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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. JORGE CAMARENA et al., Defendants and Appellants.	B270479 (Los Angeles County Super. Ct. No. PA084321)

APPEALS from judgments of the Superior Court of Los Angeles County, David W. Stuart, Judge. Affirmed.

Meredith J. Watts, under appointment by the Court of Appeal, for Defendant and Appellant Jorge Camarena.

Marta I. Stanton, under appointment by the Court of Appeal, for Defendant and Appellant Jose Ibanez Matamoros.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Paul M. Roadarmel, Jr. and David Wildman, Deputy Attorneys General, for Plaintiff and Respondent.

I. INTRODUCTION

A jury convicted defendants Jorge Camarena and Jose Ibanez Matamoros of kidnapping for ransom. (Pen. Code,[1] § 209, subd. (a).) The jury found true allegations that Camarena personally used a handgun and, as to Matamoros, a principal was armed with a handgun. (§§ 12022, subd. (a)(1); 12022.53, subd. (b).) Camarena was sentenced to life with the possibility of parole plus 10 years. Matamoros was sentenced to life with the possibility of parole plus one year.

Defendants appeal from the judgments entered after their convictions. They argue there is insufficient evidence to support their kidnapping for ransom convictions. In addition, defendants assert the trial court's failure to sua sponte instruct on false imprisonment and attempted extortion as lesser included offenses was prejudicial error. Further, they contend it was prejudicial error to refuse to instruct on simple kidnapping as a lesser related offense. Defendants also challenge the admissibility of testimony about the victim's fear of retaliation. Separately, Camarena challenges the trial court's decision to allow the prosecution to introduce the victim's preliminary hearing testimony at trial. He asserts the prosecution did not exercise due diligence to procure the victim's attendance at trial. Camarena also argues he did not have a meaningful opportunity to cross-examine the victim at the preliminary hearing. We affirm the judgments.

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[1] Further statutory references are to the Penal Code unless otherwise noted.

II. THE EVIDENCE

Gonzalo Rodriguez owned three recycling centers all located on Laurel Canyon Boulevard in the Pacoima, California area. The main office, at 10402 Laurel Canyon Boulevard, was across the street from a second center, at 10346 Laurel Canyon Boulevard. The victim, Alfonso Amezcua, was Rodriguez's sometime employee. Amezcua also resided at the main office.

A. October 8, 2014 Events

On October 8, 2014, Amezcua was at the recycling center at 10346 Laurel Canyon Boulevard. Two individuals in a dark gray vehicle approached Amezcua. The driver, defendant Camarena, got out. Amezcua did not know Camarena. Camarena said Rodriguez owed him money and Camarena was there to collect. When Amezcua started to walk away, Camarena grabbed him by the arm. Amezcua pulled away, walked to a nearby barber shop and sat down inside. Camarena followed him inside. When Amezcua refused to leave the barber shop, Camarena grabbed Amezcua around the neck. He said, "We'll be back, it will be worse tomorrow." Amezcua did not report the incident to law enforcement officers.

Oscar Valdez witnessed the altercation in the barber shop. Valdez told the investigating officer, Detective John Guerrero, he saw a man walk into the barber shop and grab Amezcua by the throat.

B. October 9, 2014 Events

The following day, October 9, 2014, Amezcua was at the main office when the same dark gray car pulled into the parking

lot. There were four individuals in the vehicle—the two defendants and Juan Huerta and Jesus Patricio.[2] Camarena was the driver. Amezcua did not know any of the men. Camarena pointed a gun out of the car window and said, "Get in or I'll kill you." Huerta got out, pressed a knife into Amezcua's back and forced him into the car. Amezcua suffered three puncture wounds.

Gustavo Dedios witnessed the abduction. Dedios told Detective Guerrero the driver pointed a gun at Amezcua and said, "Get in or I'll kill you." Amezcua sat in the rear seat between Huerta on his left and Patricio on his right. Huerta, while holding the knife against Amezcua, forced Amezcua's head down. As Camarena drove, defendants instructed Amezcua to telephone Rodriguez; they wanted to talk to him because he owed them money. Defendant Matamoros was in the front passenger seat. Speaking on a cellular telephone, Matamoros said, "Don't worry, we got him, we'll get the money." Later, after police officers executed a traffic stop and began to surround the car, Amezcua saw Camarena pass a handgun to Matamoros, who then handed it back to Camarena.

Rodriguez, the owner of the recycling centers, learned Amezcua had been "picked up by four guys." Because he feared for Amezcua's safety, Rodriguez called 911. He met responding officers at the location from which Amezcua had been adducted. Prior to the officers' arrival, Rodriguez received more than 30 telephone calls from Amezcua, none of which he answered. At the officers' direction, however, Rodriguez placed a return call.

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[2] Huerta and Patricio did not participate in the defendants' trial.

Amezcua told Rodriguez he had been "kidnapped." Rodriguez instructed Amezcua to meet him at the recycling yard. Amezcua relayed the instruction to defendants. When defendants' vehicle neared the location, police officers executed a traffic stop. Amezcua was rescued and defendants were arrested. Rodriguez testified he did not know defendants, he had never done business with them, and he did not owe money to any business associates.

Officers recovered a fully-loaded handgun with a round in the chamber from the car's center console. No fingerprints or DNA evidence was recovered from the gun. Officers also found multiple rounds of ammunition in the trunk. There was a folding knife on the left rear passenger seat, where Huerta had been sitting. As noted above, Huerta had forced Amezcua into the car at knifepoint. There was a knife in the front passenger door compartment. This is where Matamoros had been sitting. Both Camarena and Patricio had knives on their persons.

