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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. BRYAN SMITH, Defendant and Appellant.	B238011 (Los Angeles County Super. Ct. No. BA387223)

APPEAL from a judgment of the Superior Court of Los Angeles County. Monica Bachner, Judge. Affirmed.

Kimberly Howland Meyer, 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, Mary Sanchez and Jonathan M. Krauss, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Bryan Smith (defendant) appeals from the judgment entered after a jury convicted him of evading an officer in a vehicle driven in willful or wanton disregard for the safety of persons or property (Veh. Code, § 2800.2, subd. (a); count 1), misdemeanor hit-and-run driving (Veh. Code, § 20002, subd. (a); count 2), and unlawful driving or taking of a vehicle (Veh. Code, § 10851, subd. (a); count 3). Defendant contends the trial court erred by admitting the preliminary hearing testimony of a witness concerning count 3, based on that witness's unavailability at the time of trial, and that the trial court's erroneous ruling violated defendant's federal and state constitutional right of confrontation.

We conclude that the trial court did not err by admitting the prior testimony of an unavailable witness and therefore affirm the judgment.

FACTUAL BACKGROUND

Prosecution evidence

Saif Alshagra (Alshagra) was driving south in heavy traffic on the 101 freeway in his company's marked security vehicle at approximately 10:00 p.m. on July 29, 2011. As he approached the Sunset Boulevard on-ramp, he saw a white Porsche with dealer license plates merge onto the freeway. Alshagra heard a crash and as he looked to his right he saw the Porsche hit another car and then continue on without stopping. Alshagra heard another crash and looked to see the Porsche hit a second car. Again, the Porsche did not stop. The Porsche next attempted to merge into Alshagra's lane, and hit Alshagra's car in the process. The Porsche then merged onto the center divider, where Alshagra saw it hit three more cars before driving away. Alshagra called 911 and continued to follow the Porsche.

California Highway Patrol Officer Brent Patrick Leatherman (Leatherman) was in a marked patrol car traveling south on the 101 freeway when he responded to a 911 dispatch involving a white Porsche. He located both the Porsche and Alshagra's vehicle and merged into the lane behind the Porsche. Alshagra followed behind Leatherman's vehicle.

Leatherman activated the siren and lights on his patrol car and ordered defendant to pull over and exit the freeway. Defendant did not stop, but accelerated and swerved between cars to avoid Leatherman. Although traffic on the freeway was heavy, and cars were traveling at a speed of approximately five miles per hour, defendant straddled two lines and drove between the cars at 30 to 35 miles per hour. While doing so, the Porsche collided with another vehicle and continued without stopping. Defendant then accelerated to 70 miles per hour and exited the freeway at Alvarado Street.

Leatherman and Alshagra followed the Porsche in a high speed chase as defendant weaved in and out of traffic on city streets. At Glendale Boulevard, defendant stopped behind another car at a red light, and Alshagra blocked the Porsche by pulling in front. Alshagra then left his vehicle and took cover in the bushes while Leatherman approached the Porsche with his gun drawn. Defendant was found sitting calmly in the driver's seat with his hands on the steering wheel. Leatherman subsequently learned that the Porsche belonged to Paul Mittleman (Mittleman), that it had been reported stolen the previous day, and that its license plates were hidden behind the dealer plates.

Mittleman testified at the preliminary hearing that sometime before July 30, 2011, he took his Porsche to an auto body shop because the car had been damaged and needed repairs. He did not know defendant and had not given defendant permission to drive the car.

Due diligence hearing

Mittleman could not be located as the October 27, 2011 trial date approached. On October 27, 2011, the trial court held a hearing to determine whether the prosecution had exercised reasonable diligence in attempting to compel Mittleman's appearance at trial. Ken Ward (Ward), a senior investigator for the Los Angeles County District Attorney's office, and Shirley Benjamin (Benjamin), a witness assistance coordinator for the Los Angeles County District Attorney's Office, both testified regarding their efforts to locate Mittleman.

On or about September 29, 2011, Benjamin attempted to serve Mittleman with a trial subpoena by mail at 432 Vista Street, the address listed for Mittleman on the witness list for trial. The subpoena was returned because there was no such address. On October 4, Benjamin followed up by calling Mittleman's listed cell phone number and leaving him a message. The next day, a man who identified himself as Mittleman returned Benjamin's call and told her that he had moved to Germany, had not received the subpoena, and would not be available to appear in court. Mittleman said Leatherman had told him that he would not have to be present in court. When Benjamin asked for Mittleman's address in Germany, Mittleman would not provide it, stating that he did not yet have a permanent address but that he could be reached by cell phone.

