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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. SALVADOR MERCED, Defendant and Appellant.	B233868 (Los Angeles County Super. Ct. No. NA087708)

APPEAL from a judgment of the Superior Court of Los Angeles County. Mark Kim, Judge. Affirmed.

Lenore De Vita, 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, Stephanie A. Miyoshi and Robert C. Schneider, Deputy Attorneys General, for Plaintiff and Respondent.

Salvador Merced appeals from the judgment entered after he was convicted of two aggravated assault counts, one for using force likely to produce great bodily injury, and the other for using a firearm. We reject his contention that the trial court erred by allowing into evidence the preliminary hearing testimony of the victim due to her unavailability as a witness. We also reject his contentions that he could not be convicted of both assault counts because they arose from the same incident, and that the trial court erred by allowing into evidence bullets found in the back seat of his friend's car. Therefore, we affirm the judgment.

FACTS AND PROCEDURAL HISTORY

On the night of January 4, 2011, Sonya Hernandez was beaten and pistol-whipped by her then boyfriend, Salvador Merced. Merced was eventually convicted of assault with force likely to produce great bodily injury and assault with a firearm. However, nearly all the evidence against Merced came from family members or police officers who spoke to Hernandez right after the incident. Although Hernandez testified at the preliminary hearing, she claimed to recall almost nothing about what happened. Hernandez later went into hiding, and as a result, her preliminary hearing testimony was read into evidence at trial.

Hernandez's mother, Lauren Bollen, testified that Hernandez phoned her around 11:00 p.m. Her daughter was upset and crying, and said Merced had beaten her. Bollen drove to Hernandez's house. When she got there, she saw that Hernandez's face was bloody. Bollen was about to drive Hernandez to the hospital when a green car drove up and stopped nearby. Merced was in the back seat. The green car sped off, but Bollen followed it into a dead-end alley. Merced pointed what looked like a gun at her. She drove off and took Hernandez to the hospital.

After hearing about the assault, Hernandez's sister, Stephanie Najera, drove to Hernandez's house about 90 minutes after the incident. A four-door Saturn was double-parked in front of Hernandez's house. Najera saw Merced in the back seat of that car.

He got out and waved what looked like a gun. Najera drove off and headed to the hospital.

Merced was charged with four counts: (1) assault by means of force likely to produce great bodily injury (Pen. Code, § 245, subd. (a)(1)) against Hernandez; (2) assault with a firearm (Pen. Code, § 245, subd. (a)(2)) against Hernandez; (3) assault with a firearm against Bollen; and (4) brandishing a firearm (Pen. Code, § 417, subd. (a)(2)) as to Najera.[1] Various domestic violence and firearm use enhancements were also alleged.

Two Los Angeles police officers – Esmeralda Ruiz and Gregory Halka – testified that they spoke with Hernandez while she was in the hospital. According to Ruiz, Hernandez told her that everyone was drinking at her house when Merced became angry at her. Hernandez said that Merced punched and kicked her in the face, and then started beating her with a handgun he pulled from his pocket. Hernandez said that Danny Vega, who was also at her home, told Merced to stop. Hernandez told Ruiz that Merced then left with Vega in a green car. Ruiz saw that Hernandez's face was swollen and cut, and that there were scratches on her neck, arm, and leg.

Halka saw the same injuries, along with bruises on her chest and other areas. According to Halka, Hernandez told him that Merced punched and kicked her, choked her, and then struck her several times with a gun he pulled from his waistband.

The emergency room doctor who treated Hernandez testified that she had a deep, gaping laceration on her face, another laceration on her forehead, a broken nose, broken teeth, and swelling and bruising around her face and neck that were consistent with having been strangled. She also had a concussion. Her injuries were consistent with being struck by a metal object, although they could have been caused by fists or a baseball bat.

Hernandez testified at the preliminary hearing that she was with Merced and two other people – Vega and Linsdey Fernandez – when the incident occurred. She had been

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[1] All further undesignated section references are to the Penal Code.

drinking heavily. Hernandez said that she and Merced were fighting with and yelling at each other. She recalled that Merced punched her, but claimed to remember nothing else. She did not recall if Merced kicked her, choked her, or pulled out a gun and struck her with it. She remembered phoning her mother to take her to the hospital, but remembered nothing "between that night and the next day."

Hernandez did not know and did not remember whether she spoke to Officers Ruiz and Halka while she was in the hospital. She answered no when asked whether she told those officers the details of the incident, including being punched, kicked, and beaten with a handgun. She also answered no when asked whether she told Ruiz that Merced left with Vega in a green car.

