

**SUPREME COURT OF CANADA**

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| **Citation:** R. *v.* Bradshaw, 2017 SCC 35, [2017] 1 S.C.R. 865 | **Appeal Heard:** November 3, 2016  **Judgment Rendered:** June 29, 2017  **Docket:** 36537 |

Between:

Her Majesty The Queen

Appellant

and

Robert David Nicholas Bradshaw

Respondent

- and -

Attorney General of Ontario, British Columbia Civil Liberties Association and Criminal Lawyers’ Association of Ontario

Interveners

**Coram:** McLachlin C.J. and Abella, Moldaver, Karakatsanis, Wagner, Côté and Brown JJ.

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| **Reasons for Judgment:**  (paras. 1 to 97) | Karakatsanis J. (McLachlin C.J. and Abella, Wagner and Brown JJ. concurring) |

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| **Dissenting Reasons:**  (paras. 98 to 188) | Moldaver J. (Côté J. concurring) |

R. *v.* Bradshaw, 2017 SCC 35, [2017] 1 S.C.R. 865

Her Majesty The Queen Appellant

v.

Robert David Nicholas Bradshaw Respondent

and

Attorney General of Ontario,

British Columbia Civil Liberties Association and

Criminal Lawyers’ Association of Ontario Interveners

**Indexed as:** R. ***v.*** Bradshaw

2017 SCC 35

File No.: 36537.

2016: November 3; 2017: June 29.

Present: McLachlin C.J. and Abella, Moldaver, Karakatsanis, Wagner, Côté and Brown JJ.

on appeal from the court of appeal for british columbia

*Criminal law — Evidence — Hearsay — Admissibility — Principled exception to hearsay rule — Trial judge admitting co‑accused’s hearsay statement into evidence — When can trial judge rely on corroborative evidence to conclude that threshold reliability of hearsay statement is established.*

Two people were shot to death. Suspected by police, T became the target of a Mr. Big investigation, during which he told an undercover officer that he shot both victims. He then told Mr. Big that he had shot one victim and that B had shot the other. T was arrested. When he later re‑enacted the murders for police, he implicated B in both. T and B were charged with two counts of first degree murder and T pled guilty to second degree murder. Because T refused to give sworn testimony at B’s trial, the Crown sought to admit into evidence T’s re‑enactment, which had been video‑recorded. Following a *voir dire*, the trial judge admitted the re‑enactment, under the principled exception to the hearsay rule. A jury convicted B on two counts of first degree murder. The Court of Appeal allowed the appeal, set aside B’s convictions and ordered a new trial.

Held (Moldaver and Côté JJ. dissenting): The appeal should bedismissed.

*Per* McLachlin C.J. andAbella, Karakatsanis, Wagner and Brown JJ.: Hearsay evidence is presumptively inadmissible because it is often difficult for the trier of fact to assess its truth. However, it can be admitted under the principled exception if the criteria of necessity and threshold reliability are met on a balance of probabilities.

In this case, the necessity of the hearsay evidence is established because T refused to testify. Thus, its admissibility rests on whether threshold reliability is met. Threshold reliability is established when the hearsay is sufficiently reliable to overcome the dangers arising from the difficulty of testing it. The hearsay dangers relate to the difficulties of assessing the declarant’s perception, memory, narration or sincerity. These dangers can be overcome by showing that (1) there are adequate substitutes for testing truth and accuracy (procedural reliability) or (2) that there are sufficient circumstantial or evidentiary guarantees that the statement is inherently trustworthy (substantive reliability). Substantive reliability is established when the statement is unlikely to change under cross‑examination. To determine whether substantive reliability is established, the trial judge can consider the circumstances in which the statement was made and evidence (if any) that corroborates or conflicts with the statement.

A trial judge can only rely on corroborative evidence to establish substantive reliability if it shows, when considered as a whole and in the circumstances of the case, that the only likely explanation for the hearsay statement is the declarant’s truthfulness about, or the accuracy of, the material aspects of the statement.

First, corroborative evidence must go to the truthfulness or accuracy of the material aspectsof the hearsay statement. Since hearsay is tendered for the truth of its contents, corroborative evidence must go to the truthfulness or accuracy of the content of the statement that the moving party seeks to rely on.

Second, corroborative evidence must assist in overcoming the specific hearsay dangersraised by the tendered statement. Corroborative evidence does so if its combined effect, when considered in the circumstances of the case, shows that the only likely explanationfor the hearsay statement is the declarant’s truthfulness about, or the accuracy of, the material aspects of the statement. Otherwise, alternative explanations for the statement that could have been elicited or probed through cross‑examination, and the hearsay dangers, persist. Corroborative evidence is of assistance in establishing substantive reliability if it shows that alternative explanations for the statement are unavailable. In contrast, corroborative evidence that is equally consistent with the truthfulness and accuracy of the statement as well as another hypothesis is of no assistance. To be relied on for the purpose of rejecting alternative hypotheses, corroborative evidence must itself be trustworthy.

In sum, to determine whether corroborative evidence is of assistance in the substantive reliability inquiry, a trial judge should: (1) identify the material aspects of the hearsay statement that are tendered for their truth; (2) identify the specific hearsay dangers raised by those aspects of the statement in the particular circumstances of the case; (3) based on the circumstances and these dangers, consider alternative, even speculative, explanations for the statement; and (4) determine whether, given the circumstances of the case, the corroborative evidence led at the *voir dire* rules out these alternative explanations such that the only remaining likely explanation for the statement is the declarant’s truthfulness about, or the accuracy of, the material aspects of the statement.

The trial judge erred in relying significantly on corroborative evidence that was of no assistance in establishing substantive reliability to deem the re‑enactment statement admissible. The material aspect of the statement was T’s assertion that B participated in the murders. The specific danger raised by T’s statement was the inability of the trier of fact to assess whether T lied about B’s participation in the murders. T gave inconsistent statements about B’s participation. He also had a significant motive to lie to reduce his own culpability. Furthermore, T was a *Vetrovec* witness, a witness who cannot be trusted due to his unsavoury character. Given the hearsay dangers presented by the re‑enactment statement, an alternative explanation is that T lied about B’s participation in the murders. Therefore, corroborative evidence will only assist in establishing the substantive reliability of the re‑enactment statement if it shows, when considered in the circumstances of the case, that the only likely explanation is that T was truthful about B’s participation. Considered as a whole, the corroborative evidence relied on by the trial judge did not meet this standard. For example, while the weather evidence and forensic evidence showed that T accurately described the way the murders unfolded and the weather on the nights of the murders, this evidence does not mitigate the danger that T lied about B’s participation. Furthermore, while there are recordings of B admitting that he participated in the murders, there are concerns about the trustworthiness of these admissions. Much of the corroborative evidence relied on by the trial judge was probative of B’s guilt, and thus could be considered by the trier of fact in the trial on the merits, but none of it was of assistance in establishing the threshold reliability of the re‑enactment statement.

The threshold reliability of the hearsay statement is not otherwise established. Jury warnings about the dangers of hearsay evidence or *Vetrovec* testimony do not provide a satisfactory basis for the trier of fact to rationally evaluate the truth and accuracy of the hearsay statement. Instructing a jury on howto evaluate a statement that it lacks the meansto evaluate does not address the hearsay dangers that underlie the exclusionary rule. Given that the trier of fact could not adequately test the trustworthiness of T’s statement, and there were no circumstances or corroborative evidence showing that this statement was inherently trustworthy, it should not have been admitted into evidence.

*Per* Moldaver and Côté JJ. (dissenting): The trial judge did not err in admitting T’s re‑enactment. His ruling was amply supported by the record and is entitled to deference.

The principled approach to hearsay recognizes that threshold reliability can be met in three ways: (1) where a statement has sufficient features of substantive reliability; (2) where the statement has adequate features of procedural reliability; or (3) where the statement does not satisfy either of the first two ways, but incorporates features of both which, in combination, justify its admission. Under this third way, where a statement has a sufficient level of trustworthiness, relative to the strength of the procedural safeguards for the trier of fact to evaluate its ultimate reliability, the statement is safe to admit.

In this case, T’s re‑enactment was admissible under the third way of establishing threshold reliability. The hearsay dangers at issue — sincerity along with memory and perception — were sufficiently overcome by powerful corroborative evidence indicating the statement’s trustworthiness and a number of procedural safeguards that provided the jury with the tools it needed to evaluate its truth and accuracy.

In reaching a different conclusion, the majority has departed from the functional approach to threshold reliability by unduly restricting the extrinsic evidence that a court can consider when assessing a statement’s substantive reliability and by adopting a narrow view of the procedural safeguards available at trial that can equip the jury with the tools it needs to assess the ultimate reliability of a statement.

The functional approach emphasizes that there is no bright‑line distinction between factors that inform threshold and ultimate reliability. For extrinsic evidence, the inquiry is focused on whether the evidence addresses hearsay dangers by providing information about whether the statement is trustworthy. The majority’s approach instead creates a threshold test within the threshold test, which unnecessarily complicates the analysis and discards extrinsic evidence that can be crucial for evaluating threshold reliability. Trial judges should be trusted to limit the scope of extrinsic evidence that can be considered in a hearsay *voir dire* on a case‑by‑case basis to ensure that the proceedings are not derailed.

In this unusual case, the corroborative evidence included surreptitiously recorded conversations in which B admitted his involvement in the murders, telephone records as circumstantial evidence implicating B in the murders and forensic evidence from the crime scenes confirming T’s account of the details of the murders. Considered cumulatively, this evidence provides powerful support for the trustworthiness of T’s re‑enactment. There was also circumstantial indicia of trustworthiness, including: the fact that the re‑enactment was voluntary and free flowing; that it was contrary to T’s interest, in that he did not attempt to shift blame to B but instead implicated himself in two counts of first degree murder; and that T’s alleged motivation to fabricate was rebutted by his prior consistent statement to Mr. Big. There is no evidence of any inducements or assurances made by the police prior to T’s re‑enactment, nor is there any information to suggest that T’s plea to second degree murder had anything to do with his participation in the re‑enactment.

As for procedural reliability, there is no principled distinction between safeguards in place at the time the hearsay statement was made and safeguards available at trial. Both enhance the ability of the trier of fact to critically evaluate the evidence. As in this case, the latter may include jury cautions, the limited admission of prior inconsistent statements that contradict the hearsay statement, requiring the Crown to call the police officers who took prior inconsistent statements as witnesses so that they can be cross‑examined by defence counsel, and permitting enhanced leeway for defence counsel during closing submissions. The trial judge is uniquely positioned to adapt and implement these measures based on the specific circumstances of the case.

The majority’s unwillingness to consider these various procedural safeguards relied upon by the trial judge in this case leads it to skirt the third way of establishing threshold reliability — the one applied by the trial judge in this case — in which features of substantive and procedural reliability may, in conjunction, justify the admission of a hearsay statement.

In conjunction, the re‑enactment’s features of substantive and procedural reliability were capable of satisfying the test for threshold reliability. The trial judge made a difficult call in a close case. He was in the best position to make that call based on his assessment of the trustworthiness of the evidence and the jury’s ability to evaluate it. And his analysis discloses no legal error. As a result, his ruling is entitled to deference. It is not the role of the Court to second guess the trial judge’s reasonably exercised judgment from a position far removed from the trial setting. Doing so betrays both the deference owed to trial judges and the trust and confidence placed in juries to follow instructions and use their common sense and reason to evaluate evidence.

The trial judge’s refusal to admit T’s prior inconsistent statement given on May 15, 2010, for the truth of its contents is also entitled to deference. The trial judge applied the correct test and considered the relevant factors in finding this statement to be inadmissible. This included the fact that the statement was not video‑recorded, that it was contradicted by extrinsic evidence and that T had a strong incentive to exaggerate his involvement in the murders.

Ultimately, there is no reason to send this case back for a second trial. B had a fair trial before a properly instructed jury that was well positioned to critically evaluate the reliability of the re‑enactment. Accordingly, his two convictions for first degree murder should be restored.

**Cases Cited**

By Karakatsanis J.

**Applied:** *R. v. Khelawon*, 2006 SCC 57, [2006] 2 S.C.R. 787; **referred to:** *Vetrovec v. The Queen*, [1982] 1 S.C.R. 811; *R. v. Hart*, 2014 SCC 52, [2014] 2 S.C.R. 544; *R. v. B. (K.G.)*, [1993] 1 S.C.R. 740; *R. v. Baldree*, 2013 SCC 35, [2013] 2 S.C.R. 520; *R. v. Youvarajah*, 2013 SCC 41, [2013] 2 S.C.R. 720; *R. v. Hawkins*, [1996] 3 S.C.R. 1043; *R. v. U. (F.J.)*, [1995] 3 S.C.R. 764; *R. v. Couture*, 2007 SCC 28, [2007] 2 S.C.R. 517; *R. v. Smith*, [1992] 2 S.C.R. 915; *R. v. Blackman*, 2008 SCC 37, [2008] 2 S.C.R. 298; *R. v. Starr*, 2000 SCC 40, [2000] 2 S.C.R. 144; *R. v. R. (D.)*, [1996] 2 S.C.R. 291; *R. v. Khan*, [1990] 2 S.C.R. 531; *R. v. Khela*, 2009 SCC 4, [2009] 1 S.C.R. 104; *R. v. Smith*, 2009 SCC 5, [2009] 1 S.C.R. 146; *R. v. Salah*, 2015 ONCA 23, 319 C.C.C. (3d) 373.

By Moldaver J. (dissenting)

*R. v. Baldree*, 2013 SCC 35, [2013] 2 S.C.R. 520; *R. v. Khelawon*, 2006 SCC 57, [2006] 2 S.C.R. 787; *R. v. Devine*, 2008 SCC 36, [2008] 2 S.C.R. 283; *R. v. Blackman*, 2008 SCC 37, [2008] 2 S.C.R. 298, aff’g (2006), 84 O.R. (3d) 292; *R. v. Youvarajah*, 2013 SCC 41, [2013] 2 S.C.R. 720; *R. v. Couture*, 2007 SCC 28, [2007] 2 S.C.R. 517; *R. v. Khan*, [1990] 2 S.C.R. 531; *R. v. Hawkins*, [1996] 3 S.C.R. 1043; *R. v. B. (K.G.)*, [1993] 1 S.C.R. 740; *R. v. Hamilton*, 2011 ONCA 399, 271 C.C.C. (3d) 208; *R. v. U. (F.J.)*, [1995] 3 S.C.R. 764; *R. v. Hart*, 2014 SCC 52, [2014] 2 S.C.R. 544; *R. v. Abbey*, 2009 ONCA 624, 246 C.C.C. (3d) 301; *R. v. Carroll*, 2014 ONCA 2, 304 C.C.C. (3d) 252; *R. v. McNamara (No. 1)* (1981), 56 C.C.C. (2d) 193; *R. v. R. (T.)*, 2007 ONCA 374, 85 O.R. (3d) 481; *R. v. Lowe*, 2009 BCCA 338, 274 B.C.A.C. 92; *R. v. Goodstoney*, 2007 ABCA 88, 218 C.C.C. (3d) 270; *R. v. Smith*, 2009 SCC 5, [2009] 1 S.C.R. 146; *R. v. Adjei*, 2013 ONCA 512, 309 O.A.C. 328; *R. v. Stirling*, 2008 SCC 10, [2008] 1 S.C.R. 272; *R. v. Corbett*, [1988] 1 S.C.R. 670; *R. v. Carroll*, 1999 BCCA 65, 118 B.C.A.C. 219; *R. v. Noël*, 2002 SCC 67, [2002] 3 S.C.R. 433; *R. v. S. (S.)*, 2008 ONCA 140, 232 C.C.C. (3d) 158; *R. v. Post*, 2007 BCCA 123, 217 C.C.C. (3d) 225; *R. v. Tash*, 2013 ONCA 380, 306 O.A.C. 173; *R. v. Kimberley* (2001), 56 O.R. (3d) 18.

