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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

MICHAEL GILBERT TREJO et al.,

Defendants and Appellants.

B229805

(Los Angeles County
Super. Ct. No. KA084938)

APPEAL from judgments of the Superior Court of Los Angeles County,
Bruce F. Marrs, Judge. Affirmed.

Marilee Marshall, under appointment by the Court of Appeal, for Defendant
and Appellant Michael Trejo.

Christine C. Shaver, under appointment by the Court of Appeal, for Defendant
and Appellant Christine Ramos.

Leonard J. Klaif, under appointment by the Court of Appeal, for Defendant
and Appellant David Godine.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant
Attorney General, Lance E. Winters, Assistant Attorney General, Susan Sullivan Pithey,
Joseph P. Lee, and Tasha G. Timbadia, Deputy Attorneys General, for Plaintiff and
Respondent.

Defendants and appellants, Michael Gilbert Trejo, David James Godine and Christine Ramos, appeal the judgments entered following their convictions for kidnapping during the commission of a carjacking, with enhancements (Trejo only) for a prior prison term and a prior serious felony conviction (Pen. Code, §§ 209.5, 667.5, 667, subds. (a)-(i)).¹ The defendants were sentenced to the following prison terms: 20 years to life (Trejo); life (Godine); seven years (Ramos).

The judgments are affirmed.

BACKGROUND

Viewed in accordance with the usual rule of appellate review (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206), the evidence established the following.

1. *Prosecution evidence.*

Rebecca Tafolla testified she first met defendant Trejo on August 30, 2008. They smoked methamphetamine and spent the night together. The next morning they drove around in her Honda Civic trying to obtain more methamphetamine. In the afternoon they visited a house in Covina where Trejo introduced Tafolla to the two sisters who lived there, Kelly and Monique.

Tafolla went home around 4:00 p.m. because she had to babysit, but she returned to the Covina house shortly after midnight. In addition to Trejo, Kelly and Monique, there were now a few other people at the house, including defendant Godine and defendant Ramos. After a while, Tafolla drove Ramos and Trejo to a 7-Eleven store. They returned to the Covina house, but left again to visit a friend of Trejo's in La Puente. They stayed there only a few minutes and then drove back to the Covina house. Someone wanted to smoke, but Kelly and Monique said they had to do it outside, so Trejo, Godine, Ramos and Tafolla went to the backyard.

¹ All further statutory references are to the Penal Code unless otherwise specified.

Godine picked up a metal baseball bat and began swinging it at Tafolla, but he was just fooling around and she did not feel threatened. However, she did flinch and Trejo put his arms around her. The next thing Tafolla remembered was waking up inside the trunk of her own car. Her head hurt and she could taste blood. She heard Ramos say something like, “[C]heck her to see if she has anything in her pockets, check her.” The trunk opened and Tafolla saw Godine and Trejo standing there. When Tafolla tried to get out of the trunk, Trejo pushed her back in. Tafolla was crying and Trejo told her to “shut the fuck up or I’m going to shoot you.” He shut the trunk and Tafolla blacked out again.

When Tafolla regained consciousness, she felt the car going fast and she heard Trejo and Ramos talking. Tafolla pushed against the trunk lid and it opened. Even though she could tell they were driving on the freeway, Tafolla threw herself out of the car and onto the roadway because she was afraid the defendants were going to kill her. She did not recall hitting the ground, but she remembered getting up, walking off the freeway and finding a 7-Eleven. She was crying and bleeding all over. Someone called the police and Tafolla was taken to the hospital, where she remained for a week. She had fractures to one ear, abrasions to her arms, and her broken jaw had to be wired shut for a month. When Tafolla’s car was recovered, it had been set on fire and burned.

Kelly testified she lived at her parents’ house in Covina. On the weekend of this incident, she invited some friends over because her parents were out of town. Trejo arrived in the late afternoon and introduced her to Tafolla. Godine showed up later with Kelly’s brother Mark. Kelly testified Tafolla was in and out of the Covina house several times. Tafolla and Trejo went to the 7-Eleven at one point. Around midnight, the defendants were at the house along with Tafolla, Kelly, Monique and Mark. Several times, Kelly heard Trejo say “he was going to kick [Tafolla’s] ass” and that “he was going to beat her and hold her hostage for her car.” Kelly testified she was scared about “what [Trejo] was planning,” so she told everybody they had to leave.