Merced testified that he was at Hernandez's house with Vega and Fernandez, and all had been drinking heavily. Hernandez called him a cheater and began hitting him. He grabbed her and threw her, then left with Vega and Fernandez. He did not own a gun, and denied having one the night of the incident. He also denied striking Hernandez at all. According to Merced, Hernandez sent him a letter in April 2011 stating that she lied at the preliminary hearing because the officers who interviewed told her what to say and threatened her. Hernandez visited Merced in jail and still had feelings for him.

The jury convicted Merced of the two assault counts as to Hernandez, and acquitted him of the assault and brandishing counts as to Bollen and Najera. He received a combined state prison sentence of 19 years. His sentence for the assault with force likely to produce great bodily injury count was stayed pursuant to section 654.

On appeal, Merced contends: (1) the trial court violated his constitutional right to confront witnesses when it allowed the jury to hear Hernandez's preliminary hearing testimony because the prosecution did not use proper diligence in attempting to secure her attendance at trial; (2) multiple convictions for assault with a firearm and assault with force likely to produce great bodily injury were not allowed because both arose from a single, continuous assault; and (3) the trial court erred by allowing in evidence that two bullets were found in the back seat of a Saturn occupied by Merced's friends Fernandez and Vega hours after Hernandez was beaten.

DISCUSSION

1. *No Error In Finding Hernandez Unavailable to Testify*

A. Applicable Law

A criminal defendant has a constitutional right to confront and cross-examine the witnesses against him. (U.S. Const., 6th Amend.; Cal. Const., art. I, § 15.) However, under California law, an absent witness's testimony from an earlier hearing may be admitted in evidence at a subsequent trial if the witness was subject to cross-examination by the defendant during the earlier hearing, and if the prosecution exercised reasonable or due diligence in attempting to secure the witness's attendance at the subsequent trial. (Evid. Code, §§ 240, subd. (a)(5) [unavailability of witness], 1291 [prior testimony]; *People v. Cromer* (2001) 24 Cal.4th 889, 897-898 (*Cromer*).)[2]

There is no mechanical definition of the term "due diligence." However, it implies perseverance, and substantial and untiring efforts made in earnest. Factors to be considered include whether the search was timely commenced, the importance of the witness's testimony, and whether leads were competently explored. (*Cromer, supra,* 24 Cal.4th at p. 904.) If the facts concerning the prosecution's efforts to secure a witness's presence at trial are in dispute, we defer to the trial court's factual findings. We then independently review those facts against the requisite legal principles. (*Id.* at pp. 900-901.)

B. Facts Concerning Due Diligence

The facts surrounding whether the prosecution used due diligence in trying to secure Hernandez's appearance at trial come from two sources: (1) the timing of the trial date; and (2) the testimony of the prosecution investigator assigned to locate Hernandez and serve her with a subpoena.

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[2] Although Merced mentions the federal constitutional standard – a showing of a good faith effort to have the witness appear at trial – he notes that the California standard is consistent with that and limits his arguments to California law.

The preliminary hearing was February 17, 2011. Merced was arraigned on March 3, 2011, where his trial was set for April 29, 2011, as the 57th day of 60. On April 29, 2011, the trial was continued to May 16, 2011, as 0 of 10. On May 16, 2011, the trial was continued to May 23 as 7 of 10. On May 23, the prosecution declared Hernandez unavailable, the due diligence hearing was held, and jury selection began.

Ted Holst, a senior investigator for the District Attorney's office, testified that on May 11, 2011, he was asked to serve Hernandez with a subpoena. He spent that day doing background work on Hernandez so he could determine where he might best find her. He first tried to serve her on May 12 at her house, but nobody was home. He left his business card on her door. He kept phoning her for 10 days. She answered once, but hung up when he identified himself. Holst left messages the other times. Between May 12 and 18, he went to Hernandez's home multiple times at different times of day, starting as early as 7:00 a.m., and ending as late as 6:00 p.m.[3]

He also contacted Hernandez's mother and sister several times. They told him that Hernandez was in hiding because she did not want to testify and that they did not know where Hernandez was staying. He went to the sister's house and knocked on the door three times.

Holst determined that Hernandez was unemployed. He twice contacted the coroner's office and several area hospitals. Holst also spoke with several of Hernandez's neighbors, but they either did not know her, or had not seen her for about a week.

C. The Prosecutor Used Due Diligence

Merced contends the prosecution failed to show it exercised due diligence in its efforts to ensure Hernandez appeared at trial because: (1) Hernandez's failure of recollection at the preliminary hearing showed she posed a substantial risk of avoiding service of a subpoena, and the prosecution failed to keep tabs on her and waited too long

[3] Holst testified he went there as many as 20 times, but defense counsel argued the evidence showed only 13 occasions when Holst went to Hernandez's house. For purposes of our analysis, we accept the lower figure.

to try to serve its subpoena; and (2) investigator Holst's efforts were insufficient. We disagree.

