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**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**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 SEVEN

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| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>FRANK LEE SMITH, JR.,<br><br>Defendant and Appellant. | B245521<br><br>(Los Angeles County<br>Super. Ct. No. YA083025) |

APPEAL from a judgment of the Superior Court of Los Angeles County, Lauren Weis Birnstein, Judge. Affirmed.

Patricial J. Ulibarri, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Shawn McGahey Webb and Jonathan M. Krauss, Deputy Attorneys General, for Plaintiff and Respondent.

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## INTRODUCTION

Defendant Frank Lee Smith, Jr., appeals from a judgment of conviction entered after a jury found him guilty of attempted murder (Pen. Code, §§ 187, subd. (a), 664) and found true the allegations he personally used a firearm (*id*., § 12022.53, subd. (b)), personally and intentionally discharged a firearm proximately causing great bodily injury (*id*., § 12022.53, subds. (c) & (d)), and personally inflicted great bodily injury in the commission of the crime (*id*., § 12022.7, subd. (a)). The trial court found true the allegations Smith had suffered three prior serious felony convictions (*id*., § 667, subd. (a)) that also qualified as strikes under the three strikes law (*id*., §§ 667, subds. (b)-(i), 1170.12) and for which he had served prior prison terms (*id*., § 667.5, subd. (b)). The court sentenced Smith to an adequate prison term of 87 years to life.

Smith argues that the trial court committed prejudicial evidentiary error, abused its discretion in denying his request for a trial continuance, and denied him effective assistance of counsel. We affirm.

## FACTUAL BACKGROUND

### A. *Introduction*

Smith and the victim, Darryl Phillips, grew up in Inglewood. Smith, who was 36, had known Phillips, who was 46, his entire life, and thought of Phillips as an uncle. Phillips was close to the Smith family and attended Smith family functions. Phillips was an "OG," or original gangster, in the Inglewood Family Bloods, which Smith had joined when he was 11 years old. Smith stopped active participation in the gang when he was 26 and moved to Watts to get away from the gang, although his parents remained in Inglewood.

In June 2011 Smith's nephew, Shaun Bryant, was killed during a robbery at a liquor store. On the evening of July 5, 2011, Smith's family held a fish fry at their Inglewood house to raise money for the funeral.

B. *The Shooting*

On July 5, 2011, at approximately 10:00 p.m., Phillips went to the Smith family house in Inglewood to pay his respects to the family. He saw about 10 people in the yard, including Smith. He went to the house and spoke with Smith's father, who was sitting on the porch. He heard a gunshot, felt a bullet enter his back, and fell to the ground. Smith ran onto the porch and "emptied" a gun into Phillips, shooting him a total of six times. Phillips lost consciousness. Phillips later could not recall Smith saying anything to him prior to the shooting. He did not argue with or threaten Smith that evening.

Latera Knox, Smith's niece, also went to the Smith family house on July 5 at about 10:00 p.m. to get some food.[1] She arrived at the same time Phillips arrived. As Knox walked toward the house, she saw Phillips walking toward the porch. According to Knox, Smith was on the porch when Phillips approached. Smith confronted him and asked, "Blood, what happen?" Phillips put his hands in the air and asked what Smith was talking about. Smith repeated his question. He then pulled a black MAC-11 from under his shirt and shot Phillips five or six times.[2] Knox thought that Smith may have shot Phillips because he was "on cocaine" and believed Phillips was involved in Bryant's killing. Knox thought Smith was paranoid, had been "talking crazy," and "need[ed] to be locked up."[3] After shooting Phillips, Smith ran to the back of the house. Phillips went into the house, asking for help. Knox ran to her car and sat there for several minutes.

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[1] Knox was in custody at the time of trial after the police arrested her for failing to appear in court. She acknowledged that she did not want to testify in this case. In addition to her trial testimony, the prosecutor also introduced recordings of a 911 call she made and her interview with police.

[2] "MAC-11" stands for "Military Armament Corporation Model 11," a subcompact machine pistol or semi-automatic handgun. (See *People v. Abel* (2012) 53 Cal.4th 891, 902; *U.S. v. Davis* (E.D.Cal. 2014) 2014 WL 2993805 at p. 3, fn. 2.)

[3] Knox later told a defense investigator that the shooter was on the porch and started shooting as Phillips walked up the walkway. Knox refused to tell the investigator who the shooter was.

She was afraid to leave, thinking that someone might chase her because she had witnessed the shooting. While she was in her car she saw two men whom she did not know, but who looked like "gangbangers," carry Phillips out of the house and put him on the ground.

Marlon Taylor and Randall Pulliam were on Taylor's porch, down the street from the Smith family house. They heard five or six gunshots. Taylor became concerned because his nephew, Stacy Taylor, was at the Smith house.[4] Marlon Taylor and Pulliam got into Taylor's car and drove to the Smith house. When they got there, they saw Phillips lying on the ground, six or seven feet from the porch. They did not see anyone else. Taylor and Pulliam went to Phillips and saw blood. Phillips was unresponsive. Taylor and Pulliam picked him up and put him in the back seat of Taylor's car. They drove him to the hospital.

Knox, still in her car, saw Taylor and Pulliam, whom she recognized, pick Phillips up, put him in their car, and drive away. Knox drove home and called 911 from there, because she did not have a cell phone.

Phillips awoke in the hospital. He had been shot in the back, stomach, thigh and arm. He was in the hospital for a month and a half and had several surgeries. A bullet remains lodged in his spine.

### C. *The Investigation*

Dispatchers for the Inglewood Police Department received several 911 calls regarding the shooting. One dispatcher received a call from the Smith house at 10:08 p.m. She heard a woman crying, and then the call was disconnected. In response, the dispatcher sent officers to the house.