Los Angeles Police Officer Oscar Cansino interviewed Matamoros following his arrest. Detective Guerrero was present for at least part of that interview, which was recorded and eventually played for the jury. In the recording Matamoros gave the following information: Rodriguez was "into some deep shit" and had been "fuckin around." Rodriguez had hired Matamoros's company to transport recyclables by truck from other states. Matamoros had traveled to other states including Nevada and Arizona to haul recyclables back to California. Rodriguez paid cash for the recyclables then sold them at a large profit in California.[3] At some point, however, Rodriguez had stopped

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[3] Evidence was presented that in September 2015, Rodriguez was convicted in Kern County of two felonies arising from recycling fraud. He was placed on probation.

paying. Two weeks prior to the kidnapping, Matamoros had accompanied a "guy from Las Vegas," Victor Ruiz, to meet Rodriguez. Ruiz and Rodriguez argued about money owed. Rodriguez refused to pay Ruiz. Matamoros denied having been involved in the kidnapping. Matamoros told Officer Cansino he was there just to get to his truck so that he could complete a job he had to do.

At the time of trial, Amezcua's whereabouts were unknown. His preliminary hearing testimony was introduced in evidence. Detective Guerrero testified Amezcua had been reluctant to assist in the investigation or to testify because he feared retaliation.

III. DISCUSSION

A. Sufficiency of the Evidence

Defendants challenge the sufficiency of the evidence to support their kidnapping for ransom convictions.

1. Kidnapping for ransom

Pursuant to section 209, subdivision (a), "Any person who seizes, confines, inveigles, entices, decoys, abducts, conceals, kidnaps or carries away another person by any means whatsoever with intent to hold or detain, or who holds or detains, that person for ransom, reward or to commit extortion or to exact from another person any money or valuable thing, or any person who aids and abets any such act, is guilty of a felony . . . ." The words "reward" and "ransom" are used in their ordinary, everyday meanings. (*People v. Greenberger* (1997) 58 Cal.App.4th 298, 367; *People v. Hill* (1983) 141 Cal.App.3d 661, 668.) Here,

the jury was instructed: "To prove that the defendant is guilty of this crime, the People must prove that: [¶] . . . [¶] 3. The defendant [held or detained the other person] *for ransom or to get money or something of valuable*."[4] (Italics added.) The crime of kidnapping for ransom is complete when the kidnapper has control over the victim with the intent to obtain a ransom. (*People v. Anderson* (1979) 97 Cal.App.3d 419, 425.) "To define kidnapping for ransom otherwise would overlook the underlying gravity of the offense with an unwarranted emphasis on the success of the criminal activity." (*Ibid.*) The requisite intent may be established by circumstantial evidence. (*People v. Medina* (2007) 41 Cal.4th 685, 699 [kidnapping to facilitate a carjacking]; see *People v. Beeman* (1984) 35 Cal.3d 547, 558 ["Direct evidence of the mental state of the accused is rarely available except through his or her testimony."]; *People v. Matson* (1974) 13 Cal.3d 35, 41 ["[F]elonious intent . . . must usually be inferred from all of the facts and circumstances disclosed by the evidence, rarely being directly provable."].)

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[4] The full instruction was as follows: "The defendants are charged in Count 1 with kidnapping for the purpose of ransom in violation of Penal Code section 209(a). [¶] To prove that the defendant is guilty of this crime, the People must prove that: [¶] 1. The defendant kidnapped, abducted, seized or carried away another person; [¶] 2. The defendant held or detained the other person; [¶] 3. The defendant did so for ransom or to get money or something valuable; [¶] 4. The other person did not consent to being kidnapped, abducted, seized or carried away; [¶] AND [¶] 5. The defendant did not actually and reasonably believe that the other person consented to being kidnapped, abducted, seized or carried away."

2. Standard of review

We apply the following standard of review: "'[W]e review the whole record to determine whether any rational trier of fact could have found the essential elements of the crime . . . beyond a reasonable doubt. [Citation.] The record must disclose substantial evidence to support the verdict—i.e., 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.] In applying this test, we review the evidence in the light most favorable to the prosecution and presume in support of the judgment the existence of every fact the jury could reasonably have deduced from the evidence. [Citation.] "Conflicts and even testimony [that] is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends. [Citation.] We resolve neither credibility issues nor evidentiary conflicts; we look for substantial evidence. [Citation.]" [Citation.] A reversal for insufficient evidence "is unwarranted unless it appears 'that upon no hypothesis whatever is there sufficient substantial evidence to support' " the jury's verdict. [Citation.]' [Citation.]" (*People v. Manibusan* (2013) 58 Cal.4th 40, 87; accord, *People v. Banks* (2014) 59 Cal.4th 1113, 1156, abrogated on another point in *People v. Scott* (2015) 61 Cal.4th 363, 386-387, 391, fn. 3.)

3. Application to the present case

a. Matamoros

Matamoros argues there was insufficient evidence he participated in or aided and abetted the kidnapping for ransom.

He notes that he "denied involvement and was just trying to get to his truck that was parked so that he could complete a job." Matamoros argues: "No evidence was presented that [he] was aware of or shared the intent to participate in the kidnapping for ransom. The evidence demonstrates that Camarena merely wanted to talk to Amezcua." Matamoros further asserts, "There was no evidence presented that [he] held Amezcua to get money." We conclude substantial evidence supported the conviction.