“Q. Okay. And when you say ‘what he was planning,’ what did he – I don’t want you to guess at what he was planning – what did he tell you he was going to do?

“A. Well, that he was going to beat her, hold her hostage, take her car, and by the time her parents or . . . anybody reported her missing or the car stolen, that it would already be burned up.”

Kelly walked Tafolla to her car because she thought Tafolla was leaving, but 20 minutes later she noticed Tafolla’s car was still outside. Kelly looked into the backyard, where she saw Trejo and Godine. She heard the side gate open and Tafolla say, “[W]hy are you doing this to me?” Kelly then walked to the front door and saw Godine and Trejo dragging Tafolla from the backyard toward her car. Ramos was standing by the driver’s door of Tafolla’s car. Trejo told Tafolla to shut up and he punched her. Kelly could see Tafolla had been badly beaten; she was bleeding from her head and face. Trejo opened the trunk and threw Tafolla inside. All three defendants then got into Tafolla’s car, with Ramos driving.

Monique testified Tafolla went into the backyard with Trejo at some point after midnight. Ramos was in the front yard and Mark was apparently asleep somewhere in the house. Monique did not know where Godine was. The side gate made a noise and Monique saw Trejo holding Tafolla from behind. They were going toward the front of the house where Tafolla’s car was parked. Tafolla was crying and Trejo told her to shut up. Monique went inside and locked the door. She heard Tafolla’s car drive off. She did not see Godine or Ramos at this time.

Monique was initially uncooperative with the police because she was afraid of Trejo. Eventually she told them Trejo had gotten upset that night and told everyone he was going to kick Tafolla’s ass. Monique could not recall if she also told police Trejo had said he was going to hold Tafolla hostage for her car because he was tired of her. Monique denied telling detectives that, after the abduction, she cleaned up some blood on the ground and covered it with paint.

Monique and Kelly denied being members of the West Covina Mob gang. The jury was shown a photograph of the two sisters, along with Ramos and some other girls, wearing red shirts and throwing up gang signs. Kelly explained the shirts were in remembrance of Monique's fiancé, Frank, a member of the West Covina Mob who had been killed by Azusa 13 gang members three months before Tafolla was abducted. Ramos and Godine were members of the West Covina Mob. Trejo was a member of the El Monte Flores gang.

Monique told Detective Guillermo Guerrero that Trejo had been saying "he was upset with [Tafolla] and that he was going to kick her ass and hold her hostage for her car." Subsequently, Trejo asked to have the dogs put away so he could smoke in the backyard. After Monique put the dogs in the garage, Godine and Ramos arrived. All three defendants and Tafolla went into the backyard. Within minutes, Monique and Kelly heard a fight or a scuffle in the backyard. Because it was dark, they could not see exactly what was going on. Then the side gate opened. Monique looked out and saw Godine and Trejo dragging Tafolla from the backyard toward her car, which was parked in front of the house. Monique then saw Ramos drive off in Tafolla's car.

A few weeks afterward, Monique informed Detective Guerrero that later on the night of the abduction she received a phone call from Godine, who said Tafolla had been assaulted in order to protect Kelly and Monique from a planned attack by Azusa 13 gang members. Godine also told Monique to wash Tafolla's bloodstains from the cement in the backyard where the beating occurred. Monique tried to clean the area, but ended up covering it with paint.

2. Defense evidence.

Amber Demartinez was a student at Everest College who had some classes with Kelly. Demartinez's sister is married to Trejo's brother. Kelly told Demartinez that during a party at her house in August 2008, she had seen a Hispanic woman and a Black man beating up Tafolla. They put Tafolla into the trunk of a car and drove off. Then Kelly and Trejo got into another car and followed them. On the 57 Freeway, Tafolla leapt from the car and Kelly had to swerve to avoid hitting her. Kelly did not stop

because she was afraid of getting involved. Kelly said Trejo had not participated in Tafolla's abduction.