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[4] Stacy Taylor was Mr. and Mrs. Smith's grandson. Marlon Taylor testified that he had been at the Smith house earlier in the evening and had seen Smith there. He retracted this testimony on redirect.

Officer Daniel Diaz arrived at the Smith house at about 10:13 p.m. He spoke to Mr. Smith, who was on the porch. Mr. Smith said his wife was in bed, and he did not know if she had called 911. Officer Diaz asked someone else who had come to the door to get Mrs. Smith, but Mrs. Smith would not come out. Officer Diaz received a call at 10:18 p.m. indicating that Phillips had arrived at Centinela Hospital. He went to the hospital, where he met two officers who had seized Taylor's car because it had bloodstains in the back seat.

Knox called 911 at 10:21 p.m. Knox said she had witnessed a shooting and identified Smith as the shooter. She said she had fled from the scene because she was afraid that if Smith saw her, he would try to kill her and her children.

Officer Diaz received a call regarding Knox's 911 call. He went to Knox's home shortly after midnight and drove Knox to the police station, where Officer Jack Aranda interviewed her. Officer Aranda then obtained a search warrant for the Smith house but, when he went to the house, Smith was not there. Officer Aranda observed officers recover blood and 9 mm shell casings from the porch and walkway. The officers, however, never recovered a MAC-11. According to Officer Aranda, a MAC-11 can fire 9 millimeter bullets.

On July11, 2010 Officer Aranda went to the hospital to interview Phillips. Phillips refused to give him any information about the shooting. On August 9, however, Phillips called Officer Aranda and said he had not wanted to talk to the officer at the hospital because he did not feel safe and did not want anyone to hear him talking to the police. He then told Officer Aranda about the shooting and identified Smith as the shooter. On September 13 Inglewood police officers located Smith in Inglewood and arrested him.

D. *Smith's Version of the Events*

Smith testified[5] that there was no fish fry at his parents' house on July 5, 2011 and that he was not there. His girlfriend, Nakima Houston, had gone to the house to make funeral arrangements for Bryant. Because Bryant had been Smith's favorite nephew and Smith was having a hard time dealing with his death, Smith stayed home with his children.

Smith explained that Bryant's death did not affect his relationship with Phillips. When he learned Bryant had been killed, he went to the liquor store where the killing occurred. His cousin, Adriana Babino, told him that Phillips had been robbed at the liquor store and had spoken to the police. Smith believed the robbery and Bryant's death were related, and that Phillips was a potential witness in the prosecution of the person who killed Bryant. Smith had no reason to believe Phillips was involved in the robbery and killing and he did not try to kill Phillips. In addition, because Phillips was an OG, only someone with OG status could take action against him. If Smith had done anything to Phillips, he would have put his family at risk.

Smith also testified that his niece, Knox, and her husband were members of the Inglewood Family Bloods. Smith thought Knox was angry with him, but he had a good relationship with her husband. Smith was shown a police report with Knox's name circled and the words: "What did I do to her? Is Jesse paying her too?" Smith acknowledged the handwriting on the report was his but denied mailing it to people with directions to circulate it so that Knox would be labeled a snitch and would not testify against him. He claimed he sent the report to his mother so she would know what was happening in the case.

Houston corroborated Smith's testimony that on the night of the shooting he stayed home with the children while she went to the Smith house to help with funeral arrangements for Bryant. When she got to the house, there were a lot of people in the

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**5** The prosecutor impeached Smith with convictions in 2008 and 2009 of crimes involving moral turpitude.

front yard. She was not at the house when the shooting occurred because she had gone to a gas station with Smith's sister. When she returned to the house, the police were there. She did not see Smith until the following morning.

Houston and Smith's 14-year-old son, D.G., went with Houston to the Smith house. When his mother went to the gas station, D.G. was riding a bicycle up and down the street. He heard gunshots and saw a tall man running away from the Smith house. He did not see Smith at the house that night.

Stacy Taylor testified that he had been staying at the Smith house to help care for his grandfather, who had been sick. There was no fundraiser on the night of July 5, although there had been a barbecue fundraiser for Bryant's funeral earlier in the week. He thought he heard fireworks shortly before 10:00 p.m. Then he heard a commotion. He went to the front of the house and helped his uncle and Pulliam put Phillips in the car. He did not see Smith at all on July 5.

Smith's mother did not see Smith at her house on July 5 and she did not know anything about the shooting. She testified that she and her husband were in their room sleeping when someone came to tell them that the police were at the house. She also said that sometimes she and her husband would sit on the bench by the porch to rest before going into the house.

Brandon Arbaugh had known Smith and Phillips since childhood and knew Smith's family. He was an associate of the Inglewood Family Bloods. On July 5 he was at the Smith house with a number of other people, mourning Bryant's death, but he did not see Smith there. Stacy Taylor was frying fish. Arbaugh saw Phillips arrive but did not know how long Phillips was at the house. Arbaugh heard shots and saw the silhouette of a person up the street who was not Smith. Arbaugh ran into the house. He

saw Phillips on the walkway and people helping him. Arbaugh left when he heard the police were coming.[6]

## DISCUSSION

### A. *The Trial Court Properly Admitted Phillips' Preliminary Hearing Testimony*

Smith contends that the trial court committed prejudicial error by admitting Phillips' preliminary hearing testimony without an adequate showing that the prosecution used reasonable diligence in attempting to secure his presence at trial. He argues that the admission of Phillips' hearsay preliminary hearing testimony violated his right to confront and cross-examine witnesses against him.

