burglary. (*Street*, *supra*, 471 U.S. at p. 411.) At trial, Street testified that his confession had been coerced and was derived from Peele's previous written statement to the sheriff. Street claimed that the sheriff had read from Peele's statement and directed Street to say the same thing. (*Ibid.*)

In rebuttal, the prosecution called the sheriff, who testified that Street was neither read Peele's statement nor pressured to repeat its terms. (*Street*, *supra*, 471 U.S. at p. 411.) To corroborate that testimony and to rebut Street's claim of coercion, the sheriff read Peele's statement to the jury, and a copy of

it was introduced as an exhibit. (*Id.* at pp. 411-412 & fn. 2.) "Before Peele's statement was received, however, the trial judge twice informed the jury that it was admitted '*not for the purpose of proving the truthfulness of his statement*, but for the purpose of rebuttal only.'" (*Id.* at p. 412, italics added.) Later, in jury instructions, the trial court told the jury:

> "The Court has allowed an alleged confession or statement by Clifford Peele to be read by a witness.
>
> "I instruct you that such can be considered by you for rebutable [*sic*] purposes only, and *you are not to consider the truthfulness of the statement in any way whatsoever.*"

(*Street, supra*, 471 U.S. at p. 412, italics added.)

After the jury found Street guilty of murder, a state appellate court reversed, holding that the introduction of Peele's confession denied Street his Sixth Amendment right to confront witnesses, even though it was not admitted to prove the truth of Peele's assertions. (*Street, supra*, 471 U.S. at pp. 412-413.) The United States Supreme Court reversed that appellate judgment. (*Id.* at p. 417.) The high court summarized its holding as follows:

> The State introduced Peele's confession for the legitimate, nonhearsay purpose of rebutting respondent's testimony that his own confession was a coerced "copy" of Peele's statement. The jury's attention was directed to this distinctive and limited purpose by the prosecutor's questions and closing argument. In this context, we hold that the trial judge's instructions were the appropriate way to limit the jury's use of that evidence in a manner consistent with the Confrontation Clause.

(*Street*, *supra*, 471 U.S. at p. 417.)

The Court of Appeal held that "[w]ithin the scope of *Street* . . . , the jury was properly given the opportunity to compare the two versions by the two participants about what happened in the garage the night that Brown was killed, to decide whether Hopson was telling the truth about 'the immediate issue of coercion,' which was the theory of her defense." (Opn. 36, quoting *Street*, *supra*, 471 U.S. at p. 416.) For this reason, the Court of Appeal held that Detective Wheeler's account of what Thomas told him "was admissible for nonhearsay purposes, in rebuttal to the defense testimony" and that how Ms. Hopson responded to Thomas's alleged threats "was an issue in this case that was fair game for rebuttal." (Opn. 36.)

Several crucial differences distinguish *Street* from the instant case. First, the trial court in *Street* instructed the jurors, at least three times, that they were not to consider Peele's confession to police as evidence that what Peele wrote was true. (*Street*, *supra*, 471 U.S. at p. 412.) In the instant case, the trial court never told the jury not to consider Thomas's statements to police as evidence that what Thomas said was true. Indeed, the court never placed any restriction on how the jury could use Thomas's statements against Ms. Hopson. Thus, the jurors were free to accept Thomas's statements, as relayed by Wheeler, for the truth of Thomas's story.

Second, in *Street*, the prosecution used Peele's confession "not to prove what happened at the murder scene but to prove what happened when [Street] confessed," i.e., that he was not coerced by the sheriff and told to mimic Peele's confession. (*Street, supra*, 471 U.S. at p. 414.) The prosecutor did not argue to the jury that what Peele told the police about Street's role in the murder was true; instead, "the prosecutor recited the details that appeared only in [Street's] confession, and argued that [Street] knew these facts because he participated in the murder." (*Id.* at p. 416.) Importantly, the truth or falsity of the matters asserted by Peele in his confession was irrelevant to the purpose for which the prosecution used that evidence.

In the instant case, by contrast, Detective Wheeler's testimony about what Thomas told him would have had *no* value to the prosecution unless the jury accepted it as evidence that the matters asserted by Thomas were true. In closing arguments, the prosecutor urged the jurors to do just that—to use Wheeler's testimony about Thomas's statements as evidence that what Thomas said about Ms. Hopson's role in the murder was true. (See, e.g., 3 RT 516 ["she had the bloody knife, the butcher knife in her hand while she was leaning over the body of Laverna Brown. You heard that through the statements of Julius Thomas that Detective Wheeler told us about"]; 3 RT 519; 3 RT 547

["But what did [Thomas] do? He admitted his role. He came clean with the police . . ."]; 3 RT 548.)

Far from approving the use of an unconfronted declarant's out-of-court statements against a defendant in that manner, the Supreme Court in *Street* was careful to note that such use—unlike the way Peele's confession was used in *Street*—would implicate the Sixth Amendment. The court stated: "If the jury had been asked to infer that Peele's confession proved that [Street] participated in the murder, then the evidence would have been hearsay; and because Peele was not available for cross-examination, Confrontation Clause concerns would have been implicated." (*Street, supra*, 471 U.S. at p. 414.)

Unlike *Street,* Detective Wheeler's testimony concerning what Thomas told the detectives was presented without any protections being afforded to Ms. Hopson. The Court of Appeal mentions how the nonhearsay evidence was presented in *Street*, including that the trial judge "had appropriately instructed the jury to limit its use of the evidence in a manner consistent with the confrontation clause." (Opn. 31.) No such instruction was given here, though the Court of Appeal correctly states that Ms. Hopson did not request any limiting instructions or admonitions in the trial court and does not "complain of any such omission on appeal." (Opn. 35.).

Ms. Hopson's contention on appeal, however, is not one of instructional error; rather, it is one of constitutional error in admitting evidence. Ms. Hopson's argument on appeal is that, even if the Evidence Code did not prohibit the introduction of Thomas's statements to the police, the Sixth Amendment's confrontation clause did, because they were out-of-court statements introduced for the truth of their contents and Ms. Hopson had no opportunity to cross-examine the declarant. (*Crawford, supra*, 541 U.S. at p. 68.)

C. Ms. Hopson's Testimony Did Not "Open the Door" to the Otherwise Unconstitutional Admission of Thomas's Out-of-Court Testimonial Statements Implicating Her.

The Court of Appeal cited a decision by the New York Court of Appeals for the principle that there is an "emerging consensus, that a defense strategy or tactic can open the door to admitting evidence that could otherwise be prohibited by the confrontation clause." (Opn. 32-33, citing *People v. Reid* (N.Y. 2012) 971 N.E.2d 353 (hereafter *Reid*); see also *United States v. Cruz-Diaz* (1st Cir. 2008) 550 F.3d 169, 176 ["defendant's 'trial strategy opened the door to the statement's admission"], cited in Opn. 32-33.)

In *Reid*, the New York high court held that "the admission of testimony that violates the Confrontation Clause may be proper if the defendant opened the door to its admission." (*Reid, supra*, 971 N.E.2d at p. 388.) While the *Reid*

court described a growing "consensus" as to this issue, it noted, without discussion, the decision of the Sixth District Court of Appeals in *United States v. Cromer* (6th Cir. 2004) 389 F.3d 662, 679 (hereafter *Cromer*) as a "*but see*" decision. (*Reid*, 971 N.E.2d at p. 388; see also Opn. 33.) Ms. Hopson submits that *Cromer*, not *Reid*, is an accurate guide to the applicability of the principles set forth by the United States Supreme Court in *Crawford* to the instant case.

In *Cromer*, "[d]uring defense counsel's cross-examination of [one of the investigating officers], defense counsel indicated to the court that [defendant] Cromer wanted to participate in the cross-examination of [the officer], and possibly the examination of other witnesses and closing argument. While Cromer's participation was being discussed, the government's counsel stated, 'Unless his questions are scripted and defense counsel has looked at them, it could open doors to other evidence that he might not want to have come in.'" (*Cromer, supra*, 389 F.3d at pp. 668-669.) The court permitted the defendant to personally conduct "a large portion of the cross-examination" of that officer. (*Id.* at p. 679.)

