Filed 7/31/12 P. v. Aguilar CA2/2

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. SANTOS FRANCISCO AGUILAR, Defendant and Appellant.	B231391 (Los Angeles County Super. Ct. No. VA103146)

APPEAL from a judgment of the Superior Court of Los Angeles County. Michael M. Johnson, Judge. Affirmed.

Stephen Temko, 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, Assistant Attorney General, Paul M. Roadarmel, Jr., and Stephanie A. Miyoshi, Deputy Attorneys General, for Plaintiff and Respondent.

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Appellant Santos Francisco Aguilar was convicted following a jury trial of conspiracy to commit murder (Pen. Code, § 812, subd. (a)(1)).[1] The jury found true the firearm allegations that a principal personally used a firearm (§ 12022.53, subds. (b), (e)), personally and intentionally discharged a firearm (§ 12022.53, subds. (c), (e)), and did so causing death (§ 12022.53, subds. (d), (e)). The jury also found true the criminal street gang allegation (§ 186.22, subd. (b)(1)). The jury acquitted appellant of first degree murder (§ 187, subd. (a)). The court sentenced appellant to state prison for 50 years to life, consisting of 25 years to life for conspiracy plus 25 years to life for the firearm allegation that a principal personally and intentionally discharged a firearm causing death. The court stayed the remaining firearm and gang enhancements pursuant to section 654.

Appellant contends the trial court violated his constitutional rights to confront and cross-examine witnesses by admitting the preliminary hearing testimony of the key witness. We disagree and affirm the judgment.

FACTS

Preliminarily, we note that four other defendants were also charged with appellant and acquitted of murder. In a recent unpublished opinion, *People v. Pedro Gabriel Trejo et al.*, case No. B230171, filed on February 7, 2012, we affirmed the jury's verdicts finding appellant's codefendants Pedro Gabriel Trejo and Jesus Marquez guilty of conspiracy to commit murder. The parties in the instant case have stipulated that we may take judicial notice of the record in this prior case. Accordingly, we adopt our statement of facts from case No. B230171:

On July 29, 2007, J.J., who was then ten years old, was with his mother in a car on 58th Place in Los Angeles County, when he heard two or three gunshots. He saw people in a small car and the leg of a person who appeared to be getting into the car. The car drove off, followed by a light blue SUV. When the police arrived, they found Ivan Perez

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[1] All statutory references shall be to the Penal Code, unless otherwise noted.

lying in a gutter. Perez died from two bullet wounds to his head, including one "close contact shot."

Homicide Detective Jonas Shipe of the Los Angeles County Sheriff's Department investigated the shooting and learned that Perez was a member of the Florencia 13 gang with the moniker "Blackie." On June 21, 2007, about a month before he was killed, Perez had been arrested along with fellow gang member Javier Rangel. According to a statement given to the police by Javier's sister Claudia Rangel, which was recorded and played at trial and the preliminary hearing, during that incident Perez had displayed a gun at a car wash, someone fought with him, and Javier jumped into the fight.[2]

No one from the Rangel family testified at trial. Testimony given at the preliminary hearing by Claudia and her mother, Marta Moreno, was read at trial. Claudia testified at the preliminary hearing that on the day Perez was killed several people came to her house three different times to see Javier, including appellant and Perez. She recognized some of the people as Florencia gang members, and most were much older than Perez and Javier. She heard one of the gang members, codefendant Trejo, say that Perez or Javier had "snitched on the gun." At some point, a man holding a gun in the backyard said, "I'm going to shoot both of these fools right here." He was told not to shoot anyone at the house because Claudia and her baby were there. Claudia's other brother Jonathan Rangel was also home at the time.

During the final visit to Claudia's house, Trejo took Perez and Javier to the backyard and told them to fight, which they did for about four minutes. Perez was then taken to a car where others were waiting, and Trejo placed Perez in the rear middle seat. Several cars, including a light blue SUV, drove away. Javier remained at the house. About 30 minutes later, Trejo returned to the house and told Javier that Perez had been killed, though he did not say who had done the shooting. Trejo told Javier to say that a rival gang had killed Perez if anyone asked questions about his death.

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[2] Because they have the same last name, we will refer to the siblings by their first names.