#### 1. The Evidence at the Evidence Code Section 402 Hearing

The prosecution moved to admit Phillips' preliminary hearing testimony on the ground he had disappeared, the prosecution had been unable to locate him through the use of reasonable diligence, and thus he was unavailable as a witness. The trial court held a hearing pursuant to Evidence Code section 402 to determine whether the prosecution had used reasonable diligence to secure Phillips' presence at trial.

At the Evidence Code section 402 hearing, Officer Aranda testified that he served Phillips with a subpoena to testify at the September 29, 2011 preliminary hearing, but Phillips did not appear. Officer Aranda called him, and Phillips said he feared for his safety. Two officers went to Phillips' home and escorted him to court. At the courthouse, Phillips told Officer Aranda that if he was going to testify, he wanted the prosecution to relocate him. After the preliminary hearing, Phillips again requested that

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[6] Arbaugh denied telling the defense investigator that he, Smith, and Phillips were standing on the porch on the night of the shooting. He claimed that when the investigator talked to him, he was intoxicated and was not paying attention to her.

the prosecution relocate him. Officers took him to a hotel while the police department was processing the relocation paperwork. When officers returned to the hotel on October 3 to get Phillips' signature on the paperwork, Phillips was not there, his room was empty, and the manager said Phillips had left.

On October 4 Officer Aranda called Phillips, but he did not answer. Officers went to Phillips' home and knocked on the door, but no one responded. Officer Aranda had someone else call Phillips, but that person was also unable to reach Phillips. On October 18 Officer Aranda spoke to Phillips' wife, who stated that Phillips was no longer interested in participating in the case or cooperating with the prosecution. The next day, another officer told Officer Aranda that she had received a call from Phillips' mother, stating that Phillips was no longer interested in testifying.

At some point Officer Aranda received information from Phillips' wife that Phillips had left the state and the officers could stop looking for him. Officer Aranda gave the information he had to the district attorney's office, and made no further attempts to locate Phillips. He also did not make any attempt to get Phillips' cell phone records or ask the cell phone company to help locate Phillips.

Kevin Sleeth, an investigator with the district attorney's office, spoke with Officer Aranda on November 10, 2011 regarding the attempts to locate Phillips. Sleeth immediately checked his databases in an attempt to find any new information regarding Phillips or his location, but he was unable to find anything. He checked county jail records several times during his investigation. He conducted research on the internet, including social media sites. He spoke to Phillips' mother and said that he needed to speak to Phillips; she said she would tell Phillips to call Sleeth.

Phillips called Sleeth on November 19. Sleeth said he had been looking for Phillips and needed him to testify in court. Phillips expressed concerns but left Sleeth a cell phone number. Sleeth ran the number through his database, but there was no new information on the number and it was registered to someone else. Sleeth called the number and left a message on November 21. When Phillips had not called back by November 23, Sleeth called Phillips' mother and asked her to have Phillips call him.

Phillips finally returned Sleeth's call on November 29. Phillips repeated his concerns about his safety but said he would come testify. Sleeth tried to get contact information and to set up a meeting, but Phillips said he lived out of state, would not tell Sleeth where he lived, and did not want to meet with Sleeth.

Sleeth tried unsuccessfully to reach Phillips by phone on December 5 and 7. He called Phillips' mother, who said she had talked to Phillips and he had decided not to testify. Sleeth then contacted Phillips' former employer, who gave him Phillips' emergency contact information: the address and cell phone number of a girlfriend. He went to the address, but no one there had seen Phillips. He was able to locate the girlfriend's family in Arizona. He called and spoke to the girlfriend's mother, asking her to get a message to Phillips that Sleeth was looking for them. The mother would not tell him where Phillips or the girlfriend was living.

Sleeth continued trying to call Phillips, but on December 12 he heard a recording stating that the number was no longer in service. He kept trying the number, and on February 23, 2012 the number was back in service and he left a message. He went to Phillips' mother's home again and spoke to her husband, who confirmed that Phillips was out of state but said that his wife had not told him where Phillips was. Sleeth contacted Arizona Highway Patrol officers to advise them of the situation and to give them information he had regarding Phillips' girlfriend. Sleeth again spoke to Phillips' mother. She refused to tell him where Phillips was living and told him that Phillips was still unwilling to testify in court.

On March 5 Phillips answered the phone when Sleeth called. Phillips again stated that he was concerned for his safety and did not want to testify, and he would not tell Sleeth where he was living. Sleeth contacted the family of Phillips' former wife, but they had not seen him in over a year. Sleeth contacted the post office, but Phillips had not left a forwarding address. Sleeth called the Arizona Highway Patrol to see if officers there had obtained any information. They had not and told him to contact the district attorney's office. He did so and spoke to an investigator, who said he would go to the residences of the girlfriend's mother and son to try to get information.

Phillips called Sleeth on March 9 and asked Sleeth why he had detectives looking for him and his girlfriend in Arizona. Phillips again said he was not going to come to court. He told Sleeth that there was "no way anyone would find him, and he intended to hide so that he could not be found." Sleeth then called the investigator in Arizona, who said he had gone to both residences, but the residents there said they did not know Phillips or the girlfriend. Sleeth also checked his databases again and checked for vehicle registration in nearby states, but there was no new information about Phillips.

On cross-examination, Sleeth testified that he did not believe he had the power to subpoena Phillips' cell phone records because Phillips was only a witness. His belief was based on "the victim's right to privacy or undue search and seizure laws, Fourth Amendment," rather than a specific law or policy. For the same reason, he did not discuss the possibility of a wiretap with anyone in the district attorney's office.

