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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. MARCUS FREEMAN, Defendant and Appellant.	B279667 (Los Angeles County Super. Ct. No. BA441772)

APPEAL from a judgment of the Superior Court of Los Angeles County. Jose I. Sandoval, Judge. Affirmed.

Daniel G. Koryn, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Stacy S. Schwartz and Christopher G. Sanchez, Deputy Attorneys General, for Plaintiff and Respondent.

* * * * * *

A jury convicted Marcus Freeman (defendant) of pimping (Pen. Code., § 266h, subd. (a))[1]—that is, of knowingly deriving support and maintenance form a person he knows to be a prostitute. When the victim-prostitute could not be located in the months leading up to trial, the court admitted her preliminary hearing testimony in lieu of her live testimony at trial. Defendant asserts this violated his constitutional right to confront witnesses. We reject this assertion, and affirm.

FACTS AND PROCEDURAL BACKGROUND

I. Facts

In early November 2015, police officers watched as Chloe A. (Chloe)[2] chatted with lone male motorists along Figueroa Street in Los Angeles. At one point, she got into a male motorist's car, the motorist drove to a motel, the two engaged in sexual acts for approximately 20 minutes, and he eventually returned her to Figueroa Street. Chloe then called defendant on her cell phone. He drove up moments later, and they did a swap: She handed him money, and he handed her condoms. Moments later, police arrested Chloe and defendant. Chloe had a cell phone and condoms (but no money), and defendant had $2,330 in cash. Police found a cell phone used by Chloe in defendant's car.

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

[2] Because Chloe was a minor at the time of her arrest, the parties used only her first name. For consistency's sake, we will do the same.

II. Procedural Background

A. *Charge*

The People charged defendant with a single count of pimping (§ 266h, subd. (a)); specifically, the People alleged that defendant, while knowing Chloe was a prostitute, "live[d] and derive[d] support and maintenance in whole [or] in part from" her prostitution earnings.

B. *Preliminary Hearing*

The court conducted a preliminary hearing on this charge on February 16, 2016. The investigating police officer had served Chloe with the subpoena to testify at her mother's house. The officer said Chloe was not a "cooperative" witness, but "was willing to come" and "get this over with" and, in fact, arranged her own transportation to the hearing.

Chloe was the sole witness. She testified that defendant, about a month after they met, had introduced her to the world of prostitution. She had become a prostitute "by choice." Nevertheless, defendant decided which nights she would work; he drove her to one of the three "tracks" she worked (namely, on Western or on Figueroa in Los Angeles or in Pomona); he and she together set the prices to be charged for various sex acts as well as her nightly quota or "trap"; he "provide[d] protection"; and he took "all of" her earnings from prostitution, which were used to buy food and clothes for both of them.

C. *First Trial Date*

The date first set for trial was August 30, 2016.

Five days earlier, on August 25, 2016, the investigating police officer on the case attempted to serve Chloe with a trial subpoena. The officer looked for Chloe (1) at her mother's home (where the subpoena to testify at the preliminary hearing had

been served), and (2) at a second address Chloe had listed as an alternate residence. Chloe's mother reported that she had not spoken with Chloe in two months, and no one answered at the alternate residence. The officer left her business card at the alternate residence, and arranged for a "wanted" flyer to be sent to all of the law enforcement agencies in Los Angeles, Orange, Riverside, San Bernardino, and Ventura counties. She received no positive response.

On the morning of trial, the People answered unable to proceed. The People then dismissed the charge against defendant and, with defendant's consent, refiled it pursuant to sections 1382 and 1387.2

D. *Second Trial Date*

Trial was next set for November 2, 2016.

That morning, the People reported that they had yet to locate or subpoena Chloe and asked to use her preliminary hearing testimony at trial. The trial court convened a "due diligence" hearing to examine the People's efforts to secure Chloe as a witness.

The investigating officer and another member of her team testified to their team's efforts to locate Chloe in the nine weeks between August 30 and November 2. The officers had gone back to Chloe's mother's house, who told them never to return and refused to give them a phone number. On November 1, they again conducted surveillance of the mother's house. The officers also conducted surveillance at Chloe's alternate residence on three occasions, once in late September and twice in mid-October. Because Chloe's mother had indicated that Chloe was "back at it" and because Chloe had said she usually worked the Figueroa "track," the officers on five different occasions drove up and down

the "track" looking for Chloe for time periods ranging from 45 minutes to five hours. The investigating officer resent the "wanted" flyer to the five local counties, thrice checked the Los Angeles County database to see if Chloe had been arrested, and also checked the Los Angeles coroner's office. Every effort came up negative.

