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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. MARIN CARLOS FELIX, Defendant and Appellant.	B280762 (Los Angeles County Super. Ct. No. TA138640)

APPEAL from a judgment of the Superior Court of Los Angeles County, John J. Lonergan, Judge. Affirmed.

Mark R. Feeser for Defendant and Appellant.

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

INTRODUCTION

A jury convicted defendant Marin Carlos Felix of conspiracy to commit murder and first degree murder, finding true the special allegation that a principal was armed with a firearm in commission of the crime. On appeal, defendant's sole contention is that the trial court violated his right to confrontation when it admitted witness Antonio Galvan's preliminary hearing testimony after finding the People exercised due diligence in attempting to locate and procure Galvin for trial. We affirm.

FACTS AND PROCEDURAL BACKGROUND

In accord with the usual rules of appellate review, we state the facts supporting defendant's conviction in a manner most favorable to the judgment.

1. The Murder

Defendant and Edwin Marquez Barajas belonged to the South Bay Skins, a skinhead organization. Defendant and Barajas often engaged in fights with other groups of people, typically on dance floors while "mosh pitting."[1] Prior to the shooting in this case, they created a plan to start a fight with a rival skinhead group at a bar and shoot someone from that group.

On January 20, 2013, Barajas and defendant attended a punk rock show at a club known as Alpine Village. Defendant arranged for a gun to be brought into the venue. A fight broke out inside Alpine Village, and defendant began arguing with the victim. Defendant and Barajas then physically fought the victim. The fight spread until 20 people were involved and the brawl moved into the parking lot. In the parking lot, defendant

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[1] "Mosh pitting" involves moving in a circle and slamming into other people's bodies.

withdrew a small gun from his person and fatally shot the victim, who was on the ground.

2. Criminal Proceedings

The police investigation amassed evidence implicating defendant as the shooter. The People charged defendant with one count of first degree murder with the special allegation that a principal was armed with a firearm, and one count of conspiracy to commit murder. At the preliminary hearing, Galvan testified that he attended the concert and saw defendant shoot the victim. He was subject to cross examination.

Just prior to trial, the People sought to introduce witness Galvan's preliminary hearing testimony at trial because police were unable to locate Galvan. The court conducted a hearing under Evidence Code section 402, and heard testimony and argument to assess whether the People exercised reasonable diligence to obtain Galvan's testimony. Detective Brandt House testified about his efforts and those of his colleagues to locate Galvan and secure his attendance. The court tentatively decided to admit the preliminary hearing testimony, but conditioned its admission on Detective Brandt continuing to try to locate Galvan until the date Galvan was expected to testify.

On December 7, 2016, defendant's jury trial commenced. That day, outside the presence of the jury, the court and counsel further questioned House about additional efforts to locate Galvan.[2] Defense counsel questioned House about whether Galvan exhibited reluctance in coming to court at the preliminary hearing stage. The court found that the "People through Detective House and his resources have made every effort to locate [Galvan]." The court found that Galvan was unavailable

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[2] We describe House's testimony and the People's efforts to locate Galvan in our analysis below.

for purposes of testifying and permitted the People to introduce his testimony from the preliminary hearing.

Galvan's testimony identifying defendant as the shooter was read to the jury the next day. Barajas, who had made a deal with the People for a lesser sentence in exchange for his testimony, testified about defendant's plan to kill a rival gang member and defendant's conduct on the night of the murder. Barajas's then-girlfriend also stated that defendant confessed to her that he had killed the victim. A bystander at the concert testified that she had heard defendant say he had a gun and intended to shoot a rival gang member. The People also introduced photographs taken at the concert that showed defendant positioned over the victim, who was on ground.

3. Sentence

The jury found defendant guilty as charged. The trial court sentenced defendant to a prison term of 25 years to life for count 1, consecutive to a term of one year for the firearm allegation. A sentence of 25 years to life for count 2 (conspiracy to commit murder) was stayed.

DISCUSSION

Defendant contends that the trial court erred by allowing Galvan's preliminary hearing testimony to be read into evidence after finding that Galvan was unavailable to testify at trial. Defendant argues the prosecution failed to exercise reasonable diligence in attempting to secure the attendance of the witness and therefore admission of the preliminary hearing testimony violated his right to confront witnesses against him as guaranteed by the United States and California Constitutions.