Marta Moreno testified at the preliminary hearing that on the day of the killing she returned home to find several people she did not know, either in cars or leaving the back of her house. Her children were at home with Perez, who left with the others. Later that day, she saw Javier with a black eye or injury to his face.

Detective Dean Camarillo of the Los Angeles County Sheriff's Department testified as a gang expert. He was familiar with the Florencia 13 gang, and first met Perez and Javier in 2005 or 2006 when Perez was 12 or 13 years old. Both boys told him they were members of Florencia. Perez was killed in an area claimed by Florencia. Appellant was a member of the Florencia gang. He had the gang's tattoos and the moniker "Boyz." Detective Camarillo testified that in Hispanic gangs, members who are perceived as snitches will generally be killed, if the killing is authorized by more senior members of the gang. Detective Camarillo believed that the fight between Perez and Javier was intended to settle the differences between them arising from their accusing each other of having been the snitch. He opined that the killing was committed for the benefit of, in association with, and at the direction of the Florencia 13 gang.

DISCUSSION

Appellant contends the trial court violated his constitutional rights to confront and cross-examine the witness against him by admitting the preliminary hearing testimony of Claudia Rangel. Because we find the prosecution demonstrated due diligence in attempting to locate the witness, we conclude this contention lacks merit.

A. Background

On August 25, 2010, a month prior to trial, the prosecutor filed a motion to allow admission of the preliminary hearing testimony of Claudia and Moreno on the ground the witnesses were unavailable, arguing they had both "disappeared" and that Los Angeles County Sheriffs had "diligently searched" for them. The court conducted a hearing on the motion over three days, in which the prosecutor presented two witnesses, Detective

Shipe and Gilbert Roldan, an investigator with the Los Angeles County District Attorney's Office.

Detective Shipe, who was the investigating officer on the case, testified that at the preliminary hearing in July 2008, Claudia and Moreno were both in custody as material witnesses and were released without bond after the hearing. On August 1, 2008, the family was relocated to Oxnard because they were "in fear for their lives." At that time, both women were "cooperative" with law enforcement. Shipe and his partner Detective Ferguson, along with the prosecutor, decided the women did not need to be subpoenaed until closer to trial.

Detective Ferguson had telephone contact with Claudia through November 2008.[3] On December 1, 2008, the family's landlord contacted Shipe and informed him the family had "packed up and fled in the middle of the night." Shipe went to the location and spoke to the landlord, who indicated Claudia and Moreno had stated they were going to Mexico. On December 2, 2008, Moreno's boyfriend confirmed that the family had gone to Mexico.[4] The detectives were unsuccessful in later locating Moreno's boyfriend. Shipe never contacted Mexican authorities because he did not know if Claudia or Moreno were actually in Mexico and did not have an address or even know a possible Mexican state in which either woman might be located. According to Shipe, the Mexican government could not assist in locating Claudia or Moreno unless Shipe could identify a particular Mexican state in which the women might be living.

Shipe and Ferguson checked "all law enforcement resources," including "warrants, Cal Gangs, CCHRS, Department of Children Services," "Raps," the Los Angeles County booking system, the California Department of Motor Vehicles, Lexis-

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[3] The detectives used Claudia as their "contact person" because Moreno did not speak English. The detectives made contact with Claudia by calling her cell phone, which was eventually disconnected. Shipe acknowledged that he "probably" should have obtained Claudia's cell phone records.

[4] That same day, the prosecution obtained a body attachment order for Claudia, requiring that she post a surety bond in the amount of $100,000 before being released.

Nexis, and "inmate locators for surrounding agencies," as well as "every resource" that law enforcement had. Ferguson also checked with hospitals and coroner's offices. Shipe was unsuccessful in identifying the father of Claudia's child, and the probation officer of Jonathan Rangel did not provide any useful information over the telephone.

At some point in either 2008 or 2009, Shipe checked into Claudia's welfare card, "which was used until it was tapped out." The "lead dried up" and she "quit using that card." Shipe did not investigate any bank accounts for the family because he assumed they did not have any accounts "based on their lifestyle." None of the Rangel family had driver's licenses or cars registered to them. As far as Shipe knew, none of the Rangels were American citizens or were legally in the United States.