Counsel for Smith argued that the prosecution should have made an effort to subpoena cell phone records to obtain a billing address for Phillips' cell phone and to determine what cell phone towers he was accessing. Counsel for Smith argued that the prosecution did not exercise "due diligence because they have not pursued [the] one obvious lead they really had," Phillips' cell phone number.

The trial court found that the prosecution had used reasonable diligence in attempting to bring Phillips to court. In particular, the police immediately relocated Phillips to a hotel when he expressed concern for his safety, and attempted to keep track of him, but he left while they were doing the paperwork for his relocation. The trial court therefore allowed the prosecution to read Phillips' preliminary hearing testimony to the jury.

2. The Applicable Law and Standard of Review

"'A criminal defendant has the right under both the federal and state Constitutions to confront the witnesses against him [or her]. (U.S. Const., 6th Amend.; Cal. Const., art. I, § 15.) This right, however, is not absolute.'" (*People v. Friend* (2009) 47 Cal.4th 1, 67; see *U.S. v. de Jesus-Casteneda* (9th Cir. 2013) 705 F.3d 1117, 1119 ["'the face-to-

face confrontation requirement is not absolute'"], quoting *Maryland v. Craig* (1990) 497 U.S. 836, 850 [110 S.Ct. 3157, 111 L.Ed.2d 666].) The "'long-standing exception [is] that "[t]estimonial statements of witnesses absent from trial have been admitted only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine."' [Citation.] 'Evidence Code section 1291 codifies this traditional exception.' [Citation.] 'When the requirements of Evidence Code section 1291 are met, "admitting former testimony in evidence does not violate a defendant's right of confrontation under the federal Constitution. [Citations.]"' [Citation.]" (*Friend*, *supra*, at p. 67; accord, *People v. Fuiava* (2012) 53 Cal.4th 622, 675.)

Under subdivision (a)(2) of Evidence Code section 1291, "'former testimony is not rendered inadmissible as hearsay if the declarant is "unavailable as a witness," and "[t]he party against whom the former testimony is offered was a party to the action or proceeding in which the testimony was given and had the right and opportunity to cross-examine the declarant with an interest and motive similar to that which he has at the hearing." . . . Evidence Code section 240, subdivision (a)(5), states a declarant is "unavailable as a witness" if [he or she] is "[a]bsent from the hearing and the proponent of his or her statement has exercised reasonable diligence but has been unable to procure his or her attendance by the court's process."' [Citation.] [¶] 'The term "reasonable diligence" or "due diligence" under Evidence Code section 240, subdivision (a)(5) "'connotes persevering application, untiring efforts in good earnest, efforts of a substantial character. [Citations.]"'' [Citation.] 'Considerations relevant to this inquiry include the timeliness of the search, the importance of the proffered testimony, and whether leads of the witness's possible location were competently explored.' [Citation.]" (*People v. Friend*, *supra*, 47 Cal.4th at pp. 67-68; accord, *People v. Fuiava*, *supra*, 53 Cal.4th at p. 675.) "California permits the use of the prior testimony of a witness against a criminal defendant only when the unavailability of the witness and the reliability of the testimony are established." (*People v. Carter* (2005) 36 Cal.4th 1114, 1172.)

"Ordinarily, '[t]he prosecution is not required "to keep 'periodic tabs' on every material witness in a criminal case"'" (*People v. Herrera* (2010) 49 Cal.4th 613, 630)

because "'the administrative burdens of doing so would be prohibitive'" (*People v. Fuiava*, *supra*, 53 Cal.4th at p. 676). When, however, the prosecution has "knowledge of 'a "substantial risk"' that an '"important witness would flee,"' the prosecutor is required to '"take adequate preventative measures" to stop the witness from disappearing.' [Citation.]" (*People v. Friend*, *supra*, 47 Cal.4th at p. 68.)

"We review de novo the issue of whether the prosecution, in using the preliminary hearing testimony of [the witness], satisfied the due diligence requirement in attempting to produce him at trial, so as to justify an exception to defendant's constitutionally guaranteed right of confrontation at trial." (*People v. Martinez* (2007) 154 Cal.App.4th 314, 323; see *People v. Bunyard* (2009) 45 Cal.4th 836, 850.) In conducting this independent review of whether the prosecution's efforts amounted to reasonable diligence, "we 'defer to the trial court's determination of the historical facts of what the prosecution did to locate an absent witness[]' . . . ." (*People v. Thomas* (2011) 51 Cal.4th 449, 503.)

3. Application to This Case

The prosecution here exercised reasonable diligence in attempting to secure Phillips' attendance at trial. As the trial court noted, the prosecution knew that Phillips was having second thoughts about testifying and was concerned for his safety. When he did not appear at the preliminary hearing, two officers brought him to court. In response to Phillips' request for relocation assistance, the police put him in a hotel and began processing his request. Officer Aranda attempted to ensure Phillips' cooperation by temporarily relocating him to a hotel and making arrangements for a more permanent relocation, as Phillips had requested. This was a reasonable step to take to make sure Phillips would testify at trial, and there was no basis for detaining him at that time. (See *People v. Friend*, *supra*, 47 Cal.4th at p. 68; *People v. Bunyard*, *supra*, 45 Cal.4th at p. 851.) When the police brought the paperwork to Phillips at the hotel for his signature, they discovered he had disappeared. After Phillips left the hotel, Officer Aranda and Sleeth were in intermittent telephonic contact with him over a period of several months.

Phillips initially stated that he would come back to testify but then changed his mind and said he would not. He then consistently maintained that he was out of state, would not divulge his location, and did not want to be found. In an attempt to locate him, Sleeth checked various databases, contacted Phillips' family, identified a girlfriend and contacted her family in Arizona, and had law enforcement look for Phillips in Arizona. These efforts constituted reasonable diligence. (See *People v. Thomas*, *supra*, 51 Cal.4th at pp. 499-500; *People v. Valencia* (2008) 43 Cal.4th 268, 292.)