The prosecutor argued Matamoros aided and abetted the crime. "A person aids and abets the commission of a crime when he or she, (i) with knowledge of the unlawful purpose of the perpetrator, (ii) and with the intent or purpose of committing, facilitating or encouraging commission of the crime, (iii) by act or advice, aids, promotes, encourages or instigates the commission of the crime." (*People v. Cooper* (1991) 53 Cal.3d 1158, 1164; accord, *People v. Delgado* (2013) 56 Cal.4th 480, 486.) The jury was so instructed.[5]

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[5] The jury was instructed: "To prove that the defendant is guilty of a crime based on aiding and abetting that crime, the People must prove that: [¶] 1. The perpetrator committed the crime; [¶] 2. The defendant knew that the perpetrator intended to commit the crime; [¶] 3. Before or during the commission of the crime, the defendant intended to aid and abet the perpetrator in committing the crime; [¶] AND [¶] 4. The defendant's words or conduct did in fact aid and abet the perpetrator's commission of the crime. [¶] Someone aids and abets a crime if he or she knows of the perpetrator's unlawful purpose and he or she specifically intends to, and does in fact, aid, facilitate, promote, encourage, or instigate the perpetrator's commission of that crime. [¶] If all of these requirements are proved, the defendant does not need to actually have been present when the crime was committed to be guilty as an aider and abettor. [¶] If you

There was substantial evidence from which a rational trier of fact could find Matamoros acted with the requisite knowledge and purpose and held Amezcua for ransom or money. Matamoros knew Rodriguez owed money to Ruiz, the "guy from Las Vegas," among others. Two weeks prior to the kidnapping, Matamoros had facilitated a meeting between Ruiz and Rodriguez. The two men argued about Rodriguez's debt. On the day prior to the kidnapping, Camarena, accompanied by an unidentified companion, confronted, physically assaulted and threatened Amezcua. Camarena said Rodriguez owed him money. Camarena returned the following day accompanied by Matamoros. Matamoros was seated in the front passenger seat when Camarena pointed a gun out the window at Amezcua and ordered, "Get in or I'll kill you." Matamoros was present when Huerta forced Amezcua into the vehicle at knifepoint. As Camarena drove away from the abduction site, Matamoros spoke to someone by telephone saying, "Don't worry, we got him, we'll get the money." Amezcua testified that "defendants"—Matamoros and Camarena—told him to call Rodriguez; they wanted to talk to Rodriguez because he owed them money. Amezcua placed more than 30 calls to Rodriguez before Rodriguez responded. As police officers subsequently approached the vehicle, Matamoros took a fully loaded handgun from Camarena and handed it back to him. This evidence is

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conclude that defendant was present at the scene of the crime or failed to prevent the crime, you may consider that fact in determining whether the defendant was an aider and abettor. However, the fact that a person is present at the scene of a crime or fails to prevent the crime does not, by itself, make him or her an aider and abettor."

inconsistent with Matamoros's claim Camarena merely wanted to talk to Amezcua. Defendants abducted Amezcua by force. They were armed with a loaded gun and had access to extra ammunition and multiple knives. A knife was found in the front passenger door compartment where Matamoros had been sitting. This was substantial evidence Matamoros was guilty of abducting Amezcua to obtain ransom from Rodriguez. The jury could reasonably conclude defendants intended to hold Amezcua until Rodriguez paid them money.

b. Camarena

Camarena argues, "[N]o evidence demonstrates that [he] held Amezcua for ransom because no ransom demand was ever made" nor was there an offer "to exchange Amezcua for any type of consideration." Camarena concludes, "Without the offered exchange, there can be no ransom." Further, Camarena argues he "was entitled to actual evidence of a ransom demand to be convicted on aggravated kidnapping." Camarena does not cite and we have not found any legal authority for the proposition that an explicit ransom demand is an element of the charged crime. As the Court of Appeal explained in *People v. Anderson, supra*, 97 Cal.App.3d at page 425, "The crime of kidnap[p]ing for ransom is complete when the kidnap[p]ing is done for the specific purpose of obtaining ransom even though the purpose is not accomplished." Moreover, pursuant to the plain and clear language of section 209, subdivision (a), a defendant need only *intend* to hold the victim for ransom or money. (*People v. Lopez* (2003) 31 Cal.4th 1051, 1056; *People v. Lawrence* (2000) 24 Cal.4th 219, 230-231.) Section 209, subdivision (a) by its express terms does not require an explicit ransom demand. Here, despite

the law enforcement officers' intervention before defendants had an opportunity to speak with Rodriguez, the jury could reasonably conclude defendants intended to hold Amezcua until they got money from Rodriguez. Accordingly, we reject Camarena's insufficient evidence argument.

B. Lesser Included Offense Instruction

Defendants argue it was prejudicial error to fail to sua sponte instruct on false imprisonment and attempted extortion. We conclude there was no error. And even if the trial court did err, there was no prejudice to defendants.

"'Extortion is the obtaining of property from another, with his consent, . . . induced by a wrongful use of force or fear. . . .' (§ 518.) Section 524 provides that attempted extortion is committed when a person attempts 'by means of any threat . . . to extort money or other property from another.' 'Fear, such as will constitute extortion, may be induced by a threat . . . [¶] . . . [t]o do an unlawful injury to the person or property of the individual threatened.' (§ 519; *id.* subd. (1).) 'The elements of the crime of attempted extortion are (1) a specific intent to commit extortion and (2) a direct ineffectual act done towards its commission.' [Citation.]" (*People v. Ochoa* (2016) 2 Cal.App.5th 1227, 1231; accord, *People v. Salas* (2004) 116 Cal.App.4th 741, 749.) Attempted extortion is a lesser necessarily included offense of kidnapping for ransom. (*People v. Eid* (2014) 59 Cal.4th 650, 656; *People v. Serrano* (1992) 11 Cal.App.4th 1672, 1677.)

"Section 236 defines false imprisonment as 'the unlawful violation of the personal liberty of another.' False imprisonment occurs 'when "the victim is 'compelled to remain where he does not wish to remain, or to go where he does not wish to go.'"'

[Citation.]" (*People v. Williams* (2017) 7 Cal.App.5th 644, 672.) False imprisonment is a felony when "effected by violence, menace, fraud, or deceit." (§ 237, subd. (a).) Misdemeanor false imprisonment is a lesser included offense of kidnapping for ransom. (*People v. Eid, supra*, 59 Cal.4th at p. 656.) But it is less clear whether felony false imprisonment is a lesser included offense of kidnapping for ransom. (See *People v. Greenberger, supra*, 58 Cal.App.4th at p. 374 [felony false imprisonment], citing *People v. Morrison* (1964) 228 Cal.App.2d 707, 713 [misdemeanor false imprisonment] We assume for purposes of discussion that both felony and misdemeanor false imprisonment are lesser included offenses of kidnapping for ransom.