On January 21, 2009, Shipe and Ferguson contacted a "major crimes surveillance team," whose job was to track down witnesses and suspects, and provided the team with all the information they had. At some point, the team contacted the utility companies in an effort to locate the women. On March 12, 2009, Shipe sent an e-mail to Detective Juan Alvarado, a member of the surveillance team, stating that Claudia had been seen by a reliable informant with her child and an aunt at a strip mall in Fontana. The e-mail contained an address in Fontana and a telephone number for the aunt. In the e-mail, Shipe stated, "'I will hook up with her when you have time to go snatch these folks,'" by which Shipe meant that "it would be appreciated" if the team would "go out and look for the witnesses in that area" when the team's schedule was "open." Shipe explained that the team had "a heavy caseload," and that if the team was "hot on a murder suspect's case, that, would take precedence over locating a witness." Shipe did not go out to Fontana himself or call the aunt because he believed that Detective Alvarado, who spoke Spanish, should be the one to telephone the aunt.

In May 2009, the team went to four addresses provided by Shipe and Ferguson, "conducted investigations" and "contacted neighbors," but was unable to locate either Claudia or Moreno. That same month, Shipe and Ferguson created a material witness murder investigation special bulletin for Claudia, Javier and Jonathan Rangel and

Moreno. They distributed the flier to "several law enforcement investigators out in the Inland Empire." The flyer was also "passed down to Border Patrol."

On a monthly basis, Shipe and Ferguson checked "all the law enforcement resources" to determine if Claudia or Moreno were in custody; they also checked the status of Javier and Jonathan Rangel. Using these resources, they were unable to locate Claudia or Moreno.

Investigator Gilbert Roldan testified that on September 10, 2010, he received a request to investigate Claudia's whereabouts. On September 16, 2010, Roldan spent about an hour checking various databases, including the Justice Data Interface Communication system, Lexis, Prosecution Information Management System, Los Angeles County booking records, outstanding warrants, five area hospitals, 10 coroner's offices in Los Angeles and San Bernardino Counties, approximately four homeless shelters in the Los Angeles area, the United States Postal Service, and the Employment Development Department. The inquires yielded no useful information.

On September 20, 2010, Roldan spent another two to three hours checking the Los Angeles County Sheriff's Department's booking records, wants and warrants, and Lexis databases. He also called some hospitals and missions and the coroner's offices in Los Angeles and San Bernardino counties. He had not received any response from the postal service.

On September 21, 2010, Roldan spent another hour checking wants and warrants again, the booking records of the Sheriff's Department, and submitted a request to the Employment Development Department. On September 23, 2010, the day of his testimony, Roldan received a request to locate Moreno. He spent about 30 minutes checking wants and warrants, and the booking records of Los Angeles and San Bernardino counties.

The trial court found that Claudia and Moreno were unavailable witnesses and granted the prosecutor's motion. Over objections by all defense counsel, the preliminary hearing testimony of Claudia and Moreno was read to the jury, and portions of Claudia's taped police interview were played at trial.

B. Relevant Law

Under the state and federal Constitutions, a criminal defendant has the right to confront the prosecution's witnesses. (U.S. Const., 6th Amend.; Cal. Const., art. I, § 15; *People v. Herrera* (2010) 49 Cal.4th 613, 620 (*Herrera*).) "Although important, the constitutional right of confrontation is not absolute." (*Herrera, supra,* at p. 621; see also *People v. Thomas* (2011) 51 Cal.4th 449, 499.) An exception exists when a witness is unavailable, the witness testified against the defendant at a prior proceeding, and the witness was subjected to cross-examination. (Evid. Code, § 1291, subd. (a)(2)[5]; *Herrera, supra,* at p. 621; *Barber v. Page* (1968) 390 U.S. 719, 722.)

A witness is unavailable if the prosecution "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); *Herrera, supra,* 49 Cal.4th at p. 622.) Due diligence "'"'connotes persevering application, untiring efforts in good earnest, efforts of a substantial character.'"'" (*Herrera, supra,* at p. 622; *People v. Valencia* (2008) 43 Cal.4th 268, 292.) "Considerations relevant to the due diligence inquiry 'include the timeliness of the search, the importance of the proffered testimony, and whether leads of the witness's possible location were competently explored.'" (*Herrera, supra,* at p. 622; *People v. Thomas, supra,* 51 Cal.4th at p. 500.) As long as "'substantial good faith'" efforts are

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5 Evidence Code section 1291 provides in relevant part: "(a) Evidence of former testimony is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness and: [¶] . . . [¶] (2) The party against whom the former testimony is offered was a party to the action or proceeding in which the testimony was given and had the right and opportunity to cross-examine the declarant with an interest and motive similar to that which he has at the hearing."