Smith suggests that the police should have placed Phillips under surveillance or detained him to make sure he did not leave the hotel. Smith relies on *People v. Louis* (1986) 42 Cal.3d 969, where the court suggested that the prosecution could have incarcerated the missing "'material witness'" pursuant to Penal Code sections 879, 881, and 882 to make sure he was available to testify at trial. (*Louis*, *supra*, at p. 993.)

As the Supreme Court has since observed, however, "[t]he circumstances in *Louis* were unusual," and "[s]ubsequent cases have limited the holding in *Louis* to its peculiar facts." (*People v. Thomas*, supra, 51 Cal.4th at pp. 500, 502; see, e.g., *People v. Bunyard*, *supra*, 45 Cal.4th at pp. 851-854; *People v. Wise* (1994) 25 Cal.App.4th 339, 344.) At the time the witness in *Louis* testified at the preliminary hearing, he was in custody for a theft-related felony. "He 'admitted that he had used many aliases, that he had been in custody several times since August 1980, and that on three occasions after he was released he left town, failed to make required court appearances, and had to be arrested on bench warrants in order to be brought to court.' [Citation.] The prosecution also was aware that [the witness] had several felony convictions, had been committed to a hospital for the criminally insane, and apparently believed he stood to reap a reward if the defendant was convicted as a result of his testimony. [Citation.]" (*Thomas*, *supra*, at p. 500.) The witness refused to testify at trial unless he was released on his own recognizance. The prosecutor agreed, even though he knew "'"there was a very real possibility that the man would boogie, that he wouldn't show up."' [Citation.]" (*Id*. at p. 501.)

This case is distinguishable from *Louis*. While Phillips expressed fear for his safety and did not come voluntarily to court to testify at the preliminary hearing, he indicated he would cooperate with the prosecution if relocated. He was not "'known to be both unreliable and of suspect credibility—the very type of witness that requires, but is likely not to appear to submit to, cross examination before a jury.' [Citation.]" (*People v. Thomas*, *supra*, 51 Cal.4th at p. 501.) In addition, Phillips, unlike the witness in *Louis*, "'was a citizen-victim. He was not facing criminal charges and the record does not indicate any reason for the prosecution to believe he would disappear.'" (*Id*. at p. 503, quoting *People v. Wise*, *supra*, 25 Cal.App.4th at p. 344.) This case is more like *People v. Fuiava*, *supra*, 53 Cal.4th 622, where, although the witness "testified that she had been fearful, she did testify at the preliminary hearing, and, moreover, she testified that she had moved (with the assistance of the sheriff's department) since the shooting, which presumably was for her protection." (*Id*. at p. 676.) As in *Fuiava*, the prosecution's failure to keep tabs on the witness does not negate a finding of reasonable diligence. (See *id*. at p. 677.)

Smith also suggests that the prosecution should have set up surveillance at Phillips' mother's house in December, so that if Phillips came home to visit his mother for the holidays the prosecution could serve him with a subpoena. Smith, however, cites no authority for the proposition that reasonable diligence requires the prosecution to conduct surveillance at a location where a witness *might* appear. (See *People v. Bunyard*, *supra*, 45 Cal.4th at p. 855 [prosecution was reasonably diligent where officers "repeatedly check[ed the witness'] last known address, and areas he was *known* to frequent" (italics added)].)

Smith also relies on *People v. Roldan* (2012) 205 Cal.App.4th 969, where the court stated "that the requirement of due diligence is not limited to situations in which the prosecution is trying to find a witness who has gone missing. '[N]o less important "is the duty to use reasonable means to *prevent a present witness from becoming absent.*" [Citation.] If the prosecution fails in this latter duty, it does not satisfy the requirement of due diligence. [Citation.]' [Citations.]" (*Id*. at p. 980, quoting *People v. Louis*, *supra*, 42

Cal.3d at p. 991.) *Roldan*, however, is also distinguishable. In *Roldan*, the prosecution knew the federal government intended to deport the witness after the preliminary hearing. The court stated that the prosecution could have videotaped the witness' testimony so that, if the witness were deported and could not be located, the jury would still have the opportunity to assess his demeanor. (*Roldan*, *supra*, at pp. 980-981.) Here, in contrast to *Roldan*, the prosecution had no advance knowledge that Phillips would disappear. He agreed to temporary relocation to a hotel and appeared willing to cooperate as long as he received relocation assistance.

Smith also cites *Roldan* for the proposition that "courts have sanctioned the months-long detention of material witnesses when they possess vital information about the alleged offenses. [Citations.]" (*People v. Roldan*, *supra*, 205 Cal.App.4th at p. 981.) However, "[t]he unjustified deprivation of a material witness's liberty is a violation of the due process clauses of the federal and state Constitutions. [Citations.]" (*People v. Bunyard*, *supra*, 45 Cal.4th at p. 850; see Cal. Const., art. 1, § 10; *People v. Hovey* (1988) 44 Cal.3d 543, 564.) In the absence of evidence that the witness will not return for trial, there is no justification for detaining the witness. (See *Bunyard*, *supra*, at pp. 851, 854 [detention is not justified where witness "promised to cooperate," but is justified where "based in large part on the witnesses' avowed noncooperation"].) As stated, Phillips gave every indication that he would testify at trial if he were relocated.