On October 25, 2011, Ward's supervisor asked him to contact Benjamin, who was having difficulty locating Mittleman. After speaking with Benjamin, Ward searched a database of California driver's licenses and learned that Mittleman's address was 732 Vista Street, and not 432 Vista Street, as listed on the subpoena. Using Mittleman's name, license number, and social security number, Ward searched two additional databases for information, and both indicated that Mittleman lived at 732 Vista Street.

Ward drove to 732 Vista Street, where he met Ms. Allen-Barr, who told him she had recently purchased the property from Mittleman. According to Allen-Barr, Mittleman had relocated to Germany, but she did not know his precise whereabouts there.

Ward then contacted the Customs and Protection Unit of the Department of Homeland Security at the Los Angeles International Airport and spoke with Agent Shawn Keyhoe. Ward requested verification that Mittleman had left the country. Keyhoe asked that Ward send his request in an email, but noted that the request "would have to go up through the chain of command." Ward knew from past experience that obtaining a response to such a request could take months. He nevertheless sent an email request concerning Mittleman's whereabouts abroad. He did not receive a response. Ward also made a follow-up telephone call to Keyhoe's office, but no one was in the office to answer the call.

Ward next called the cell phone number listed for Mittleman. No one answered, but an outgoing voicemail message identified Mittleman as the owner of the phone. Ward left a message for Mittleman but did not receive a return call.

The prosecutor filed a declaration regarding internet research he had undertaken to locate Mittleman. The prosecutor also gave an oral account of his efforts at the due diligence hearing. According to the prosecutor, several websites, including sportinglife.com, hypebeast.com, brandmagazine.com, and huhmagazine.com.uk, contained references to a Paul Mittleman moving from a job at Stussy to work for Adidas in Germany. A Facebook page indicated that Mittleman was an Adidas employee who lived in Herzogenaurach, Germany. A September 29 post on that Facebook page stated "Berlin bound," and several other posts indicated that Mittleman was in Germany.

The trial court found that the hearsay evidence offered by the prosecutor concerning Mittleman's whereabouts was admissible to show the prosecution's diligence in attempting to locate Mittleman, even though such evidence was not admissible to show that Mittleman was actually in Germany. The trial court further found that Mittleman was absent from the hearing and that the prosecutor had exercised reasonable diligence but had been unable to procure Mittleman's attendance through the court process.

Trial and sentencing

Alshagra and Leatherman testified at the trial about their pursuit of defendant, and Mittleman's preliminary hearing testimony was read into evidence. The jury convicted defendant of all three of the charged Vehicle Code violations. The trial court sentenced defendant to a total term of two years eight months in state prison for count 1, a concurrent six-month term for count 2, and a consecutive term of eight months for count 3. Defendant timely appealed.

DISCUSSION

I. Applicable law and standard of review

A criminal defendant has the right, under both the federal and California constitutions, to confront the prosecution's witnesses. (*People v. Herrera* (2010) 49

Cal.4th 613, 620.) A defendant's constitutional right of confrontation, while important, is not absolute. It is subject to an exception allowing the admission of a witness's prior recorded testimony if the witness is unavailable and the defendant had a prior opportunity to cross-examine the witness. (*People v. Cogswell* (2010) 48 Cal.4th 467, 477 (*Cogswell*).) That exception is codified in Evidence Code section 1291, which provides, in pertinent part as follows:

> "Evidence of former testimony is not made inadmissible by the hearsay rule 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." (Evid. Code, § 1291, subd. (a)(2).)

A declarant is "unavailable as a witness" if absent from the hearing and the proponent of the declarant's prior testimony has exercised reasonable diligence but has been unable to procure the declarant's attendance by the court's process. (Evid. Code, § 240, subd. (a)(5).) "Reasonable diligence, often called 'due diligence' in case law, '"connotes persevering application, untiring efforts in earnest, efforts of a substantial character."' [Citation.]" (*Cogswell, supra*, 48 Cal.4th at pp. 476-477, quoting *People v. Cromer* (2001) 24 Cal.4th 889, 904.) Relevant factors include whether the search for the witness was timely begun and whether leads were competently explored. (*People v. Wilson* (2005) 36 Cal.4th 309, 341 (*Wilson*).) A trial court's due diligence determination is reviewed de novo. (*Ibid.*)

II. Reasonable diligence

Defendant contends the prosecution's unsuccessful attempt to serve Mittleman by mail with a subpoena and its belated follow-up efforts to locate and procure Mittleman's attendance were per se unreasonable. The record does not support this contention.

Prosecutorial investigator Benjamin attempted to serve Mittleman with a trial subpoena by mail more than a month before the trial was set to begin. Less than a week later, when the subpoena was returned as undeliverable, she immediately contacted

Mittleman by telephone and learned that Mittleman had relocated to Germany. She asked Mittleman for his address in Germany, which Mittleman declined to provide.