Additionally, Evidence Code section 1294, subdivision (a) provides that "evidence of prior inconsistent statements of a witness properly admitted in a preliminary hearing or trial of the same criminal matter . . . is not made inadmissible by the hearsay rule if the witness is unavailable and former testimony of the witness is admitted pursuant to Section 1291: [¶] (1) A video recorded statement introduced at a preliminary hearing or prior proceeding concerning the same criminal matter. [¶] (2) A transcript, containing the statements, of the preliminary hearing or prior proceeding concerning the same criminal matter."

undertaken to locate a witness, the fact that "'additional efforts might have been made or other lines of inquiry pursued'" does not indicate lack of diligence because "'[t]he law requires only reasonable efforts, not prescient perfection.'" (*People v. Diaz* (2002) 95 Cal.App.4th 695, 706.)

"We review the trial court's resolution of disputed factual issues under the deferential substantial evidence standard [citation], and independently review whether the facts demonstrate prosecutorial good faith and due diligence." (*Herrera, supra,* 49 Cal.4th at p. 623.)

C. Due Diligence Was Exercised

We agree with the trial court that the prosecution sufficiently established reasonable due diligence in attempting to locate Claudia and Moreno.[6] After the preliminary hearing, they were relocated for their safety and protection. Detective Shipe and his partner kept in contact with Claudia for several months, until they were notified the family had fled in the middle of the night most likely to Mexico. The detectives made numerous efforts to locate the women, including checking various databases, the records of various state and local agencies, and "every resource" available to law enforcement. Detectives Shipe and Ferguson asked for assistance from a surveillance team trained to locate witnesses and suspects. The team went to Fontana to investigate a possible sighting of Claudia and visited four different addresses provided by the detectives. The detectives continued to check "law enforcement resources" on a monthly basis, and sent a missing persons bulletin to other law enforcement agencies, including the border patrol. Additionally, investigator Roldan checked numerous databases and records of local agencies on three separate occasions in a separate effort to locate Claudia and Moreno.

Appellant nevertheless argues that due diligence was not exercised, relying on *People v. Louis* (1986) 42 Cal.3d 969 and *People v. Cromer* (2001) 24 Cal.4th 889. But

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6 There is no dispute these women were critical witnesses; the prosecutor conceded there was no case without their former testimony.

these cases do not assist him. *People v. Louis* involved witness Gregory Tolbert, "whose credibility was indisputably minimal," who was "known to be highly unreliable and likely to disappear," and "'one of the flakiest, most unreliable witnesses that the court has come in contact with.'" (*People v. Louis, supra,* at pp. 974, 989.) While Tolbert was in custody awaiting sentencing on an unrelated matter, he refused to testify during the trial of the defendant's three codefendants unless he was released on his own recognizance for a weekend with an unnamed friend at an undisclosed location. (*Id*. at p. 990.) The prosecutor agreed, and Tolbert promptly vanished after his testimony in the codefendants' case. His preliminary hearing testimony was read at the trial of the defendant, who was sentenced to death. Our Supreme Court reversed the conviction, finding that the prosecution had failed to exercise reasonable means to secure the witness's presence. (*Id*. at p. 991.) The Court noted that "at the very minimum" the prosecution could have attempted to obtain from the witness and independently verify the name and address of the friend with whom Tolbert was allegedly spending the weekend, and could have then arranged to keep him under surveillance for the weekend. (*Id*. at p. 992.) The Court noted that "the diligence required of the prosecution to prevent Tolbert from becoming absent was particularly high" because the defendant was on trial for his life and "Tolbert was a critical prosecution witness, and was 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." (*Id*. at p. 991.)