The trial court is required to inform jurors of the law that is relevant to the evidence that has been presented and the charges that have been filed. "'This sua sponte obligation extends to lesser included offenses if the evidence "raises a question as to whether all of the elements of the charged offense are present and there is evidence that would justify a conviction of such a lesser offense."' [Citation.]" (*People v. Moon* (2005) 37 Cal.4th 1, 25.)

However, not every possible lesser included offense instruction need be given. "[T]here must be substantial evidence of the lesser included offense, that is, 'evidence from which a rational trier of fact could find beyond a reasonable doubt' that the defendant committed the lesser offense. (*People v. Berryman* (1993) 6 Cal.4th 1048, 1081.) Speculation is insufficient to require the giving of an instruction on a lesser included offense. (*Ibid.; People v. Wilson* (1992) 3 Cal.4th 926, 941.) In addition, a lesser included instruction need not be given when there is no evidence that the offense is less than that charged. [Citation.]"

(*People v. Mendoza* (2000) 24 Cal.4th 130, 174.) "'On appeal, we review independently the question whether the trial court failed to instruct on a lesser included offense.' [Citation.]" (*People v. Avila* (2009) 46 Cal.4th 680, 705; accord, *People v. Trujeque* (2015) 61 Cal.4th 227, 271.) As noted above, we find no error.

There was no substantial evidence the kidnapping for ransom offense was less than that charged. The evidence established defendants forcibly kidnapped Amezcua. (They did not merely intend to commit extortion and simply take a direct but *ineffectual* step towards committing extortion.) Moreover, defendants kidnapped Amezcua for the purpose of obtaining money or ransom from Rodriguez. When Camarena first accosted Amezcua, he said Rodriguez owed him money and he was there to collect. He told Amecua, "We'll be back, it will be worse tomorrow." The following day, after abducting Amezcua, defendants again said Rodriquez owed them money. Matamoros, speaking on a cell phone, said "Don't worry, we got him, *we'll get the money*." (Italics added.) The evidence reflected the purpose of the abduction was to secure money from Rodriguez, nothing less. Contrary to Matamoros's contention, the evidence did not establish Camarena detained Amezcua simply because he wanted to talk to him. If Camarena wanted only to talk, there would have been no need for a loaded gun, extra ammunition and knives; there would have been no need to force Amezcua into the car and abscond with him. The trial court had no sua sponte duty to instruct on false imprisonment or attempted extortion. Moreover, given the strength of the evidence, even if the instructions had been given, there is no reasonable probability the jury would have convicted defendants of a lesser offense.

(*People v. Prince* (2007) 40 Cal.4th 1179, 1267; *People v. Breverman* (1998) 19 Cal.4th 142, 149, 165.)

Defendants concede simple kidnapping is not a lesser included offense of kidnapping for ransom under the statutory elements test because simple kidnapping, unlike kidnapping for ransom, includes an asportation element. (*People v. Greenberger, supra*, 58 Cal.App.4th at p. 368, fn. 56.) In the trial court, defendants requested a simple kidnapping instruction as a *lesser related* offense. On appeal, they argue simple kidnapping was a lesser included offense of kidnapping for ransom under the accusatory pleading test, therefore the trial court had a sua sponte duty to instruct on simple kidnapping. "[T]he accusatory pleading test . . . look[s] not to official definitions, but to whether the accusatory pleading describes the greater offense in language such that the offender, if guilty, must necessarily have also committed the lesser crime. [Citation.]" (*People v. Moon, supra,* 37 Cal.4th at pp. 25-26.) The complaint alleged defendants "did . . . carry away" Amezcua. Assuming this issue is properly before us, it is unavailing. As discussed above, there was no substantial evidence the offense was less than that charged, and no reasonable probability the jury would have convicted defendants of a lesser offense.

C. Lesser Related Offense Instruction

Defendants argue it was prejudicial error to refuse to instruct on simple kidnapping as a *lesser related* offense. "Lesser included offenses are distinguished from lesser *related* offenses, which 'merely bear some relationship' to another offense. [Citation.]" (*People v. Robinson* (2016) 63 Cal.4th 200, 207, fn. 3.)

There was no error because the parties did not both agree to the instruction.

A defendant has no federal constitutional right to compel the giving of a lesser related offense instruction. (*Hopkins v. Reeves* (1998) 524 U.S. 88, 90-91, 97-98; *People v. Foster* (2010) 50 Cal.4th 1301, 1343-1344.) Further, under state law, "[a] defendant has no right to instructions on lesser related offenses, even if he or she requests the instruction and it would have been supported by substantial evidence, because California law does not permit a court to instruct concerning an uncharged lesser related crime unless agreed to by both parties. [Citations.]" (*People v. Jennings* (2010) 50 Cal.4th 616, 668; accord, *People v. Batchelor* (2014) 229 Cal.App.4th 1102, 1116; *People v. Hall* (2011) 200 Cal.App.4th 778, 781.) Here, the prosecutor objected to the instruction on simple kidnapping. Therefore, the trial court did not err in refusing to so instruct.

D. Testimony About Victim's Fear of Retaliation

As noted above, Detective Guerrero testified Amezcua feared retaliation. Defense counsel sought to exclude that testimony as more prejudicial than probative. The trial court denied exclusion. The trial court found: "First . . . it's relevant. Second, yes, it's hearsay. But, third, it falls within the state of mind exception under [Evidence Code sections] 1250 or 1251 for previously existing, and does not appear to be made under circumstances indicating a lack of trustworthiness under [Evidence Code section] 1252. [¶] As far as [Evidence Code section] 352, more prejudicial than probative, the conduct here is extremely serious, kidnapping for ransom, so I don't think the jury is going to be shocked if they hear that a witness is afraid of

retaliation such that they wouldn't be able to listen to any of the other evidence. [¶] And it is probative as to the witness'[s] credibility and why he testified the way he did at the preliminary hearing."