1. Applicable Law

The federal and state constitutions give criminal defendants the right to confront and cross-examine the witnesses testifying against them. (*People v. Carter* (2005) 36 Cal.4th 1114,

1172; *Ohio v. Clark* (2015) 135 S.Ct. 2173, 2179.) The confrontation right is subject to certain exceptions. (*Ibid.*) These exceptions include "where the witness is unavailable, has given testimony at a previous judicial proceeding against the same defendant, and was subject to cross-examination by that defendant." (*Carter,* at p. 1172; see also Evid. Code, § 1291, subd. (a) [hearsay exception].) For a witness to be unavailable under federal law, the prosecution must show that " ' "it made 'a good-faith effort' to obtain the presence of the witness at trial." ' " (*People v. Fuiava* (2012) 53 Cal.4th 622, 675 (*Fuiava*); *Barber v. Page* (1968) 390 U.S. 719, 725.) Under California law, a witness is "unavailable" if the declarant is "[a]bsent from the hearing and the proponent of his or her statement has exercised reasonable diligence but has been unable to procure his or her attendance by the court's process." (Evid. Code, § 240, subd. (a)(5).)

"Reasonable diligence" is often referred to as "due diligence." (*Fuiava, supra,* 53 Cal.4th at p. 675.) In this context, the federal standard of "good faith effort" and the state "reasonable diligence" formula are in "harmony." (*People v. Foy* (2016) 245 Cal.App.4th 328, 339.) Diligence is a situation-specific inquiry that " ' "connotes persevering application, untiring efforts in good earnest, efforts of a substantial character." Relevant considerations include " ' "whether the search was timely begun," ' " the importance of the witness's testimony, and whether leads were competently explored.' " (*Fuiava, supra,* at p. 675, citations omitted.)

In this case, the trial court admitted Galvan's preliminary hearing testimony, where he was subject to cross-examination by defendant. At issue on appeal is whether the People made a good faith effort and exercised due diligence in procuring Galvan's attendance. We review de novo the trial court's determination.

(*Fuiava, supra,* 53 Cal.4th at p. 675; *People v. Cromer* (2001) 24 Cal.4th 889, 894.)

2. The Prosecution's Conduct in Securing Galvan's Testimony

Detective House testified that he was the investigator on the case and had located and secured Galvan's testimony for the preliminary hearing on February 10, 2016. House speculated that Galvan may have been reluctant to testify because he initially acted as though he did not know why he was being subpoenaed, and because Galvan's father (who had the same name) initially showed up in court. House nonetheless stated that Galvan did not express any reluctance to come to court and testify at the preliminary hearing. Galvan did not say he did not want to testify, and did not appear frightened when testifying.

Two weeks before the December 7, 2016 trial date, House learned that defendant's case was going to trial. At that time, he called Galvan's phone number and discovered that it no longer belonged to Galvan. House then went to Galvan's home in Gardena, but Galvan no longer lived there. Galvan's father, mother, and brothers had kicked Galvan out of the house. The family had no idea where Galvan was currently residing and did not know how to contact him. House returned to the Gardena residence twice at different times of day and night, but Galvan was never there. House sent deputies to the residence on six additional occasions, but Galvan's family continued to tell deputies that they did not know Galvan's whereabouts.

House had crime analysts access government databases, "private information databases," and social media. The analysts found numerous leads, which House pursued without success in Los Angeles, San Bernardino, Ventura, and Kern counties. House also contacted several people who were related to Galvan

or had children with him. These people either refused to disclose Galvan's contact information or did not have it.

House checked Galvan's criminal history, but Galvan did not have any arrests or contacts with law enforcement. House checked Galvan's DMV records and vehicle registration records, which did not provide any new addresses to investigate. House examined records from hospitals, morgues, and jails in Los Angeles, San Bernardino, Orange, and Kern counties. House also requested other agencies to watch the residences of Galvan's relatives in case Galvan visited those locations. These agencies were given copies of Galvan's subpoena and were instructed to serve him with it when they saw him.

House estimated that he had spent 30 hours attempting to locate Galvan before trial. Others under his supervision spent an additional 20 to 30 hours trying to locate Galvan.

In the two days that followed the Evidence Code, section 402 hearing, House pursued two additional leads but still could not locate Galvan. Also at this time, House placed a "want in the wanted person's system," which would tell any law enforcement officer who stopped Galvan and ran his name that House was trying to locate him as a murder witness. A crime analyst also distributed a wanted flier with a photograph of Galvan and Galvan's information to law enforcement in Los Angeles, Orange, Kern, San Bernardino and Ventura counties. These additional efforts were fruitless. On December 9, 2016, the court found the People "made every effort to locate" Galvan and admitted his preliminary hearing testimony.