Smith further argues that the prosecution should have subpoenaed Phillips' cell phone records in an effort to locate him. As Sleeth testified, however, attempts by law enforcement to obtain cell phone records can raise Fourth Amendment and privacy concerns. (See *U.S. v. Davis* (11th Cir. 2014) 754 F.3d 1205, 1215 ["government's warrantless gathering of his cell site location information violated his reasonable expectation of privacy" under the Fourth Amendment]; *In re U.S. for Historical Cell Site Data* (5th Cir. 2013) 724 F.3d 600, 615, dis. opn. of Dennis, J. ["the government must obtain a warrant in order to secure an order requiring an electronic communications provider to disclose data potentially protected by the Fourth Amendment"]; see generally *State v. Earls* (2013) 214 N.J. 564, 581 [70 A.3d 630] [collecting cases and noting that

while some courts "have found that the government's use of cell-site information to get a general location does not violate the Fourth Amendment," "[o]ther courts have found that the Fourth Amendment requires that police get a warrant to obtain cell-site data"]; cf. *People v. Chapman* (1984) 36 Cal.3d 98, 113 [police may not seize name and address of telephone company's customer with an unlisted number without a warrant]; *People v. Blair* (1979) 25 Cal.3d 640, 654, 655 [obtaining a list of telephone calls made from defendant's hotel room violated article I, section 13, of the California Constitution]; *People v. McKunes* (1975) 51 Cal.App.3d 487, 490-491 [government's securing of "records of telephone calls from the telephone company without having secured a subpoena or other court order" violates "a person's constitutional right of privacy"].) Smith has not cited any cases that have allowed the government to subpoena the cell phone records of a witness who is not suspected of any crime.

Moreover, as the trial court noted, even if Sleeth could have attempted to get Phillips' cell phone records in order to locate him, his failure to do so did not preclude a finding of reasonable diligence. The fact that the prosecution could have done more does not mean that its efforts were not reasonable. For example, in *People v. Valencia*, *supra*, 43 Cal.4th 268 the defendant "suggested other things the prosecution might have done" to find a witness who was unavailable to testify. (*Id*. at p. 293.) The court held that "'these suggestions do 'not change our conclusion that the prosecution exercised reasonable diligence. "That additional efforts might have been made or other lines of inquiry pursued does not affect this conclusion. [Citation.] It is enough that the People used reasonable efforts to locate the witness." [Citation.]'" (*Ibid*.; accord, *People v. Fuiava*, *supra*, 53 Cal.4th at p. 677; see *Hardy v. Cross* (2011) ___ U.S. ___, ___ [132 S.Ct. 490, 495, 181 L.Ed.2d 468] ["when 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, [citation], but the Sixth Amendment does not require the prosecution to exhaust every avenue of inquiry, no matter how unpromising"]; *People v. Guiterrez* (1991) 232 Cal.App.3d 1624, 1641 ["the prosecution need not exhaust every potential avenue of investigation to satisfy its obligation to use due diligence to secure the witness"], fn.

omitted, disapproved on other grounds in *People v. Cromer* (2001) 24 Cal.4th 889, 901, fn. 3.)[7]

B. *The Trial Court Did Not Abuse Its Discretion in Excluding Evidence of a Gang War on Recross-Examination*

During the recross-examination of Marlon Taylor, counsel for Smith asked whether Adriana Babino had been shot in front of his house. The prosecutor objected that the question was beyond the scope of redirect.

In a sidebar conference counsel for Smith made the following offer of proof: "This is a frequent occurrence on this block. I'd like to address what my client brought to my attention that some people know who were shot on this block around the corner." Counsel added "that unfortunately it's one of those areas that this sort of thing is commonplace." The relevance of evidence of the Babino shooting was "[t]hat a number of people have been shot including one of his nephews was shot and killed around this corner. Our theory of the case is this is a Crip-Blood shooting and not something that my client shot his friend and mentor for no reason." The trial court asked, "So you're saying this is like a gang war going on. It has nothing to do with this defendant?" After counsel for Smith confirmed the trial court's understanding, and in response to the court's question whether counsel for Smith had any evidence to support his theory, counsel responded, "Yes, that the murder happened the weekend before." The prosecutor argued that counsel for Smith's question was "beyond the scope of my direct and trying to get into issues that I don't think are relevant to my examination." The trial court agreed and added that if Smith intended to call Taylor as a witness, then the court would hold an

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[7] Smith also asserts that "no effort was made by the prosecution to contact Phillips between September 12, 2011 and January 25, 2012 other then [*sic*] by phone with a few drives to his mother's house." Even assuming this accusation were accurate, Smith does not suggest what additional steps Sleeth could have taken during this time period, other than subpoenaing Phillips' phone records and conducting surveillance on his mother's house, that would have proved successful.

Evidence Code section 402 hearing regarding the relevance of the testimony. Smith did not call Taylor as a witness in his case.

Smith argues that the trial court's ruling was erroneous because "[t]he evidence was relevant and probative as tending to undermine any motive for [Smith] to have shot Phillips contributing to a cornerstone of his defense." While evidence that the shooting of Phillips was part of a gang war might have been relevant the trial court's ruling was still proper.

"'As a general matter, an appellate court reviews a trial court's ruling as to the order of proof for abuse of discretion. That is because, as a general matter, the trial court has authority to "regulate the order of proof" in the exercise of "its discretion." (Evid. Code, § 320.)' [Citations.]" (*People v. Tafoya* (2007) 42 Cal.4th 147, 175; accord, *People v. Blacksher* (2011) 52 Cal.4th 769, 824.) The trial court has discretion to exclude on recross-examination matters that exceed the scope of redirect examination. (Evid. Code, § 761; see *People v. DeHoyos* (2013) 57 Cal.4th 79, 123 ["[o]n appeal, we review the trial court's ruling on the scope of cross-examination for an abuse of discretion"]; *People v. Farnam* (2002) 28 Cal.4th 107, 187 ["[i]t is settled that the trial court is given wide discretion in controlling the scope of relevant cross-examination"]; cf. *People v. Samuels* (2005) 36 Cal.4th 96, 122 [trial court did not err in admitting testimony on redirect examination that did not exceed the scope of cross-examination].)