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APPEAL from a judgment of the British Columbia Court of Appeal (Neilson, Bennett and Garson JJ.A.), 2015 BCCA 195, 323 C.C.C. (3d) 475, 372 B.C.A.C. 77, 640 W.A.C. 77, 20 C.R. (7th) 398, [2015] B.C.J. No. 884 (QL), 2015 CarswellBC 1168 (WL Can.), setting aside the accused’s convictions for first degree murder and ordering a new trial. Appeal dismissed, Moldaver and Côté JJ. dissenting.

Margaret A. Mereigh and David Layton, for the appellant.

Richard S. Fowler, Q.C., Eric Purtzki and Karin Blok, for the respondent.

Michael Bernstein, for the intervener the Attorney General of Ontario.

Greg J. Allen, for the intervener the British Columbia Civil Liberties Association.

Louis P. Strezos and Samuel Walker, for the intervener the Criminal Lawyers’ Association of Ontario.

The judgment of McLachlin C.J. and Abella, Karakatsanis, Wagner and Brown JJ. was delivered by

Karakatsanis J. —

1. Introduction
2. Hearsay is an out-of-court statement tendered for the truth of its contents. It is presumptively inadmissible because — in the absence of the opportunity to cross-examine the declarant at the time the statement is made — it is often difficult for the trier of fact to assess its truth. Thus hearsay can threaten the integrity of the trial’s truth-seeking process and trial fairness. However, hearsay may exceptionally be admitted into evidence under the principled exception when it meets the criteria of necessity and threshold reliability.
3. In this case, the Crown tendered hearsay from Roy Thielen, an accomplice, implicating Robert Bradshaw, the accused, in two murders. The trial judge ruled that this hearsay statement was admissible. The Court of Appeal allowed the appeal and ordered a new trial.
4. The following issue arises in this appeal: When can a trial judge rely on corroborative evidence to conclude that the threshold reliability of a hearsay statement is established?
5. In my view, corroborative evidence may be used to assess threshold reliability if it overcomes the specific hearsay dangers presented by the statement. These dangers may be overcome on the basis of corroborative evidence if it shows, when considered as a whole and in the circumstances of the case, that the only likely explanation for the hearsay statement is the declarant’s truthfulness about, or the accuracy of, the material aspects of the statement. The material aspects are those relied on by the moving party for the truth of their contents.
6. Here, the hearsay statement was tendered for the truth of Thielen’s claim that Bradshaw participated in the murders. The specific hearsay danger raised by Thielen’s statement was the inability of the trier of fact to assess whether Thielen lied about Bradshaw’s participation in the murders. In addition to the reliability dangers that are inherent in all hearsay statements, there are specific reasons to be concerned that Thielen lied. Thielen had a motive to lie to shift the blame to Bradshaw. Thielen previously said that he had shot both victims, and had not implicated Bradshaw. Furthermore, Thielen was a *Vetrovec* witness, a witness who cannot be trusted to tell the truth due to his unsavoury character (*Vetrovec v. The Queen*, [1982] 1 S.C.R. 811).
7. The trial judge relied significantly on the existence of corroborative evidence to deem Thielen’s statement admissible. However, the evidence he relied on did not, when considered in the circumstances of the case, show that the only likely explanation was that Thielen was truthful about Bradshaw’s involvement in the murders. It did not substantially negate the possibility that Thielen lied about Bradshaw’s participation in the murders. While this corroborative evidence may increase the probative value of the re-enactment statement if admitted, it is of no assistance in assessing the statement’s threshold reliability. The trial judge therefore erred in relying on this corroborative evidence.
8. Given that the trier of fact could not adequately test the trustworthiness of Thielen’s statement, and there were no circumstances or corroborative evidence showing that this statement was inherently trustworthy, it should not have been admitted into evidence.
9. For the reasons that follow, I would dismiss the appeal.
10. Background
11. Laura Lamoureux and Marc Bontkes were killed in March 2009, five days apart. The police suspected that Thielen was involved in both murders. They ran a Mr. Big operation targeting Thielen. In a Mr. Big operation, undercover officers recruit a suspect into a fictitious criminal organization for the purpose of eliciting a confession from him (*R. v. Hart*, 2014 SCC 52, [2014] 2 S.C.R. 544, at para. 85). The officers befriend the suspect and demonstrate that membership in the criminal organization provides rewards and friendship. The suspect discovers that his membership is conditional on a confession to the crime boss, Mr. Big (*Hart*, at paras. 1-2).
12. As part of the Mr. Big operation, Thielen went on a road trip with Cst. B., an undercover agent, in May 2010. During the road trip, Thielen told Cst. B. that he had shot both Lamoureux and Bontkes.
13. In July 2010, Thielen met an undercover agent posing as the crime boss. During this meeting, Thielen said that he had shot Lamoureux but that “Paulie” and Michelle Motola had shot Bontkes. “Paulie” was Bradshaw’s nickname.
14. Later that day, Thielen and Bradshaw met up at the Best Western Hotel. Their conversation was recorded, but only the latter part is audible. Bradshaw said that he had shot Bontkes and had participated in both murders.
15. Two days later, Thielen and Bradshaw met at Bothwell Park. Bradshaw discussed an unsuccessful attempt to kill Bontkes, which preceded Bontkes’s actual murder in March 2009.
16. Thielen was arrested on July 30, 2010. He initially denied his involvement in both murders. However, when the police told Thielen that he had been the target of a Mr. Big operation, he then described the murders and identified unnamed participants. The next day, he made another statement to the police in which he described the murders and directly named Bradshaw. A few days later, Thielen re-enacted the murders for the police officers and implicated Bradshaw in both murders. This re-enactment was recorded in a roughly six-hour video.
17. Thielen and Bradshaw were initially charged together with two counts of first degree murder. However, Thielen pled guilty to second degree murder before the trial started. Thielen was called as a Crown witness in Bradshaw’s trial, but refused to be sworn to give testimony. As a result, he was held in contempt of court. The Crown sought to admit part of the re-enactment video — a hearsay statement — into evidence.
18. Decisions Below
19. Following a *voir dire*, Greyell J. admitted the re-enactment video into evidence (2012 BCSC 2025). He found that this hearsay statement was necessary and sufficiently reliable to be admitted. In finding that the statement was sufficiently reliable, he noted that the re-enactment was voluntary, incriminating, and was made after Thielen received legal advice. The statement was also corroborated by extrinsic evidence. However, given Thielen’s unsavoury character, the trial judge determined that a strong *Vetrovec* warning regarding the re-enactment video was required.
20. The British Columbia Court of Appeal held that the trial judge erred in admitting the re-enactment video because it was not sufficiently reliable. The court noted that the trial judge relied significantly on evidence that did not implicate Bradshaw in the murders as corroboration. Furthermore, in the recorded conversations at the Best Western Hotel and Bothwell Park, Bradshaw did not implicate himself in the murders to the degree that Thielen implicated Bradshaw in the re-enactment. The British Columbia Court of Appeal concluded that the trial judge erred in finding that threshold reliability was established. It allowed the appeal, set aside the guilty verdicts, and ordered a new trial (2015 BCCA 195, 323 C.C.C. (3d) 475).
21. Analysis
    1. Legal Principles
22. Hearsay can exceptionally be admitted into evidence if it is necessary and sufficiently reliable. This appeal raises the following question: When can a trial judge rely on corroborative evidence to conclude that the threshold reliability of a hearsay statement is established? To answer, I turn to the rationale for the rule against hearsay and for the principled exception to this rule.
    * 1. The Principled Exception to the Hearsay Rule
23. The truth-seeking process of a trial is predicated on the presentation of evidence in court. Litigants make their case by presenting real evidence and *viva voce* testimony to the trier of fact. In court, witnesses give testimony under oath or solemn affirmation. The trier of fact directly observes the real evidence and hears the testimony, so there is no concern that the evidence was recorded inaccurately. This process gives the trier of fact robust tools for testing the truthfulness of evidence and assessing its value. To determine whether a witness is telling the truth, the trier of fact can observe the witness’s demeanor and assess whether the testimony withstands testing through cross-examination (*R. v. Khelawon*,2006 SCC 57,[2006] 2 S.C.R. 787, at para. 35).
24. Hearsay is an out-of-court statement tendered for the truth of its contents. Because hearsay is declared outside of court, it is often difficult for the trier of fact to assess whether it is trustworthy. Generally, hearsay is not taken under oath, the trier of fact cannot observe the declarant’s demeanor as she makes the statement, and hearsay is not tested through cross-examination (*R. v. B. (K.G.)*, [1993] 1 S.C.R. 740, at p. 764). Allowing a trier of fact to consider hearsay can therefore compromise trial fairness and the trial’s truth-seeking process. The hearsay statement may be inaccurately recorded, and the trier of fact cannot easily investigate the declarant’s perception, memory, narration, or sincerity (*Khelawon*, at para. 2). As Fish J. explains in *R. v. Baldree*, 2013 SCC 35, [2013] 2 S.C.R. 520:

First, the declarant may have *misperceived* the facts to which the hearsay statement relates; second, even if correctly perceived, the relevant facts may have been *wrongly remembered*; third, the declarant may have narrated the relevant facts in an *unintentionally misleading manner*; and finally, the declarant may have *knowingly made a false assertion*. The opportunity to fully probe these potential sources of error arises only if the declarant is present in court and subject to cross-examination. [Emphasis in original; para. 32.]