In reviewing *People v. Louis*, our Supreme Court in *People v. Thomas* (2011) 51 Cal.4th 449 recently acknowledged: "But it was more than the prosecution's failure to prevent Tolbert's absence at the defendant's trial that led this court to reverse the defendant's conviction. . . . The opinion in *Louis* goes so far as to suggest 'something other than mere indifference' on the part of the prosecution, stating that the prosecutor 'may have taken no steps to prevent Tolbert's disappearance after the first trial because he had the testimony from defendant's preliminary hearing which could be used if Tolbert became unavailable. Indeed, the prosecutor may have taken no steps *because he hoped that Tolbert would disappear*, since as the court recognized "[Tolbert] would not

look as good in person as he does in reading out of the transcript . . . .'"" (*People v. Thomas, supra,* at p. 501, citing *People v. Louis, supra,* 42 Cal.3d at p. 993, fn. 7.) The *Thomas* Court noted that "[s]ubsequent cases have limited the holding in *Louis* to its peculiar facts." (*People v. Thomas, supra,* at p. 502.)

We agree with the People that the facts in *People v. Louis* are simply not present here. There is nothing in the record to suggest that the prosecution preferred that Claudia be absent from trial. Indeed, the prosecution engaged in repeated efforts to locate Claudia and secure her presence after she and her family had been moved for their safety. Although appellant attempts to paint Claudia as an unreliable witness and flight risk, the record invites no substantial comparison to Tolbert. The *Louis* Court noted that at all relevant times "it was known by the parties and the court that Tolbert had been convicted of several felonies, including burglary, grand theft, and receiving stolen property; that he had been committed to a hospital for the criminally insane; that he had used nine or ten aliases over a long and varied criminal career; that he habitually failed to make court appearances and had to be arrested to compel his attendance; and that he apparently had some expectation of receiving a reward if the defendants were convicted as a result of his testimony." (*People v. Louis, supra,* 42 Cal.3d at p. 989.) The same is not true here.

In *People v. Cromer*, our Supreme Court held that the prosecution failed to exercise reasonable diligence to secure the attendance at trial of the victim Courtney Culpepper, who was also the only witness to the defendant's crime of second degree robbery with personal use of a handgun. The Court stated: "Although the prosecution lost contact with Culpepper after the preliminary hearing, and within two weeks had received a report of her disappearance, and although trial was originally scheduled for September 1997, the prosecution made no serious effort to locate her until December 1997. After the case was called for trial on January 20, 1998, the prosecution obtained promising information that Culpepper was living with her mother in San Bernardino, but prosecution investigators waited two days to check out this information. With jury selection under way, an investigator went to Culpepper's mother's residence, where he received information that the mother would return the next day, yet the investigator never

bothered to return to speak to Culpepper's mother, the person most likely to know where Culpepper then was. Thus, serious efforts to locate Culpepper were unreasonably delayed, and investigation of promising information was unreasonably curtailed." (*People v. Cromer, supra*, 24 Cal.4th at p. 904.)

Appellant argues that like *Cromer*, the prosecution did not exercise due diligence because no one immediately followed up on the lead that Claudia might be living in Fontana with her aunt. But Shipe passed the information on to the surveillance team, and explained that he believed one of the Spanish-speaking members of the team was better able to contact Claudia's aunt. Appellant complains that the surveillance team took no action on the lead until nearly two months later. But Shipe explained that the team was also assigned to locate murder suspects, which would be of more importance than locating a witness. Appellant also suggests that Shipe or his partner should have driven out to Fontana themselves. While the record does not dispute the detectives could have taken such steps, so long as "'substantial good faith'" efforts are undertaken to locate a witness, the fact that "'additional efforts might have been made or other lines of inquiry pursued'" does not indicate lack of diligence because "'[t]he law requires only reasonable efforts, not prescient perfection.'" (*People v. Diaz, supra*, 95 Cal.App.4th at p. 706.)

Moreover, after the family was relocated to Oxnard on August 1, 2008, Claudia was "cooperative" with the detectives, remaining in contact with them for the first four months following the relocation. It was not unreasonable for the prosecution to assume during that time that there was no need to take drastic measures to secure her future attendance at trial. As soon as the prosecution learned that the family fled during the night and may have gone to Mexico, the prosecution immediately obtained a body attachment order for Claudia.

We are satisfied the prosecution exercised reasonable diligence in attempting to locate Claudia. Because the witness was unavailable, appellant's constitutional rights were not violated by the admission of Claudia's preliminary hearing testimony.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.

DOI TODD

We concur:

_____, P. J.

BOREN

_____, J.

CHAVEZ