Cromer and his trial counsel then "introduced the existence of an informant and a description provided by that informant in an attempt to discredit the government's case." (*Cromer, supra*, 389 F.3d at p. 679.) "Even after [the defendant] was warned that this line of questioning would open the

door to allow the government to question [the officer] about the exact content of the informant's statements, [the defendant] continued in his attempt to establish that the informant's statement did not describe him. On redirect examination, the government [through the testimony the officer] . . . clarified the precise nature of the description provided by the [informant]." (*Ibid.*)

The Sixth Circuit Court of Appeals stated that "as a matter of modern evidence law, the district court may well have been correct in admitting [the officer's] redirect testimony about the description provided by the informant since Cromer, on cross-examination, had opened the door to the subject by asking about that description." (*Cromer, supra*, 389 F.3d at p. 678.) That was not the end of the Sixth Circuit's analysis, however, and it should not be the end of the analysis in this case. As the *Cromer* court explained:

> The pertinent question, however, is not whether the CI's statements were properly admitted pursuant to "the law of Evidence for the time being." (*Crawford*, 124 S.Ct. at 1364.) Rather, the relevant inquiry is whether Cromer's right to confront the witnesses against him was violated by O'Brien's redirect testimony. If there is one theme that emerges from *Crawford*, it is that the Confrontation Clause confers a powerful and fundamental right that is no longer subsumed by the evidentiary rules governing the admission of hearsay statements. Thus, the mere fact that Cromer may have opened the door to the testimonial, out-of-court statement that violated his confrontation right is not sufficient to erase that violation.

(*Cromer, supra*, 389 F.3d at p. 679.)

Cromer may well stand outside the "consensus" of federal appellate courts which have held otherwise. (Opn. 33, citing *United States v. Cruz-Diaz*, *supra*, 350 F.3d at p. 178; *United States v. Lopez-Medina* (10th Cir. 2010) 596 F.3d 716, 733; *United States v. Holmes* (8th Cir. 2010) 620 F.3d 836, 843-844; and *United States v. Acosta* (5th Cir. 2007) 475 F.3d 677, 683-684.) Ms. Hopson submits, however, that the analysis of the *Cromer* court is correct.

Under *Crawford*, the "use of an out-of-court statement that is testimonial in nature is prohibited by the Sixth Amendment's confrontation clause whether or not the statement is inherently reliable or meets an established exception to the hearsay rule unless the witness is unavailable and the defendant has had a prior opportunity to cross-examine the witness." (*People v. Mayo* (2006) 140 Cal.App.4th 535, 554.) The "mere fact" that Ms. Hopson "may have opened the door" to the admission of Thomas's out-of-court statements on rebuttal on state evidentiary grounds does not override the denial of her constitutional right of confrontation as to those statements. (*Cromer*, *supra*, 389 F.3d at p. 679.)

As the Michigan Supreme Court has observed, "the [state] rules of evidence cannot override the Sixth Amendment and cannot be used to admit evidence that would otherwise implicate the Sixth Amendment." (*People v. Fackelman* (Mich. 2011) 802 N.W.2d 552, 568; see also *Crawford*, *supra*, 541

U.S. at p. 61 ["Where testimonial statements are involved, we do not think the Framers meant to leave the Sixth Amendment's protection to the vagaries of the rules of evidence . . ."].)

The United States Supreme Court has yet to resolve the conflict among the federal circuits on whether a criminal defendant may "open the door" to the violation of his or her right to confrontation under the Sixth Amendment. There are no published California appellate opinions which address this precise issue. Ms. Hopson respectfully asks this court to grant review to address this important and unsettled question of law.

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III. THE CUMULATIVE PREJUDICIAL EFFECT OF THE TRIAL COURT'S ERRORS VIOLATED MS. HOPSON'S FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS OF LAW AND REQUIRES REVERSAL OF THE JUDGMENT.

Even where individual errors do not result in prejudice, the cumulative effect of such errors may require reversal. (*People v. Hill* (1998) 17 Cal.4th 800, 844 ["a series of trial errors, though independently harmless, may in some circumstances rise by accretion to the level of reversible and prejudicial error"]; *Mak v. Blodgett* (9th Cir. 1992) 970 F.2d 614, 622 [cumulative prejudice required affirmance of order granting petition for writ of habeas corpus]; *Lincoln v. Sunn* (9th Cir. 1987) 807 F.2d 805, 814, fn. 6 [cumulative errors may result in unfair trial in violation of due process].)

Having found "no constitutional error as claimed in both of Hopson's arguments," the Court of Appeal concluded that "no cumulative error occurred." (Opn. 37.) Ms. Hopson respectfully disagrees. The trial court committed two significant constitutional errors which violated Ms. Hopson's rights under the Sixth Amendment. (See *ante*, Arguments I, II.) Each error set forth in those arguments independently requires reversal; however, even if that were not so, Ms. Hopson contends that the cumulative effect of these errors requires reversal.

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CONCLUSION

For the foregoing reasons, Ms. Hopson respectfully requests that this court grant her petition for review.

DATED: July 31, 2015

/s/ Gordon S. Brownell
GORDON S. BROWNELL, ESQ.
Attorney for Defendant and Appellant
RUTHETTA LOIS HOPSON

CERTIFICATE OF COMPLIANCE

In accordance with California Rules of Court, rule 8.504(d), I certify that my word-processing program indicates that this petition consists of 5,914 words, excluding the tables, the caption, signature blocks, and this Certificate of Compliance.

/s/ Gordon S. Brownell
GORDON S. BROWNELL, ESQ.
Attorney for Defendant and Appellant
RUTHETTA LOIS HOPSON

Exhibit "A"

(Court of Appeal Opinion, filed June 24, 2015)

Filed 6/24/15 P. v. Hopson CA4/1

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. RUTHETTA LOIS HOPSON, Defendant and Appellant.	D066684 (Super. Ct. No. RIF1105594)

APPEAL from a judgment of the Superior Court of Riverside, Jeffrey J. Prevost, Judge. Affirmed.

Gordon S. Brownell, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Andrew S. Mestman and Sean M. Rodriguez, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted defendant and appellant Ruthetta Hopson of first degree murder of her housemate, Laverna Brown. (Pen. Code, § 187, subd. (a).) The jury also found

true the allegations that Hopson killed Brown by means of lying in wait, and in the course of a robbery. (Pen. Code, § 190.2, subds. (a)(15) & (a)(17)(A).) Hopson was sentenced to life imprisonment without the possibility of parole.

On appeal, Hopson argues for reversal of the judgment on two separate alleged violations of her rights under the confrontation clause of the Sixth Amendment. (*Crawford v. Washington* (2004) 541 U.S. 36 (*Crawford*).) As a criminal defendant, she had the right to cross-examine the witnesses who testified against her. (*Id.* at pp. 51, 54.) Testimonial statements are "statements, made with some formality, which, viewed objectively, are for the primary purpose of establishing and proving facts for possible use in a criminal trial." (*People v. Cage* (2007) 40 Cal.4th 965, 984, fn. 14 (*Cage*); italics omitted.) Confrontation clause analysis extends to the use of a declarant's out-of-court statements at trial, and the high court has explained that it is the "primary purpose of creating an out-of-court substitute for trial testimony" that implicates the confrontation clause. (*Michigan v. Bryant* (2011) 562 U.S. 344, 358 (*Bryant*).)

Even testimonial statements may be admissible for purposes other than establishing the truth of the matter asserted in them. (*Tennessee v. Street* (1985) 471 U.S. 409, 414 (*Street*); *Crawford, supra*, 541 U.S. at p. 59, fn. 9.) "[I]f a statement is not offered for its truth, or is nontestimonial in character, the confrontation clause is not a bar to admission." (*People v. Blacksher* (2011) 52 Cal. 4th 769, 813 (*Blacksher*).)

We apply these principles to Hopson's claims. At her trial, evidence about out-of-court statements made by her codefendant, Julius Thomas, after he was arrested and interviewed by detectives, was presented on two theories. By the time of trial, the

codefendant had committed suicide, and Hopson never had the opportunity to cross-examine him. The detectives testified at her trial that he (1) led them to the location of the murder weapon, and (2) made statements that conflicted with the version of the killing offered by Hopson during her testimony in her defense, as to which of the two was the planner and in charge during the execution of the plan.

Hopson's appeal first presents the issue of whether her confrontation rights were violated when one of the detectives testified, in the prosecution's case-in-chief, about "implied statements" the codefendant made to him when showing the detectives things, including the location where the weapon was later found.

Hopson next argues confrontation principles were violated when, during her cross-examination and the rebuttal case, the codefendant's out-of-court statements were brought in to attack the credibility of her testimony about how the offense was committed (i.e., she testified he had forced her to participate in the killings and hide the evidence), but she had no opportunity to confront him. (See Evid. Code,[1] § 1202 [credibility of hearsay declarant, a basis of this ruling].) Hopson further claims there was cumulative error, in that she might have decided not to testify, if not for the initial error in admitting the weapon testimony, and it in turn led to error violating her rights to confrontation of her codefendant.