We will not reverse just because the defendant can conceive of further steps the prosecution could have taken, or because the prosecution left some avenues unexplored. The law requires only reasonable efforts, not prescient perfection. (*People v. Diaz* (2002) 95 Cal.App.4th 695, 706 (*Diaz*).) Nor can the courts require the prosecution to keep periodic tabs on every material witness in a criminal case. It is often unclear what effective and reasonable controls the prosecution can use on a witness who plans to go into hiding long before a trial date is set. (*Ibid.*)

In *Diaz, supra*, five attempts to subpoena a key eyewitness were made at the start of the trial. A police officer spoke to the witness's mother, who said she had no information. The officer also went to the witness's school, but got no leads. Patrol officers on all three shifts were asked to look for her. The officer was with the witness's brother when the witness phoned. The brother said she knew the police were looking for her and she was determined not to testify. The officer also checked with local hospitals and the Department of Motor Vehicles, and also checked to see if the witness had been arrested recently. Furthermore, one of the investigating officers had to take the witness to the preliminary hearing to get her to testify, and knew she was afraid to do so. He monitored her whereabouts, but decided not to subpoena her until the day of trial in order to avoid scaring her off. The *Diaz* court affirmed the trial court's findings that the witness was unavailable, in part because of her calculated efforts to avoid testifying, and in part because reasonable efforts were made to subpoena her under the circumstances.

A comparison of *Diaz* with the facts in this case is instructive. First, unlike in *Diaz*, where the prosecution kept tabs on its witness because it knew she might go into hiding, there is no evidence that the prosecution in this case had reason to suspect Hernandez would not testify. Merced's assertion to the contrary is based on Hernandez's preliminary hearing testimony, but her failure of recollection was neither a refusal to testify nor a recantation of her statements to the police. She confirmed that she and Merced had been fighting and that he had punched her, but claimed she did not recall

what happened after that. While this might suggest a decision on her part to shield Merced, it does not by itself raise a substantial risk of flight to avoid service of a subpoena.

Second, the prosecution used efforts similar to those endorsed in *Diaz*: the investigator staked out Hernandez's house at different times of day for several days, made repeated attempts to phone her, spoke with and went to the home of her family members on several occasions, talked to the neighbors, and checked the hospitals and jails. These efforts began on May 11, when the trial was set for five days away as zero of ten, and continued through May 18, by which time the trial date had been moved to May 23.

Finally, we take into account that Hernandez was actively evading service of the subpoena, and had told her family members that she refused to testify, and in that light we hold that the prosecution used due diligence to secure her attendance at trial. (*Diaz, supra,* 95 Cal.App.4th at pp. 706-707; *People v. Rodriguez* (1971) 18 Cal.App.3d 793, 796-797 [attempts to subpoena witness began May 20, with original trial date of March 27, and continued trial dates of May 8 and May 19, held sufficient because witness had gone into hiding to avoid testifying].)

2. *Multiple Assault Convictions Were Proper*

When Merced committed and was tried for his crimes, section 245, subdivision (a)(1) applied to any person who assaulted another "with a deadly weapon or instrument other than a firearm or by any means of force likely to produce great bodily injury . . . ." Section 245, subdivision (a)(2) read as it does now, prohibiting an assault with a firearm.[4] Merced was convicted of both assault with force likely to produce great bodily injury (former § 245, subd. (a)(1)) and assault with a firearm. (§ 245, subd. (a)(2).) The

[4] Effective in 2012, section 245 was amended, removing assault with force likely to produce great bodily from subdivision (a)(1) and placing it separately in subdivision (a)(4). (Stats. 2011, c. 183 (A.B. 1026), § 1.)

prosecution's theory was that Merced's use of fists and feet constituted the first offense, while his use of a handgun to bludgeon Hernandez constituted the second offense. Merced contends that his conviction of both offenses was improper because regardless of the instrumentalities used, all the blows he struck occurred during one continuous course of conduct. He is wrong.

Under section 954, multiple convictions for different offenses occurring during an indivisible course of conduct are permitted unless one offense is a lesser included offense of the others. (*People v. Reed* (2006) 38 Cal.4th 1224, 1226.) Where multiple convictions are permitted, multiple sentencing is barred under section 654, and sentence on all but the most serious count must be stayed. (*Ibid.*)[5] Merced does not address whether either of the two offenses of which he was convicted was a lesser included offense of the other, and we therefore deem the point waived. (*People v. Carrillo* (2008) 163 Cal.App.4th 1028, 1035.)