Trejo testified in his own defense. He first met Tafolla at a friend's house. After getting high together, they slept in an abandoned apartment and then drove around the next day looking for more methamphetamine. Later they went to Kelly and Monique's house in Covina. Trejo knew them because he had been friends with Monique's fiancé Frank, who had been killed by gang members a few months earlier. Trejo and Tafolla went to the Covina house because they needed a place where they could use drugs. When they first arrived the only people there were Kelly, Monique and their brother Mark. Tafolla was feeling dirty from sleeping in the abandoned apartment, so she decided to go home while Trejo stayed at the Covina house.

In the early evening, "a crowd of people rolled up in a van . . . it was a bunch of Bloods . . . guys, girls, Mexican, Black. It was all sorts." These people had been attending a gang social function held in Frank's memory. Tafolla rejoined Trejo at the Covina house. Later, they started to run out of drugs. Tafolla said she could get more drugs from her "homeys," but she would have to go alone. Trejo agreed and Tafolla left. Trejo started feeling tense because "some Black dudes" asked Monique why Tafolla kept going in and out of the house.

When Tafolla returned, they went to the backyard so Trejo could smoke a cigarette. There were other people there, including a big African-American guy who had a large "M" tattooed on his neck. This man was not defendant Godine. This man made hostile remarks to Trejo and then grabbed a baseball bat. Trejo told Tafolla he was worried and she suggested they leave. She asked him to retrieve her things from the house. While Trejo was inside, he heard a loud noise. When he returned to the yard, Tafolla was unconscious on the ground. Trejo punched the guy standing next to him and a fight ensued. Kelly and Monique came outside and yelled at Trejo to leave. Trejo went to help Tafolla, who was crying and yelling. When he tried to walk Tafolla to the side gate, she fell face first onto the ground. Her mouth started to bleed and she passed out.

Another fight started. Trejo saw a woman standing next to Tafolla's car. He asked her where Tafolla was and the woman said they had put her in the trunk. Trejo opened the trunk and found Tafolla bleeding but conscious. He told her he would take her home. However, other people got into Tafolla's car and drove off. Trejo jumped into Kelly's car. They argued because Kelly didn't want to follow Tafolla's car, but eventually she did. Trejo saw Tafolla fall out of the trunk onto the freeway. Kelly swerved to avoid her. Trejo told Kelly to go back, but she refused and ordered him out of her car. Trejo did not call the police about Tafolla's abduction because he feared retaliation from Bloods gang members.

Ramos testified she arrived at Kelly and Monique's house about 11:30 p.m. that night. Trejo was supposed to give Ramos a tattoo. Ramos went with Tafolla and Trejo to the 7-Eleven to buy cigarettes. When they returned, Ramos went into the backyard by herself to smoke. While there, she did not see a fight, anyone with a bat, or anything unusual. She left around midnight. Ramos did not recall having seen Godine that night or telling the police that she had.

Two weeks later Ramos left California because she was having problems with her mother; she went to stay with relatives in Texas. When her mother informed her a detective was looking for her in connection with a kidnapping, Ramos turned herself in.

Justin Corvetti, Godine's former parole agent, testified he had taken photographs of Godine in 2008. At that time there was no red "M" tattoo visible on Godine's neck, although Corvetti acknowledged such a tattoo could have been hidden by Godine's shirt collar.

3. Rebuttal evidence.

Detective Guerrero testified both Ramos and Trejo told him Godine was at the Covina house that night. According to Trejo, Godine did not trust Tafolla and wanted her to leave the party. Trejo told him to relax because Tafolla was okay. Later, Trejo, Godine, Tafolla and several unknown African-American males went to the backyard. Godine was swinging a bat. They all stood in a semi-circle and Godine walked up to Tafolla and hit her in the head with the bat. Ramos then came up and took Tafolla's car

keys. Godine and another man carried Tafolla to her car and put her in the trunk. Godine got in and Ramos drove off. Trejo got into Kelly's car and they followed. Trejo saw Tafolla jump onto the freeway, but he did not stop for her because he didn't want to get involved.

CONTENTIONS

1. There was insufficient evidence to sustain defendants' convictions for kidnapping during the commission of a carjacking (§ 209.5).
2. The trial court erred by admitting evidence of Godine's declaration against penal interest.

DISCUSSION

1. *There was sufficient evidence to prove defendants violated section 209.5.*

Defendants contend there was insufficient evidence to sustain their convictions for violating section 209.5 (kidnapping during the commission of a carjacking). This claim is meritless.