As we will show, we accept for purposes of analysis that the codefendant's out-of-court statements during his police interview (interrogation) are testimonial in nature.

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1 All further statutory references are to the Evidence Code unless noted.

(*Davis v. Washington* (2006) 547 U.S. 813, 822 (*Davis*) [statements are testimonial in circumstances objectively indicating there is no ongoing emergency and the primary purpose of an interrogation "is to establish or prove past events potentially relevant to a criminal prosecution"].) However, this record shows they were offered for two nonhearsay purposes. First, his statements and conduct were offered to show their effect on the listeners and thus to explain how their investigation proceeded, when they went to the place where he left the weapon. (*People v. Livingston* (2012) 53 Cal.4th 1145, 1162 (*Livingston*).)

Next, the codefendant's out-of-court "actual statements," as reported by the detective in rebuttal, were admissible for the nonhearsay purpose of impeaching Hopson's account at trial of the codefendant's threats and controlling conduct, before, during and after the killing. Hopson's testimony introduced the concept of what the codefendant told her out of court, and she placed an immediate issue into dispute, her credibility about the influence on her of his character and actions during these events. (*Street, supra*, 471 U.S. 409, 414 [no violation of confrontation rights occurred at a trial, when evidence about a nontestifying codefendant's confession was admitted for a nonhearsay purpose, on the immediate issue of coerced confessions].)

Under these unusual circumstances, we conclude Hopson "opened the door" to these permissible nonhearsay uses at trial, of the reported, testimonial out-of-court statements by her codefendant, and the evidence was not introduced in violation of the protections of the confrontation clause. (*Street, supra*, 471 U.S. 409, 414; *United States v. Cruz-Diaz* (1st Cir. 2008) 550 F.3d 169, 176-177 [a defendant's trial strategy may open

the door to admission of a statement with confrontation clause implications].) We affirm the judgment.

I

FACTUAL AND PROCEDURAL BACKGROUND

A. Events of October 28-29, 2011

In October 2011, Hopson, a 39-year-old registered nursing assistant, was renting a room at a house owned by Darcy Timm. Hopson worked off and on for a staffing service and had recently taken out loans to cover her $500 monthly rental payments.

Hopson met Julius Thomas, a bus driver, in 2006 and from 2008 to 2011, they had an intimate dating relationship. He weighed over 300 lbs. and she called him her teddy bear. Thomas normally called Hopson when he got off work and then came to her house in the middle of the night for a while.

Hopson wanted to move out of Timm's house and made plans to rent an apartment for $995 per month. On her rental application, she placed her monthly income at $3,000. Hopson's credit history was poor and the apartment manager (Cunningham) told her an $800 security deposit was required by October 29. As of the end of October, Hopson had $16.05 in her checking account and $17.11 in savings. At the end of September she had $19.49 in her checking account and $2.12 in savings. In August, the balances were also low.

Brown, a 66-year-old registered nurse who worked for Riverside County Hospital, was also a renter at Timm's house. Brown often worked 12-hour shifts and always paid her rent. On the morning of October 28, Brown planned to fly to Georgia to visit family.

The evening of October 27, she was packing her suitcase and had some items written on "to-do" lists, such as packing shoes and going to the bank.

Around 5:15 a.m. on October 28, Timm got up and went out to the garage to do laundry. She kept tools in the garage, including a machete that her son owned, and saw its empty sheath on a workbench, although the machete was not there. Timm went back into the house and in the kitchen she noticed that a large knife in her butcher block was missing. As Timm was writing a note to Hopson to ask about the missing machete and knife, Hopson arrived at the side door. She told Timm she was going to be spending the day with her boyfriend, Thomas, and was there to change her clothes. When Timm asked her about the knife and machete, she said she did not know. Hopson mentioned to Timm that she had just washed away some spilled Coca Cola, so Timm should be careful not to slip in the area at the side of the house. Hopson and Thomas left in his car.

Timm returned to the garage and saw that an indoor/outdoor rug had been moved against the garage door. She took Hopson's trash can, containing a Coca Cola box, outside to empty it into a larger can. In the larger can, she found a blanket soaked in blood, and she saw blood and globs of flesh on the ground. Timm called 911, and an officer arrived. They found no signs of a break in or forced entry. Timm left Hopson a voicemail asking about the machete and the knife, but did not mention the bloody blanket.

About two and a half hours later, Hopson returned Timm's call and told her that she had moved some things around in the garage, but not the machete or knife. Hopson said she had noticed a blond, long haired, homeless looking man wearing a backpack and

walking around the neighborhood. Timm had not seen any homeless people in her neighborhood for at least 30 years.

When Timm came home from work early, Hopson was in the garage, and told her she had again washed the side of the house to remove the spilled Coca Cola. Timm asked her where some missing cleaning solution was, but Hopson said she did not know.

Later that day, Timm got a call from Brown's daughter, who was worried because Brown was not on the flight she had booked. Hopson was staying close to Timm at the time, but Timm did not want her to overhear the conversation or to learn that Timm was getting suspicious of her actions. Hopson asked her what she was doing that weekend, which Timm thought was strange, and she noticed Hopson had her hands behind her back, which scared her. Timm explained her plans and went outside, for the purpose of staying visible to the neighbors.

Thomas came over to Timm's house and left with Hopson so he could drive her to work. Timm went back into the house and called 911 again. She told the dispatcher that she was "scared to death," because she thought Hopson was involved in Brown's disappearance. She said Hopson looked "kind of disheveled" that morning and she must have "made up" the story about the homeless man with the backpack. Officer Jayson Jahanian arrived and interviewed Timm, who seemed to have been crying.

Investigators came to Timm's house around midnight and found blood on the sidewalk and in the trash can, along with two pairs of rubber gloves in the can. It looked like the wires on a motion activated light on the side of the house had been detached.

Later, Officer Jahanian went to the hospital where Hopson was working and asked her about Brown's disappearance. She seemed nervous but seemed to be "trying to remain calm." He thought she was lying when she said she didn't know anything about Brown. She told him that Thomas, her boyfriend and "a big, snuggly teddy bear," had come over to visit her that morning around 2:30 a.m. She said they went outside to talk, then came home around 4:30 a.m., when she noticed that Brown was moving about in her room and "getting ready for w—to go."

Next, Hopson told Officer Jahanian that she and Thomas left to go out for breakfast at McDonald's, and she then ran some errands. When she got home around 6:00 or 6:30 am, Brown's van was already gone. She said she asked Thomas to meet her at the check cashing businesses, since he lived nearby. She had called the apartment manager and asked her to reduce the security deposit so she could move into the new place, but the answer was no. Hopson unsuccessfully applied for a cash advance from a business, "Check Into Cash." She got a $300 advance from "Check N Go" around noon.

During the interview, Officer Jahanian told Hopson there was blood on the sidewalk at Timm's house. Hopson responded that she had not seen any, although she did hose down the ground at the side of the house to clean up some spilled soda. She told him she saw a "weird guy" with "scraggly, black hair underneath a hat" walking around the neighborhood that week. She agreed to go to the police station for an interview after work, around 2:00 a.m., and gave the officer Thomas's phone number, although she did not know his address.

After the officer left, Hopson's coworker asked her if she was okay. Hopson was acting upset and said she was unable to reach her "honey" by phone. She told the coworker that Brown, who "was" a nice lady, was missing.

When Hopson arrived at the police station, she was willing to talk in a videotaped interview. She was not under arrest. She told Officers Richard Wheeler and Rick Cobb that she had a good relationship with Brown, and the last time she saw her was when Brown came home from work that night and started to pack. Hopson then went to sleep until Thomas called her and came over around 2:00 a.m. She mentioned that she loved and adored him. When they went outside, they noticed a "weird" guy with scraggly blond hair and a backpack walking around the neighborhood. She and Thomas went to a nearby park for about an hour. When they came back to the house through the front door, Hopson saw a light on in Brown's room and assumed she was home and awake. Thomas took Hopson to McDonald's for breakfast that morning.

When Hopson came home, she ran into Timm. Hopson then went out the back door, spilling a can of Coca Cola she took from the garage. She sprayed the ground with a hose before leaving with Thomas. They drove around for a while and then Thomas dropped her off near a bus stop, where she went shopping for paint and furniture for her new apartment. She was not sure where Thomas went.