We alternatively affirm on the merits. If a crime cannot be committed without also necessarily committing a lesser offense, the latter is a lesser included offense of the former. (*People v. Sloan* (2007) 42 Cal.4th 110, 116.) In *People v. Aguilar* (1997) 16 Cal.4th 1023, 1033, the court held that assault with a deadly weapon or instrument other than a firearm under former section 245, subdivision (a)(1) could not be a lesser included offense of assault with a firearm, because such an interpretation would render the latter provision redundant.

We believe the same reasoning applies here. Assault with force likely to produce great bodily injury does not require proof that a firearm was used, and assault with a firearm cannot be committed by the use of some other instrumentality. An assault with a firearm can also be committed without the likelihood of great bodily injury when, for example, it is used as a blunt instrument. If an assault with force likely to produce great bodily injury could be committed with a firearm, then subdivision (2) would be redundant, an interpretation that should be avoided. It would also lead to absurd results.

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[5] That is what happened here, because the court stayed the assault with force likely to produce great bodily injury sentence.

For instance, an attacker who is punching his victim in a manner likely to produce great bodily injury might well meet resistance and an effort to defend one's self. If the attacker then produced a handgun, the victim is likely to stop resisting, making herself even more vulnerable. We will not endorse such a result. Accordingly, we hold that the multiple convictions were proper in this case.

3. *Evidence of the Two Bullets Was Properly Allowed*

Officer Ruiz was allowed to testify that at around 2:10 a.m. on January 5 she arrived at the scene of a traffic stop, where Danny Vega and Lindsey Fernandez had been pulled over in an aqua blue Saturn. The vehicle generally matched the description of the vehicle in which Merced fled after the assault on Hernandez. Fernandez was the driver. In the backseat were two unspent rounds of .22 caliber ammunition. Merced was not in the car, and no gun was found there. The evidence was offered as a rebuttal to Merced's testimony that he did not have a gun and did not use one on Hernandez. Merced objected to this evidence on relevance grounds but the trial court allowed it as circumstantial evidence that a gun had been used in the attack on Hernandez.

Merced contends this evidence was not relevant because the gun he supposedly used was never recovered, no gun was found in the car, he was not in the car at the time of the traffic stop, and there was an insufficient connection between him and the ammunition. We disagree.

Hernandez told the police and her mother that Merced beat her with a gun. The mother and sister both saw Merced in the back seat of a green sedan, carrying a gun. Hernandez told the police that after Merced stopped his assault, he left with Vega in a green car. Merced testified that he left with both Vega and Fernandez. The fact that two bullets were found in the backseat of an aqua colored Saturn occupied by Vega and Fernandez just three hours after the assault is relevant to whether Merced had a gun, as Hernandez claimed.

Even if the evidence was not relevant, its admission was harmless. The case turned on whether the jury believed the mother, sister, and the two investigating officers,

and their stories were backed up by the medical evidence showing the nature and extent of Hernandez's injuries. Even if evidence of the bullets had been excluded, we conclude that a different result was not reasonably probable. (Evid Code, § 353, subd. (b); *People v. Harris* (2005) 37 Cal.4th 310, 336.) We also conclude the evidence was harmless even under the more stringent federal test, which requires a showing that the error was harmless beyond a reasonable doubt.

By way of supplemental briefing, Merced also contends that admission of the evidence violated his constitutional due process rights. However, the admission of relevant evidence does not violate a defendant's due process rights unless the evidence was so prejudicial that it rendered the trial fundamentally unfair. (*People v. Partida* (2005) 37 Cal.4th 428, 439.) As previously discussed, we conclude that the evidence was relevant, and that its admission was harmless under the harmless error standard applicable to errors under both state law and the United States Constitution.[6]

Merced also contends that even if the bullet evidence was relevant, its prejudicial effect outweighed its probative value under Evidence Code section 352. Merced concedes that no such objection was made, but contends that this failure was excused because the trial court's ruling that the evidence was relevant rendered the objection futile. The cases he cites for this proposition are inapposite and nothing in the record supports his contention. We therefore deem the issue waived. (Evid. Code, § 353, subd. (b).)

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6 Respondent asks us to deem this issue waived because no such objection was raised below. Because the argument merely asserts that the trial court's ruling had the additional legal consequence of violating the Constitution, the issue was not forfeited on appeal. (*People v. Carasi* (2008) 44 Cal.4th 1263, 1289, fn. 15.)

DISPOSITION

The judgment is affirmed.

RUBIN, J.

WE CONCUR:

BIGELOW, P. J.

SORTINO, J.*

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