- a. *Legal principles.*

“In assessing a claim of insufficiency of evidence, the reviewing court's task is to review the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence – that is, evidence that is reasonable, credible, and of solid value – such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] The federal standard of review is to the same effect: Under principles of federal due process, review for sufficiency of evidence entails not the determination whether the reviewing court itself believes the evidence at trial establishes guilt beyond a reasonable doubt, but, instead, whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. [Citation.] The standard of review is the same in cases in which the prosecution relies mainly on circumstantial evidence. [Citation.] ‘ “Although it is the duty of the jury to acquit a defendant if it finds that circumstantial evidence is susceptible of two interpretations, one of which suggests guilt and the other innocence [citations], it is the jury, not the appellate court[,] which

must be convinced of the defendant's guilt beyond a reasonable doubt. "If the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also reasonably be reconciled with a contrary finding does not warrant a reversal of the judgment." [Citations.] [Citation.] (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11.)

"An appellate court must accept logical inferences that the [finder of fact] might have drawn from the circumstantial evidence.' [Citation.] 'Before the judgment of the trial court can be set aside for the insufficiency of the evidence, it must clearly appear that on no hypothesis whatever is there sufficient substantial evidence to support the verdict of the [finder of fact].' [Citation.]" (*People v. Sanghera* (2006) 139 Cal.App.4th 1567, 1573.) "Perhaps the most fundamental rule of appellate law is that the judgment challenged on appeal is presumed correct, and it is the appellant's burden to affirmatively demonstrate error. [Citation.] Thus, when a criminal defendant claims on appeal that his conviction was based on insufficient evidence of one or more of the elements of the crime of which he was convicted, we *must* begin with the presumption that the evidence of those elements *was* sufficient, and the defendant bears the burden of convincing us otherwise. To meet that burden, it is not enough for the defendant to simply contend, 'without a statement or analysis of the evidence, . . . that the evidence is insufficient to support the judgment[] of conviction.' [Citation.] Rather, he must *affirmatively demonstrate* that the evidence is insufficient." (*Ibid.*)

Section 209.5 provides, in pertinent part: "(a) Any person who, during the commission of a carjacking and in order to facilitate the commission of the carjacking, kidnaps another person who is not a principal in the commission of the carjacking shall be punished by imprisonment in the state prison for life with the possibility of parole. [¶] (b) This section shall only apply if the movement of the victim is beyond that merely incidental to the commission of the carjacking, the victim is moved a substantial distance from the vicinity of the carjacking, and the movement of the victim increases the risk of harm to the victim over and above that necessarily present in the crime of carjacking itself."

b. *Discussion.*

Defendants argue that, although the evidence proved they committed simple kidnapping (§ 207) and carjacking (§ 215), there was insufficient evidence they also committed kidnapping for carjacking (§ 209.5) because the carjacking had facilitated the kidnapping, rather than the other way around. Not so.

The evidence showed Trejo kidnapped Tafolla in order to obtain her car, and that Godine and Ramos helped him carry out this plan. Both Kelly and Monique heard Trejo say he was going to “kick Tafolla’s ass” and hold her hostage for her car. Kelly heard Trejo say he was going to burn Tafolla’s car. All of this is exactly what happened. Godine and Trejo assaulted Tafolla in the backyard, dragged her to her car, threw her in the trunk, and left the Covina house with Ramos driving. When Tafolla’s car was eventually recovered, it had been burned.

“Kidnapping during the commission of a carjacking can be analogized to kidnapping during the commission of a robbery. The California Supreme Court has held that ‘where a kidnap[p]ing occurs after the actual perpetration of a robbery such kidnap[p]ing may be kidnap[p]ing for the purpose of robbery if it may reasonably be inferred that the transportation of the victim was to effect the escape of the robber or to remove the victim to another place where he might less easily sound an alarm.’ [Citation.] Therefore, if there is substantial evidence that appellant intended the kidnapping to effect an escape or prevent an alarm from being sounded, his conviction for kidnapping during the commission of a carjacking must stand.” (*People v. Perez* (2000) 84 Cal.App.4th 856, 860-861.)