1. Given the dangers that hearsay evidence presents, “[t]he fear is that untested hearsay evidence may be afforded more weight than it deserves” (*Khelawon*, at para. 35). Therefore, while all relevant evidence is generally admissible, hearsay is presumptively inadmissible (*Khelawon*,at paras. 2-3).
2. However, some hearsay evidence “presents minimal dangers and its *exclusion*, rather than its admission, would impede accurate fact finding” (*Khelawon*,at para. 2 (emphasis in original)). Thus, categorical exceptions to the rule excluding hearsay developed through the common law over time. These traditional exceptions are based on admitting types of hearsay statements that were considered necessary and reliable, such as dying declarations (*Khelawon*, at para. 42; *R. v. Youvarajah*, 2013 SCC 41, [2013] 2 S.C.R. 720, at para. 20; J. H. Wigmore, *Evidence in Trials at Common Law* (2nd ed. 1923), vol. III, at p. 152).
3. Eventually, a more flexible approach to hearsay developed through the jurisprudence. Under the principled exception, hearsay can exceptionally be admitted into evidence when the party tendering it demonstrates that the twin criteria of necessity and threshold reliability are met on a balance of probabilities (*Khelawon*, at para. 47).
4. By only admitting necessary and sufficiently reliable hearsay, the trial judge acts as an evidentiary gatekeeper. She protects trial fairness and the integrity of the truth-seeking process (*Youvarajah*,at paras. 23 and 25). In criminal proceedings, the threshold reliability analysis has a constitutional dimension because the difficulties of testing hearsay evidence can threaten the accused’s right to a fair trial (*Khelawon*, at paras. 3 and 47). Even when the trial judge is satisfied that the hearsay is necessary and sufficiently reliable, she has discretion to exclude this evidence if its prejudicial effect outweighs its probative value (*Khelawon*, at para. 49).
5. In this case, the necessity of the re-enactment evidence is established because Thielen refused to testify. Thus, its admissibility rests on whether threshold reliability is met.
   * 1. Threshold Reliability
6. To determine whether a hearsay statement is admissible, the trial judge assesses the statement’s *threshold* reliability. Threshold reliability is established when the hearsay “is sufficiently reliable to overcome the dangers arising from the difficulty of testing it” (*Khelawon*, at para. 49). These dangers arise notably due to the absence of contemporaneous cross-examination of the hearsay declarant before the trier of fact (*Khelawon*, at paras. 35 and 48). In assessing threshold reliability, the trial judge must identify the specific hearsay dangers presented by the statement and consider any means of overcoming them (*Khelawon*, at paras. 4 and 49; *R. v. Hawkins*, [1996] 3 S.C.R. 1043, at para. 75). The dangers relate to the difficulties of assessing the declarant’s perception, memory, narration, or sincerity, and should be defined with precision to permit a realistic evaluation of whether they have been overcome.
7. The hearsay dangers can be overcome and threshold reliability can be established by showing that (1) there are adequate substitutes for testing truth and accuracy (procedural reliability) or (2) there are sufficient circumstantial or evidentiary guarantees that the statement is inherently trustworthy (substantive reliability) (*Khelawon*, at paras. 61-63; *Youvarajah*, at para. 30).
8. *Procedural* reliability is established when “there are adequate substitutes for testing the evidence”, given that the declarant has not “state[d] the evidence in court, under oath, and under the scrutiny of contemporaneous cross-examination” (*Khelawon*, at para. 63). These substitutes must provide a satisfactory basis for the trier of fact to rationally evaluate the truth and accuracy of the hearsay statement (*Khelawon*, at para. 76; *Hawkins*, at para. 75; *Youvarajah*, at para. 36). Substitutes for traditional safeguards include a video recording of the statement, the presence of an oath, and a warning about the consequences of lying (*B. (K.G.)*, at pp. 795-96). However, some form of cross-examination of the declarant, such as preliminary inquiry testimony (*Hawkins*) or cross-examination of a recanting witness at trial (*B. (K.G.)*; *R. v. U. (F.J.)*, [1995] 3 S.C.R. 764), is usually required (*R. v. Couture*, 2007 SCC 28, [2007] 2 S.C.R. 517, at paras. 92 and 95). In this respect, I disagree with the Court of Appeal’s categorical assertion that safeguards relevant to assessing procedural reliability are only “those in place when the statement is taken” (para. 30). Some safeguards imposed at trial, such as cross-examination of a recanting witness before the trier of fact, may provide a satisfactory basis for testing the evidence.
9. However, jury warnings about the dangers of hearsay evidence or *Vetrovec* testimony do not provide adequate substitutes for traditional safeguards. Instructing a jury on *how* to evaluate a statement that it lacks the *means* to evaluate does not address the hearsay dangers that underlie the exclusionary rule. Furthermore, *Vetrovec* warnings are designed to address concerns about a witness who is inherently untrustworthy, despite the opportunity to cross-examine in court. They are not tools for assessing the truth and accuracy of a hearsay statement in the absence of contemporaneous cross-examination.
10. A hearsay statement is also admissible if *substantive* reliability is established, that is, if the statement is inherently trustworthy (*Youvarajah*, at para. 30; *R. v. Smith*, [1992] 2 S.C.R. 915, at p. 929). To determine whether the statement is inherently trustworthy, the trial judge can consider the circumstances in which it was made and evidence (if any) that corroborates or conflicts with the statement (*Khelawon*,at paras. 4, 62 and 94-100; *R. v. Blackman*, 2008 SCC 37, [2008] 2 S.C.R. 298, at para. 55).
11. While the standard for substantive reliability is high, guarantee “as the word is used in the phrase ‘circumstantial guarantee of trustworthiness’, does not require that reliability be established with absolute certainty” (*Smith*,at p. 930). Rather, the trial judge must be satisfied that the statement is “so reliable that contemporaneous cross-examination of the declarant would add little if anything to the process” (*Khelawon*, at para. 49).  The level of certainty required has been articulated in different ways throughout this Court’s jurisprudence. Substantive reliability is established when the statement “is made under circumstances which substantially negate the possibility that the declarant was untruthful or mistaken” (*Smith*, at p. 933); “under such circumstances that even a sceptical caution would look upon it as trustworthy” (*Khelawon*, at para. 62, citing Wigmore, at p. 154); when the statement is so reliable that it is “unlikely to change under cross-examination” (*Khelawon*, at para. 107; *Smith*, at p. 937); when “there is no real concern about whether the statement is true or not because of the circumstances in which it came about” (*Khelawon*, at para. 62); when the only likely explanation is that the statement is true (*U. (F.J.)*, at para. 40).
12. These two approaches to establishing threshold reliability may work in tandem. Procedural reliability and substantive reliability are not mutually exclusive (*Khelawon*, at para. 65) and “factors relevant to one can complement the other” (*Couture*, at para. 80). That said, the threshold reliability standard always remains high — the statement must be sufficiently reliable to overcome the specific hearsay dangers it presents (*Khelawon*, at para. 49). For example, in *U. (F.J.)*, where the Court drew on elements of substantive and procedural reliability to justify the admission of a hearsay statement, both cross-examination of the recanting witness and corroborative evidence were required to meet threshold reliability, though neither on its own would have sufficed (see also *Blackman*, at paras. 37-52). I know of no other example from this Court’s jurisprudence of substantive and procedural reliability complementing each other to justify the admission of a hearsay statement. Great care must be taken to ensure that this combined approach does not lead to the admission of statements despite insufficient procedural safeguards and guarantees of inherent trustworthiness to overcome the hearsay dangers.
    * 1. Corroborative Evidence and Substantive Reliability
13. With these principles in mind, I turn to the issue at the heart of this appeal: When and how can a trial judge rely on corroborative evidence to conclude that substantive reliability is established?
14. The Crown submits that threshold reliability involves a consideration of all the corroborative evidence that supports the truthfulness of a statement, including evidence that does not implicate the accused, or directly confirm the disputed aspect of the statement. The Crown explains that this approach to corroboration is aligned with other areas of the law, including corroboration when assessing the ultimate reliability of hearsay statements, the ultimate reliability of unsavoury witness statements, and the threshold reliability of Mr. Big statements.
15. In contrast, the respondent Bradshaw submits that the trial judge can only consider evidence that corroborates the *purpose* for which a hearsay statement is tendered, and notes that the re-enactment statement was tendered to implicate him in the murders.
16. In my view, the Crown’s position that “a uniform definition of confirmatory evidence” should be employed “at both the threshold and ultimate reliability stages” is untenable because it misconstrues the relationship between threshold and ultimate reliability (A.F., at para. 96). It also misconstrues the relationship between threshold reliability and probative value.
17. In *R. v. Starr*, 2000 SCC 40, [2000] 2 S.C.R. 144, this Court held that corroborative evidence could not be considered in assessing the threshold reliability of hearsay. This bright-line rule was created to ensure that the trial judge did not invade the province of the trier of fact by pre-determining a hearsay statement’s ultimate reliability (para. 217).[[1]](#footnote-1)
18. *Khelawon* overturned *Starr* on this point. Charron J. explained that, in appropriate cases, corroborative or conflicting evidence can be considered in assessing threshold reliability (paras. 93-100). *Khelawon* established that “an item of evidence [that] goes to the trustworthiness of the statement . . . should no longer be excluded simply on the basis that it is corroborative in nature” (*Blackman*, at para. 55 (emphasis added)). But “[i]t is important to emphasize that *Khelawon* did not broaden the scope of the admissibility inquiry; it merely refocused it” (*Blackman*, at para. 54). While *Khelawon* overturned the prohibition on considering corroborative evidence in the admissibility inquiry, it reaffirmed the distinction between threshold and ultimate reliability (para. 50; *Blackman*, at para. 56).
19. The distinction between threshold and ultimate reliability, while “a source of confusion”, is crucial (*Khelawon*, at para. 50). Threshold reliability concerns admissibility, whereas ultimate reliability concerns reliance (*Khelawon*, at para. 3). When threshold reliability is based on the inherent trustworthiness of the statement, the trial judge and the trier of fact may both assess the trustworthiness of the hearsay statement. However, they do so for different purposes (*Khelawon*, at paras. 3 and 50). In assessing ultimate reliability, the trier of fact determines whether, and to what degree, the statement should be believed, and thus relied on to decide issues in the case (*Khelawon*, at para. 50; D. M. Paciocco and L. Stuesser, *The Law of Evidence* (7th ed. 2015), at pp. 35-36). This determination is made “in the context of the entirety of the evidence” including evidence that corroborates the accused’s guilt or the declarant’s overall credibility (*Khelawon*, at para. 3).
20. In contrast, in assessing threshold reliability, the trial judge’s preoccupation is whether in-court, contemporaneous cross-examination of the hearsay declarant would add anything to the trial process (*Khelawon*, at para. 49; see also H. Stewart, “*Khelawon*: The Principled Approach to Hearsay Revisited” (2008), 12 *Can. Crim. L.R.* 95, at p. 106). At the threshold stage, the trial judge must decide on the *availability* of competing explanations (substantive reliability) and whether the trier of fact will be in a position to choose between them by means of adequate substitutes for contemporaneous cross-examination (procedural reliability). For this reason, where procedural reliability is concerned with whether there is a satisfactory basis to rationally *evaluate* the statement, substantive reliability is concerned with whether the circumstances, and any corroborative evidence, provide a rational basis to *reject* alternative explanations for the statement, other than the declarant’s truthfulness or accuracy.
21. In short, in the hearsay context, the difference between threshold and ultimate reliability is qualitative, and not a matter of degree, because the trial judge’s inquiry serves a distinct purpose. In assessing substantive reliability, the trial judge does not usurp the trier of fact’s role. Only the trier of fact assesses whether the hearsay statement should ultimately be relied on and its probative value.
22. To preserve the distinction between threshold and ultimate reliability and to prevent the *voir dire* from overtaking the trial, “[t]here must be a distinction between evidence that is admissible on the *voir dire* to determine necessity and reliability, and the evidence that is admissible in the main trial” (Stewart, at p. 111; see also L. Lacelle, “The Role of Corroborating Evidence in Assessing the Reliability of Hearsay Statements for Substantive Purposes” (1999), 19 C.R. (5th) 376; *Blackman*, at paras. 54-57). As Charron J. explained in *Khelawon*, “the trial judge must remain mindful of the limited role that he or she plays in determining admissibility — it is crucial to the integrity of the fact-finding process that the question of ultimate reliability not be pre-determined on the admissibility *voir dire*” (para. 93). Similarly, she noted in *Blackman*: “The admissibility *voir dire* must remain focused on the hearsay evidence in question. It is not intended, and cannot be allowed by trial judges, to become a full trial on the merits” (para. 57). Limiting the use of corroborative evidence as a basis for admitting hearsay also mitigates the risk that inculpatory hearsay will be admitted simply because evidence of the accused’s guilt is strong. The stronger the case against the accused, the easier it would be to admit flawed and unreliable hearsay against him. The limited inquiry into corroborative evidence flows from the fact that, at the threshold reliability stage, corroborative evidence is used in a manner that is qualitatively distinct from the manner in which the trier of fact uses it to assess the statement’s ultimate reliability. As Lederman, Bryant and Fuerst explain, at the threshold reliability stage,

[t]he use of corroborative evidence should be directed to the reliability of the hearsay. Certain items of evidence can take on a corroborative character and be supportive of the Crown’s theory when considered in the context of the evidence as a whole. Such evidence relates to the merits of the case rather than to the limited focus of the *voir dire* in assessing the trustworthiness of the statement and is properly left to the ultimate trier of fact.

(S. N. Lederman, A. W. Bryant and M. K. Fuerst, *The Law of Evidence in Canada* (4th ed. 2014), at §6.140)

1. Thus, the Crown’s argument that the approach to corroboration when assessing the ultimate reliability of *Vetrovec* testimony is analogous to the approach for assessing the threshold reliability of hearsay is also fundamentally flawed. Further, an unsavoury witness, unlike a hearsay declarant, is a witness at trial and can be cross-examined. The particular dangers posed by the absence of cross-examination make it necessary to distinguish between the *Vetrovec* and hearsay approaches to corroborative evidence. As a result, I do not accept the Crown’s submissions in this regard.
2. In my view, the rationale for the rule against hearsay and the jurisprudence of this Court make clear that not all evidence that corroborates the declarant’s credibility, the accused’s guilt, or one party’s theory of the case, is of assistance in assessing threshold reliability. A trial judge can only rely on corroborative evidence to establish threshold reliability if it shows, when considered as a whole and in the circumstances of the case, that the only likely explanation for the hearsay statement is the declarant’s truthfulness about, or the accuracy of, the material aspects of the statement. If the hearsay danger relates to the declarant’s sincerity, truthfulness will be the issue. If the hearsay danger is memory, narration, or perception, accuracy will be the issue.
3. First, corroborative evidence must go to the truthfulness or accuracy of the *material aspects* of the hearsay statement (see *Couture*, at paras. 83-84; *Blackman*, at para. 57). Hearsay is tendered for the truth of its contents and corroborative evidence must go to the truthfulness or accuracy of the content of the hearsay statement that the moving party seeks to rely on. Because threshold reliability is about admissibility of evidence, the focus must be on the aspect of the statement that is tendered for its truth.[[2]](#footnote-2) The function of corroborative evidence at the threshold reliability stage is to mitigate the need for cross-examination, not generally, but *on the point* that the hearsay is tendered to prove.
4. A similar approach was taken in restricting the type of corroborative evidence that can be relied on to establish the threshold reliability of Mr. Big statements. In *Hart*, Moldaver J. (writing for the majority) concluded that there was a “complete lack of confirmatory evidence” (para. 143), disregarding corroborative evidence that merely confirmed the accused’s presence at the scene of the crime when it took place, because the Mr. Big statement was tendered to show that the accused killed his daughters, not that he was present at the scene of the crime. As Moldaver J. explained:

The issue has always been whether the respondent’s daughters drowned accidentally or were murdered. There was never any question that the respondent was present when his daughters entered the water. All of the objectively verifiable details of the respondent’s confession (e.g., his knowledge of the location of the drowning) flow from his acknowledged presence at the time the drowning occurred. [para. 143]

Thus, in assessing the threshold reliability of Mr. Big statements, the trial judge considers only corroborative evidence that goes to the truthfulness or accuracy of the material aspects of the statement.

1. Second, at the threshold reliability stage, corroborative evidence must work in conjunction with the circumstances to overcome the *specific hearsay dangers* raised by the tendered statement. When assessing the admissibility of hearsay evidence, “the scope of the inquiry must be tailored to the particular dangers presented by the evidence and limited to determining the evidentiary question of admissibility” (*Khelawon*, at para. 4). Thus, to overcome the hearsay dangers and establish substantive reliability, corroborative evidence must show that the material aspects of the statement are unlikely to change under cross-examination (*Khelawon*, at para. 107; *Smith*, at p. 937). Corroborative evidence does so if its combined effect, when considered in the circumstances of the case, shows that the *only likely explanation* for the hearsay statement is the declarant’s truthfulness about, or the accuracy of, the material aspects of the statement (see *U. (F.J.)*, at para. 40). Otherwise, alternative explanations for the statement that could have been elicited or probed through cross-examination, and the hearsay dangers, persist.
2. In assessing substantive reliability, the trial judge must therefore identify alternative, even speculative, explanations for the hearsay statement (*Smith*, at pp. 936-37). Corroborative evidence is of assistance in establishing substantive reliability if it shows that these alternative explanations are unavailable, if it “eliminate[s] the hypotheses that cause suspicion” (S. Akhtar, “Hearsay: The Denial of Confirmation” (2005), 26 C.R. (6th) 46, at p. 56 (emphasis deleted)). In contrast, corroborative evidence that is “equally consistent” with the truthfulness and accuracy of the statement as well as another hypothesis is of no assistance (*R. v. R. (D.)*, [1996] 2 S.C.R. 291,at paras. 34-35). Adding evidence that is supportive of the truth of the statement, but that is also consistent with alternative explanations, does not add to the statement’s inherent trustworthiness.
3. While the declarant’s truthfulness or accuracy must be more likely than any of the alternative explanations, this is not sufficient. Rather, the fact that the threshold reliability analysis takes place on a balance of probabilities means that, based on the circumstances and any evidence led on *voir dire*, the trial judge must be able to rule out any plausible alternative explanations on a balance of probabilities.
4. To be relied on for the purpose of rejecting alternative hypotheses for the statement, corroborative evidence must itself be trustworthy. Untrustworthy corroborative evidence is therefore not relevant to the substantive reliability inquiry (see *Khelawon*, at para. 108). Trustworthiness concerns are particularly acute when the corroborative evidence is a statement, rather than physical evidence (see Lacelle, at p. 390).
5. The jurisprudence of this Court provides two examples of corroborative evidence that could be relied on to establish threshold reliability.
6. In *R. v. Khan*, [1990] 2 S.C.R. 531, this Court held that a hearsay statement from a child regarding a sexual assault was admissible, notably because it was corroborated by a semen stain on the child’s clothes (p. 548). The child alleged that she had been sexually assaulted at the doctor’s office. She was only alone in the office for a brief period and “did not come into contact with any other male person during [that] period” (p. 534). Given the semen stain and the circumstances of the case, the only likely hypothesis was that the child had not lied about or misperceived the assault. The semen stain directly responded to the hearsay dangers.
7. *Khan* can be contrasted with *R. (D.)*, where this Court held that a child’s hearsay regarding a sexual assault by her father was inadmissible, although there was evidence that supported her statement: bloodstained underpants. This corroborative evidence was consistent with more than one hypothesis, both the possibility that her brother had assaulted her and the possibility that her father had assaulted her, and thus was of no assistance in assessing threshold reliability (paras. 34-35).
8. In *U. (F.J.)*, a hearsay statement was admissible in part because it was corroborated by a strikingly similar statement. The strikingly similar statement was capable of supporting the threshold reliability of the hearsay statement because the Court was able to rule out the possibilities that the similarity was purely coincidental, that the second declarant had heard the first statement and modeled her statement off of it, and that either statement was the result of collusion or outside influence. Importantly, Lamer C.J. was concerned with rejecting, not the hypothesis that the second statement was *in fact* based on the first, but the possibility that it *could have been* based on the first. He concluded that the only likely explanation for the similarity between the two statements was the truthfulness of the hearsay declarant (*U. (F.J.)*, at paras. 40 and 53).
9. In contrast, the corroborative evidence in *Khelawon*, bruises and garbage bags filled with clothes, was not capable of bolstering the threshold reliability of a hearsay statement regarding an assault. Charron J. explained that the bruises on the complainant’s body could have been caused by a fall rather than an assault. And while the complainant had alleged that the accused had put his clothes in garbage bags, Charron J. reasoned that the complainant “could have filled those bags himself” (para. 107). Given that the corroborative evidence was consistent with many hypotheses, it did not show that the only likely explanation was the declarant’s truthfulness about the assault.
10. Clarifying when corroborative evidence can be relied on to establish substantive reliability is not a departure from the functional approach to the admissibility of hearsay. There is no bright-line rule restricting the type of corroborative evidence that a trial judge can rely on to determine that substantive reliability is established. In all cases, the trial judge must consider the specific hearsay dangers raised by the statement, the corroborative evidence as a whole, and the circumstances of the case, to determine whether the corroborative evidence (if any) can be relied on to establish substantive reliability.
11. In sum, to determine whether corroborative evidence is of assistance in the substantive reliability inquiry, a trial judge should
    * + - 1. identify the material aspects of the hearsay statement that are tendered for their truth;
          2. identify the specific hearsay dangers raised by those aspects of the statement in the particular circumstances of the case;
          3. based on the circumstances and these dangers, consider alternative, even speculative, explanations for the statement; and
          4. determine whether, given the circumstances of the case, the corroborative evidence led at the *voir dire* rules out these alternative explanations such that the only remaining likely explanation for the statement is the declarant’s truthfulness about, or the accuracy of, the material aspects of the statement.
12. With these principles in mind, I now turn to the trial judge’s assessment of the threshold reliability of the re-enactment statement.
    1. Application
13. In concluding that the threshold reliability of the re-enactment statement was established, the trial judge relied on the fact that the statement was: (1) voluntary; (2) incriminating; (3) made after Thielen received legal advice; (4) a detailed, free-flowing narrative; and (5) corroborated by extrinsic evidence. As a result, he was satisfied that threshold reliability was established.
14. I conclude that the trial judge erred in relying significantly on corroborative evidence that did not show, in the circumstances of the case, that the only likely explanation was Thielen’s truthfulness about the material aspect of the re-enactment statement. Given this error, the trial judge’s admissibility ruling is not entitled to deference. This Court must therefore determine whether the hearsay re-enactment statement meets the reliability threshold. I conclude that it does not.
    * 1. The Trial Judge’s Reliance on Corroborative Evidence
15. The trial judge relied significantly on the existence of corroborative evidence to find that the re-enactment statement was admissible. In particular, he relied on

* forensic evidence that corroborated Thielen’s detailed description of the murders (para. 45);
* Thielen’s accurate description of the weather on the nights of the murders (para. 46);
* evidence of a conversation between Bontkes and Motola on the night Bontkes died (para. 47) (Motola was a third accomplice in Bontkes’s death and pled guilty to manslaughter in separate proceedings.);
* evidence that Bradshaw may have been present when Motola and Thielen discussed their plan to kill Bontkes (para. 52);
* call records between one of the murder victims and Bradshaw on the night of one of the murders, and between Thielen and Bradshaw on the night of the other murder (para. 51); and
* Bradshaw’s admissions at the Best Western and Bothwell Park (paras. 48-49).