Hopson explained to the officers that when she returned home from her errands around 2:30 that afternoon, she used cleaning solution and a broom to spray and scrub the Coca Cola she had spilled earlier. When the officers told her there was blood in the exact same location as the soda spill, she acted surprised, since she thought she was cleaning up

soda, not blood. She started to pause in her responses and seemed to get quieter than before. When the officers mentioned she had referred to Brown in the past tense, she said she did not mean to do so. She told them she did not take the machete or the butcher knife, and she was not involved with the bloody blanket found in the trash can.

Officers tracked Thomas's cell phone signals and found that as of October 29, around 3:20 a.m., he was at or near Republic Street in Riverside. Later that day, they found Brown's van nearby in an empty parking lot. Her body was inside, lying face down, with a spray bottle lying on her back. Her throat had been cut and it appeared she had been dragged into the van through the driver's side. Her suitcase containing clothing and toiletries was in the front passenger's seat, but no shoes, cell phone or purse were there.

B. Events of November 1-December 15, 2011

Both Hopson and Thomas were arrested. At first, Thomas denied participating in any killing. In his second interview on November 1, 2011, Thomas broke down and confessed that he and Hopson had planned the killing, and although he wanted to back out, she persuaded him to go through with it. He cried and asked the detectives to apologize for him to Brown's family. The detectives took him out in a marked police car, and Thomas showed them where he had dumped some bloody clothing, and where he had thrown the machete into a fenced off canal area. The dumpster had been emptied. It was dark and nothing could be found. However, the next day, Detective Cobb went to the canal area and found the machete from Timm's garage. Brown's blood was found on it. No knife was recovered.

Shortly after Hopson was jailed, she talked to family and friends on the phone and told them that she had seen Thomas in passing, and that he had encouraged her to pray and told her they would both get through this. She told her son that Thomas said to say hello to him. She asked her friend to find Thomas's jail address so she could correspond with him.

Over the next month or two, Hopson sent Thomas notes saying she loved him and missed him. Later, she sent a note breaking off their relationship. In another letter dated December 7, 2011, she expressed her continuing love and loyalty and asked him about statements she heard he had made to the police.

In December 2011, Thomas replied, "Goodbye. Like you said, you won't write no more. That's fine. You did this, not me . . . . Don't waste my time no more. That's how you want to be. Well, have a nice life."

On December 15, 2011, Thomas committed suicide in jail. Letters from Hopson were found in his cell. In her cell, investigators found a post-it note with Thomas's address on it, crossed out. Underneath his address, she wrote, "My love is gone and I pray he is in heaven with Jesus. 7/6/81-12/16/11."

C. Trial Proceedings

After Hopson was arrested, a neighbor helped Timm clean out her room. They found receipts from the evening of October 27, showing that Hopson went shopping and bought a folding knife and pepper spray for $76.46. The same evening, she bought clothes at Target in large sizes (including a hooded sweatshirt and sweatpants).

DNA testing of the blood on the blanket, on the ground, and in splatters in the garage and on the house revealed that it belonged to Brown. She had died from a sharp force injury to her neck, which was cut open down to her spinal cord, severing the carotid artery, trachea, and esophagus. Such wounds could have been caused by an attack with a machete or a butcher's knife. Brown did not have any defensive wounds.

The steering wheel of the van yielded traces of Hopson's DNA, as well as Brown's, but none from Thomas. According to Timm, Brown had sometimes given Hopson rides to the store, but to Timm's knowledge, Hopson did not drive the van herself.

Cell phone evidence was presented of the numerous messages and frequent telephone calls that Hopson exchanged with Thomas between October 27 and 29. On October 28, between 1:49 a.m. and 2:32 a.m., Thomas called Hopson while going toward Timm's house. Hopson received his calls in the location of Timm's house. Around 7:42 a.m., Thomas called Hopson from somewhere around the cell tower nearest to where the machete was found. Around 7:56 a.m., Thomas called Hopson from somewhere around the cell tower where Brown's van was found.

At trial, Detective Cobb testified about driving around with Thomas after he confessed, and about going back the next day and finding the machete at the location Thomas pointed out to him. Cobb did not mention Hopson to the jury in connection with describing Thomas's acts that showed detectives where he left the machete.

The thrust of Hopson's defense case was her testimony that Thomas forced her to participate in the robbery and killing, by repeatedly threatening her and her adult son.

Hopson explained that she never met Thomas's relatives or went to his house, and she believed he was divorced. At some point, he told her that he had killed someone and beaten someone else, but she loved him and continued the relationship. Another reason was that he threatened to harm her if they broke up.

Hopson said that as a bus driver, Thomas was concerned about getting germs from the public, so she brought him gloves and protective booties. At Thomas's request on October 27, Hopson bought gifts for his sister, the large size sweatpants outfit he later wore during the killing. She told Thomas that Brown would be out of town that weekend, so that they could spend time together without disturbing anyone, since he did not like to come over if the other women were awake in the house. Hopson had mentioned to him that Timm kept a machete at her house.

Hopson testified that when she responded to Thomas's telephone call that night by meeting him in the garage at her house, she was shocked to find Brown lying bloody and dead. Thomas was wearing the gloves and booties she had given him, and he told Hopson that when he tried to rob Brown of her travel money, she recognized him and he killed her with the machete and the butcher knife. After Thomas threatened to kill Hopson and her son if she did not help him, Hopson cleaned up the blood and helped Thomas hide Brown's body. At Thomas's direction, Hopson drove Brown's van to a parking lot to leave it, so it would look like Brown was away from home, as Brown had planned.

Thomas then picked Hopson up and they went to McDonald's, where Thomas ordered apple pie and soda, but they didn't eat or drink them. Thomas told Hopson to tell

the police that a long-haired homeless man must have killed Brown. He told her not to betray him, because "Snitches will die, and even if you're locked up, they will get to you."

As they returned to Timm's house, Thomas required Hopson to go into a 7/11 store to buy Coca Cola for use in cleaning up the blood. When she was done cleaning, she put the clothes she was wearing in bags in Thomas's car. Eventually, Thomas threw away the bags of clothes, the machete, and the knife. Although Hopson bought a small knife and pepper spray during the week of Brown's killing, she did so for purposes of self-defense. When she wrote letters to Thomas while they were both in jail, she wanted to stay on good terms so he would not have her son harmed.

Because of the nature of Hopson's confrontation clause arguments, which must be analyzed within their complete factual context, we defer setting forth further details of her testimony on cross-examination and in response to the rebuttal case, until our discussion of the merits of her claims. (Pts. III-IV, *post.*) Although she raised confrontation clause objections to the detectives' accounts of what Thomas said to them, she did not request any admonitions from the trial court that the jury should view their testimony, or her own, for any limited purposes. She clarifies in her reply brief that she is not claiming error on the basis of a lack of such limiting instructions, nor does she claim prosecutorial misconduct in the introduction of evidence.

At the close of testimony, the jury was instructed in standard language, including how to evaluate prior statements made by a witness or by the defendant. After argument, the jurors deliberated and returned verdicts convicting Hopson of first degree murder and

the special circumstances as charged (lying in wait). She was sentenced to life imprisonment without the possibility of parole, and filed this appeal.

II

SCOPE OF REQUIRED CONFRONTATION ANALYSIS OF "TESTIMONIAL" STATEMENTS

In *Crawford, supra*, 541 U.S. 36, the court acknowledged the confrontation clause "does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted." (*Id.* at p. 59, fn. 9.) As *Crawford* was interpreted in *Cage, supra*, 40 Cal.4th 965, 984, "the confrontation clause is concerned solely with hearsay statements that are testimonial."[2] The focus of analysis under the clause must be on " 'witnesses' against the accused--in other words, those who 'bear testimony.' " (*Crawford, supra*, at p. 51.) By contrast, when an out-of-court statement is not offered for the truth of its contents, or the statement is "nontestimonial in character, the confrontation clause is not a bar to admission." (*Blacksher, supra*, 52 Cal.4th at p. 813.)