""Evidence that a witness is afraid to testify or fears retaliation for testifying is relevant to the credibility of that witness and is therefore admissible." [Citations.] . . . For such evidence to be admissible, there is no requirement to show threats against the witness were made by the defendant personally or the witness's fear of retaliation is "directly linked" to the defendant. [Citation.]' [Citation.]" (Fn. omitted.) (*People v. Valdez* (2012) 55 Cal.4th 82, 135; accord, *People v. Chism* (2014) 58 Cal.4th 1266, 1291-1292) The admission of such evidence is subject to the trial court's discretion under Evidence Code section 352. (*People v. Chism, supra*, 58 Cal.4th at pp. 1290-1291; *People v. Harris* (2008) 43 Cal.4th 1269, 1289.)

Matamoros argues the "highly inflammatory" evidence led the jury to believe he was a dangerous person who caused Amezcua to be concerned for his safety. Moreover, he argues, defense counsel had no opportunity to cross-examine Amezcua about his fear because Amezcua did not testify to that state of mind at the preliminary hearing; it was only at trial that Detective Guerrero testified Amezcua feared retaliation.[6] Matamoros reasons because Amezcua's credibility was the principal issue at trial, the evidence of Amezcua's fear "tipped the balance in the prosecution's favor." He asserts the error was prejudicial. He further contends, "[B]ecause the trial court's

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[6] It appears Detective Guerrero first testified to this effect at the due diligence hearing.

error in admitting the evidence violated [defendant's] federal constitutional rights, it is reversible unless the government proves the error to be harmless beyond a reasonable doubt." Camarena argues the evidence Amezcua feared retaliation was irrelevant and more prejudicial than probative.

We disagree with defendants' assertions. The fear of retaliation evidence was relevant to Amezcua's credibility. (*People v. Chism, supra*, 58 Cal.4th at p. 1292; *People v. Valdez, supra,* 55 Cal.4th at p. 137.) Amezcua's preliminary hearing testimony, which was introduced at trial, was inconsistent with what he told Detective Guerrero. During the preliminary hearing, Amezcua professed not to remember details and minimized the seriousness of defendants' actions. For example, he denied, initially, that Camarena had grabbed him around the neck at the barber shop. He said Camarena never touched him in any way. He also testified he did not remember whether, on the day he was kidnapped, Camarena had been holding anything in his hand. When pressed, he said Camarena *could have been* pointing a gun at him. He further denied Huerta had assaulted him with a knife. Amezcua testified he did not remember whether Huerta touched him, he did not think so. He then said the "young man" grabbed him and forced him into the car. Finally he admitted Huerta had a small knife and he "poked me a little bit." Amezcua testified he did not know whether there was a gun in the car.

Evidence Amezcua feared retaliation was relevant as a possible explanation for the reluctant, minimizing nature of his preliminary hearing testimony as well as his absence from the trial. Further, the evidence was not "highly inflammatory" when viewed in relation to defendants' conduct. And although

Amezcua was an important prosecution witness, his testimony was corroborated in significant part by other witnesses. The trial court could reasonably conclude evidence Amezcua feared retaliation was more probative than prejudicial. And because the evidence was properly admitted, there was no violation of defendant's federal constitutional rights. (*People v. Panah* (2005) 35 Cal.4th 395, 482, fn. 31; *People v. Benavides* (2005) 35 Cal.4th 69, 95.)

We next turn to the argument, very briefly raised by Matamoros, that allowing Detective Guerrero to testify about Amezcua's fear of retaliation violated Matamoros's Sixth Amendment rights because Matamoros had no opportunity to cross-examine Amezcua on this issue. The Attorney General argues the statement was hearsay, but not testimonial hearsay, therefore it was not barred under *Crawford v. Washington* (2004) 541 U.S. 36.

We conclude, based on California Supreme Court authority, that Detective Guerrero's testimony about Amezcua's fear was not hearsay; it was admitted not for the truth but as evidence of Amezcua's state of mind as relevant to his credibility. The United States Supreme Court has held the confrontation clause does not bar the use of out-of-court statements "for purposes other than establishing the truth of the matter asserted." (*Crawford v. Washington, supra*, 541 U.S. at p. 60, fn. 9; accord, *People v. Melendez* (2016) 2 Cal.5th 1, 26; *People v. Thomas* (2012) 53 Cal.4th 771, 803.) Moreover, our Supreme Court has held evidence a witness fears retaliation is relevant to credibility and is not offered for the truth; further, because it is not hearsay, testimonial or otherwise, a defendant's confrontation clause objection under these circumstances is meritless. (*People v.*

Burgener (2003) 29 Cal.4th 833, 869; accord, *People v. Seumanu* (2015) 61 Cal.4th 1293, 1313 [threat evidence "was not hearsay because it was admissible not for its truth but as evidence of [the witness's] state of mind that was relevant to his credibility"]; *People v. Chism, supra*, 58 Cal.4th at pp. 1291-1292 [threat evidence relevant to jury's assessment of witness's credibility and admissible for that *nonhearsay* purpose]; *People v. Harris, supra*, 43 Cal.4th at p. 1288 & fn. 4 [rejecting Sixth Amendment claim]; *People v. Sapp* (2003) 31 Cal.4th 240, 281 [threat evidence admissible for *nonhearsay* purpose of showing why witness did not come forward sooner]; see generally, Evid. Code, § 780, subd. (f).)