1. As I shall explain, this corroborative evidence is of no assistance in the threshold reliability inquiry.
2. The first step in assessing the substantive reliability of a hearsay statement is identifying the material aspects of the statement. The re-enactment statement was tendered for the truth of Thielen’s claim that Bradshaw participated in the murders. Given the purpose for which the statement was tendered, the material aspect of the statement was Thielen’s assertion that Bradshaw participated in the murders.
3. As to the specific hearsay dangers presented by the statement, a number of common hearsay dangers were not in play in this case. The accuracy of the statement is not at issue because it was video-recorded. While the difficulties of investigating a hearsay declarant’s perception and memory are often dangers associated with hearsay evidence, these dangers are minimal in this case because the statement was not tendered to provide details of how the murders unfolded, but rather to prove that Bradshaw participated in the murders. It is hardly plausible that Thielen would have been mistaken — or wrongly remembered — whether Bradshaw participated in the murders.
4. Therefore, the specific hearsay danger presented by the re-enactment statement is the difficulty of testing Thielen’s sincerity with regards to Bradshaw’s participation in the murders. This danger is inherent in all hearsay statements due to the inability to test for and detect the hearsay declarant’s insincerity through contemporaneous, in-court cross-examination. Additionally, in this case, there are serious reasons to be concerned that Thielen lied about Bradshaw’s participation in the murders.
5. First, Thielen gave inconsistent statements about Bradshaw’s participation in the murders. In May 2010, Thielen told Cst. B. that he shot Lamoureux and Bontkes, and he did not implicate Bradshaw. When he met with the crime boss in July, Thielen implicated Bradshaw in the murders. When he was arrested, Thielen initially denied his own involvement in both murders. After the police told Thielen that he had been the target of a Mr. Big operation, he admitted that he had been involved in the murders and he implicated Bradshaw.
6. Second, Thielen had a significant motive to lie about Bradshaw’s participation in the murders. Like the hearsay declarant in *Youvarajah*, Thielen “had a strong incentive to minimize his role in the crime and to shift responsibility” to his accomplice (para. 33). Thielen had a motive to implicate Bradshaw to reduce his own culpability, particularly given his admissions to Cst. B. Although Thielen was charged with the first degree murder of Lamoureux and Bontkes, he ultimately pled guilty to second degree murder. Thielen’s motive to lie is relevant in assessing the reliability of his hearsay statement (*Blackman*, at para. 42).
7. Third, Thielen was a *Vetrovec* witness. In the trial judge’s words:

. . . there is already considerable evidence of Mr. Thielen’s unsavoury character before the jury. He has been described by a number of witnesses as a drug dealer, a thug, an enforcer and a murderer. He is clearly a person about whom a strong *Vetrovec* warning is appropriate. [para. 60 (CanLII)]

1. Given that a *Vetrovec* witness cannot be trusted to tell the truth, even under oath (*R. v. Khela*,2009 SCC 4, [2009] 1 S.C.R. 104, at para. 3), establishing that hearsay evidence from a *Vetrovec* witness is inherently trustworthy will be extremely challenging. However, there is no blanket prohibition on admitting hearsay from *Vetrovec* witnesses. In all cases, the trial judge must assess whether the hearsay dangers have been overcome. That said, the strong *Vetrovec* warning indicates that the dangers presented by the hearsay statement here are particularly severe.
2. The third step in assessing a hearsay statement’s substantive reliability is considering alternative explanations for the hearsay statement that arise from the particular circumstances of the case. Given the hearsay dangers presented by the re-enactment statement, an alternative explanation is that Thielen lied about Bradshaw’s participation in the murders.
3. With this in mind, corroborative evidence will only assist in establishing the substantive reliability of the re-enactment statement if it shows, when considered in the circumstances of the case, that the only likely explanation is that Thielen was truthful about Bradshaw’s involvement in the murders. When the hearsay danger is sincerity, substantive reliability is only established when the circumstances and corroborative evidence show that the possibility that the declarant lied is substantially negated, that “even a sceptical caution would look upon [the statement] as trustworthy” (Wigmore, at p. 154; *Khelawon*, at para. 62; *Couture*, at para. 101). Corroborative evidence or circumstances showing that the statement is inherently trustworthy are required to rebut the presumption of inadmissibility.
4. The forensic evidence, weather evidence, and evidence of a conversation between Bontkes and Motola did not implicate Bradshaw in the murders. This evidence is of no assistance in determining whether Thielen was being truthful about Bradshaw’s involvement in the murders. The fact that Thielen accurately described the way the murders unfolded and the weather on the nights of the murders does not mitigate the danger that he lied about Bradshaw’s participation. As an accomplice, Thielen was present at the scenes of the crimes and was well positioned to fabricate a story implicating Bradshaw (see *R. v. Smith*,2009 SCC 5, [2009] 1 S.C.R. 146, at para. 15; *R. v. Salah*, 2015 ONCA 23, 319 C.C.C. (3d) 373, at para. 116).
5. The remaining corroborative evidence relied on by the trial judge was probative of Bradshaw’s involvement in the murders. It will be for the trier of fact to determine whether or not this evidence increases the likelihood that Bradshaw is guilty. The call records show that Bradshaw may have spoken to Lamoureux and Thielen on the evenings in question, and the evidence of Bradshaw’s presence when the plan to kill Bontkes was discussed shows that Bradshaw may have been aware of this plan. However, this evidence, viewed in the circumstances, did not assist in effectively ruling out the alternative explanation for the re-enactment statement — the danger that Thielen lied about Bradshaw’s involvement in the murders.
6. Finally, the recorded conversations at the Best Western Hotel and Bothwell Park provide direct evidence of Bradshaw’s involvement in the murders. However, as I shall explain, there are concerns about the trustworthiness of these statements. As mentioned above, corroborative evidence must itself be trustworthy to be relied on to establish the threshold reliability of a hearsay statement (see *Khelawon*, at para. 108).
7. When Thielen was the target of a Mr. Big operation, undercover officers encouraged him to meet up with Bradshaw to clarify their respective roles in the murders. On July 21, 2010, Thielen and Bradshaw met in a room at the Best Western Hotel. Their conversation was recorded. The first eight minutes of the recorded conversation are inaudible because Bradshaw and Thielen were in the bathroom, while the tap was running. Cst. B. called Thielen to get him to leave the bathroom so the conversation could be captured. Once Bradshaw and Thielen moved into the main room, Bradshaw said that he had shot Bontkes and participated in both murders.
8. A few days later, Thielen and Bradshaw met at Bothwell Park. Their conversation was recorded again. During their meeting, Bradshaw discussed their unsuccessful attempt to kill Bontkes, before Bontkes was actually murdered in March 2009.
9. While this evidence provides some evidence of guilt, it does not assist, for several reasons, in effectively ruling out the possibility that Thielen lied about Bradshaw’s involvement in the murders.
10. The Best Western and Bothwell Park evidence was collected in a Mr. Big operation. Undercover officers were orchestrating the circumstances to obtain an admission from Thielen and then from Bradshaw. As the trial judge explained, the Best Western and Bothwell Park “meetings were set up by Constable B. with Mr. Thielen’s cooperation, during the course of the Mr. Big operation, in an endeavour to elicit evidence of Mr. Bradshaw’s possible participation in the murders of Ms. Lamoureux and Mr. Bontkes” (para. 43). Indeed, Cst. B. explained that he “wanted Mr. Thielen to get . . . the truth from Mr. Bradshaw” (examination in chief, A.R., vol. V, at p. 134) and that he gave Thielen instructions on what was required during his conversation with Bradshaw at the Best Western Hotel.
11. In Mr. Big operations, parties believe they are dealing with a criminal organization. They are often induced and threatened. As this Court noted in *Hart*: “Suspects confess to Mr. Big during pointed interrogations in the face of powerful inducements and sometimes veiled threats — and this raises the spectre of unreliable confessions” (para. 5). The Mr. Big operation raises concerns about Thielen’s motivation and role in these conversations, and the trustworthiness of Bradshaw’s statements at the Best Western and Bothwell Park.
12. As well, the initial part of the Best Western conversation was inaudible because Thielen and Bradshaw were in the bathroom and a tap was running. This raises questions about what followed. As I have said, the trial judge is required to consider alternative, even speculative, explanations that could account for the hearsay statement (*Smith* (1992), at pp. 936-37). Indeed, while this evidence was not before the trial judge at the time of his ruling, Bradshaw subsequently testified that, while the tap was running, Thielen asked him to lie and say that he had been involved in Lamoureux and Bontkes’s murders.
13. Furthermore, in the Bothwell Park conversation, Bradshaw primarily implicated himself in the attempted murder of Bontkes, rather than in Bontkes’s actual murder.
14. Of course, as the accused’s admissions, the recording of Bradshaw’s own words are admissible against him quite independently of whether Thielen’s re‑enactment video is admitted. Indeed, Bradshaw’s admissions at the Best Western and Bothwell Park were admitted into evidence for the jury’s consideration. That is not challenged on appeal.
15. However, these admissions are not of such a nature to justify the admission of Thielen’s highly suspect hearsay statements implicating Bradshaw. They do not, when considered in the circumstances and with the other evidence led at the *voir dire*, “substantially negate the possibility that the [hearsay] declarant was untruthful” about Bradshaw’s involvement in the murders (*Smith* (1992), at p. 933). Bradshaw’s Best Western admission does not, in the circumstances, demonstrate that Thielen’s statement would be unlikely to change under cross-examination (*Khelawon*, at para. 107; *Smith* (1992), at p. 937).
16. In *U. (F.J.)*, this Court held that “instances of statements so strikingly similar as to bolster their reliability will be rare” (para. 45). Lamer C.J. explained that a similar statement cannot bolster the reliability of a hearsay statement unless it is unlikely that “[t]he second declarant knew of the contents of the first statement, and based his or her statement in whole or in part on this knowledge” and unlikely that the similarity is due to outside influence (para. 40). Thielen was present for Bradshaw’s Best Western and Bothwell Park admissions, and could have based his re-enactment statement on this knowledge. Furthermore, outside influence cannot be rejected as a possible explanation for Bradshaw’s Best Western and Bothwell Park admissions. Indeed, according to Cst. B.’s testimony, he played a role in orchestrating the admissions. The Best Western and Bothwell Park statements were therefore of no assistance in establishing the inherent trustworthiness of the re-enactment statement.
17. The evidence led at the admissibility *voir dire* as corroborative of Thielen’s statement is unlike the semen stain in *Khan*, or the strikingly similar statement in *U. (F.J.)*. When considered in the circumstances of the case, this evidence does not show that the only likely explanation for the statement was Thielen’s truthfulness about Bradshaw’s involvement in the murders. Taken as a whole, this evidence therefore did not assist in establishing threshold reliability. While much of the evidence relied on by the trial judge was probative of Bradshaw’s guilt, and thus could be considered by the trier of fact in the trial on the merits, none of it was of assistance in establishing the threshold reliability of the re-enactment statement. Furthermore, as noted above, the evidence and circumstances here showed that there were serious reasons to be concerned that Thielen lied.
    * 1. Threshold Reliability of the Re-enactment Statement
18. Given the trial judge’s flawed approach to corroborative evidence, this Court must determine whether the threshold reliability of the hearsay re-enactment statement is nonetheless established. Are the serious hearsay dangers presented by the re-enactment statement overcome?
19. To respect the role of the trier of fact in assessing trustworthiness, I consider first the statement’s procedural reliability (*Khelawon*, at para. 92). There were few means for the trier of fact to determine whether Thielen lied about Bradshaw’s participation in the murders. While the accuracy of the reporting of the statement is not at issue in this case because it was video-taped, Thielen was not cross-examined at the time the statement was taken or subsequently. Thielen’s statement was not taken under oath and he was not warned of the consequences of lying before the statement was taken. Most importantly, he was not available to be cross-examined at trial. The trier of fact evidently did not possess a “sufficient substitute basis for testing the evidence” in the absence of cross-examination (*Khelawon*, at para. 105).
20. The trial judge considered “possible safeguards that [could] be put in place by the Crown and the court to overcome [the hearsay] dangers” (para. 19). He explained that Thielen’s inconsistencies could be put into evidence and that the Crown had agreed to call the police officers to whom Thielen gave the different statements, in order to allow the defence to cross-examine them on these inconsistencies (para. 59). He also noted that a strong *Vetrovec* warning would be given (para. 60).
21. Putting Thielen’s inconsistencies into evidence did not provide the jury with a sufficient substitute basis for evaluating the truth of the re-enactment statement. And while cross-examining the *recipient* of a hearsay statement may be helpful if there are concerns about the recipient’s credibility or reliability (*Blackman*, at para. 50), there were no such concerns in this case. As the Criminal Lawyers’ Association of Ontario (an intervener) notes, “where there is no doubt about what was actually said or under what circumstances — if the statement is video-taped, for instance — then cross-examination of the recipient does nothing to help assess whether the *content* of the hearsay is true” (I.F., at para. 32 (emphasis in original)). Furthermore, as explained above, jury warnings about the dangers of hearsay evidence and *Vetrovec* testimony do little to support the statement’s procedural reliability. Jury warnings do not provide an adequate substitute for the traditional safeguards. They are no substitute for other conditions of admissibility. Rules of evidence, such as the rule against hearsay, protect trial fairness and the integrity of the trial process by deeming certain types of evidence presumptively inadmissible.
22. Because there were few tools available for testing the truth and accuracy of the re-enactment statement, it could only be admitted if the circumstances in which it was made and corroborative evidence, if any, “substantially negate[d] the possibility that the declarant was untruthful” (*Smith* (1992), at p. 933).
23. The trial judge found that the statement was reliable because it was voluntary, made after Thielen had received legal advice, and was a “free-flowing narrativ[e]”. He also relied on the fact that it was incriminating. He reasoned that Thielen put himself at risk, even in the prison system, by implicating himself and others in the murders (para. 40).
24. However, these circumstances “while relevant, in essence simply point to an absence of factors that, if present, would detract from an otherwise trustworthy statement” (*Couture*,at para. 101). They do not provide a circumstantial guarantee of trustworthiness. Furthermore, while Thielen incriminated himself in the murders in the re-enactment video, he had already done so in his statements to police following his arrest, and during the Mr. Big operation. And while he may have put himself at risk in the prison system by implicating Bradshaw, he nonetheless benefited from the opportunity of reduced criminal liability: he pled guilty to the lesser charge of second degree murder. Thielen clearly had a significant motive to lie about Bradshaw’s involvement in the murders. The Court of Appeal rightfully noted that “[t]he [trial] judge did not sufficiently address the issues that would detract from the truthfulness of Mr. Thielen’s statements, including his considerable motive to lie to extricate himself from his admissions to Cst. B. that he committed first degree murder, not once, but twice” (para. 37).
25. Finally, as discussed above, the corroborative evidence relied on by the trial judge was of no assistance in establishing threshold reliability.
26. The hearsay danger raised by the re-enactment evidence, namely the inability to investigate Thielen’s sincerity about Bradshaw’s participation, is particularly difficult to overcome in this case. Thielen had a motive to lie about Bradshaw’s involvement in the murders and he initially did not implicate Bradshaw in the murders. Thielen is also a *Vetrovec* witness, a witness who cannot be trusted due to his unsavoury character. There are few tools available to the trier of fact to test Thielen’s sincerity. The circumstances in which the statement came about, and the evidence led at the *voir dire*, do not substantially negate the possibility that Thielen lied about Bradshaw’s participation in the murders.
27. This is not a case where the hearsay “presents minimal dangers and its *exclusion*, rather than its admission, would impede accurate fact finding” (*Khelawon*,at para. 2 (emphasis in original)). Rather, admitting the re-enactment statement would undermine the truth-seeking process and trial fairness. Hearsay is presumptively *inadmissible* and the trial judge erred in finding that this presumption was rebutted.
28. Conclusion
29. I conclude that the trial judge erred in admitting the re-enactment statement into evidence. The Crown failed to establish the threshold reliability of this statement on a balance of probabilities.
30. I would dismiss the appeal. I agree with the British Columbia Court of Appeal that the convictions be set aside and a new trial ordered.