In *Bryant, supra,* 562 U.S. at page 355, the Supreme Court interpreted *Davis, supra*, 547 U.S. 813 as making it clear "that not all those questioned by the police are witnesses and not all 'interrogations by law enforcement officers,' [citation] are subject to the Confrontation Clause." (*Bryant, supra,* at p. 355; see *Crawford, supra,* 541 U.S. at

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2 " 'Hearsay evidence' is evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated." (§ 1200, subd. (a).) It should be noted that the California Supreme Court has two confrontation clause cases before it, concerning the use of gang expert testimony that relies on testimonial hearsay. (*People v. Archuleta*, review granted May 19, 2014, S218640; *People v. Sanchez,* review granted May 14, 2014, S216681.) They do not directly concern the issues in this case.

p. 53.) Nevertheless, we think it is clear on this record that Thomas's statements to detectives, created during a postarrest, more or less formalized interview, must be characterized as testimonial in nature. This approach will obviate one of the usual components of confrontation clause analysis, which would otherwise seek to determine the "primary purpose of creating an out-of-court substitute for trial testimony," as it implicates testimonial status. (*Blacksher, supra*, 52 Cal. 4th 769, 813; *Bryant, supra,* at p. 358.)

Specifically, the parties have not identified any factors that could have affected whether Thomas's statements were "testimonial" in nature or not (e.g., an ongoing emergency). (Cf. *Bryant, supra,* 562 U.S. at p. 358 ["[T]here may be other circumstances, aside from ongoing emergencies, when a statement is not procured with a primary purpose of creating an out-of-court substitute for trial testimony," italics omitted]; *id.* at p. 362, fn. 9 [discussing various hearsay exceptions that cover statements that "by their nature [were] made for a purpose other than for use in a prosecution"].) On this record, we are able to conclude that Thomas's statements were testimonial under the usual definitions.

We are reminded by *Crawford, supra,* 541 U.S. 36, that the confrontation clause "does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted." (*Id.* at p. 59, fn. 9.) As we will show, the record does not support either of Hopson's arguments that an out-of-court statement was offered against her "for the truth of its contents." (*Blacksher, supra*, 52 Cal. 4th 769, 813.) Thus, it is unnecessary to carry out any extensive hearsay analysis, and we shall discuss hearsay

issues only in connection with the trial court's (erroneous) ruling under section 1202, pertaining to the credibility of Thomas, as a "hearsay declarant."[3] (Pt. IV, *post*.)

Accordingly, we focus not upon the purpose of Thomas in creating his statements in a role as a "hearsay declarant," but instead, upon the purpose of the prosecution at trial in offering evidence of those statements, by way of the testimony of the detectives. Both as to (1) Detective Cobb's version of Thomas's statements and how they led Cobb to discover the discarded weapon, and as to (2) Detective Wheeler's report of Thomas's statements about why the killing occurred, we address whether they fell within the scope of nonhearsay evidence, and if they were therefore outside the concerns and protections of the confrontation clause.

As will be shown, our inquiry need not reach the component of confrontation clause analysis that applies a harmless error standard. (*Livingston, supra*, 53 Cal.4th 1145, 1158-1159 [confrontation clause violations are subject to federal harmless error analysis].)

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3 Section 1202 provides in relevant part: "Evidence of a statement or other conduct by a declarant that is inconsistent with a statement by such declarant received in evidence as hearsay evidence is not inadmissible for the purpose of attacking the credibility of the declarant though he is not given and has not had an opportunity to explain or to deny such inconsistent statement or other conduct."

III

EVIDENCE LEADING TO LOCATION OF WEAPON; THOMAS'S OUT-OF-COURT STATEMENTS AND CONDUCT, AS PART OF PROSECUTOR'S CASE-IN-CHIEF

A. Introduction to Issues

Evidence was presented to show that Thomas participated with Hopson in attempting to rob Brown of any travel money she might have obtained for her plan to leave town, but Brown was killed in the attempt. After Thomas and Hopson were arrested, he confessed to detectives and led them to the location of one of the weapons used in the killing, a machete. Six weeks later, he committed suicide in jail.

Before trial, the court limited the scope of Detective Cobb's testimony to allow him to describe the search for the machete, but not to reference Hopson or implicate her as a participant. She objected to the admission of Thomas's statements for any purpose other than to show how the machete was found. The court said that if the prosecutor wanted to introduce Thomas's statements for impeachment purposes, the matter would be addressed at a sidebar.

Detective Cobb testified in the prosecution's case-in-chief about how they later found the machete. The prosecutor did not play any recording of Thomas's statements for the jury.

Hopson contends the trial court committed prejudicial error when it admitted evidence at trial of these out-of-court statements, testimonial in nature, as "indirect" statements that harmed her defense. Hopson thus argues her rights under the confrontation clause were violated, because Thomas was unavailable as a witness and she

could not cross-examine him. She further contends the machete was erroneously admitted into evidence, because officers would not have found the weapon if not for Thomas' out-of-court statements to them.

B. Authority and Analysis

Hopson characterizes her claim as one of first impression in California, as follows: "Whether evidence of a suspect's implied statements to the police can constitute evidence of a testimonial statement which cannot be used at trial against a criminal defendant in the absence of an opportunity by that defendant to cross-examine the person who made those implied statements." However, she cannot properly characterize Thomas's conduct in leading officers to the weapon as "implied statements" about where it could be found, because in this instance, his statements and conduct were not offered for their truth. " 'An implied statement may be inferred from an express statement whenever it is reasonable to conclude: (1) that declarant in fact intended to make such implied statement, or (2) that a recipient of declarant's express statement would reasonably believe that declarant intended by his express statement to make the implied statement.' " (*People v. Garcia* (2008) 168 Cal.App.4th 261, 289; italics omitted.) Here, however, Thomas's ability to lead detectives to the location of the machete was offered not to show the truth that he knew where it was, but to show how the investigation proceeded.

In *Livingston, supra*, 53 Cal.4th 1145, 1162, the court identified and applied this " ' "important category of nonhearsay evidence—evidence of a declarant's statement that is offered to prove that the statement imparted certain information to the hearer and that the hearer, believing such information to be true, acted in conformity with that belief.

The statement is not hearsay, since it is the hearer's reaction to the statement that is the relevant fact sought to be proved, not the truth of the matter asserted in the statement." ' "

Hopson relies on cases such as *United States v. Meises* (1st Cir. 2011) 645 F.3d 5, for the concept that a prosecutor cannot evade the limitations of the confrontation clause "by weaving an unavailable declarant's statements into another witness's testimony by implication." (*Id.* at p. 22.) In that case, the prosecutor asked an officer whether a nontestifying codefendant had "said anything during his interview that changed the targets of the investigation and prompted the defendants' arrests." (*Id.* at p. 21.) When the officer said yes, the court found that such testimony "plainly told the jurors" that the codefendant said the defendant was guilty. (*Ibid.*) This was an indirect or backdoor way of bringing in the truth of those statements of an accusation of guilt. (*Id.* at pp. 22-23.)

In Hopson's case, Detective Cobb testified about going for a ride with Thomas while Thomas showed detectives where to find things involved in the offense to which he was confessing. At that point, the assignment of guilt between Thomas or Hopson was not being discussed. The evidence was not offered to show that Thomas was speaking the truth about how the weapon got there. (*United States v. Meises, supra,* 645 F.3d at p. 21.)

Similarly, in *Ocampo v. Vail* (9th Cir. 2011) 649 F.3d 1098, the Court of Appeals rejected a prosecutor's attempt to bring in a description of the "critical substance" of testimonial statements inculpating the defendant, even though those statements were not introduced verbatim. (*Id.* at p. 1113.) The court said it was impermissible for a detective to "digest" or "outline" or "summarize" out-of-court statements and then present them for

their truth, such as when telling the jury that a nontestifying witness had identified the defendant as present at the shooting. (*Id.* at p. 1109.) The defendant had said he was not present. The prosecutor then argued the nontestifying witness had corroborated the statements of a testifying witness, who had identified the defendant as the perpetrator. (*Id.* at pp. 1111-1112.) This violated confrontation principles. (*Id.* at p. 1113; see *Minnesota v. Swaney* (Minn. 2010) 787 N.W.2d 541, 552-555 [agent's questioning of defendant's wife about items photographed at a crime scene, where items had been discussed out of court by defendant and wife in a recorded conversation, could not properly be used to imply that wife's statements were testimonial and established that defendant was at the scene].)

In Hopson's case, Cobb's account of the interview with Thomas was admitted into evidence not for the truth that Thomas put the weapon there, but to show the course of the investigation. In *People v. Mitchell* (2005) 131 Cal.App.4th 1210, 1224-1225 (*Mitchell*), portions of a police dispatch tape were deemed to be nontestimonial evidence that was not subject to *Crawford* restrictions, because they were introduced for purposes other than establishing the truth of the matter asserted. In *Mitchell*, much of the dispatch tape was not offered by the prosecution to establish the truth of the matter asserted in the recorded statements, but "to show how the pursuit unfolded and to describe the police officers' actions." (*Mitchell, supra*, at p. 1224.) Moreover, the voices heard on the dispatch tape were mainly those of those officers who testified at trial and were subject to cross-examination. "Accordingly, admission of their statements on the tape did not violate the confrontation clause or the principles announced in *Crawford*." (*Mitchell,*

supra, at p. 1224.) The truth of the matters discussed on the tape "was immaterial *to any contested matter in the trial.*" (*Ibid.;* italics added.) Also in *Mitchell*, any confrontation clause error in admission of the dispatch tape was harmless. (*Id.* at pp. 1224-1225.)