In *People v. Burgener, supra*, 29 Cal.4th at page 869, our Supreme Court explained: "On appeal, defendant renews his claims that the evidence [a witness was threatened] was hearsay and unduly prejudicial and adds that its admission violated his federal rights to due process and confrontation. . . . Those constitutional claims, which depend on a finding that the threat evidence was hearsay, are . . . meritless. This evidence was not offered for its truth. [¶] Evidence that a witness is afraid to testify or fears retaliation for testifying is relevant to the credibility of that witness and is therefore admissible. [Citations.] . . . In this case, the threats explained why [the witness's] testimony in 1981 differed in certain respects from her current testimony."

Burgener is controlling here. Evidence Amezcua feared retaliation tended to explain why he was reluctant to testify at the preliminary hearing and why he made himself unavailable to testify at trial.

E. Camarena's Confrontation Rights Regarding Prior Testimony

1. Amezcua's Unavailability

a. The applicable law

Camarena challenges the trial court's decision to allow the prosecution to introduce Amezcua's preliminary hearing testimony at trial. Camarena argues the prosecution did not exercise due diligence in attempting to locate Amezcua.

"A criminal defendant has the right, guaranteed by the confrontation clauses of both the federal and state Constitutions, to confront the prosecution's witnesses. (U.S. Const., 6th Amend.; Cal. Const., art. 1, § 15.) . . . [¶] Although important, the constitutional right of confrontation is not absolute. (*Chambers v. Mississippi* [(1973)] 410 U.S. [284,] 295; [*People v.*] *Cromer* [(2001)] 24 Cal.4th [889,] 897.) 'Traditionally, there has been "an exception to the confrontation requirement where a witness is unavailable and has given testimony at previous judicial proceedings against the same defendant [and] which was subject to cross-examination . . . ." [Citations.] Pursuant to this exception, the preliminary hearing testimony of an unavailable witness may be admitted at trial without violating a defendant's confrontation right. [Citation.]" (*People v. Herrera* (2010) 49 Cal.4th 613, 620-621; accord, *People v. Seijas* (2005) 36 Cal.4th 291, 303.) This traditional exception is codified in Evidence Code section 1291, subdivision (a).[7] (*People v. Herrera, supra*, 49 Cal.4th at p. 621; *People v. Friend* (2009) 47 Cal.4th 1, 67.)

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[7] Evidence Code section 1291, subdivision (a) states: "Evidence of former testimony is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness and: [¶] (1) The former testimony is offered against a person who offered it in evidence in his own behalf on the former occasion or against

"A witness who is absent from a trial is not 'unavailable' in the constitutional sense unless the prosecution has made a 'good faith effort' to obtain the witness's presence at trial. [*Barber v. Page* (1968) 390 U.S. 719, 724-725.] The United States Supreme Court has described the good-faith requirement this way: 'The law does not require the doing of a futile act. Thus, if no possibility of procuring the witness exists . . . , "good faith" demands nothing of the prosecution. But if there is a possibility, albeit remote, that affirmative measures might produce the declarant, the obligation of good faith *may* demand their effectuation. "The lengths to which the prosecution must go to produce a witness . . . is a question of reasonableness." [Citation.] The ultimate question is whether the witness is unavailable despite good-faith efforts undertaken prior to trial to locate and present that witness.' (*Ohio v. Roberts* (1980) 448 U.S. 56, 74, disapproved on another point in *Crawford v. Washington* (2004) 541 U.S. 36, 60-68.)" (*People v. Herrera, supra,* 49 Cal.4th at p. 622.)

"Our Evidence Code features a similar requirement for establishing a witness's unavailability. Under section 240, subdivision (a)(5) . . . , a witness is unavailable when he or she is '[a]bsent from the hearing and the proponent of his or her statement has exercised *reasonable diligence* but has been unable to procure his or her attendance by the court's process.' (Italics

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the successor in interest of such person; or [¶] (2) The party against whom the former testimony is offered was a party to the action or proceeding in which the testimony was given and had the right and opportunity to cross-examine the declarant with an interest and motive similar to that which he has at the hearing."

added.)[8] The term '[r]easonable diligence, often called "due diligence" in case law, "'connotes persevering application, untiring efforts in good earnest, efforts of a substantial character.'"' (*People v. Cogswell* (2010) 48 Cal.4th 467, 477.) Considerations relevant to the due diligence inquiry 'include the timeliness of the search, the importance of the proffered testimony, and whether leads of the witness's possible location were competently explored.' (*People v. Wilson* (2005) 36 Cal.4th 309, 341 [relying on *Cromer, supra*, 24 Cal.4th at p. 904].) In this regard, 'California law and federal constitutional requirements are the same. . . .' (*People v. Valencia* (2008) 43 Cal.4th 268, 291-292.)" (*People v. Herrera, supra*, 49 Cal.4th at p. 622.)

"We review the trial court's resolution of disputed factual issues under the deferential substantial evidence standard [citation], and independently review whether the facts demonstrate prosecutorial good faith and due diligence [citation]." (*People v. Herrera, supra*, 49 Cal.4th at p. 623; accord, *People v. Foy* (2016) 245 Cal.App.4th 328, 339.) Here, because the facts are undisputed, our review is de novo. (*People v. Valencia, supra*, 43 Cal.4th at p. 292; *People v. Smith* (2003) 30 Cal.4th 581, 610.)