The reasons of Moldaver and Côté JJ. were delivered by

Moldaver J. (dissenting) —

1. Overview
2. At issue in this appeal is the admissibility of a video re-enactment[[3]](#footnote-3) of the events surrounding the murders of Laura Lamoureux and Marc Bontkes in March 2009. In the re-enactment, which occurred in August 2010, some 17 months after the murders, Roy Thielen describes for the police how he and the respondent, Robert Bradshaw, carried out the murders together. After Mr. Thielen refused to testify at Mr. Bradshaw’s trial, the trial judge admitted the re-enactment under the principled approach to hearsay evidence.
3. My colleague, Karakatsanis J., concludes that the trial judge erred in doing so. She reaches this conclusion on the basis of a restrictive new test that departs from the functional approach to threshold reliability which this Court has endorsed in its modern jurisprudence.
4. With respect, I disagree with my colleague’s approach and her conclusion. I acknowledge that Mr. Thielen’s re-enactment was not problem-free and that hearsay dangers are generally more pronounced when a declarant is not available to be cross-examined. However, this was an unusual case, in that there was exceptionally powerful corroborative evidence, including surreptitiously recorded conversations in which Mr. Bradshaw admitted his involvement in the two murders. In addition, the trial judge adopted a number of procedural safeguards which placed the jury in a position to critically evaluate the impugned evidence. These included the limited admission of prior inconsistent statements taken by police officers along with the opportunity to cross-examine them, strict cautionary instructions to the jury and wide latitude given to defence counsel to canvass the same points in his closing submissions that he would have canvassed had he been able to cross-examine Mr. Thielen.
5. In conjunction, these factors — powerful corroborative evidence and procedural safeguards — were capable of satisfying the test for threshold reliability. The principled approach to hearsay should not stand in the way of the truth-seeking function of a trial where the impugned evidence is shown to be trustworthy and the jury has the tools it needs to critically evaluate its ultimate reliability. This was the conclusion of the trial judge, who was uniquely positioned to make this determination. In my view, his ruling admitting the video re-enactment was amply supported by the record and error-free. I see no basis in fact or law to interfere with it.
6. The trial judge’s decision to reject a defence application to tender another hearsay statement by Mr. Thielen which did not implicate Mr. Bradshaw is also entitled to deference. I would uphold it.
7. Accordingly, I would allow the appeal, set aside the judgment of the British Columbia Court of Appeal ordering a new trial and restore Mr. Bradshaw’s convictions for the first degree murders of Ms. Lamoureux and Mr. Bontkes.
8. Analysis
9. The modern approach governing the admissibility of hearsay evidence is the principled approach. Under this approach, hearsay evidence can be admitted where it is necessary and where it meets the test for threshold reliability. It is uncontested that Mr. Thielen’s refusal to testify at trial satisfies the necessity criterion.The focus of this appeal is on whether Mr. Thielen’s re-enactment meets the test for threshold reliability.

*The Test for Threshold Reliability*

1. Hearsay evidence is presumptively inadmissible primarily because of the difficulty in testing its reliability. There is always a risk that a witness may misperceive the facts, wrongly remember them, narrate events in a misleading or incomplete manner, or make an intentionally false assertion. When a statement is made in court, traditional safeguards — such as the presence of the declarant in the courtroom and cross-examination — protect against the danger of falsehoods or inaccuracies going undetected by the trier of fact. Without the declarant being present in court and subjected to contemporaneous cross-examination, the trier of fact may be unable to detect mistakes, exaggerations or deliberate falsehoods: *R. v. Baldree*, 2013 SCC 35, [2013] 2 S.C.R. 520, at paras. 31-32; *R. v. Khelawon*, 2006 SCC 57, [2006] 2 S.C.R. 787, at para. 2.
2. The extent to which the reliability of hearsay evidence may be difficult to assess varies according to context. In certain circumstances, the challenges in assessing the declarant’s perception, memory, narration or sincerity and the dangers arising from this will be sufficiently overcome to meet the test for threshold reliability: *R. v. Devine*, 2008 SCC 36, [2008] 2 S.C.R. 283, at para. 22; *R. v. Blackman*, 2008 SCC 37, [2008] 2 S.C.R. 298, at para. 35; *Khelawon*, at para. 61.
3. The principled approach to hearsay recognizes that threshold reliability can be met in three ways: (1) where the statement has sufficient features of substantive reliability; (2) where the statement has adequate features of procedural reliability; or (3) where the statement does not satisfy either of the first two ways, but incorporates features of both which, in combination, justify its admission. As I will explain, this case engages the third way and provides this Court with an opportunity to clarify its operation for the first time.
4. First, substantive reliability in this context refers to a statement’s degree of trustworthiness. Features of substantive reliability include the circumstances in which the statement was made and the existence of extrinsic evidence capable of corroborating or contradicting it: *R. v. Youvarajah*, 2013 SCC 41, [2013] 2 S.C.R. 720, at para. 30; *Khelawon*, at para. 62; *Blackman*, at para. 35; *R. v. Couture*, 2007 SCC 28, [2007] 2 S.C.R. 517, at para. 80. In the absence of procedural safeguards, these features of substantive reliability will, on their own, satisfy the threshold reliability requirement where they show that there is “no real concern about a statement’s truth and accuracy”: *Couture*, at paras. 98 and 100; *Devine*, at para. 22; *Khelawon*, at para. 62.[[4]](#footnote-4) For example, in *R. v. Khan*, [1990] 2 S.C.R. 531,features of substantive reliability justified the admission of a three-and-a-half-year-old child’s hearsay statement describing a sexual act, in that the statement was made spontaneously and was powerfully corroborated by a semen stain found on her clothing.
5. Second, threshold reliability may be established where there are adequate features of procedural reliability, namely, procedural safeguards in place when the statement is made or at trial that permit the trier of fact to assess the statement’s ultimate reliability: *Youvarajah*, at para. 30; *Khelawon*, at para. 63; *Blackman*, at para. 35; *Couture*, at para. 80. In the absence of features of substantive reliability indicating a statement’s trustworthiness, threshold reliability will be satisfied if these procedural safeguards, on their own, demonstrate that without contemporaneous cross-examination of a witness in court, a hearsay statement’s “truth and accuracy can nonetheless be sufficiently tested” by the trier of fact: *Khelawon*, at para. 63; *Devine*, at para. 22; *Couture*, at para. 80. Where features of procedural reliability *alone* are relied on, some form of cross-examination of the declarant has generally been required to satisfy the test for threshold reliability. For example, courts have held that adequate substitutes for testing truth and accuracy are present in preliminary hearing testimony (see *R. v. Hawkins*, [1996] 3 S.C.R. 1043) and prior inconsistent statements that are video-taped and taken under oath where the declarant has recanted but remains available to be cross-examined at trial (see *R. v. B. (K.G.)*, [1993] 1 S.C.R. 740).
6. As Charron J. explained in *Khelawon*, characterizing these procedural safeguards as factors which indicate a statement’s threshold *reliability* is “somewhat of a misnomer” (para. 80). These tools for testing hearsay evidence do not enhance the reliability of the statement, but rather ensure that the trier of fact is sufficiently equipped to evaluate the ultimate reliability of the statement: see also D. M. Paciocco and L. Stuesser, *The Law of Evidence* (7th ed. 2015), at p. 138.
7. Finally, threshold reliability may be established where the statement has adequate features of *both* substantive and procedural reliability. These two categories that inform threshold reliability are not mutually exclusive: *Youvarajah*, at para. 30; *Khelawon*, at para. 66; *Devine*, at para. 22; *Blackman*, at para. 35; *Couture*, at paras. 80 and 99. Rather, features of procedural reliability and substantive reliability may, in combination, satisfy threshold reliability: *Couture*, at para. 99; *R. v. Hamilton*, 2011 ONCA 399, 271 C.C.C. (3d) 208, at para. 156. In *R. v. U. (F.J.)*, [1995] 3 S.C.R. 764, the Court applied this approach, drawing on features of both substantive and procedural reliability to justify the admission of a hearsay statement (para. 53).
8. Thus, a statement that is not admissible under the first two principal ways of establishing threshold reliability may still be admitted under this third way. Where a statement has a sufficient level of trustworthiness, relative to the strength of the procedural safeguards for the trier of fact to evaluate its ultimate reliability, the statement is safe to admit. Put another way, “[s]o long as [the hearsay statement] can be assessed and accepted by a reasonable trier of fact, then the evidence should be admitted”: Paciocco and Stuesser, at p. 134.
9. It is important to keep in mind that threshold reliability is distinct from ultimate reliability. The trial judge does not need to be satisfied that the hearsay statement is true for it to meet the threshold reliability requirement under any of the three ways set out above. As with the common law tests for Mr. Big statements and expert evidence, the reliability of a hearsay statement need not be established *to a point of certainty* before it can be admitted: *R. v. Hart*, 2014 SCC 52, [2014] 2 S.C.R. 544, at para. 98; *R. v. Abbey*, 2009 ONCA 624, 246 C.C.C. (3d) 301, at para. 89. Otherwise, the trier of fact’s role of determining the ultimate reliability of a hearsay statement will have been usurped.
10. On several occasions, this Court has discussed the danger of conflating threshold and ultimate reliability. In *Khelawon*, Charron J. stated, at para. 50:

It is important that the trier of fact’s domain not be encroached upon at the admissibility stage. If the trial is before a judge and jury, it is crucial that questions of ultimate reliability be left for the jury — in a criminal trial, it is constitutionally imperative. If the judge sits without a jury, it is equally important that he or she not prejudge the ultimate reliability of the evidence before having heard all of the evidence in the case. Hence, a distinction must be made between “ultimate reliability” and “threshold reliability”. Only the latter is inquired into on the admissibility *voir dire*. [Emphasis added.]

This cautionary note was echoed in *Blackman*, at para. 56: “It is essential to the integrity of the fact-finding process that the question of ultimate reliability not be pre-determined on the admissibility voir dire: see Khelawon, at para. 93.”

1. In this regard, I agree with the observations of Watt J.A. in *R. v. Carroll*, 2014 ONCA 2, 304 C.C.C. (3d) 252, at para. 111, that the party tendering hearsay

need not eliminate all possible sources of doubt about the perception, memory or sincerity of the declarant. All that was required in this case was that the circumstances in which the statements were made and any relevant extrinsic evidence provided the trier of fact with the means to critically evaluate the honesty and accuracy of the declarant . . . . [Citations omitted.]

1. In other words, as with expert evidence and Mr. Big confessions, the trial judge is simply tasked with deciding “the threshold question of ‘whether the evidence is worthy of being heard by the jury’”: *Hart*, at para. 98, quoting *Abbey*, at para. 89.
2. I am satisfied that the re-enactment in the present case was admissible under the third way of establishing threshold reliability. As I will explain, there was powerful corroborative evidence indicating the statement’s trustworthiness and a number of procedural safeguards that provided the jury with the tools it needed to evaluate its truth and accuracy. With respect, I believe that in reaching a different conclusion, my colleague has departed from the functional approach to threshold reliability by: (1) unduly restricting the extrinsic evidence that a court can consider when assessing a statement’s substantive reliability; and (2) adopting a narrow view of the procedural safeguards available at trial that can equip the jury with the tools it needs to assess the ultimate reliability of a statement.
   * 1. The Extrinsic Evidence That a Court Can Consider When Assessing Substantive Reliability
3. My colleague maintains that “at the threshold reliability stage, corroborative evidence is used in a manner that is qualitatively distinct from the manner in which the trier of fact uses it to assess the statement’s ultimate reliability” (para. 42). In her view, “[a] trial judge can only rely on corroborative evidence to establish threshold reliability if it shows, when considered as a whole and in the circumstances of the case, that the only likely explanation for the hearsay statement is the declarant’s truthfulness about, or the accuracy of, the material aspects of the statement” (para. 44).
4. Respectfully, my colleague’s test gives rise to two difficulties. First, her test would replace the functional approach that this Court has repeatedly endorsed, with a restrictive test that unnecessarily complicates the analysis and discards crucial information for evaluating threshold reliability. The functional approach emphasizes that there is no bright-line distinction between factors that inform threshold and ultimate reliability. Rather, the inquiry is focused on whether the extrinsic evidence addresses hearsay dangers by providing information about whether the statement is trustworthy:

In each case, the scope of the inquiry must be tailored to the particular dangers presented by the evidence and limited to determining the evidentiary question of admissibility.

. . .

. . . Relevant factors should not be categorized in terms of threshold and ultimate reliability. Rather, the court should adopt a more functional approach . . . and focus on the particular dangers raised by the hearsay evidence sought to be introduced and on those attributes or circumstances relied upon by the proponent to overcome those dangers.

(*Khelawon*, at paras. 4 and 93; see also para. 55.)