In *Livingston, supra*, 53 Cal.4th 1145, the nonhearsay purpose of the out-of-court statement was to explain certain conduct (why rival gang members ran across the street away from the defendant's car, which had someone in it shooting at them). It was relevant to an issue in the case, the location of the defendant and his easily recognizable car at the time of the shooting offense, as that affected the actions of the rival gang member who spoke. (*Id.* at p. 1161.) Introduction of that out-of-court statement was not done in violation of confrontation clause restrictions, because it was brought in for nonhearsay purposes, to show a response. (*Id.* at pp. 1162-1164; see *People v. Scalzi* (1981) 126 Cal.App.3d 901, 907; *People v. Samuels* (2005) 36 Cal.4th 96, 122 [out-of-court statement properly admitted to explain witness's subsequent actions]; *Cage, supra*, 40 Cal.4th at p. 975, fn. 6.)

The interview with Thomas, as he led detectives to the place where the weapon was found, was not brought before the jury as a hearsay statement that was being offered for the truth of the matter asserted. (§ 1200, subd. (a).) It was not a contested matter at trial whether Thomas knew the location of the weapon or if he was telling the truth about it. (See *Mitchell, supra*, 131 Cal.App.4th 1210, 1224-1225.) Similarly, in *United States v. Wright* (8th Cir. 2014) 739 F.3d 1160, 1170-1171, the testimony of one investigating officer about being told by another, "Come here[, w]e've got something," was properly offered to show its effect on the listening officer, that it caused him to enter a room, and it

was not improperly offered or admitted to show whether he found anything there. (See *United States v. Mitchell* (9th Cir. 2007) 502 F.3d 931, 966 [testimony by police officer, about information from a witness regarding a parked car, was offered as a basis for police action, not for its truth].)

Here, Cobb's testimony about the driving portion of the investigation was offered to show that statements from Thomas had an effect upon him as an investigator. (*United States v. Dupree* (2d Cir. 2013) 706 F.3d 131, 136.) The officers acted based on information they received from Thomas, that enabled them to locate the machete. These events were brought in for nonhearsay purposes that did not violate Hopson's confrontation clause rights, and there was no evidentiary error in this respect. (*Cage, supra*, 40 Cal.4th at p. 975, fn. 6.)

IV

ADMISSIBILITY OF "ACTUAL STATEMENTS" BY THOMAS, AS DETECTIVE WHEELER REPORTED THEM IN REBUTTAL; NO CUMULATIVE ERROR

A. Arguments; Section 1202

Hopson contends the trial court violated her confrontation clause protections when it admitted evidence at trial, "actual" out-of-court statements by Thomas, as reported to the jury by Detective Wheeler during the prosecution's rebuttal case. Wheeler testified about the verbal statements Thomas made after his arrest and while being interviewed. At that point, Thomas was remorseful and told detectives that it was Hopson who planned the robbery-murder and persuaded him to participate in it, and that she was the leader in cleaning up the scene and hiding the evidence. The trial court relied on section

1202 (impeachment of a hearsay declarant) to allow the detective to recount what Thomas said to the jury. Hopson claims this was prejudicial error under *Crawford, supra,* 541 U.S. 36, because she never had an opportunity to cross-examine Thomas.

At the outset of trial, the court said that if the prosecutor wanted to introduce Thomas's statements for impeachment purposes, the matter would be addressed at a sidebar. Toward the close of Hopson's testimony, the prosecutor argued that in rebuttal, he should be allowed to bring in impeachment of hearsay declarations that came in through her testimony, on state of mind. (§ 1250 [declarant's state of mind hearsay exception]; § 1202 [credibility of hearsay declarant].)[4] The trial court ruled that the prosecutor could have Detective Wheeler testify about the statements Thomas made to detectives, when Thomas confessed his participation but said that Hopson was the driving force who was always in charge of creating, pursuing, and executing the plan. The court relied on section 1202, saying that the prior inconsistent statements would be admissible for that limited purpose.

On rebuttal, Detective Wheeler testified that Thomas told officers during his November 1 interview that Hopson wanted to forcibly take any travel money Brown would have on hand, but he tried to talk her out of it. However, he gave in when Hopson told him that Brown would be an "easy target." As arranged, Hopson brought Brown out to the garage, where Thomas hit her with the machete. Hopson held a bloody knife in her

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4 The prosecutor seem to be arguing the applicability of section 1250 (existing mental or physical state), but the court reporter transcribed it as section 1215 (no such section).

hand as she leaned over Brown's body. Afterward, Hopson discouraged Thomas from calling the police, said they should get rid of the body, and that Coca Cola could be used to clean up and hide blood residue, as she had learned on television. When they went to McDonald's afterward, Thomas said Hopson was able to eat a snack, but he was too upset to do so.

Hopson now asserts her rights to confrontation of witnesses were violated in this way, through the use of Thomas's "actual" statements as reported at trial, after his death (as contrasted to what she calls his "implied" statements discussed above, e.g., where to find the machete). According to Hopson, the trial court erred in applying section 1202, which allows prior inconsistent statements of a hearsay declarant to be allowed for impeachment purposes.

It is not clear from the briefs whether Hopson is arguing that Thomas's reported statements were being erroneously used to impeach (a) her own defense testimony about her own role, or (b) to impeach her version of what Thomas said to her during the offenses, about how he was actually the prime mover in the killing and he repeatedly threatened Hopson not to tell, or she or her son would be harmed. Hopson claims that her testimony about why she kept quiet until after he died, and only then told the jury about his threats to her, was unfairly undermined by testimonial statements by Thomas, who could never be cross-examined.

It is also unclear from the respondent's brief whether the Attorney General is assuming that the rebuttal testimony affected the credibility of Hopson as the defendant, or Thomas as the declarant. For example, respondent contends that the admission of

Thomas's statements to Detective Wheeler was not a violation of the confrontation clause, "as his statements were admissible for the nonhearsay purpose of impeaching *his statements previously admitted through appellant's testimony.*" (Italics added.) Strictly speaking, Hopson did not obtain admission of the truth of Thomas's "threatening" statements, simply by the way she reported them. (§ 1200, subd. (a).) Instead, she presented her own testimony about how the dynamics of their relationship affected the commission of the offense.

The trial court's ruling did not properly apply section 1202, because Thomas's statements, as a declarant, were not received in evidence as hearsay offered for the truth of the statements, pursuant to section 1200, subdivision (a). Section 1202 applies to impeaching a hearsay declarant by his or her own inconsistent statements, whether the declarant was ever given an opportunity to explain or deny the inconsistency, or not. (*People v. Curl* (2009) 46 Cal.4th 339, 361-362.) " 'The purpose of section 1202 is to assure fairness to the party against whom hearsay evidence is admitted without an opportunity for cross-examination,' " of the hearsay declarant. (*Curl, supra*, at p. 362, quoting *People v. Corella* (2004) 122 Cal.App.4th 461, 470.) That is not our case.

Read in context, the apparent purpose of the rebuttal testimony from Detective Wheeler was to attack the credibility of Hopson as a testifying defendant, with regard to her fear of Thomas as supposedly motivating her to cooperate with him in covering up the killing of Brown. According to Detective Wheeler, Thomas's statements to him blamed Hopson, which was markedly different from how Hopson described the events in court.

Whatever the stated basis of the trial court's ruling, we are required to resolve, consistent with confrontation clause principles, whether it was proper for the court to admit Detective Wheeler's testimony about Thomas telling detectives that Hopson persuaded him to attack Brown for purposes of robbing her, and she took the leadership role in concealing evidence of the killing. We consider whether Thomas's statements were admissible for the nonhearsay purpose of impeaching Hopson's credibility, on her claim that she was coerced into doing what she did by her fear of Thomas. She brought into issue her own credibility about her relationship with Thomas during the offense, as follows.