The evidence here supported the conclusion defendants kidnapped Tafolla to prevent her from going to the police to report the theft of her car. As the Attorney General argues, “[a]n escape attempt that is poorly thought out is still an escape attempt,” and the jury could have reasonably concluded that “if Tafolla was left at the house, appellants would most certainly be identified and apprehended.” Such a conclusion is particularly appropriate given the nature of this particular crime. “A ‘direct offshoot of robbery,’ carjacking ‘was made a separate offense because of perceived difficulties with

obtaining convictions under the robbery statute. [Citation.]’ [Citation.] The Legislature was specifically concerned with the ‘ “*considerable increase in the number of persons who have been abducted, many have been subjected to the violent taking of their automobile and some have had a gun used in the taking of the car. This relatively ‘new’ crime appears to be as much thrill-seeking as theft of a car. If all the thief wanted was the car, it would be simpler to hot-wire the automobile without running the risk of confronting the driver. People have been killed, seriously injured, and placed in great fear, and this calls for a strong message to discourage these crimes.*” ’ [Citation.] Such concern for the abduction and safety of a driver or passenger is particularly evident in section 209.5, which provides for significant punishment if the victim is also moved a substantial distance with the risk of increased harm.” (*People v. Medina* (2007) 41 Cal.4th 685, 697-698.)

There was sufficient evidence here that the defendants committed kidnapping in the commission of a carjacking in violation of section 209.5

2. *Evidence of Godine’s phone call to Monique was properly admitted.*

Defendants Trejo and Ramos contend the trial court erred by admitting evidence of defendant Godine’s phone call to Monique after Tafolla had been abducted. Defendants argue the evidence of Godine’s extra-judicial statements amounted to improper hearsay and violated the confrontation clause. This claim is meritless. Godine’s statement to Monique was a declaration against penal interest, and Detective Guerrero’s testimony about Monique’s report of the phone call was properly admitted as a prior inconsistent statement.

a. *Background.*

Detective Guerrero testified that, a few weeks after the abduction, Monique said she had received a phone call from Godine after the defendants left with Tafolla that night. During this call, Godine told Monique: “[H]ey, we did this for you guys, you know, to protect you, . . . we beat her because of you guys. [¶] At which time [Monique] said . . . I don’t understand, what are you talking about? [¶] And then [Godine] said something to the effect that . . . we believe that they were going to come over and harm

you guys or attack you guys, referring to a different gang, so that's why we did what we did." When Monique replied, "I think you got things confused, I didn't see a problem that night," Godine became "upset and said, hey, you ought to be thankful for what we did, we did this because of you, you need to go back and get rid of the blood or some of the evidence."

The trial court ruled this testimony was admissible against all three defendants as a declaration against penal interest because it put Godine at the crime scene "[a]nd it placed the victim, Trejo, Ramos, and Godine all in the backyard." The trial court explained it found Godine's statement reliable because "[w]e have . . . [Godine] calling in, talking about the crime that was committed, and specifically directing that certain things be done . . . , talking about bleach and soap, in essence . . . [Monique] should be thankful for what we did, the victim was setting us up with her gang friends to shoot up the house, we had to knock her out to protect the house. Impliedly, you owe us; therefore, you must clean up the mess. [¶] I don't find that to be self-serving as to [Godine] at all. It doesn't seem to minimize anybody's liability."

b. *Legal principles.*

"In California, '[e]vidence of a statement by a declarant having sufficient knowledge of the subject is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness and the statement, when made, . . . so far subjected him to the risk of . . . criminal liability . . . that a reasonable man in his position would not have made the statement unless he believed it to be true.' (§ 1230.) The proponent of such evidence must show that the declarant is unavailable, that the declaration was against the declarant's penal interest when made and that the declaration was sufficiently reliable to warrant admission despite its hearsay character. [Citation.]" (*People v. Duarte* (2000) 24 Cal.4th 603, 610-611.)

"To determine whether the declaration passes the required threshold of trustworthiness, a trial court 'may take into account not just the words but the circumstances under which they were uttered, the possible motivation of the declarant, and the declarant's relationship to the defendant.' [Citation.] On appeal, the trial court's

determination on this issue is reviewed for abuse of discretion. [Citation.]” (*People v. Cudjo* (1993) 6 Cal.4th 585, 607.) “We have recognized that, in this context, assessing trustworthiness “requires the court to apply to the peculiar facts of the individual case a broad and deep acquaintance with the ways human beings actually conduct themselves in the circumstances material under the exception.” ’ ” (*People v. Duarte, supra*, 24 Cal.4th at p. 614.) As we have noted, although “ [t]here is no litmus test for the determination of whether a statement is trustworthy and falls within the declaration against interest exception. . . . [¶] . . . the most reliable circumstance is one in which the conversation occurs between friends in a noncoercive setting that fosters uninhibited disclosures. [Citations.]’ [Citation.]” (*People v. Cervantes* (2004) 118 Cal.App.4th 162, 175.)