1. My colleague’s approach instead creates a “threshold test within the threshold test”, which is

subject to the same criticisms which arise from the [absolute] exclusion of corroborating or conflicting evidence. The categorizing or labelling of evidence that is suitable for including in the *decision-making process* of hearsay admissibility is neither necessary nor desirable. [Emphasis in original.]

(S. Akhtar, “Hearsay: The Denial of Confirmation” (2005), 26 C.R. (6th) 46, at p. 60)

1. Second, in applying her approach, my colleague parses the analysis by examining whether each individual piece of corroborative evidence demonstrates that the “only likely explanation” is the declarant’s truthfulness. This ignores the reality that even if an individual piece of extrinsic evidence does not satisfy my colleague’s requirement on its own, it may nonetheless work in conjunction with other extrinsic evidence or features of substantive reliability to satisfy the test for threshold reliability (see *R. v. McNamara (No. 1)* (1981), 56 C.C.C. (2d) 193 (Ont. C.A.), at pp. 278-79, points 4 and 5, on the nature of corroborative evidence in general). Yet according to her test, for a piece of corroborative evidence to make its way onto the evidentiary scale for threshold reliability purposes, it must effectively be independently capable of tipping the scale. This restrictive test fails to look at the picture as a whole and discards corroborative evidence that could play an important role in satisfying threshold reliability.
2. That said, I acknowledge that it may be necessary for the trial judge to limit the scope of extrinsic evidence that can be considered in a hearsay *voir dire*. As Paciocco and Stuesser note (at p. 134): “There is concern, however, that the *voir dire* on the admissibility of the hearsay evidence could well overtake the trial. . . . The difficulty is where to draw the line and the reality [is] that there is no fixed line” (emphasis added). I agree that such concerns must be addressed on a case-by-case basis, which is consistent with the functional approach to the admissibility of hearsay endorsed in *Khelawon*: see *R. v. R. (T.)*, 2007 ONCA 374, 85 O.R. (3d) 481, at para. 19; *R. v. Lowe*, 2009 BCCA 338, 274 B.C.A.C. 92, at para. 78. In my opinion, the line should be drawn where the trial judge is of the view that the probative value of certain corroborative evidence is tenuous and outweighed by its prejudicial effect in prolonging and complicating the proceedings — in other words, where the bang is not worth the buck. Trial judges should be trusted to make this determination and exercise restraint when considering extrinsic evidence to ensure the trial proceedings are not derailed by the *voir dire*: *Blackman*, at para. 57.
   * 1. The Role of Safeguards Implemented at Trial in Establishing Procedural Reliability
3. As Charron J. held in *Khelawon*, “the optimal way of testing evidence adopted by our adversarial system is to have the declarant state the evidence in court, under oath, and under the scrutiny of contemporaneous cross-examination” (para. 63). It follows that where no meaningful cross-examination is possible, trial judges should be particularly cautious when determining the admissibility of a hearsay statement. However, where there are adequate substitutes for these traditional safeguards, “common sense tells us that we should not lose the benefit of the evidence”: *Khelawon*, at para. 63. A trial judge may have procedural safeguards at his or her disposal that can provide the trier of fact with the tools needed to evaluate the ultimate reliability of hearsay evidence.
4. In this case, the Court of Appeal held that the trial judge erred in considering procedural safeguards that were implemented at trial in evaluating the threshold reliability of the re-enactment. According to the Court of Appeal, only safeguards in existence at the time of the statement could be considered:

The guarantee of trustworthiness and accuracy at the threshold test does not arise as a result of anything a judge or the Crown at trial can do. Safeguards are those in place when the statement is taken, for example, placing the person under oath, warning them of the consequences of lying under oath and so on, but that is not the situation here. The judge looked at safeguards that could be imposed at trial, which do not assist in ascertaining threshold reliability. [Emphasis added; para. 30.]

1. I agree with the Crown that safeguards that support procedural reliability include those which can be implemented at trial. In my view, there is no principled distinction between safeguards in place at the time the hearsay statement was made and safeguards available at trial. Both enhance the ability of the trier of fact to critically evaluate the evidence.
2. This is well established in the jurisprudence. For example, where a recanting declarant is available to be cross-examined at trial on a prior statement, this significantly enhances the trier of fact’s ability to evaluate its reliability: *Khelawon*, at para. 66; *Devine*, at para. 19; *Couture*, at para. 92; *B. (K.G.)*, at pp. 795-96. In addition, the cross-examination of a third party who witnessed the declarant’s demeanour may provide an added procedural safeguard implemented at trial: *U. (F.J.)*, at para. 32; *B. (K.G.)*, at p. 792.
3. There are also other tools that can be implemented at trial to assist the jury in evaluating a hearsay statement. As this case illustrates, jury cautions, the limited admission of prior inconsistent statements that contradict the hearsay statement, requiring the Crown to call the police officers who took prior inconsistent statements as witnesses so that they can be cross-examined by defence counsel, and permitting enhanced leeway for defence counsel during closing submissions may also enable the trier of fact to test a statement’s truthfulness and accuracy. The trial judge is uniquely positioned to adapt and implement these measures based on the specific circumstances of the case.
4. My colleague does not consider or address several safeguards referred to above upon which the trial judge relied. In particular, she rejects the viability of jury instructions as a procedural safeguard, asserting that “[i]nstructing a jury on *how* to evaluate a statement that it [the jury] lacks the *means* to evaluate does not address the hearsay dangers that underlie the exclusionary rule” (para. 29 (emphasis in original)). In my respectful view, this statement oversimplifies the issue.
5. Jury instructions can be a *means* of assisting the jury with the evaluation of a hearsay statement. Like cross-examination, instructions can draw a jury’s attention to evidentiary concerns, which ameliorates hearsay dangers by helping the jury assess the reliability of a statement: see *R. v. Goodstoney*, 2007 ABCA 88, 218 C.C.C. (3d) 270, at paras. 58 and 92; *R. v. Blackman* (2006), 84 O.R. (3d) 292 (C.A.), at paras. 81-87, aff’d 2008 SCC 37, [2008] 2 S.C.R. 298. For example, an instruction cautioning a jury about a declarant’s motive to fabricate and a suggestion of a motive to fabricate put to a witness in cross-examination can both alert a jury to a concern regarding sincerity, which helps it assess whether the statement is reliable. Further, jury instructions include a caution to resolve any doubt in favour of the accused.
6. It goes without saying that cross-examination is a superior means of testing evidence because it allows the jury to observe how a witness responds — be it a denial, an admission or an explanation. However, in setting out the potential dangers of a hearsay statement, jury instructions are capable of enhancing, to a limited extent, the procedural reliability of the statement. In this case, to be clear, the instructions were only one feature of a package of safeguards adopted by the trial judge to put the jury in a position whereby it could critically evaluate the ultimate reliability of the re-enactment.
7. Ultimately, my colleague’s unwillingness to consider the various procedural safeguards relied upon by the trial judge in this case leads her to conclude that, because the hearsay statement does not have sufficient features of substantive reliability, it cannot be admitted. With respect, this skirts the third way of establishing threshold reliability — the one applied by the trial judge in this case — in which features of substantive and procedural reliability may, in conjunction, justify the admission of a hearsay statement.
8. I now turn to the issue of whether the trial judge erred in admitting the re-enactment under this third way.
9. Application to the August 2, 2010 Re-enactment
   1. The Hearsay Dangers Raised by the Re-enactment
10. In this case, the primary hearsay danger raised by the re-enactment was the possibility that Mr. Thielen was lying about Mr. Bradshaw’s involvement in the murders. Mr. Thielen made prior inconsistent statements and he was an accomplice in both murders. The concern that the jury could not assess Mr. Thielen’s sincerity was therefore a particularly acute hearsay danger.
11. The challenges of testing Mr. Thielen’s memory and perception also created hearsay dangers, given his drug abuse at the time of the events and the nearly 17 months that had elapsed between the murders and the re-enactment. My colleague suggests that Mr. Thielen’s sincerity was the sole danger in issue, dismissing Mr. Thielen’s memory and perception concerns as “minimal” (para. 64). In my view, this is not supported by the record. During oral submissions on the *voir dire*, defence counsel specifically referred to memory and perception concerns that he said detracted from the re-enactment’s reliability. In doing so, he did not characterize these as weak or minimal. Rather, he stated:

Now, I also want to highlight to you some of the other overriding factors that you have to consider in assessing threshold reliability, and those are that Mr. Thielen has a long-term substance abuse problem. His statement are replete with references to being foggy, to having no recollection, all of which he attributes to drug use and, I might say, the fact is that he’s giving this video re-enactment 17 months after the fact. [Emphasis added.]

(A.R., vol. VII, at p. 147)

In my view, Mr. Bradshaw’s trial counsel was in a better position than this Court to assess whether it was “plausible” that Mr. Thielen’s memory of Mr. Bradshaw’s role in the killings was inaccurate. In light of defence counsel having raised these concerns, the trial judge can hardly be faulted for responding to them.

1. As I will explain, however, these hearsay dangers — sincerity along with memory and perception — were sufficiently overcome by features of both substantive and procedural reliability that permitted the trier of fact to evaluate the reliability of the re-enactment.
   1. The Substantive Reliability of the Re-enactment
2. The substantive reliability of the re-enactment was significantly enhanced by both powerful extrinsic evidence that corroborated its content and the circumstances in which it took place. I acknowledge that these features of substantive reliability, on their own, were insufficient to justify the admission of the re-enactment under the first way of meeting threshold reliability. That said, they went a long way toward establishing the trustworthiness of the re-enactment. In my view, this attenuated the importance of cross-examination and the relative strength of the procedural safeguards needed to meet the third way of establishing threshold reliability.
   * 1. The Powerful Corroborative Evidence
3. Mr. Thielen’s re-enactment was corroborated by three separate groups of evidence: (a) surreptitiously recorded conversations with Mr. Bradshaw, in which Mr. Bradshaw admitted his involvement in the murders; (b) circumstantial evidence implicating Mr. Bradshaw in the murders; and (c) forensic evidence from the crime scenes confirming Mr. Thielen’s account of the details of the murders. As stated, this corroborative evidence must be examined as a whole, not assessed on a piecemeal basis. Considered cumulatively, this evidence provides powerful support for the trustworthiness of Mr. Thielen’s re-enactment.
   * + 1. The Recorded Conversations
4. This case is unusual, in that the most compelling corroborative evidence comes from Mr. Bradshaw’s own admissions. As noted by my colleague, two surreptitiously recorded conversations with Mr. Thielen “provide direct evidence of Bradshaw’s involvement in the murders” (para. 74).
   * + - 1. The July 21, 2010 Conversation
5. The first recorded conversation took place approximately 16 months after the two murders at a local hotel on July 21, 2010. It followed Mr. Thielen’s meeting earlier that day with “Mr. Big”, during which Mr. Thielen implicated both himself and Mr. Bradshaw in the two murders. In the meeting with Mr. Big, Mr. Thielen was told by undercover officers posing as members of a criminal organization to discuss the murders with Mr. Bradshaw in order to ensure there were no loose ends that needed to be brought to Mr. Big’s attention.
6. The first eight minutes or so of the conversation between Mr. Thielen and Mr. Bradshaw at the hotel were not captured because they were in a washroom together and their discussion was muffled by the sound of running water. After an undercover officer called Mr. Thielen on his phone, Mr. Bradshaw and Mr. Thielen left the washroom and the conversation continued in the hotel room where it could be heard. Neither Mr. Thielen nor Mr. Bradshaw knew they were being recorded. During this conversation, Mr. Bradshaw admitted to being present during the murder of Ms. Lamoureux (who went by the moniker “Double ‘D’”):

Thielen: ‘Kay, remember like my first one, Double ‘D’?

Bradshaw: Uh-hm.

Thielen: Right? When you parked, right. Is there anybody that could have seen me?

Bradshaw: Houses.

Thielen: What?

Bradshaw: The houses around us.

Thielen: Right.

Bradshaw: And they said they saw a white Acura leaving.

Thielen: Exactly.

Bradshaw: Right, we were in the black Cobalt.

Thielen: . . . there’s nothing I touched, right?

Bradshaw: No, that’s a tactic.

Thielen: That’s a tactic?

Bradshaw: Yeah. That’s what I think. My personal opinion. ‘Cause if they had anything fuckin’, (knocking sound) [video shows Bradshaw knocking on wooden table] like that —

Thielen: Yeah.

Bradshaw: -pff-

Thielen: There’s nothing man. [Emphasis added.]

(A.R., vol. XII, at pp. 51-52)

1. Later, Mr. Bradshaw seemingly agreed that he and Mr. Thielen did not have a plan for murdering Ms. Lamoureux. He described how Ms. Lamoureux called him to purchase drugs and he picked up Mr. Thielen before the murder:

Bradshaw: . . . Before I picked you up. I think you were just getting ready weren’t you?

Thielen: Yeah, well we didn’t-

Bradshaw: . . .

Thielen: -really hatch a plan.

Bradshaw: . . .

Thielen: We didn’t really have that one planned did we? It was just kinda on a whim remember?

Bradshaw: Maybe-

Thielen: You went-

Bradshaw: -and she called me-

Thielen: -you went, you went and sold her dope and then she wanted to trade it back.

Bradshaw: Yeah.

Thielen: And then, ‘cause I wasn’t with you went and met her and you picked me up from somewhere out in the area.

Bradshaw: Okay. [Emphasis added.]

(A.R., vol. XII, at pp. 60-61)

This was consistent with Mr. Thielen’s re-enactment. It was also corroborated by logs on Ms. Lamoureux’s phone, which was recovered from the crime scene and showed several calls with Mr. Bradshaw immediately prior to the murder.

1. Mr. Bradshaw implicated himself in the murder of Mr. Bontkes as well. He described how he and Mr. Thielen had worn gloves and waited for Michelle Motola (Mr. Bradshaw’s then girlfriend) to drive up with Mr. Bontkes, which corresponds with Mr. Thielen’s re-enactment. He also told Mr. Thielen that Ms. Motola did not see who shot Mr. Bontkes. Ms. Motola thought the shooter was Mr. Thielen, when it fact it was Mr. Bradshaw:

Thielen: On the second one, did we touch the van?

Bradshaw: No, we had gloves on the whole time.

Thielen: ‘Kay.

Bradshaw: As soon as got out of the car, gloves. And then we pulled the piece out. Cleaned all the shells off. Put everything back together and waited. And then there’s fuckin’ . . .

Thielen: But Michelle didn’t do the last . . . did she?

Bradshaw: She was there, but she didn’t see shit.She didn’t see what happened, she thought it was you. She didn’t even know it was me.

Thielen: Okay.

Bradshaw: So, she’s fuckin’, even if she wanted to, she couldn’t even tell it straight, because of that advantage because she was (smacking sound) we were over here, right? She’s sitting her like this and this . . . everything’s going on over here. She doesn’t know. She doesn’t know anything for sure. [Emphasis added.]

(A.R., vol. XII, at pp. 52-53)

1. Mr. Bradshaw also discussed their actions after the murders:

Thielen: Where were we before that? Where were we after that?

Bradshaw: My house.

Thielen: And before, at your house, right?

Bradshaw: All my house.

Thielen: Both times?

Bradshaw: Both. Before and after. We stashed the thing in my house, took all the shit, you fuckin’ left with it. You walked over to the fuckin’ . . .

Thielen: And then I came back and got it later.

Bradshaw: Yeah.

Thielen: . . . got rid of it, right?

Bradshaw: . . . the pieces that were missing were my shoes and I burned them personally. [Emphasis added.]