B. Additional Facts from Cross-Examination and Rebuttal Testimony

During cross-examination, Hopson agreed that when she was interviewed, she told detectives that Thomas was her "big snuggly teddy bear," and never said he had threatened her. She remembered telling them about the "weird guy" she saw walking around the neighborhood that week, but was confused if she said his hair was blond or black. She knew that Brown made money as a registered nurse, and assumed she would be taking money with her on her planned trip. Hopson described preparing to move into her new apartment the day after Brown was killed, by applying for payday loans.

In her redirect testimony, Hopson said she heard in jail that Thomas had made a statement that accused her of planning Brown's robbery and killing. She said he was wrong in telling detectives that she told him Brown would have some travel money and they should rob her. She denied telling Thomas to hide in the garage so she could bring Brown out there. Rather, she only cleaned up at his direction and helped get rid of the

body because she was afraid of him. She said he was mistaken in telling detectives that she ate the food ordered at McDonald's without a problem, after Brown was dead.

As previously summarized in the factual statement, *ante*, in rebuttal, Detective Wheeler testified about his interview with Thomas, when Thomas cried, blamed Hopson for the plan, and told him he now wanted to make it right for Brown's family. When Wheeler talked to Hopson, she was dry eyed and did not seem concerned about Brown. Brown's missing wallet and purse were never found.

In rebuttal testimony from Thomas's fiancée, she said she did not know he had a girlfriend that he visited while she was at work. She and Thomas had a four-year-old daughter together, and she did not know him to be a violent person and did not want his memory tarnished.

The prosecutor's investigator looked for Thomas's criminal history, but found he had no past convictions or arrests. The investigator had a transcript of Hopson's jail telephone conversation that occurred a few days after her arrest, with her son and her best friend. Hopson told her friend that she ran into Thomas, who told her to be strong and said that they would "get through it" if they prayed. Hopson wanted to write him a letter and asked for his jail address. She told her son that Thomas said, "Hi."

After Thomas killed himself, the investigator searched his cell, finding Hopson's letters to him dated December 7 and 10, 2011. In them, Hopson and Thomas were corresponding about information that her attorney had read to her, that Thomas had made a statement on November 1, 2011 about the case and their roles in it. Among other things, Hopson wrote, "The things that were said in the statement shocked me, and I

could not believe you would say those things about me. It caused me to be confused and have doubts, because you said you would never hurt me, and what she said you said cut me to the core of my being. . . . [¶] . . . Please don't leave me or forsake me. I promise you with all that I am that I have never betrayed you. . . . My love has never changed and never will, even if yours has."

In a letter from Thomas found in Hopson's cell after his death, he denied making the statement she was talking about. The letter told her, "But now you say I have forsaken you. Okay, that's fine. You want to talk about lives destroyed. You're a hypocrite. It's funny how all the same things you said I have said, they were said to me as well. But that does not matter now. You act as though you're the only one here. Uhm, hello, I am too. [¶] Well, you have said enough. Don't write to me, because at this point I don't really care. It's like whatever, you always believed what you heard. It's your naiveness [sic] that's playing with you again. [¶] Goodbye. Like you said, you won't write no more. That's fine. You did this, not me. . . . Don't waste my time no more. That's how you want to be. Well, have a nice life."

After the investigator testified about the letter Thomas wrote to her, saying "you did this, not me," Hopson testified on further redirect examination that Thomas must have been referring to her letter in which she broke up with him. She did not interpret his letter as accusing her of killing Brown.

During closing arguments, the prosecutor started off by saying Hopson had made the plan for Thomas to lie in wait for Brown in the garage, so Hopson could bring her out

there. Brown had evidently been interrupted during her preparations for her trip and the items on her to do lists had not all been crossed off.

The gist of the defense attorney's closing argument was that Thomas called the shots in their relationship and throughout this offense, leading Hopson to cooperate with him out of fear. In reply, the prosecutor argued that Hopson was lying about threats to herself and her son. Instead, her actions showed that she planned to kill the "easy target" she had identified, but it appeared from the to do lists that Brown had not yet been to the bank to get money. Although the prosecutor talked about Thomas's confession to the detectives as showing that Thomas had a conscience and wanted to help Brown's family, his argument mainly dwelled on the lies that he believed Hopson had told, "all the way through this case."

C. Authority

In *Street, supra,* 471 U.S. 409, the United States Supreme Court found no violation of confrontation rights had occurred at a trial in which the defendant testified that a confession he had made to a detective was coerced, such that he was forced to say the same thing as his accomplice had said in his own confession (both made out of court). The accomplice was not a testifying witness. In rebuttal, the prosecutor was allowed to call the detective as a witness, to read the accomplice's confession to the jury and then to explain the differences between the two confessions. The high court said that the purpose of the rebuttal testimony was not impermissible, and that the introduction of the accomplice's confession was not being done to prove the truth of what was said in it. Instead, the confession evidence had a nonhearsay purpose, to rebut the defendant's

testimony that his own confession was coercively derived from the other one. (*Id.* at pp. 415-417.)

Moreover, in *Street, supra*, 471 U.S. 409, the defendant had the opportunity to cross-examine the law enforcement witness who presented that information against him, and there was no deprivation of his right to cross-examine the accomplice, since the accomplice's confession was not being presented for its truth. The jury was properly given the opportunity to compare the two confessions, to decide whether the defendant was telling the truth about his defense of "the immediate issue of coercion" of his confession. (*Id.* at p. 416.) The trial judge had appropriately instructed the jury to limit its use of the evidence in a manner consistent with the confrontation clause.

In a concurring opinion in *Street, supra*, 471 U.S. 409, two Justices said that the out-of-court confession was admissible for nonhearsay purposes and was proper rebuttal to the defense testimony, and "it is important to note that [defendant] created the need to admit the statement by pressing the defense that his confession was a coerced imitation of [the accomplice's] out-of-court confession." For those reasons, the confrontation clause did not bar the evidence. (*Id.* at pp. 417-418 (conc. opn. of Brennan J. & Marshall, J.).) In *Crawford, supra,* 541 U.S. at page 59, footnote 9, the court relied on *Street* as support for its conclusion that evidence admitted for a nonhearsay purpose does not have confrontation clause implications.[5]

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5 Compare *Williams v. Illinois* (2012) ___ U.S. ___ [132 S.Ct. 2221, 2255-2256, 2259–2260 (conc. opn. of Thomas, J.), in which *Street, supra,* 471 U.S. at page 417, was distinguished on how to apply the proposition that the confrontation clause does not bar

In *United States v. Cruz-Diaz, supra*, 550 F.3d 169, the court ruled that the admission into evidence of an out-of-court confession of a codefendant did not violate a defendant's confrontation clause rights, because the statement was admitted to explain why the criminal investigation was terminated, and not for the truth of the confession. (*Id.* at p. 177.) In its analysis, the appellate court ruled that one of the defendants had opened the door to testimony about the out-of-court statement, from the law enforcement authorities to whom it was made, by arguing the investigation was inadequate. (*Id.* at p. 175.) The out-of-court statement was offered to explain why the agents had stopped investigating, because of the confession they obtained that led them to conclude they had the right suspects. Thus, the defendant's "trial strategy opened the door to the statement's admission." (*Id.* at p. 176.) Within the scope of *Street, supra*, 471 U.S. 409, the trial court had properly admitted that out-of-court statement, "not to prove the truth of the matter asserted but to rebut [the codefendant's] attempt to cast doubt on the integrity of the government's investigatory efforts. The district court instructed the jury as to the limited nature of the statement's admission. And the government's interest in introducing the substance of the confession, rather than a more sanitized narrative, was both legitimate and strong." (*Cruz-Diaz, supra,* at pp. 179-180.)

In *People v. Reid* (2012) 971 N.E. 2d 353 (*Reid*), the highest court in New York enumerated federal and state court opinions that have held, " 'a defendant can open the

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the use of out-of-court statements for purposes other than their truth. Justice Thomas said the views in *Street* "did not accept that nonhearsay label at face value," but it "thoroughly examined the use of the out-of-court confession and the efficacy of a limiting instruction before concluding that the Confrontation Clause was satisfied '[i]n this context.' " (*Williams, supra,* at p. 2257; conc. opn. of Thomas, J.).)

door to the admission of evidence otherwise barred by the Confrontation Clause.' " (*Id.* at pp. 356-357, citing, e.g., *United States v. Cruz-Diaz, supra*, 550 F.3d 169, 178; *United States v. Lopez-Medina* (10th Cir. 2010) 596 F.3d 716, 733; *United States v. Holmes* (8th Cir. 2010) 620 F.3d 836, 843-844; *United States v. Acosta* (5th Cir. 2007) 475 F.3d 677, 683-684; cf. *United States v. Cromer* (6th Cir. 2004) 389 F.3d 662, 679 [confrontation rights are not erased when a defendant opens the door to admission of a testimonial out-of-court statement].) The court in *Reid* said it agreed with that emerging consensus, that a defense strategy or tactic can open the door to admitting evidence that could otherwise be prohibited by the confrontation clause. (*Reid, supra,* at p. 357.)