Investigator Ward learned of Benjamin's difficulty in locating Mittleman two days before the due diligence hearing. He conducted several database searches, learned that the address listed for Mittleman on the witness list was incorrect, and located the correct address in Los Angeles. Ward then drove to that address and spoke to the current resident, who confirmed that Mittleman had moved to Germany. Ward next contacted the Department of Homeland Security in an effort to determine Mittleman's whereabouts. Finally, Ward called Mittleman's cell phone and left a message, although he did not receive a return call before the hearing.

The prosecutor also undertook efforts to locate Mittleman. He searched several internet websites and found references to a Paul Mittleman having moved from Los Angeles to Germany sometime on or after September 29, 2011.

The foregoing efforts demonstrate reasonable diligence on the part of the prosecution. The attempt to serve Mittleman with a trial subpoena by mail more than a month before the scheduled trial date was neither untimely nor unreasonable. Nothing in the record indicates that the prosecution knew or had reason to know of Mittleman's intent to relocate to Germany. "The prosecution is not required 'to keep "periodic tabs" on every material witness in a criminal case . . .'" (*Wilson, supra*, 35 Cal.4th at p. 342), or to take preventative measures to stop the witness from disappearing absent knowledge of a substantial risk that the witness would flee. (*Ibid.*) The record shows timely, reasonable, and diligent efforts by the prosecution in its efforts to locate Mittleman and procure his attendance at trial.

Defendant next argues that the prosecution should have pursued other means of compelling Mittleman's attendance, such as the issuance of a federal subpoena, or enlisting the help of German authorities pursuant to the international Treaty on Mutual Legal Assistance in Criminal Matters between Germany and the United States. That the prosecution did not pursue these additional measures does not compel a finding that it

failed to exercise reasonable diligence in this case. (*People v. Cummings* (1993) 4 Cal.4th 1233, 1298.) Defendant cites *People v. Sandoval* (2001) 87 Cal.App.4th 1425 (*Sandoval*) as authority for his position that pursuing these additional means of compelling a foreign witness's attendance at trial is a constitutionally mandated element of the prosecution's burden of demonstrating reasonable diligence. The court's holding in *Sandoval* is not so broad, and the facts of that case are distinguishable. The trial court in *Sandoval* found a witness to be unavailable simply because he was a Mexican citizen who had been deported to Mexico. (*Id.* at p. 1443.) Although prosecutorial investigators had located the witness, who had expressed his willingness to testify if he were given $100 to obtain a visa to enter the United States legally, the prosecution did nothing more to secure the witness's attendance at trial. (*Id.* at p. 1442.) Given those circumstances, the appellate court in *Sandoval* concluded that admission of the witness's preliminary hearing testimony violated the defendant's constitutional right of confrontation.

The circumstances in the instant case are substantially different from those in *Sandoval*. The investigators here did not know Mittleman's address or his precise location in Germany. Mittleman did not express any willingness to testify at trial and he would not provide an address where he could be reached in Germany. The trial court's finding of unavailability was based not on Mittleman's presence in Germany, but on his absence despite the prosecution's efforts to procure his presence at trial. Given these differences, *Sandoval* does not compel a reversal of the trial court's ruling.

III. Harmless error

Even assuming the trial court's admission of Mittleman's prior testimony was erroneous, that error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.) To sustain a conviction under Vehicle Code section 10851, subdivision (a), the prosecution bore the burden of showing "by direct or circumstantial evidence" that defendant did not have Mittleman's consent to drive the Porsche. (Veh. Code, § 10851, subd. (a); *People v. Clifton* (1985) 171 Cal.App.3d 195, 199.) There was ample evidence, apart from Mittleman's preliminary hearing testimony, that defendant

did not have Mittleman's permission to drive the car. Officer Leatherman testified without objection that Mittleman was the owner of the Porsche and that the car had been reported stolen the day before defendant was apprehended while driving it. Leatherman also testified that the vehicle's license plates were concealed beneath dealer plates that had been placed on top of the actual license plates. Both Leatherman and Alshagra testified that defendant took extreme and dangerous measures to avoid being apprehended, driving erratically and at high speeds in heavy traffic after being ordered to stop and pull over. Defendant's possession of a stolen vehicle and his efforts to evade the police were more than sufficient to support his conviction under Vehicle Code section 10851, subdivision (a). (*People v. Clifton, supra*, at pp. 199-200.) There is no reasonable doubt that a rational jury would have found defendant guilty of violating Vehicle Code section 10851, subdivision(a), even in the absence of Mittleman's testimony.

DISPOSITION

The judgment is affirmed.

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_____, J.
CHAVEZ

We concur:

_____, P. J.
BOREN

_____, J.
ASHMANN-GERST