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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. OSCAR A. SAA, Defendant and Appellant.	B268810 (Los Angeles County Super. Ct. No. MA066646)

APPEAL from a judgment of the Superior Court of Los Angeles County, Daviann L. Mitchell, Judge. Affirmed.

Christine M. Aros, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Victoria B. Wilson, Supervising Deputy Attorney General, Jessica C. Owen, Deputy Attorney General, for Plaintiff and Respondent.

A jury convicted defendant and appellant Oscar Saa (defendant) on the sole charge alleged against him: assault with a deadly weapon. The conviction was based on evidence—including defendant's own admissions to law enforcement—that he stabbed victim David Dominguez (Dominguez). During trial, the court ruled the prosecution could read the preliminary hearing testimony of Dominguez and another witness to the jury because both were unavailable to testify: Dominguez had been deported to Mexico and the other man was believed to have moved to Nicaragua. The trial court also denied defendant's request to instruct the jury on self-defense, concluding there was no substantial evidence to support such an instruction. We consider the correctness of both rulings.

I. BACKGROUND

A. Evidence Presented by the Prosecution, Including the Preliminary Hearing Testimony of Dominguez

Defendant and his brother Carlos lived in an apartment complex in the City of Palmdale. Dominguez lived in the same apartment complex with his sister and her family, and he had become friends with defendant and Carlos.

On March 20, 2015, Dominguez was hanging out with defendant and Carlos in their apartment. Shortly after Dominguez arrived, defendant became upset, accused Dominguez of taking photos of him, and insisted several times that Dominguez stop. In response, Dominguez showed defendant his phone to prove he was looking at Facebook and not taking pictures. At that point, defendant swung at Dominguez with a steak knife, stabbing him in the left shoulder. Dominguez exclaimed, "your brother just stabbed me," and Carlos stepped in

to try to pull defendant back from Dominguez. Despite Carlos's intervention, defendant was able to stab Dominguez again, this time under the left armpit, and the knife punctured his lung.

Dominguez was able to leave defendant's apartment and return to his own. He arrived, "all bloody," and told his mother "I got hurt" and "I can't breathe." She called 911 and Dominguez went to the front of the apartment complex to wait for the ambulance to take him to the hospital. While at the hospital, Dominguez spoke with a sheriff's deputy and told her he had been stabbed outside the apartment complex while going to the store. According to Dominguez, he initially provided this false account of what happened because he was fearful that if he identified defendant as the culprit, defendant would attack someone in Dominguez's family.

After returning home from the hospital, Dominguez spoke to another sheriff's deputy, Mourad Kabanjin, to correct his statement about who had stabbed him. Once Dominguez reported defendant was responsible for the stabbing, Deputy Kabanjin went to interview defendant and his brother Carlos.

Defendant told Deputy Kabanjin that he got into an altercation with Dominguez because he (defendant) thought Dominguez was taking photos of his tattoos. Defendant admitted stabbing Dominguez in the shoulder and armpit. According to Deputy Kabanjin, defendant also recalled being tackled to the floor by his brother Carlos, which prevented defendant from further attacking Dominguez. Carlos provided an essentially identical account of what happened. Carlos said he saw defendant grab a knife and stab Dominguez twice, and Carlos

then tackled defendant to the floor so Dominguez could escape.[1] During the interview with Deputy Kabanjin, defendant and Carlos confirmed it had only been a verbal dispute between Dominguez and defendant until defendant drew the knife and stabbed Dominguez.

Another law enforcement officer, Detective Saylor, testified to statements made by Milton Jackson (Jackson), the boyfriend of Dominguez's sister, when Jackson was interviewed prior to trial. Jackson was present at the apartment complex on the afternoon in question and ran into Dominguez in the hallway after he had been stabbed. Dominguez told Jackson "[defendant] stabbed me, [defendant] stabbed me." Jackson then went to defendant's apartment, where he saw Carlos holding defendant down on the ground in front of the apartment and a knife on the ground nearby. Jackson asked defendant why he had assaulted Dominguez, and defendant said something about Dominguez looking at pictures of his girlfriend. During the pre-trial interview, Jackson said he did not want to testify at trial because he would be in prison for the next several years and he feared defendant would also be sent to prison and retaliate against him.[2]

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[1] Carlos testified to a different account of events at trial. Carlos denied he told Deputy Kabanjin he saw his brother stab Dominguez. As Carlos described the events during his trial testimony: he saw Dominguez enter the apartment; Dominguez was not bleeding at that time; Dominguez began verbally "antagonizing" defendant while defendant just "sat there"; and Dominguez started bleeding at some point, but Carlos did not see a stabbing nor did he know what caused the wound.