In *Reid*, the court explained its reasoning: "If evidence barred under the Confrontation Clause were inadmissible irrespective of a defendant's actions at trial, then a defendant could attempt to delude a jury 'by selectively revealing only those details of a testimonial statement that are potentially helpful to the defense, while concealing from the jury other details that would tend to explain the portions introduced and place them in context' [citation]. A defendant could do so with the secure knowledge that the concealed parts would not be admissible under the Confrontation Clause. To avoid such unfairness and to preserve the truth-seeking goals of our courts [citation], we hold that the admission of testimony that violates the Confrontation Clause may be proper if the defendant opened the door to its admission." (*Reid, supra*, 971 N.E. 2d 353, 357.)

D. Analysis

We examine whether the statements Thomas made about Hopson's participation in the killing, as given to the detectives after his arrest and thus deemed to be testimonial

under those circumstances, were properly admitted for reasons other than establishing the truth of the contents of his statements. Hopson's defense strategy put at issue her credibility as to why she cooperated with Thomas after he had carried out the killing (because of her fear of him). Her cross-examination was conducted by the prosecutor in an extremely argumentative manner, in which he emphasized her previously expressed love for Thomas, her "teddy bear," as contrasted to her recent testimony that he told her he had killed somebody else and was threatening her and her son, even from the grave, such as through "somebody with long scraggly blond hair." The prosecutor asked her why she had waited 15 months after Thomas died to accuse him of threatening her, and when she said she did not know how to tell the truth about it, he said he believed her when he heard her say she did not know how to tell the truth, because of her lies to Timm and her coworker.

Defense counsel made a few objections that the prosecutor was being argumentative, when the prosecutor asked Hopson about her "very nice little dance" with her defense attorney in presenting "each piece of damning evidence" and explaining it. Defense counsel objected when the prosecutor scolded Hopson for trying to control him during her cross-examination. In redirect testimony, defense counsel asked Hopson about the police reports in which Thomas accused her of planning the event. The prosecutor objected on hearsay grounds, which were overruled.

In rebuttal, Detective Wheeler described how Thomas confessed to detectives about how the killing occurred. When the prosecutor asked whether Thomas knew he was taking detectives to the evidence that would convict him, an objection was sustained,

but the prosecutor rephrased to ask whether Thomas knew he was taking detectives to evidence that would be used in investigating the killing of Brown (answer, yes).

During her own testimony, Hopson brought in multiple layers of hearsay. In general, evidentiary rules were very loosely applied at this trial and few restrictions were observed by either side, or by the trial court. Even so, to the extent Thomas's out-of court statements contradicted Hopson's account, they could have been offered to show not their truth but their falsity. (*People v. Hinton* (2006) 37 Cal.4th 839, 893 (*Hinton*).) "Indeed, the statements were offered for their falsity to rebut defendant's claim that he had lied to the police . . . and thus [showed] that defendant's stated reason for lying to the police was untrue." (*Ibid.*)

To the extent Hopson failed to challenge any conclusions about the manner in which she "opened the door" to the admission of Thomas's statements through Detective Wheeler's testimony, we could easily find she has forfeited the issue. (*Hinton, supra*, 37 Cal.4th at p. 893; *Reid, supra*, 971 N.E. 2d at pp. 356-357.) She testified in layers of multiple hearsay and brought Thomas's character and actions into issue as her key defense point. She should not be heard to complain on appeal that the prosecution should not have been able to produce evidence that rebutted her version of the offense. She was allowed to cross-examine Detective Wheeler and did so. She did not request any limiting instructions or admonitions on the use of his evidence, and does not complain of any such omission on appeal. CALCRIM Nos. 318, 358 and 362 nevertheless were used to educate the jury about how to evaluate prior statements of witnesses or the defendant, and consciousness of a defendant's guilt from false statements.

Within the scope of *Street, supra,* 471 U.S. 409, the jury was properly given the opportunity to compare the two versions by the two participants about what happened in the garage the night that Brown was killed, to decide whether Hopson was telling the truth about "the immediate issue of coercion," which was her theory of defense. (*Id.* at p. 416.) Wheeler's account of Thomas's out-of-court confession was admissible for nonhearsay purposes, in rebuttal to the defense testimony. Hopson "created the need to admit the statement by pressing the defense" (*id.* at p. 417 (conc. opn. of Brennan J. & Marshall, J.)) that she was coerced into hiding the evidence, at least. How she responded to Thomas's asserted threats was an issue in the case that was fair game for rebuttal. His statements were not presented for their truth, but to show that her version was not believable, when considered with the rest of the evidence. (*Ibid.*) Her confrontation clause protections were not violated.

We also agree with respondent that Thomas' statements were admissible for the nonhearsay purpose of explaining why Hopson apparently continued to stay friends with Thomas up until the weeks before his death, consistently claiming a homeless man must have done the killing, and why she did not start to blame Thomas for planning the killing until she became aware he had made statements against her. She then changed her tactics to accommodate his version of what happened. This set of circumstances and her own testimony properly invoked the duty of the court to make rulings that would promote "truth-seeking." (See *Reid, supra,* 971 N.E.2d 353, 357.) Even if we assume there were a confrontation clause problem posed by Thomas's reported testimonial statements, in the nature of "bleeding over" from impeachment into substantive evidence about the identity

of the killer, we conclude the rebuttal testimony from Detective Wheeler was properly admitted because Hopson "opened the door to its admission." (*Ibid.*)

Because we have found no constitutional error as claimed in both of Hopson's arguments, no cumulative error occurred.

DISPOSITION

The judgment is affirmed.

HUFFMAN, Acting P. J.

WE CONCUR:

HALLER, J.

AARON, J.

PROOF OF SERVICE BY MAIL

Re: Ruthetta Lois Hopson, Court Of Appeal Case: D066684, Superior Court Case: RIF1105594

I the undersigned, declare that I am employed in the County of Sonoma, California. I am over the age of eighteen years and not a party to the within entitled cause. My business address is 4968 Snark Ave, Santa Rosa CA. On July 31, 2015, I served a copy of the attached Petition for Review (CA Supreme Court) on each of the parties in said cause by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid in United States mail at Sonoma, California, addressed as follows:

Court of Appeal, 4th District, Division 1
Clerk of the Court
750 B Street, Suite 300
San Diego, CA 92101

Hon. Jeffrey J. Prevost
Judge of the Superior Court
Hall of Justice
4100 Main Street
Riverside, CA 92501

Paul Zellerbach
Riverside County District Attorney
3960 Orange Street
Riverside, CA 92501

Ruthetta Lois Hopson
WE6518
P.O. Box 1508
Chowchilla, CA 93610

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on this 31st day of July, 2015.

Phil Lane
(Name of Declarant)

(Signature of Declarant)

PROOF OF SERVICE BY ELECTRONIC SERVICE

Re: Ruthetta Lois Hopson, Court Of Appeal Case: D066684, Superior Court Case: RIF1105594

I the undersigned, am over the age of eighteen years and not a party to the within entitled cause. My business address is 4968 Snark Ave, Santa Rosa CA. On July 31, 2015 a PDF version of the Petition for Review (CA Supreme Court) described herein was transmitted to each of the following using the email address indicated or direct upload. The email address from which the intended recipients were notified is Service@GreenPathSoftware.com.

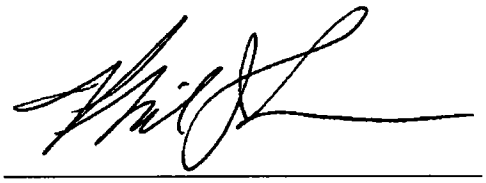
Appellate Defenders Inc. - Criminal
Lynelle Hee
San Diego, CA 92101
eservice-criminal@adi-sandiego.com

Court of Appeal, 4th District, Division 1
Clerk of the Court
San Diego, CA 92101

State of California Supreme Court
Supreme Court
San Francisco, CA 94102-4797

Office of the Attorney General
San Diego
San Diego, CA 92186-5266
ADIEService@doj.ca.gov

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on this 31st day of July, 2015 at 10:49 Pacific Time hour.



Phil Lane
(Name of Declarant)

(Signature of Declarant)