The trial court did not abuse its discretion in precluding questioning on recross-examination about the shooting of Babino. Counsel had not previously raised the issue on direct-, cross-, or redirect-examination, and the proffered testimony exceeded the scope of redirect. Moreover, the trial court did not exclude all evidence of a "gang war" to explain the shooting. The court merely excluded it at the time, and essentially invited counsel for Smith to call Taylor as a witness, at which time the court could hold an Evidence Code section 402 hearing to determine the relevancy of the proffered evidence. The trial court's ruling was an appropriate practical solution to a procedural problem that arose at the time. Smith, however, did not follow up and attempt to call Taylor as a witness. Smith did call Babino as a witness but did not question her about whether she

had been shot in front of Taylor's house (or anywhere else). Smith never presented any evidence or made an offer of proof of a "gang war" that explained or had any connection with Phillips' shooting.

C. *The Trial Court Did Not Abuse Its Discretion in Denying a Continuance*

Smith began his defense case on Friday, March 23, 2012. After the trial court had excused the jury for the day, the court asked counsel for Smith if he needed the court to order any witnesses back to court on Monday. Counsel responded that he needed the court to order back Smith's mother and Brandon Arbaugh, which the trial court did. Counsel for Smith then requested that the court issue a bench warrant for Deron Dowdell, whom counsel had subpoenaed to appear in court on Friday. Counsel for Smith had spoken with Dowdell on Thursday, but Dowdell failed to appear on Friday.

The court asked to see the proof of service. Counsel for Smith stated, "The situation was that Mr. Arbaugh, it's my understanding that Mr. Arbaugh gave Mr. Dowdell the subpoena that I had given to him, and that I spoke with Mr. Arbaugh [who] has another proof of service, but I spoke with Mr. Dowdell who I met before personally." The court said that Arbaugh should fill out a proof of service if he had served Dowdell with the subpoena, and that Dowdell's oral confirmation that he had received the subpoena was "not enough. You have to confirm it and give it with your driver's license, et cetera. Because under the code, that's not good enough if he just says, 'Yeah, I got it.' It's not good enough for a body attachment. If he signs something and says he served him with it, then that's going to be good enough." Counsel for Smith stated that he hoped it would not be necessary for Arbaugh to fill out a proof of service, speculating that "[i]t may be that Mr. Dowdell just heard that we were behind."

On Monday, March 26 the prosecutor advised the court that he had obtained a criminal history for Dowdell and wanted the court to review it to see if there were any convictions the prosecution could use to impeach Dowdell. Counsel for Smith interjected, "We will see if Mr. Dowdell shows up." The court asked, "He's not here right now?" Defense counsel answered, "I spoke to him last night. He said he would be

here at 1:30." The court raised the issue of the body attachment, and counsel for Smith stated that he needed Arbaugh, who was in the hallway, to complete a proof of service. The court stated, "Okay, so he's there. He was ordered back, so you want to just call your witness back?" Counsel for Smith stated, "yes."

At the end of the day on Tuesday, March 27 counsel for Smith requested a brief continuance of the trial in order to locate Dowdell, who had not appeared in court. The court stated that Dowdell "was subpoenaed for March 22nd. He has not shown up. You've had phone contact. He's obviously avoiding coming to court; correct?" Counsel for Smith said that "it wasn't clear he was avoiding coming to court until Monday afternoon when he didn't appear. There was a delay getting some physical description of him so the warrant could be issued. Still, for [Smith's] constitutional right to the subpoena power to mean anything there has to be some reasonable time allowed for a witness who doesn't come to court, for them to be arrested pursuant to the court's power." In response to the court's request for an offer of proof, counsel for Smith stated that Dowdell was sitting on the bench by the porch and observed Phillips talking to a woman on his cell phone. Then "[t]he shooting happened. [Dowdell] ran to the house, followed closely by Mr. Phillips, who collapsed just inside the door, and that Mr. Dowdell saw someone running, didn't know where that person was shooting but the person he saw in the vicinity was not" Smith.

The court ruled, "I'm willing to allow you not to rest until the People present their rebuttal witnesses, which we'll take out of order. If you have not found Mr. Dowdell by that time, your motion to continue is denied. This has been a very long trial. The jurors were told that this was going to be a 12-day trial. This witness should have been ordered into court. He wasn't. You should have gotten the body attachment a long time before you did. I know there was some difficulty getting a description but the staff here was ready to go on that days ago." In any event, the court had "ask[ed] the sheriff's department to do whatever they can do to contact the authorities in Victorville to try to look for him, that being his known address."

The prosecution completed presentation of its rebuttal witnesses the following day. Dowdell did not testify.[8]

Smith contends that the trial court abused its discretion in refusing to grant a "limited continuance" to locate Dowdell. Smith also argues that the trial court's refusal to grant a continuance deprived him of his rights to due process and to effective representation.