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[8] Evidence Code section 240 provides: "(a) Except as otherwise provided in subdivision (b), 'unavailable as a witness' means that the declarant is any of the following: [¶] . . . [¶] (5) Absent from the hearing and the proponent of his or her statement has exercised reasonable diligence but has been unable to procure his or her attendance by the court's process."

b. The prosecution's efforts to locate Amezcua

A due diligence hearing was held on Monday, January 11, 2016. The investigating officer, Detective Guerrero, and two investigators with the district attorney's office, Cindy Palm and Jeff Bright, testified at the hearing. Their testimony was as follows.

i. Detective John Guerrero

Detective Guerrero had been in contact with Amezcua following the kidnapping, in October 2014, through the first preliminary hearing, on March 18, 2015, after which this case was dismissed and refiled. (Amezcua did not testify at the second preliminary hearing, held on October 2, 2015.) Amezcua at all times "really did not want to be involved[.]" Amezcua told Detective Guerrero he feared retaliation. Detective Guerrero knew Amezcua was "transient" and staying at one of Rodriguez's recycling centers. Detective Guerrero was in contact with Amezcua by phone and in person. He served Amezcua with a subpoena to secure his attendance at the first preliminary hearing. Detective Guerrero also transported Amezcua to that hearing. For a short time after the preliminary hearing, Amezcua continued to stay at the recycling center.

Sometime in April 2015, however, Detective Guerrero lost the ability to contact Amezcua. (This was eight months before the present trial commenced.) The telephone number Amezcua had provided no longer worked. Amezcua called Detective Guerrero and said he was staying with family members in Orange County. Amezcua said he did not know the address. He did not provide a telephone number. Amezcua continued to call Guererro periodically from restricted numbers to inquire about

the status of the case. Detective Guerrero testified: "[H]e would . . . say . . . I'm done with this case, I don't want to go to court anymore."

Detective Guerrero went to the recycling center where Amezcua had been staying, but no one there was able to provide any location information. The last time Detective Guerrero heard from Amezcua was early December 2015, when Amezcua called him. This was two months after the second preliminary hearing and one month prior to both the due diligence hearing and trial. Amezcua did not provide any contact information. Detective Guerrero told Amezcua the case was shortly going to be tried. He impressed upon Amezcua the importance of his attendance.

ii. Investigator Cindy Palm

Palm attempted to locate Amezcua in September 2015. This was two months before Detective Guerrero's last contact with Amezcua. Palm's search was limited because she lacked a birth date for Amezcua. Palm spoke to employees at three of Rodriguez's recycling centers. She also spoke to employees of adjacent markets at two of those locations. She did not learn any information regarding Amezcua: "They said they hadn't seen him in several months." Palm also searched multiple databases including Department of Motor Vehicles, gun registration, law enforcement, and credit databases. She received information about potential relatives in Pomona. Palm and fellow investigator Bright went to the Pomona location and spoke with Amezcua's nephew. The nephew said he had not spoken to Amezcua in several months. The nephew knew about this criminal case and that his uncle did not want to be involved. He thought Amezcua might be living somewhere in Orange County.

Palm did an "employment search" to no avail. When Palm learned Amezcua went by a moniker, she returned to the markets she had earlier visited and asked for Amezcua by that name. No one had any information. At that point, the case against defendants had been dismissed and was going to be refiled. Bright was assigned to continue the search for Amezcua.

iii. Investigator Jeff Bright

One week prior to the due diligence hearing, Bright received Amezcua's birth date. He searched Department of Motor Vehicles and law enforcement databases and obtained three possible addresses for Amezcua. Bright went to all three locations and did not learn anything of use. As noted above, although Investigators Palm and Bright spoke with Amezcua's nephew, the nephew did not know where Amezcua was and had not heard from him. Bright also telephoned three Los Angeles homeless shelters, the coroner's office and several local hospitals. He contacted the California Department of Corrections. He found no record of Amezcua.

c. Analysis

The Attorney General argues Camarena forfeited any claim under *Crawford v. Washington, supra*, 541 U.S. 36 by objecting in the trial court solely on due diligence grounds. We conclude the due diligence objection preserved the constitutional claim because the due diligence requirement arises from a defendant's Sixth Amendment confrontation rights. (*People v. Herrera, supra*, 49 Cal.4th at pp. 620-621; *People v. Friend, supra*, 47 Cal.4th at pp. 67-68; see *People v. Guerra* (2006) 37 Cal.4th 1067, 1084-1085, fn. 4, disapproved on another point in *People v. Rundle* (2008) 43

Cal.4th 76, 151 [constitutional claims resting on same facts or legal standards defendant asked trial court to apply are not forfeited].)

We agree with the trial court's conclusion that the prosecution exercised reasonable diligence under the circumstances, hence admitting Amezcua's preliminary hearing testimony did not violate defendant's Sixth Amendment rights. The prosecution competently sought leads to Amezcua's possible location. Detective Guerrero was in contact with Amezcua and knew his whereabouts until sometime in April 2015, eight months prior to trial. After he lost the ability to contact Amezcua in person or by telephone, Detective Guerrero visited the recycling center. But no one at the recycling center was able to provide any information about Amezcua's location. From April 2015 through November 2015, Amezcua continued to call Detective Guerrero for updates on the case. During his last contact with Amezcua one month prior to trial, Detective Guerrero told Amezcua the trial would soon commence and it was important that he be present. That was the last time Amezcua called Detective Guerrero. Meanwhile, in September 2015, three to four months prior to trial, Palm attempted to locate Amezcua. On two separate occasions, she questioned employees at three of Rodriguez's recycling centers and two adjacent markets. She searched multiple databases. She traveled to Pomona and spoke with Amezcua's nephew. And within one week of trial, Bright made further efforts to locate Amezcua. He searched motor vehicle and law enforcement databases, traveled to three possible addresses for Amezcua, and contacted homeless shelters, hospitals, the Department of Corrections and the coroner's office.

All leads were explored. There is no indication there was more that could have been done.

The efforts to locate Amezcua were timely. Detective Guerrero's initial efforts began eight months before trial, in April 2015. It may have been prudent for Detective Guerrero to take steps to locate Amezcua beginning in April 2015 beyond visiting the recycling center. But there is no reason to believe additional steps taken prior to Palm's efforts in September 2015 would have yielded better results. When Palm began looking for Amezcua, Detective Guerrero was still receiving periodic telephone calls from him; however, no one had seen or heard from Amezcua for several months.