“A statement by a witness that is inconsistent with his or her trial testimony is admissible to establish the truth of the matter asserted in the statement under the conditions set forth in Evidence Code sections 1235^[2] and 770.^[3] The ‘fundamental requirement’ of section 1235 is that the statement in fact be *inconsistent* with the witness’s trial testimony. [Citation.] Normally, the testimony of a witness that he or she does not remember an event is not inconsistent with that witness’s prior statement describing the event. [Citation.] However, courts do not apply this rule mechanically. ‘Inconsistency in effect, rather than contradiction in express terms, is the test for admitting a witness’ prior statement [citation], and the same principle governs the case of the forgetful witness.’ [Citation.] When a witness’s claim of lack of memory amounts to deliberate evasion, inconsistency is implied. [Citation.] As long as there is a reasonable

² Evidence Code section 1235 provides: “Evidence of a statement made by a witness is not made inadmissible by the hearsay rule if the statement is inconsistent with his testimony at the hearing and is offered in compliance with Section 770.”

³ Evidence Code section 770 provides: “Unless the interests of justice otherwise require, extrinsic evidence of a statement made by a witness that is inconsistent with any part of his testimony at the hearing shall be excluded unless: [¶] (a) The witness was so examined while testifying as to give him an opportunity to explain or to deny the statement; or [¶] (b) The witness has not been excused from giving further testimony in the action.”

basis in the record for concluding that the witness's 'I don't remember' statements are evasive and untruthful, admission of his or her prior statements is proper." (*People v. Johnson* (1992) 3 Cal.4th 1183, 1219-1220.)

c. *Discussion.*

Detective Guerrero's testimony did not violate either the Sixth Amendment confrontation clause or California's hearsay rules.

(1) *There was no Crawford violation.*

"In *Crawford v. Washington* (2004) 541 U.S. 36 [124 S.Ct. 1354] . . . , the United States Supreme Court announced a new standard for determining when the confrontation clause of the Sixth Amendment prohibits the use of hearsay evidence – i.e., an out-of-court statement offered for its truth – against a criminal defendant. *Crawford* held that this clause protects an accused against hearsay uttered by one who spoke as a ' "witness[]" ' "bear[ing] testimony" ' [citation] if the declarant neither takes the stand at trial nor was otherwise available for cross-examination by the accused." (*People v. Cage* (2007) 40 Cal.4th 965, 969.) *Crawford* held that " "[w]here testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation." [Citation.]" (*People v. Cervantes, supra*, 118 Cal.App.4th at p. 172.) "*Crawford* recognized that if the statement in issue is nontestimonial, the rules of evidence, including hearsay rules, apply. *Crawford* stated: 'Where nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law' [Citation.] Thus, state courts may consider 'reliability factors beyond prior opportunity for cross-examination when the hearsay statement at issue was not testimonial. [Citation.]' [Citation.]" (*Id.* at p. 173.)

As Trejo and Ramos properly concede, Godine’s extra-judicial statement was nontestimonial within the meaning of *Crawford* because he made it to an acquaintance, Monique, in a non-coercive setting. (See, e.g., *People v. Cervantes, supra*, 118 Cal.App.4th at p. 174 [extra-judicial declaration made when declarant “sought medical assistance from a friend of long standing who had come to visit his home” was non-testimonial].) Because Godine’s statement was nontestimonial, we need only determine if it “falls within a well-settled hearsay exception or bears sufficient indicia of trustworthiness so as to render it admissible.” (*Ibid.*)

That test is met. Godine’s telling Monique he had participated in Tafolla’s abduction was obviously against his penal interest, and Godine was unavailable as a witness because he chose not to testify at trial. (See *People v. Duarte, supra*, 24 Cal.4th at p. 611 [witness’s invocation of Fifth Amendment right against self-incrimination means witness was unavailable].) Furthermore, the trial court did not abuse its discretion in deciding the statement was trustworthy. (See *People v. Cervantes, supra*, 118 Cal.App.4th at p. 175 [most reliable circumstance is where conversation occurs between friends in noncoercive setting].)