[2] Jackson's trial testimony differed from his statements during the pre-trial interview. He admitted seeing Dominguez

B. Defendant's Testimony

Defendant was the only witness to testify during the defense case at trial. He denied he was friendly with Dominguez, who defendant described as a homeless man staying at Jackson's apartment. According to defendant, he and Dominguez had problems in the past because Dominguez would knock on the door early in the morning and he had also made several threats to burglarize defendant's apartment.

Defendant testified Dominguez was trespassing in defendant's apartment on the date of the charged assault. Dominguez arrived already injured and bleeding; he also had a knife with him. Defendant admitted he fought with Dominguez, but defendant claimed it "did not involve a knife or the stabbing of David Dominguez"; defendant also denied he confessed to stabbing Dominguez when interviewed by Deputy Kabanjian. Rather, defendant claimed Dominguez was hostile when he arrived at defendant's apartment, refused warnings to leave, hit Carlos and gave him a black eye, and struck defendant in the eye as well. According to defendant, he and Carlos were then able to remove Dominguez from the apartment and push him into the hallway.

Although defendant denied stabbing Dominguez, he told the jury he had been acting in self-defense. Defendant agreed,

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was injured on the day after the incident, but thought the injuries were minor and they "happened on the street." Jackson denied Dominguez ran over to him on the day of the incident saying "[defendant] stabbed me, [defendant] stabbed me." Jackson did acknowledge he knew defendant and his brother, but Jackson said he did not speak to either of them on the day of the incident and denied getting into a confrontation with them.

however, that he did not report Dominguez's purported "trespass" and assault to the police.

C. The Prosecution's Rebuttal Case: Cristian Giacoman's Testimony in a Prior Proceeding

Defendant had sustained a prior assault with a deadly weapon conviction as the result of a 2007 attack on Cristian Giacoman (Giacoman), who was one of his co-workers at the time. The prosecution argued, as we will soon describe in greater detail, that Giacoman was unavailable as a witness and sought to read Giacoman's testimony from the prior criminal proceeding to the jury.

After hearing argument from counsel, the trial court found there was no substantial evidence offered in support of self-defense and Giacoman's testimony therefore could not be admitted to negate that defense. The court did find, however, Giacoman's testimony was admissible, among other reasons, as evidence of defendant's character for violence under Evidence Code section 1103, subdivision (b).

As read into evidence during the prosecution's rebuttal case, Giacoman testified he and defendant went to a park together after work to drink some beer. Giacoman went to buy more beer, and when he returned, defendant was "standing up all impatient" and asked Giacoman for the change from the purchase. As Giacoman was digging in his pocket to try to produce the change, defendant began to attack him, hitting hit him in the head with a candle taken from a nearby homeless man, knocking him to the ground, and cutting Giacoman until he felt "all the blood coming down."

II. DISCUSSION

Defendant contends the trial court erred in finding the prosecution exercised reasonable diligence when attempting to compel Dominguez and Giacoman to testify at trial, a prerequisite for the court's determination that both witnesses were unavailable. On our independent review of the record, we affirm the trial court's finding: investigators competently pursued potential avenues to compel the witnesses' attendance and the prosecution began its efforts to secure their presence at trial in a reasonably timely fashion. As to Dominguez specifically, we see no evidence to indicate the prosecution should have suspected he would be deported to Mexico, and we therefore do not fault the prosecution for refraining from acting more quickly to release a warrant for his arrest.

Defendant additionally contends the trial court should have instructed the jury on self-defense. We again hold to the contrary: there was no substantial evidence to support a self-defense instruction and there is no reasonable probability defendant would have obtained a more favorable result had a self-defense instruction been given.