(A.R., vol. XII, at p. 53)

1. Finally, the two discussed the investigations and potential sources of evidence regarding the two murders:

Thielen: Have you talked to anybody about it?

Bradshaw: Nah.

Thielen: Nobody?

Bradshaw: Nothing.

Thielen: Just absolutely nobody, so if-

Bradshaw: No.

Thielen: -it’s anybody yapping their gums it’s Michelle?

Bradshaw: That’s it. But people have been saying that I killed Double ‘D’ since it happened.

Thielen: I know, I know, I’ve been-

Bradshaw: . . .

Thielen: -hearing so many things, I heard-

Bradshaw: . . .

Thielen: -stories about it in jail.

Bradshaw: -about me, blah, blah, blah. Fuckin’ everybody’s saying . . . whatever, that’s hearsay. That doesn’t make a fuckin’ difference . . . to nothing . . . anyone that even has a half fuckin’ I know, is Michelle. The only one. Because she knows for a fact who was there, that’s it. And it can only be one or the other.

Thielen: On the one, on the one, that’s it.

Bradshaw: Yeah, only on that one. Right? She doesn’t know shit about the first one.

Thielen: And so after both of them we went to your house?

Bradshaw: Uh-hm. No, not after the first one.

Thielen: Where’d we go?

Bradshaw: I think we went to your house after the first one.

Thielen: And you just dropped me off? And you kept goin’ on right?

Bradshaw: I think I was working.

Thielen: Yeah.

Bradshaw: Yeah.

Thielen: Okay. So, we’re not gonna say nothing about this? Not gonna talk to nobody about this?

Bradshaw: I’m not sweating it to be honest. [Emphasis added.]

(A.R., vol. XII, at pp. 55-56)

* + - * 1. The July 23, 2010 Conversation

1. The second conversation took place two days later at Bothwell Park on July 23, 2010. Undercover officers posing as members of a criminal organization again instructed Mr. Thielen that he needed to speak to Mr. Bradshaw about the murders, particularly with respect to a “dry run” that had preceded the murder of Mr. Bontkes. This dry run involved Ms. Motola picking up Mr. Bontkes and taking him for a drive, while Mr. Bradshaw pretended to be unconscious in the back seat and Mr. Thielen hid under a jacket across the back seat floor with a firearm. The plan to kill Mr. Bontkes on that occasion failed because, in Mr. Bradshaw’s words, “[i]t was my fault ‘cause I was supposed to string him up and then you were supposed to put the bitch on him . . . . And I didn’t do that” (the “bitch” being the gun they had at the time) (A.R., vol. XII, at p. 76).
2. Because this conversation centres more on the dry run of the murder of Mr. Bontkes, it is somewhat less compelling in corroborating Mr. Bradshaw’s involvement in the actual murders than the hotel conversation. Nevertheless, Mr. Bradshaw’s admitted participation in the dry run strongly supports his motive for the killing of Mr. Bontkes. In addition, Mr. Bradshaw did refer to the murders themselves, mentioning the ongoing police investigation and suggesting that if the police had any evidence, they would have already acted:

Thielen: So, I just, I’m trying to go through everything because how much dope I was on back then, I’m so fuzzy with a lot of shit, man. I thought I was-

Bradshaw: Even better.

Thielen: No, it’s not even better because I-

Bradshaw: Why?

Thielen: -I’m goin’ through stuff . . . trying to figure out what the hell needs to be fixed here. So we don’t get popped, right.

Bradshaw: You could fly through a polygraph on that. If you don’t know . . .

Thielen: Yeah, I would never, I would never do a polygraph in my life, obviously I’m uh, I’m just trying to figure what is missing and what can be put against us, right, so that we-

Bradshaw: Honestly, like I said I think as long as . . . I think the, the rest of it is fuckin’ snap shut tight. I think if there was anything left it would have already been done immediately. They wouldn’t have waited so long, they’re, they’re playing the drum, that’s all they’re doin’. [Emphasis added.]

(A.R., vol. XII, at p. 80)

1. Mr. Bradshaw later added that no one would have seen Ms. Motola pick up Mr. Bontkes prior to the murder and the only witnesses who could have seen them on the night of Mr. Bontkes’s murder was a construction crew they drove past after the murder took place:

Bradshaw: And when she went to go see him, it was just her and then you, so . . . no other eyeballs on that one, the only other thing, the only other people that saw us together was a construction crew.

Thielen: What construction crew?

Bradshaw: Construction crew . . . remember that? You went south on 192, down to 32.

Thielen: And there was a construction crew there?

Bradshaw: There was a construction worker on 32. We came across 32, hit 176, came up 176 and the car died. Remember?

Thielen: On that day?

Bradshaw: . . . that was that night.

Thielen: No that was the night it all went down. We left and . . . phone call . . . someone . . . sources . . . fuck off. Um . . .

Bradshaw: Personally, I think, like I said, I think it’s fuckin’ smooth. You know if I didn’t even know you guys at that time, you know, we met at the bar talking maybe a month or so later, whatever. You know, everybody’s fuzzy enough . . . no one can say for sure, right. That’s what I’m talking about. (Chuckles) You know, especially with her. [Emphasis added.]

(A.R., vol. XII, at p. 82)

It is apparent that “her” referred to Ms. Motola — who was also present for the killing of Mr. Bontkes — as the two went on to discuss how the police had approached her. The police investigation also confirmed that a construction crew was working in the area at the relevant time.

1. Reading these two conversations in their entirety, there can be no doubt that Mr. Thielen and Mr. Bradshaw were implicitly — and at times overtly — discussing their joint involvement in the two murders. This provides powerful corroborative evidence that significantly enhances the substantive reliability of the re-enactment by alleviating concerns about Mr. Thielen’s sincerity.
2. For my colleague, however, these conversations provide “no assistance” in establishing substantive reliability (para. 84) — a remarkable proposition that no one advanced in the proceedings below or before this Court. In her view, Mr. Thielen’s truthfulness is not the only likely explanation for the conversations — a conclusion which rests squarely on her second-guessing the trial judge’s factual assessment of the conversations and speculating about “outside influence” as a “possible explanation” for them (para. 84).
3. My colleague makes two points in this regard. First, she maintains that the trial judge did not account for the reduced reliability of Mr. Bradshaw’s statements because they were “collected in a Mr. Big operation” (para. 78). With respect, calling these “Mr. Big” statements is a misnomer. Mr. Bradshaw was not the subject of the Mr. Big operation. He believed he was speaking to an accomplice, not to a member of a criminal organization in circumstances involving the type of inducements or implied threats that characterize Mr. Big operations: *Hart*, at paras. 5 and 58-60. The rationales for exercising special caution with Mr. Big confessions therefore simply do not apply. On the contrary, I agree with the trial judge that the fact that these conversations were surreptitiously recorded while both Mr. Thielen and Mr. Bradshaw believed they were privately discussing the details of the murders, as accomplices, significantly enhanced their reliability (ruling on *voir dire* No. 1, 2012 BCSC 2025, at para. 44 (CanLII)). Any motive for Mr. Bradshaw to falsely implicate himself in such circumstances is mere fancy.
4. Second, my colleague expresses concern that “the initial part [the first eight minutes] of the Best Western conversation was inaudible because Thielen and Bradshaw were in the bathroom and a tap was running” (para. 80). In her opinion, this raises questions about the trustworthiness of the recording.
5. I disagree. Neither individual knew that they were being recorded. It stretches the bounds of credulity and common sense to think that this initial part of the conversation could explain away the incriminating admissions made by Mr. Bradshaw in the audible part of the conversation. How one could reasonably infer that during these eight minutes, Mr. Bradshaw may have been influenced and prepared to falsely recite his participation in the two murders escapes me. It is clear from the transcript that Mr. Bradshaw was, at times, leading the conversation and volunteering details about the murders without any prompting on Mr. Thielen’s part. Unlike my colleague, I do not believe it is appropriate to consider Mr. Bradshaw’s trial testimony — that, during these eight minutes, Mr. Thielen asked him to pretend that he had been involved in the murders — in assessing the substantive reliability of the re-enactment. Mr. Bradshaw testified after the re-enactment was admitted and therefore his testimony was not before the trial judge at the time of his ruling. Furthermore, the jury clearly rejected Mr. Bradshaw’s testimony that he was lying about his involvement in the murders at Mr. Thielen’s request.
6. If these conversations do not qualify as corroborative evidence supporting a hearsay statement’s substantive reliability, then I am at a loss to know what would. Even on the basis of my colleague’s restrictive test, they clearly qualify. The only plausible — and certainly the “only likely” — explanation for Mr. Bradshaw’s admissions was that he participated in the two murders. It follows, in my view, that the trial judge did not err in relying on Mr. Bradshaw’s admissions as powerful corroboration of the truthfulness of Mr. Thielen’s re-enactment.
   * + 1. The Circumstantial Evidence Implicating Mr. Bradshaw in the Murders
7. The Crown also led circumstantial evidence implicating Mr. Bradshaw in the murders.
8. Indeed, there are telephone records that connect Mr. Bradshaw to both murders on the nights in question. These records establish a number of calls between Mr. Bradshaw and Ms. Lamoureux on the night she was murdered. Several of these calls took place immediately prior to the murder. This corroborates Mr. Thielen’s account of Mr. Bradshaw luring her into a set-up under the ruse of a drug transaction before Mr. Thielen shot her.
9. Similarly, on the night Mr. Bontkes was killed, telephone records show a number of calls between Mr. Bradshaw and Mr. Thielen, Mr. Thielen and Ms. Motola, and Ms. Motola and Mr. Bontkes — which was the last call registered on Mr. Bontkes’s cell phone. This is consistent with Mr. Thielen’s account that all three of them participated in the killing.
   * + 1. The Forensic Evidence From the Crime Scenes Investigation
10. In my view, forensic evidence from the crime scenes investigation, which corroborates the details of Mr. Thielen’s description of the murders, provides additional support for the trustworthiness of the re-enactment. The trial judge noted that this forensic evidence included: “. . . where and how the shootings occurred, the number of shots fired, the fact the same gun was used, the positioning of the bodies of Ms. Lamoureux and Mr. Bontkes, the presence and position of the van at High Knoll Park . . .” (ruling on *voir dire* No. 1, at para 45).
11. This evidence responds to the memory and perception concerns raised by defence counsel. It alleviated the risk that Mr. Thielen’s drug abuse and/or the passage of time made his account inaccurate.
12. In my view, this evidence also addressed Mr. Thielen’s overall sincerity. Assessing a declarant’s sincerity in a hearsay statement, like assessing the credibility of a witness, is not a mathematical exercise. Where extrinsic evidence corroborates or contradicts the contents of a statement, this affects the statement’s overall reliability. If the details of Mr. Thielen’s account were belied by the forensic evidence, this would cast further doubt on his sincerity. On the other hand, the corroboration of the details of his account by forensic evidence enhances the substantive reliability of the re-enactment.
13. I acknowledge that in view of Mr. Thielen’s status as an accomplice, the forensic evidence is not as compelling in this case as the corroborative evidence which directly implicated Mr. Bradshaw in the murders: see *Youvarajah*, at para. 62; *R. v. Smith*, 2009 SCC 5, [2009] 1 S.C.R. 146, at para. 15. However, I agree with counsel for the intervener British Columbia Civil Liberties Association that this forensic evidence is relevant and should not be taken off the table.
    * 1. The Circumstances of the Re-enactment
14. Beyond the powerful corroborative evidence, there are also other features of the re-enactment that enhance its substantive reliability. The statement was voluntary and detailed, and it was provided after Mr. Thielen received legal advice. It was also delivered in a free-flowing narrative, without any leading questions from the police (ruling on *voir dire* No. 1, at paras. 40-41). Although not under oath, it was made to police officers while Mr. Thielen was under arrest in circumstances which, viewed objectively, would have underscored the importance of telling the truth: *B. (K.G.)*, at p. 792; *R. v. Adjei*, 2013 ONCA 512, 309 O.A.C. 328, at para. 45.
15. In addition, Mr. Thielen’s motives for participating in the re-enactment with police were important to consider because of the concerns regarding his sincerity. As recognized by this Court in *Blackman*, at para. 42:

There is no doubt that the presence or absence of a motive to lie is a relevant consideration in assessing whether the circumstances in which the statements came about provide sufficient comfort in their truth and accuracy to warrant admission. It is important to keep in mind, however, that motive is but one factor to consider in the determining of threshold reliability, albeit one which may be significant depending on the circumstances. The focus of the admissibility inquiry in all cases must be, not on the presence or absence of motive, but on the particular dangers arising from the hearsay nature of the evidence. [Emphasis added.]

1. In my view, the fact that Mr. Thielen’s re-enactment went against his own interests is significant in this regard. It directly implicated him in both murders and could be used to incriminate him. It also implicated Ms. Motola, whom he considered to be a “sister”. Moreover, he was aware that, in re-enacting the two murders for the police, he was putting himself at risk in the prison system: “. . . what I’m asked to do here is take the biggest step of my life and bring down a whole bunch of people and you know what else, that’s gonna put me at risk for the rest of my life” (A.R., vol. XV, at p. 169). Given the unlikelihood that Mr. Thielen would willingly make a false statement prejudicial to his own interests, this provides further support that the re-enactment is trustworthy.
2. My colleague takes a different view of Mr. Thielen’s motivations for re-enacting the murders. She asserts that Mr. Thielen’s statement was not actually made against his interests because he had previously incriminated himself to police and in the Mr. Big operation. She also takes the position that Mr. Thielen had a “significant motive to lie” to gain “the opportunity of reduced criminal liability”, citing the fact that he pled guilty to two counts of second degree murder (para. 92).
3. I disagree with both of these assertions. First, the fact that Mr. Thielen had previously implicated himself in both murders to police does not change the fact that the re-enactment was made against his interests. The police clearly wanted to collect as much information as possible from Mr. Thielen and the re-enactment provided detailed and cogent evidence that could be used against him.
4. Second, the suggestion that Mr. Thielen was seeking leniency is purely speculative. There is no evidence of any inducements or assurances made by the police prior to Mr. Thielen’s re-enactment. Indeed, the police rejected Mr. Thielen’s requests to see his girlfriend, receive a name change, and be incarcerated in a faraway prison. The fact that Mr. Thielen ultimately pled guilty to second degree murder does not detract from the reliability of his previously made statement. We have no information to suggest that the plea offer had anything to do with his participation in the re-enactment. Indeed, we do not know if the same plea offer was made to Mr. Bradshaw before his trial.
5. Furthermore, the theory that Mr. Thielen fabricated Mr. Bradshaw’s involvement to shift responsibility away from himself is belied by the facts. Mr. Thielen did not minimize his own role in the killings or shift the primary responsibility to Mr. Bradshaw for the murder of Ms. Lamoureux. Instead, he admitted to pulling the trigger himself. Additionally, in my view, Mr. Thielen’s prior statement to Mr. Big on July 21, 2010, in which he implicated Mr. Bradshaw in the murders, rebuts any purported motive on Mr. Thielen’s part to fabricate Mr. Bradshaw’s involvement during the re-enactment. Mr. Thielen had no motive to lie about Mr. Bradshaw’s involvement to Mr. Big. Rather, it was against Mr. Thielen’s interest to implicate Mr. Bradshaw when speaking to Mr. Big. At that time, Mr. Thielen believed his role in the organization was in jeopardy because of the ongoing police investigation. This jeopardy was only enhanced by implicating another person in the murders, which could further complicate matters for Mr. Big. Mr. Big repeatedly emphasized that Mr. Thielen had to be honest about the murders to maintain his role in the organization, telling him:

. . . lie to everybody else, but we don’t lie to each other here. And uh, and guys that get found out for lying or fuckin’ uh, screwing me around are gone. . . .