Trejo argues, however, that “even if Godine’s statement to Monique is non-testimonial . . . , Guerrero obtained the statement through the interrogation of Monique. The statement is, therefore, testimonial and inadmissible under *Crawford*.” But *Crawford* is inapplicable because Monique testified at trial and was subject to cross examination. (See *United States v. Owens* (1988) 484 U.S. 554 [108 S.Ct. 838] [even loss of memory does not render witness unavailable for Confrontation Clause purposes]; *People v. Cowan* (2010) 50 Cal.4th 401, 468 [*Owens* concluded “that ‘when a hearsay declarant is present at trial and subject to unrestricted cross-examination,’ ‘the traditional protections of the oath, cross-examination, and opportunity for the jury to observe the witness’[s] demeanor satisfy the constitutional requirements,’ notwithstanding the

witness's claimed memory loss about the facts related in the hearsay statement" and "[n]othing in *Crawford* casts doubt on the continuing vitality of *Owens*."].⁴

Monique appeared at trial, testified and was cross-examined. The jury had the opportunity to assess her demeanor as a witness and to evaluate the credibility of her extra-judicial statements. The confrontation clause was not violated.

(2) *There was no hearsay violation.*

Detective Guerrero's testimony, in turn, was admissible under the hearsay exception for prior inconsistent statements. Trejo argues there was no inconsistency because Monique did not deny having the phone conversation with Godine, but merely testified she could not recall if it took place. However, as noted *ante*, what counts is "[i]nconsistency in effect, rather than contradiction in express terms." (*People v. Johnson, supra*, 3 Cal.4th at p. 1219.)

Monique did not completely refuse to testify. She answered some questions and then testified she could not recall anything about a phone conversation with Godine that night. Trejo argues "there was nothing to suggest that Monique was being evasive or untruthful when she testified that she did not remember." However, after testifying she could not recall such a conversation taking place, the following colloquy occurred:

"Q. Your testimony here today is that that conversation never took place, or you don't remember that conversation?

"A. I don't remember.

"Q. Okay. I mean, if you had a conversation like that, you would have remembered it, wouldn't you?

"A. I think I'd remember it.

"Q. I mean because it's so bizarre, isn't it?

⁴ "... California courts before and after *Crawford* have held that the admission of statements possessing sufficient indicia of reliability to fall within the hearsay exception for declarations against interest does not deny a defendant the right of confrontation guaranteed by the United States Constitution. [Citations.]" (*People v. Arceo* (2011) 195 Cal.App.4th 556, 571-572.)

“A. Yes.

“Q. And what you’re saying is that you don’t remember any conversation ever like that taking place?

“A. No, I don’t remember.”

This colloquy contains a strong implicit denial by Monique that any such conversation occurred and, therefore, admission of Detective Guerrero’s testimony was proper. (See *People v. Sapp* (2003) 31 Cal.4th 240, 297 [where ample evidence supports trial court’s finding witness’s lack of memory amounted to deliberate evasion, prior statements are admissible without violating confrontation clause or state hearsay rule]; *People v. O’Quinn* (1980) 109 Cal.App.3d 219, 225 [prior statements admissible if reasonable basis to conclude “ ‘I don’t remember’ responses are evasive and untruthful”]; *People v. Burciago* (1978) 81 Cal.App.3d 151, 165 [“Purdy’s testimony was a combination of statements of a lack of memory, together with several express denials, and many instances of refusal to answer a question. Viewed in its entirety, it is clear that if not an express denial, it constituted an implicit denial.”].) Because there is a reasonable basis in the record for finding Monique’s testimony was inconsistent in effect, her prior statements were properly admitted. (See *People v. Johnson, supra*, 3 Cal.4th at pp. 1219-1220.)

Hence, the trial court did not err by admitting the evidence about Godine’s post-abduction phone call.

DISPOSITION

The judgment is affirmed.

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KLEIN, P. J.

We concur:

CROSKEY, J.

KITCHING, J.