As the victim of defendants' crimes, Amezcua was potentially an important witness. But he was not forthcoming when he testified at the preliminary hearing. And he had consistently made known his desire not to be involved. His nephew confirmed that his uncle did not want anything to do with the case. The clear inference is that Amezcua did not want to be found.

Camarena argues in part, "[O]ne or both [of the investigators] spoke to a nephew of Amezcua who put them off simply by saying that his uncle did not want to get involved. The disinclination of a family member to assist the investigator should have resulted in a warrant for the nephew's arrest, so that he could be brought in and testified. Just taking his word for the fact that his uncle was disinclined to cooperate is not diligence." [*sic*] But the nephew did not simply say his uncle did not want to be involved. He also said he had not spoken to Amezcua in several months. The nephew thought Amezcua *might* be living somewhere in Orange County. The reasonable inference is the

nephew did not know where Amezcua was. There is no reason to believe arresting the nephew, even if "disinclination . . . to assist" was a crime, would have led to any useful information.

F. Meaningful Opportunity to Cross-Examine[9]

Camarena asserts he did not have a meaningful opportunity to cross-examine Amezcua at the preliminary hearing. "Here, [Camarena was] represented by counsel at the preliminary hearing, but not the same counsel who conducted the trial. [Joseph Gutierrez, the attorney who represented Camarena at the first preliminary hearing,] did have an opportunity to cross-examine Mr. Amezcua on the statements reflected in the prosecutor's questions but [his] motives were to attempt to show there was not enough evidence to hold [Camarena] over for trial. Of course, [his] theor[y] of the case [was] undeveloped. The motive of an attorney hired for the preliminary hearing only who seeks to better position a defendant for settlement may in the larger picture be the same as the motive of that defendant's later trial attorney, namely to defend the defendant. But the difference in audience between the jury and the judge, and the difference in legal standard between that required to convict and that required to hold on charges is markedly different in effect. [¶] . . . Trial counsel did not get to ask Amezcua whether he was actually plotting with Rodriguez to commit insurance fraud, or plotting with [Camarena] and Matamoros to steal money from

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[9] This issue does not appear to have been raised in the trial court. Ordinarily, we would conclude the argument is forfeited. (*People v. Williams* (2008) 43 Cal.4th 584, 626; *People v. Harris* (2005) 37 Cal.4th 310, 332.) The Attorney General, however, raises no objection on that ground.

Rodriguez. The jury did not get to see Amezcua answer that, or any other question. This was not sufficiently meaningful cross-examination to satisfy the Sixth Amendment and *Crawford*. It was certainly not meaningful enough to justify the lack of effort spent in getting Amezcua to testify at trial." (Fn. omitted.)

A defendant's interest and motive at a second proceeding need not be identical to that at a first proceeding, only similar. (*People v. Valencia, supra*, 43 Cal.4th at pp. 293-294.) "Both the United States Supreme Court and [the California Supreme Court] have concluded that 'when a defendant has an opportunity to cross-examine a witness at the time of his or her prior testimony, that testimony is deemed sufficiently reliable to satisfy the confrontation requirement [citation], regardless whether subsequent circumstances bring into question the accuracy or the completeness of the earlier testimony.' [Citation.]" (*People v. Wilson* (2005) 36 Cal.4th 309, 343; accord, *People v. Valencia, supra*, 43 Cal.4th at p. 294.) "Frequently, a defendant's motive for cross-examining a witness during a preliminary hearing will differ from his or her motive for cross-examining that witness at trial. For the preliminary hearing testimony of an unavailable witness to be admissible at trial under Evidence Code section 1291, these motives need not be identical, only 'similar.' [Citation.] Admission of the former testimony of an unavailable witness is permitted under Evidence Code section 1291 and does not offend the confrontation clauses of the federal or state Constitutions—not because the opportunity to cross-examine the witness at the preliminary hearing is considered an exact substitute for the right of cross-examination at trial [citation], but because the interests of justice are deemed served by a balancing of the defendant's right to effective cross-

examination against the public's interest in effective prosecution. [Citations.]" (*People v. Zapien* (1993) 4 Cal.4th 929, 975; accord, *People v. Carter* (2005) 36 Cal.4th 1114, 1172-1173.)

A defendant's motive in cross-examining a witness at a preliminary hearing may differ some from the motive at trial, but the earlier testimony is nonetheless admissible at trial because, as noted above, the motives need not be identical, only similar. (*People v. Zapien, supra*, 4 Cal.4th at p. 975.) Moreover, "as long as a defendant was provided the *opportunity* for cross-examination, the admission of preliminary hearing testimony under Evidence Code section 1291 does not offend the confrontation clause of the federal Constitution simply because the defendant did not conduct a particular form of cross-examination that in hindsight might have been more effective. (See *People v. Zapien, supra*, 4 Cal.4th at p. 975.)" (*People v. Samayoa* (1997) 15 Cal.4th 795, 851.)

Camarena was present and represented by counsel at the preliminary hearing when Amezcua testified. Camarena's attorney cross-examined Amezcua. Defendant's interest in cross-examining Amezcua at the preliminary hearing was similar to his motive at trial—to challenge Amezcua's credibility and to discredit Amezcua's testimony with respect to Camarena's commission of the charged offense. Admission of Amezcua's preliminary hearing testimony at trial did not violate Camarena's confrontation rights. (*People v. Harris, supra*, 37 Cal.4th at p. 333; *People v. Carter, supra*, 36 Cal.4th at pp. 1173-1174; *People v. Samayoa, supra*, 15 Cal.4th at p. 850.)

IV. DISPOSITION

The judgments are affirmed.
NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

LANDIN, J.*

We concur:

KRIEGLER, Acting P.J.

BAKER, J.

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