"'The decision whether to grant a continuance of a hearing to permit counsel to secure the presence of a witness rests in the sound discretion of the trial court.' [Citation.]" (*People v. Lewis* (2009) 46 Cal.4th 1255, 1310.) "'To establish good cause for a continuance, defendant had the burden of showing that he had exercised due diligence to secure the witness's attendance, that the witness's expected testimony was material and not cumulative, that the testimony could be obtained within a reasonable time, and that the facts to which the witness would testify could not otherwise be proven.' [Citation]" (*People v. Roybal* (1998) 19 Cal.4th 481, 504; see *People v. Lewis and Oliver* (2006) 39 Cal.4th 970, 1036 ["[i]n order to show the court abused its discretion in denying a continuance in the midst of trial, the defendant must demonstrate, among other things, that he diligently attempted to secure the attendance of witnesses"]; *People v. Johnson* (2013) 218 Cal.App.4th 938, 942 ["'[p]articularly, when the party seeks a continuance to secure a witness's testimony, the party must show that he exercised due

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**8** On December 5, 2013 the court held a contempt hearing on Dowdell's failure to appear in court. Dowdell denied receiving a subpoena but acknowledged telling counsel for Smith he would come to court. He explained that he had to go to San Bernardino and had no way to get back to court. Dowdell acknowledged that he saw the shooting but when asked who the shooter was, he stated, "I can't—I don't know." He added that Smith was not the shooter, but that there was "a tall dude just coming towards us shooting." Dowdell also stated that he had known Smith and Phillips since they were children, there was no "bad blood" between them, and he did not know why Phillips would lie that Smith was the shooter. He also knew Knox and did not know why she would also lie that Smith was the shooter.

diligence to secure the witness's attendance, that the witness would be available to testify within a reasonable time, that the testimony was material and not cumulative'"].)

Even assuming that counsel for Smith had served Dowdell with a subpoena and had exercised due diligence in attempting to secure Dowdell's testimony, and assuming that the trial court's effective one-day continuance until after the prosecution had presented its rebuttal case was not a reasonable amount of time, the trial court still did not abuse its discretion because Dowdell's proffered testimony was cumulative. According to counsel for Smith, Dowdell would have testified that "[t]he shooting happened," he saw someone running, and the person he saw was not Smith. Both Smith and Houston, however, testified that Smith was not at the Smith house on the night of July 5, and Stacy Taylor and Mrs. Smith testified that they did not see Smith at the house on that day. D.G. testified that he did not see his father at the Smith house that night either, and that after he heard gunshots he saw a tall man running away from the house. Arbaugh testified that he did not see Smith at the house that night, and that after he heard gunshots he saw the silhouette of a person who was not Smith up the street. Dowdell's proffered testimony would have added nothing new to the evidence in Smith's defense.[9] Because Dowdell's proffered testimony was cumulative, the trial court did not abuse its discretion in denying a continuance to allow the defense to try to locate Dowdell and secure his testimony. (See *People v. Roybal*, *supra*, 19 Cal.4th at p. 504; *People v. Johnson*, *supra*, 218 Cal.App.4th at p. 942.)

Nor did the denial of a continuance deprive Smith of due process and a fair trial. "'One of the elements of a fair trial is the *right to offer relevant and competent evidence on a material issue*. Subject to such obvious qualifications as the court's power to restrict cumulative and rebuttal evidence . . . , and to exclude unduly prejudicial matter [citation], denial of this fundamental right is almost always considered reversible error.

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**9** When Dowdell subsequently testified at the contempt hearing, his testimony added nothing to the testimony of the witnesses who testified at trial. All he said was that the shooter was "a tall dude" who was not Smith.

[Citations.]' [Citation.]" (*Elkins v. Superior Court* (2007) 41 Cal.4th 1337, 1357; see *People v. Sherrod* (1997) 59 Cal.App.4th 1168, 1174-1175 [where denial of continuance results in denial of a fair trial, reversal is required].) Because Dowdell's testimony was cumulative, and because the trial court did not abuse its discretion in denying Smith's request for a continuance, the trial court did not deny Smith due process and a fair trial. (See *People v. Panah* (2005) 35 Cal.4th 395, 425 [denial of request for continuance was not detrimental where the defendant failed to establish that the absent witnesses' testimony "would have been anything other than cumulative"]; *People v. Lucas* (1995) 12 Cal.4th 415, 464-465 [because exclusion of evidence did not deprive defendant of crucial evidence, there was no violation of his due process rights]; *People v. Laursen* (1972) 8 Cal.3d 192, 204 [trial court did not abuse its discretion in denying motion to continue the trial to allow the defendant to call witness whose testimony "would likely be merely cumulative of that of other defense witnesses"].)

Finally, because Dowdell's proffered testimony was cumulative, it is not reasonably probable that Smith would have obtained a more favorable result had Dowdell testified. Therefore, any failure by Smith's trial counsel to take further steps to compel Dowdell to appear at trial did not deprive Smith of the effective assistance of counsel. (See *People v. Homick* (2012) 55 Cal.4th 816, 893, fn. 44 [no ineffective assistance in failing to call certain cumulative witnesses]; *People v. Roybal*, *supra*, 19 Cal.4th at p. 506, fn. 2 [trial court "did not abuse its discretion; there is thus no predicate error on which to base the constitutional claims," including ineffective assistance of counsel claim]; *In re Emilye A.* (1992) 9 Cal.App.4th 1695, 1716 [failure to call witness whose testimony would have been cumulative is not ineffective assistance].)[10]

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**10** We also reject Smith's claim of cumulative error because we have rejected each of Smith's claims of error on the merits. (See *In re Reno* (2012) 55 Cal.4th 428, 483 ["claims previously rejected on their substantive merits . . . cannot logically be used to support a cumulative error claim because we have already found there was no error to cumulate"].)

## DISPOSITION

The judgment is affirmed.

SEGAL, J.*

We concur:

WOODS, Acting P. J.

ZELON, J.

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