On the day of the due diligence hearing, the officers checked the statewide database for arrests, checked Chloe's DMV records, and left a voicemail for one of Chloe's friends. The database yielded no hits, and the DMV records listed Chloe's address as the alternative address the officers had been surveilling. However, Chloe's friend called back and put Chloe on the line. When the officers told her that her testimony was needed, Chloe "became very upset," started "yelling and screaming" into the phone, and adamantly refused to testify, explaining that defendant had killed someone and had posted a $5,000 reward for her murder. Chloe refused to divulge her location and hung up.

The trial court ruled that the People could use Chloe's preliminary hearing testimony at trial. The court reasoned that Chloe was "doing her best to evade service of . . . process," and that "the People have made [a] sufficient showing [of] due diligence."

The trial court permitted the prosecutor to read all of Chloe's preliminary hearing testimony into the record.

The jury returned a guilty verdict.

E. *Sentencing*

The trial court imposed a three-year prison sentence.

F. *Appeal*

Defendant filed a timely notice of appeal.

DISCUSSION

Defendant's sole claim on appeal is that the trial court erred in allowing the People to introduce Chloe's preliminary hearing testimony at his trial. The Sixth Amendment guarantees an "accused" the "right . . . to be confronted with the witnesses against him." (U.S. Const., 6th Amend.) But this right "is not absolute." (*People v. Cromer* (2001) 24 Cal.4th 889, 892, 897 (*Cromer*).) As spelled out in *Crawford v. Washington* (2004) 541 U.S. 36 (*Crawford*), the confrontation clause is not violated when the People introduce the statements of an absent witness if (1) that witness is unavailable to testify at trial, and (2) the defendant had a previous opportunity to cross-examine that witness. (*Id.* at pp. 62, 68; *People v. Sanchez* (2016) 63 Cal.4th 665, 680; Evid. Code, § 1291, subd. (a)(2).) If these conditions are met, this exception allows for the use of the absent witness's preliminary hearing testimony at trial. (E.g., *People v. Herrera* (2010) 49 Cal.4th 613, 621 (*Herrera*).)

I. Unavailability

As pertinent here, a witness is "unavailable" to testify if she is "[a]bsent from the hearing and the proponent of . . . her statement has exercised reasonable diligence but has been unable to procure . . . her attendance by the court's process." (Evid. Code, § 240, subd. (a)(5); *Cromer*, *supra*, 24 Cal.4th at p. 898 [using this definition for confrontation clause purposes].) The prosecution bears the burden of establishing reasonable diligence. (*Herrera*, *supra*, 49 Cal.4th at p. 623.) We review the trial court's factual findings for substantial evidence, and its determination of reasonable diligence de novo. (*Cromer*, at pp. 900-901.)

Reasonable diligence is a flexible standard aimed at assessing whether the People's efforts to locate the witness were "timely, reasonably extensive and carried out over a reasonable period." (*People v. Bunyard* (2009) 45 Cal.4th 836, 856; *Cromer*, *supra*, 24 Cal.4th at p. 904 [reasonable diligence "'connotes persevering application, untiring efforts in good earnest, efforts of a substantial character'"].) Reasonable diligence demands "reasonable efforts to locate the witness" (*People v. Cummings* (1993) 4 Cal.4th 1233, 1298), but "'not prescient perfection'" (*People v. Diaz* (2002) 95 Cal.App.4th 695, 706 (*Diaz*)). In assessing whether the People's efforts meet this standard, courts have looked to (1) """whether the search was timely begun,""" (2) "the importance of the witness's testimony," and (3) "whether leads were competently explored." (*Cromer*, at p. 904.) What matters is the reasonableness of what the People did, not whether additional efforts or other lines of inquiry would have been more fruitful. (*People v. Wilson* (2005) 36 Cal.4th 309, 342 (*Wilson*).)

Applying these factors, we independently agree with the trial court's conclusion that the People acted with reasonable diligence in attempting to locate Chloe.

The investigating police officer and her team started looking for Chloe on August 25—nearly 10 weeks before the November 2 trial date. That the officers began looking for Chloe five days before the August 30 trial date is, contrary to what defendant suggests, of no moment because the trial date was moved and, more importantly, the search for Chloe continued.

Chloe's testimony was undoubtedly important: Although the testimony of the man who drove her to the motel, the surveillance officers, and the arresting officers established that

Chloe was selling sexual services, that she and defendant were working together, and that she gave defendant all of her cash that night, Chloe's testimony was direct evidence that further confirmed the circumstantial evidence showing that defendant was knowingly living off of Chloe's wages from prostitution.

And the officers competently explored numerous leads. When Chloe's mother's residence was a non-starter, they started looking for Chloe at her alternate address, along the "tracks" where her mother said she might be "back at it," and in all of the pertinent law enforcement databases. Indeed, their efforts finally succeeded when they reached Chloe on the first day of trial, and Chloe's reaction revealed that she had been trying to remain hidden. Efforts similar to these have satisfied the reasonable diligence requirement. (E.g., *People v. Valencia* (2008) 43 Cal.4th 268, 292-293 [reasonable diligence shown where investigator attempted to reach the witness by phone, visited his home once, checked DMV records and visited two other apartments listed in those records, spoke with five or six neighbors but received no leads, ran a "rap sheet," a credit check, real estate records, and court records]; *People v. Wise* (1994) 25 Cal.App.4th 339, 344 [reasonable diligence shown where prosecution attempted to serve the witness three times at one address, twice at others, and contacted the jail, hospital, coroner, and post office].)