3. The Prosecution Made Reasonable, Good Faith Efforts to Secure Galvan's Testimony

We, too, conclude that the prosecution made reasonable, good faith efforts to secure Galvan's attendance and testimony at trial, particularly because they had no reason to believe the

witness would not appear. We observe that while important to the People's case, Galvan was not the sole witness linking defendant to the crime. Rather, multiple witnesses described his incriminating statements, plans, and actions on the night of the murder that supported the jury's finding of guilt. Upon finding that Galvan was missing, law enforcement attempted to locate Galvan based on his known address and phone numbers, through communication with family members, and via social media and database searches. Detective House and his team spent 50 to 60 hours over a two-week period attempting to hunt down Galvan by exploring numerous leads in Los Angeles, Orange, Kern, San Bernardino, and Ventura counties. House's efforts were exhaustive and continued up until the date Galvan was to testify.

In *Fuiava, supra,* 53 Cal.4th at page 677, the Supreme Court found generally similar efforts sufficient to show that the witness was unavailable. There, the People likewise had no reason to believe the witness would not appear and the detective began looking for the witness two weeks before the start of trial. He checked her two last known addresses, DMV records, and hospital and jail records in Los Angeles County on a "pretty regular basis." (*Fuiava,* at p. 676.) The detective tried to locate the witness's brother. (*Id.* at p. 677.) He also gave patrol deputies in the relevant neighborhood a photograph and physical description of the witness, with instructions to contact him if she was spotted, and take her into custody if necessary. (*Id.* at p. 676.) The Supreme Court rejected defendant's argument that the witness's admission at the preliminary hearing that she was fearful of testifying put the prosecution on notice that she might flee or hide instead of testifying. (*Ibid.*) The court stated that the detective "began the search a reasonable period of time before the trial was to commence" and concluded the People exercised

reasonable diligence under the circumstances in attempting to locate the witness. (*Id.* at p. 677.)

Defendant argues that the People's "admittedly . . . significant efforts to locate Galvan prior to trial" were "too little, too late." Defendant argues that the People were on notice that Galvan did not want to cooperate and thus should have started their search sooner than two weeks before trial. For support, defendant cites *People v. Avila* (2005) 131 Cal.App.4th 163 (*Avila*) and *People v. Louis* (1986) 42 Cal.3d 969 (*Louis*), two cases where the courts reversed the reasonable efforts findings because the People were on notice that the witnesses were flight risks and could have done more to secure their testimony.

Avila and *Louis* are inapt here because the People were not on notice that Galvan would be reluctant to testify. As mentioned above, Galvan cooperated during the preliminary hearing and expressed no reluctance or fear of testifying. Defendant asserts that the People were on notice of Galvan's reluctance based on House's testimony. Specifically, defendant references House's statement that Galvan *may* have been reluctant to testify because Galvan acted like he did not know what the preliminary hearing subpoena was about when he first received it. Not only did House clarify that this was purely his speculation, but House testified that Galvan cooperated at the preliminary hearing, did not express reluctance to testify, and expressed no fear of testifying.

Defendant asserts that "Incredibly, House didn't initially seek a subpoena for Galvan's trial testimony, because he thought Galvan was hiding." Our review of the testimony reveals that House did not make that statement. House testified that he had been unable to find Galvan in the two weeks before trial and that he speculated Galvan was now trying to avoid him. House repeated that this was his speculation. He never stated that he

did not seek a subpoena. The opening brief does not fairly characterize House's testimony.

To the extent the police were on notice Galvan was possibly avoiding them, this notice did not occur until after House attempted to locate Galvan two weeks before trial. The police had no reason to believe two weeks would be insufficient to find Galvan.

As mentioned above, " '[t]he lengths to which the prosecution must go to produce a witness . . . is a question of reasonableness.' " (*People v. Herrera* (2010) 49 Cal.4th 613, 622.) Absent knowledge of a "substantial risk" that the witness will flee, the prosecution is not required to take protective measures to prevent the witness's disappearance. (*People v. Wilson* (2005) 36 Cal.4th 309, 342.) "[W]hen a witness disappears before trial, it is always possible to think of additional steps that the prosecution might have taken to secure the witness' presence . . . but the Sixth Amendment does not require the prosecution to exhaust every avenue of inquiry, no matter how unpromising." (*Hardy v. Cross* (2011) 565 U.S. 65, 71.)

Here, the People acted with reasonable diligence and in good faith in trying to secure Galvan's testimony. The court did not err in admitting the preliminary hearing testimony.

DISPOSITION

We affirm defendant's conviction.

RUBIN, J.

WE CONCUR:

BIGELOW, P.J. FLIER, J.