. . .

. . . if I find out at anytime as we go along that anything you tell me right now is wrong or it’s bullshit or it’s a lie, and again I’m not sayin’ that it is . . . but I want to be up front . . . then I’m washing my hands of you.

(A.R., vol. XVIII, at pp. 66 and 88-89)

1. The fact that Mr. Thielen told Mr. Big about Mr. Bradshaw’s involvement well before he had any motive to fabricate indicates that he was telling the truth when he re-enacted the two murders for police: see *R. v. Stirling*, 2008 SCC 10, [2008] 1 S.C.R. 272, at para. 5; *Couture*, at paras. 83 and 127-28; *Goodstoney*, at paras. 69-71.
2. In sum, the substantive reliability of the re-enactment was significantly enhanced by a combination of:

(1) Extrinsic corroborative evidence, including: surreptitiously recorded conversations of Mr. Bradshaw admitting to his involvement in the two murders; circumstantial evidence implicating Mr. Bradshaw in the murders; and forensic evidence from the crime scenes confirming the details of the murders as described by Mr. Thielen.

(2) Circumstantial indicia of trustworthiness, including: the fact that the re-enactment was voluntary and free flowing; that it was contrary to Mr. Thielen’s interest, in that he did not attempt to shift blame to Mr. Bradshaw but instead implicated himself in two counts of first degree murder; and that Mr. Thielen’s alleged motivation to fabricate was rebutted by his prior consistent statement to Mr. Big.

* 1. The Procedural Reliability of the Re-enactment

1. In this case, the jury had the benefit of several substitutes for the traditional safeguards relied on for testing evidence. As my colleague acknowledges, the fact the re-enactment was video-taped ensures an accurate record of the statement and enhances the ability of the jury to observe and evaluate it. In addition, the trial judge took a number of steps to ensure the jury was in a position where it could assess and weigh the reliability of the hearsay statement. These safeguards included the following: requiring the Crown to call officers who were present for the re-enactment and prior inconsistent statements so that defence counsel could cross-examine them on any inconsistencies and any reduced plea offers or inducements made to Mr. Thielen; the limited admission of prior inconsistent statements made by Mr. Thielen to help assess his credibility; and wide latitude for defence counsel to discuss Mr. Thielen’s possible motives and challenge the ultimate reliability of the re-enactment in closing submissions.
2. Further, the trial judge provided detailed cautions to help the jury identify and evaluate the strengths and weaknesses of the re-enactment. Before the video re-enactment was played for the jury, the trial judge provided a mid-trial instruction that told the jury the following:

That evidence is hearsay evidence, and is not usually permitted as evidence in a court of law. The reason it is not permitted is because the individual who is offering the evidence is not appearing in the witness box, and testifying and subjecting himself to cross-examination, cross-examination which might reveal lies, inconsistencies, motive for making up a story and so forth. So you will need to consider the weight ultimately that you are going to attach to the evidence that you are about to hear this morning.

Now, that is particularly important because in this case, the person who is offering that evidence is subject to a special warning, and you will hear more about this from me in my final instructions to you on the law. Mr. Thielen, you have heard other witnesses testify, is not only an unsavoury character, having regard to his background in drugs and the drug culture in Langley and Surrey. He has been described as an enforcer. He is certainly of unsavoury character in that regard. You have also and will hear -- I think you have heard that he pled guilty to the second degree murder of Ms. Lamoureux and Mr. Bontkes.

You will recall when I gave you some opening instructions, I set out some things you should consider when you decide whether or not to believe a witness. Well, you should consider those things when you assess what Mr. Thielen is about to say. But in addition, I must warn you that you should be extremely cautious in accepting Mr. Thielen’s testimony. I must caution you it is dangerous to rely on that testimony alone. The reasons are Mr. Thielen has admitted to participation in the commission of the offence. As I’ve said, he has an unsavoury reputation. He’s admitted and pled guilty to a criminal conviction. Mr. Thielen may well have some motive other than the pursuit of truth. All of these things you will need to consider. [Emphasis added.]

(A.R., vol. VIII, at pp. 2-3)

1. In the jury charge at the close of trial, the trial judge thoroughly and repeatedly cautioned the jurors about Mr. Thielen’s re-enactment and instructed them on how to evaluate it. This included the following key excerpts:

As I explained during in the trial, this evidence [Thielen’s re-enactment] was placed before you without the usual testing of evidence by cross-examination, and that you must therefore be very cautious in determining the reliability of the evidence.

. . .

In this case Mr. McMurray was not able to cross-examine Mr. Thielen on the things he said or did in the enactment. He was unable to test Mr. Thielen’s memory, credibility, motive of or for the things said and done during the re-enactment. You did not have the opportunity to observe the demeanour of Mr. Thielen in the witness box as he gave his evidence.

Furthermore, the statements Mr. Thielen gave to [Cst. D.] were not given under oath. As a result of all that you should not place the statement of Mr. Thielen on the same footing as the statement of a witness who testifies under oath in the courtroom. You should treat Mr. Thielen’s out-of-court statement with special care and, after considering it with all the evidence in this case, give it the weight you think it deserves.

. . .

. . . In addition, however, I must warn you that you should be extremely cautious in accepting some or any of his testimony. It is dangerous for you to rely on his evidence alone. There are a number of grounds upon which you may question whether his evidence is reliable: Thielen admitted he participated in the commission of the two offences with which Mr. Bradshaw is charged. He plead guilty to second degree murder of Ms. Lamoureux and Mr. Bontkes.

Thielen admitted to an extensive history of criminal conduct, including the attempted murder of Sigurdson. He has an unsavoury reputation. He has given prior inconsistent statements, that is, in his statement particularly to [Cpl. G.] on March the 18th, when he said he had not seen Lamoureux for two months; and to [Cst. B.] on the drive from Edmonton to Calgary. Mr. Thielen might have some motive other than the pursuit of truth in giving his testimony.

The last and most important ground is that of course Mr. Thielen’s evidence was not tested by cross-examination. A person who participated in the commission of an offence would be in a particularly good position to concoct a story that falsely implicates the accused. All that person would need to do is tell a truthful story that could be confirmed easily, and falsely add to it an allegation the accused was also a participant.

. . .

. . . In this case Thielen made statements to the police that tend to show Mr. Bradshaw was involved in committing the offences you are trying. You should consider those statements with particular care because Thielen may have been more concerned about protecting himself than about telling the truth. [Emphasis added.]

(A.R., vol. I, at pp. 73, 82-83, 85-86 and 96)

1. In my view, the opportunity to observe Mr. Thielen in the re-enactment video and the numerous procedural safeguards adopted by the trial judge, including these instructions, placed the jury in a position to identify and critically evaluate each of the frailties of the re-enactment that my colleague identifies. To assume that the jury was incapable of following these instructions and appreciating the frailties of this evidence betrays the time-honoured trust and confidence our justice system places in juries. In *R. v. Corbett*, [1988] 1 S.C.R. 670, this Court emphasized the need to “trust the good sense of the jury” in determining what evidence it may hear (p. 691). This point was put succinctly by Donald J.A. in *R. v. Carroll*, 1999 BCCA 65, 118 B.C.A.C. 219, at para. 41:

Juries are often required to find facts from a melange of evidence. It is not uncommon for cross-examination to use prior statements of several kinds: police statements, testimony given in a previous trial, an inquest or a preliminary inquiry. We have to trust juries to use their common sense in sifting the evidenceand to follow the guidance offered by the trial judge. [Emphasis added.]

1. I share the sentiment expressed by L’Heureux-Dubé J. in dissent in *R. v. Noël*, 2002 SCC 67, [2002] 3 S.C.R. 433, at para. 145, that courts should trust juries to make proper use of admissible evidence or risk “demean[ing] the jury by suggesting that they are incapable of properly dealing with [the] evidence. Our faith in the jury system is a hollow one if such an attitude is allowed to prevail.”
   1. Final Balancing
2. In this case, I am satisfied and agree with the trial judge that the re-enactment met the test for threshold reliability on the basis of strong features of substantive reliability, supplemented by sufficient features of procedural reliability. The trial judge was uniquely positioned to make this determination. And, contrary to my colleague’s assertions, his analysis discloses no legal error. As a result, his ruling is entitled to deference.
3. In *Youvarajah*, Karakatsanis J. explained the rationale for this deference (at para. 31):

The admissibility of hearsay evidence, such as the prior inconsistent statement in this case, is a question of law. Of course, the factual findings that go into that determination are entitled to deference and are not challenged in this case. As well, a trial judge is well placed to assess the hearsay dangers in a particular case and the effectiveness of any safeguards to assist in overcoming them. Thus, absent an error in principle, the trial judge’s determination of threshold reliability is entitled to deference: [*Couture*], at para. 81. [Emphasis added.]

1. In *Blackman*, Charron J. made a similar observation (at para. 36):

The trial judge is well placed to determine the extent to which the hearsay dangers of a particular case are of concern and whether they can be sufficiently alleviated. Accordingly, the trial judge’s ruling on admissibility, if informed by correct principles of law, is entitled to deference.

1. Ultimately, the trial judge made a difficult call in a close case. It must be emphasized that he was in the best position to make that call based on his assessment of the trustworthiness of the evidence and the jury’s ability to evaluate it. Contrary to my colleague’s assertions, the trial judge’s reasons for admitting the re-enactment were free from error and, as I have endeavoured to demonstrate, were well supported by the record. Indeed, he followed the functional approach that has been repeatedly endorsed by this Court.
2. I agree with the comments of the Court of Appeal for Ontario in *R. v. S. (S.)*, 2008 ONCA 140, 232 C.C.C. (3d) 158, at paras. 29-30:

Trial judges cannot consult rules akin to mathematical formulas to tell them how much weight to give to each of the factors. The assessment is case-specific. Different judges will reasonably assign more or less weight to each of the particular factors in any given case.

As long as the trial judge addressed the factors germane to the reliability of the hearsay statement, did not fall into any material misapprehension of the evidence relevant to those factors, and made a reasonable assessment of the weight to be assigned to those factors, this court should not redo the weighing process, but should defer to the trial judge’s weighing of those factors. [Emphasis added.]

1. Respectfully, in my view, it is not the role of this Court to second guess the trial judge’s reasonably exercised judgment from a position far removed from the trial setting. Doing so betrays both the deference owed to trial judges and the trust and confidence placed in juries to follow instructions and use their common sense and reason to evaluate evidence. As a result, I would uphold the trial judge’s ruling that the re-enactment was admissible.
2. Application to the May 15, 2010 Statement
3. Since I have concluded that the re-enactment was admissible, I must address Mr. Bradshaw’s alternative argument that the trial judge erred in refusing to admit a prior statement by Mr. Thielen given on May 15, 2010, for the truth of its contents.
4. That statement occurred during a road trip from Edmonton to Calgary that Mr. Thielen took with an undercover office as part of the Mr. Big operation. Their conversation in the car was audio-recorded. During the trip, Mr. Thielen told the undercover officer that he killed Ms. Lamoureux by himself and killed Mr. Bontkes with the assistance of Ms. Motola. He made no mention of any involvement by Mr. Bradshaw.
5. The May 15, 2010 statement shares the same hearsay dangers as the re-enactment. However, as I will explain, this statement has a number of distinguishing features that add to its frailties and support the trial judge’s decision to refuse to admit it for the truth of its contents.
6. First, it is significant that the statement was not video-recorded. This prevents the jury from observing Mr. Thielen’s demeanour and reduces its ability to assess his credibility.
7. Second, Mr. Thielen’s motives were entirely different in this context. He had a strong incentive to exaggerate his individual involvement and responsibility for the murders in order to impress his perceived peer in the criminal underworld: *Hart*, at paras. 68-69. Moreover, the statement cannot be characterized as being against his interests because Mr. Thielen admitted his involvement to an associate, not to the police. Unlike the re-enactment, these circumstances of the May 15, 2010 statement cast doubt over Mr. Thielen’s sincerity.
8. Third, this May 15, 2010 statement was strongly contradicted by extrinsic evidence which suggests that it was untruthful. For example, Mr. Thielen stated that after he shot Mr. Bontkes in the head and body, Ms. Motola shot him again in the groin area. This version of events was directly contradicted by forensic evidence which showed Mr. Bontkes was not shot in his groin area. Mr. Thielen’s omission of any mention of Mr. Bradshaw is also directly contradicted by Mr. Bradshaw’s own admissions of involvement in his recorded conversations with Mr. Thielen described above.
9. The trial judge considered the relevant factors and applied the correct test in finding this statement to be inadmissible for its truth. As indicated, his ruling is entitled to deference. Accordingly, I would not interfere. I say this mindful of the fact that the trial judge may relax the rules of evidence for hearsay tendered by the accused in order to prevent a miscarriage of justice: *R. v. Post*, 2007 BCCA 123, 217 C.C.C. (3d) 225, at paras. 89-90; *R. v. Tash*, 2013 ONCA 380, 306 O.A.C. 173, at para. 89; *R. v. Kimberley* (2001), 56 O.R. (3d) 18 (C.A.), at para. 80. Accepting this principle, I note that this statement was put before the jury as a prior inconsistent statement for the purpose of evaluating Mr. Thielen’s credibility in the re-enactment. Indeed, defence counsel made reference to it in his closing address and submitted to the jury that it was true. As a result, even if the trial judge did err in refusing to admit it for the truth of its contents, I do not think it caused significant prejudice or resulted in a miscarriage of justice that would warrant appellate intervention.
10. Conclusion
11. For these reasons, I conclude the trial judge did not err in admitting Mr. Thielen’s re-enactment and refusing to admit his May 15, 2010 statement for the truth of its contents. In my respectful view, there is no reason to send this case back for a second trial. Mr. Bradshaw had a fair trial before a properly instructed jury that was well positioned to critically evaluate the reliability of the re-enactment. Accordingly, I would allow the appeal and restore Mr. Bradshaw’s two convictions for first degree murder.

*Appeal dismissed,* Moldaver *and* Côté JJ. *dissenting.*

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1. This rule was criticized for being antithetical to the flexible nature of the principled exception to hearsay (H. Stewart, “*Khelawon*: The Principled Approach to Hearsay Revisited” (2008), 12 *Can.* *Crim*. *L*.*R*. 95, at p. 105) and for leading to the exclusion of manifestly reliable hearsay evidence (S. Akhtar, “Hearsay: The Denial of Confirmation” (2005), 26 C.R. (6th) 46). [↑](#footnote-ref-1)
2. Ensuring that corroborative evidence goes to the truthfulness or accuracy of the material aspects of the hearsay statement is particularly important when the hearsay statement is lengthy. In this case, for example, a 200-page transcript from the re-enactment video was given to the jury. If the trial judge were entitled to consider anyevidence that corroborated *any* part of this statement in assessing its admissibility, the *voir dire* could become a trial within a trial (*Blackman*, at para. 57). [↑](#footnote-ref-2)
3. In these reasons, Mr. Thielen’s hearsay re-enactment refers to both the visual demonstrations and verbal statements he made in the video to describe how the murders and related events took place. [↑](#footnote-ref-3)
4. While this is clearly a high standard, it does not require the trial judge to be convinced to a point of certainty that the statement is true, otherwise the difference between threshold and ultimate reliability, which this Court has consistently maintained, would be lost (see paras. 113-16 below). [↑](#footnote-ref-4)