Defendant raises three arguments in response. First, he asserts that the People did not exercise reasonable diligence because they waited too long to start looking for Chloe. In his view, the People should have served Chloe with some sort of subpoena right after she testified at the preliminary hearing. For support, he cites *People v. Louis* (1986) 42 Cal.3d 969. We reject

this assertion. *Louis* holds that the reasonable diligence standard is not met if the People fail to take adequate measures to prevent a crucial witness from fleeing if the prosecutor or investigators *know* of a substantial risk the witness will flee. (*People v. Friend* (2009) 47 Cal.4th 1, 68; *People v. Sánchez* (2016) 63 Cal.4th 411, 446-447; *Louis*, at pp. 990-992.) Even if we assume that Chloe is a crucial witness, the People knew she was at most uncooperative; they did not know—or, for that matter, have any reason to know—that she was a substantial flight risk. After all, she showed up to testify at the preliminary hearing on her own. In *Louis*, by contrast, the People agreed to let a critical eyewitness out of custody on his own recognizance for a weekend in the middle of trial even though the prosecutor knew, "'[i]n [his] mind there was a very real possibility that the man would boogie.'" (*Louis*, at p. 992.) The prosecutor here suspected no such risk of "boogie"-ing. Further, to the extent defendant suggests that the People should have nevertheless "kept tabs" on Chloe between February and August 2016, the law is to the contrary. (See *People v. Fuiava* (2012) 53 Cal.4th 622, 676 ["'[W]e could not properly impose upon the People an obligation to keep "periodic tabs" on every material witness in a criminal case'"].)

Second, defendant contends that Chloe's testimony was of "dubious credibility." Under *Crawford*, however, the reliability of her testimony is no longer relevant to the confrontation clause analysis. (*Wilson*, *supra*, 36 Cal.4th at p. 343.)

Lastly, defendant argues that the People should have called Chloe's friend sooner than the day of the reasonable diligence hearing. As noted above, however, reasonable diligence is to be measured by what the People did, not what they might have done. (*Wilson*, *supra*, 36 Cal.4th at p. 342.) More to the point,

the call to Chloe's friend—and the conversation with Chloe herself—only reinforces the conclusion that the People's reasonably diligent efforts to locate Chloe would have lead to naught because Chloe adamantly refused to disclose her whereabouts or to testify. (Accord, *Diaz*, *supra*, 95 Cal.App.4th at pp. 706-707 [witness's "determin[ation] not to testify" relevant to reasonable diligence inquiry].)

II. Prior Opportunity to Cross-Examine

The exception for prior testimony of an unavailable witness applies as long as the defendant had a prior *opportunity* to cross-examine the absent witness. (*Crawford*, *supra*, 541 U.S. at pp. 62, 68.) That requirement is met if the defendant had a "'similar'" "'interest and motive'" to cross-examine that witness at the prior proceeding as he would have at the upcoming trial. (*People v. Harris* (2005) 37 Cal.4th 310, 332 (*Harris*).) "The "'motives need not be identical, only 'similar.'"'" (*Id.* at p. 333.) The prior cross-examination in the prior proceeding need not be an "exact substitute" for cross-examination at trial because the exception reflects "'a balancing of the defendant's right to effective cross-examination against the public's interest in effective prosecution.'" (*People v. Samayoa* (1997) 15 Cal.4th 795, 850.)

In this case, defendant had the prior opportunity to cross-examine Chloe at the preliminary hearing. And, in fact, he took that opportunity and asked her several questions about the details of her arrangement with defendant, about her personal choice to be a prostitute, and about potential lies she had made to law enforcement in the past, all of which the jury heard at defendant's subsequent trial. What is more, the trial court imposed no limits on this cross-examination.

Defendant asserts that his prior cross-examination was "superficial" because, at that time, he did not know about the content of the cell phones found in defendant's vehicle and thus could not question Chloe about it. It is well settled, however, that "a defendant's interest and motive at a second proceeding is not dissimilar . . . simply because events occurring after the first proceeding might have led counsel to alter the nature and scope of cross-examination of the witness in certain particulars." (*Harris*, *supra*, 37 Cal.4th at p. 333.)[3]

DISPOSITION

The judgment is affirmed.

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_____, J.
HOFFSTADT

We concur:

_____, P. J.
LUI

_____, J.
ASHMANN-GERST

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[3] Because we conclude there was no error, we have no occasion to evaluate the question of prejudice.