A. Confrontation and Unavailability

1. Legal background and standard of review

The United States and California constitutions afford criminal defendants the right to confront witnesses against them. (U.S. Const., 6th Amend.; Cal. Const., art. I, § 15.) "Although important, the constitutional right of confrontation is not absolute. (*Chambers v. Mississippi* [1973] 410 U.S. [284,] 295; [*People v.*] *Cromer* [2001] 24 Cal.4th [889,] 897 [*Cromer*].)" (*People v. Herrera* (2010) 49 Cal.4th 613, 621 (*Herrera*).) Where

the prosecution demonstrates a witness is unavailable and was subject to cross-examination during a prior proceeding involving the same defendant, the prior testimony may be admitted at trial without violating the defendant's confrontation right. (*Herrera, supra,* at p. 621; accord, *Cromer*, *supra*, at p. 897.)

Evidence Code section 1291, subdivision (a)(2) codifies this exception to the confrontation right. It states that when a witness is unavailable at trial, prior testimony of the witness may be introduced if "[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).) Evidence Code section 240, subdivision (a)(5) defines "unavailable as a witness" to mean the witness 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."

Reasonable diligence "'requires only reasonable efforts, not prescient perfection.' [Citation.]" (*People v. Diaz* (2002) 95 Cal.App.4th 695, 706 (*Diaz*); accord, *People v. Smith* (2003) 30 Cal.4th 581, 609 (*Smith*).) The prosecution is not required "'to keep "periodic tabs" on every material witness in a criminal case.' [Citation.]" (*People v. Wilson* (2005) 36 Cal.4th 309, 342 (*Wilson*); see also *People v. Hovey* (1988) 44 Cal.3d 543, 564 ["[I]t is unclear what effective and reasonable controls the People could impose upon a witness who plans to leave the state, or simply 'disappear,' long before a trial date is set"] (*Hovey*).) The fact that "'additional efforts might have been made or other lines of

inquiry pursued' [citation]" does not preclude a finding of reasonable diligence. (*Wilson*, *supra*, at p. 342.)

Cromer, *supra*, 24 Cal.4th 889 identifies three considerations courts should evaluate when determining whether the prosecution has exercised reasonable diligence: (1) whether the efforts to find the witness began in a timely manner; (2) the importance of the witness's testimony; and (3) whether leads were competently explored. (*Cromer*, *supra*, 24 Cal.4th at p. 904; see also *People v. Sanchez* (2016) 63 Cal.4th 411, 440 (*Sanchez*).) "In this regard, 'California law and federal constitutional requirements are the same.' (*People v. Valencia* (2008) 43 Cal.4th 268, 291–292[ ].)" (*Herrera*, *supra*, 49 Cal.4th at p. 622.)

Our Supreme Court has held that "appellate courts should independently review a trial court's determination that the prosecution's failed efforts to locate an absent witness are sufficient to justify an exception to the defendant's constitutionally guaranteed right of confrontation at trial." (*Cromer*, *supra*, 24 Cal.4th at p. 901.) "While *Cromer* speaks solely of failed efforts to *locate* an absent witness, there is no logical reason not to apply the independent review standard to failed efforts to *obtain the attendance* of a witness at trial. [Citation].)" (*People v. Sandoval* (2001) 87 Cal.App.4th 1425, 1432.) "We [accordingly] review the trial court's resolution of disputed factual issues under the deferential substantial evidence standard (*Cromer*, *supra*, 24 Cal.4th at p. 902), and independently review whether the facts demonstrate prosecutorial good faith and due diligence (*id.* at pp. 902–903)." (*Herrera*, *supra*, 49 Cal.4th at p. 623.)

2. The prosecution made reasonably diligent efforts to secure Dominguez's presence at trial

a. facts

The trial court held a pre-trial due diligence hearing to determine whether victim Dominguez (and Giacoman, see *post*) were unavailable to testify.[3] The trial court took judicial notice that Dominguez was in custody when he testified at the preliminary hearing on April 10, 2015, and that the prosecutor and the court agreed to release him after the hearing on an order that he appear at arraignment on April 28, 2015. The court also took judicial notice that Dominguez did not appear at arraignment, and a body attachment order was issued at that time but held by the prosecution.[4]

Ronald York (York), an investigator with the Los Angeles County District Attorney's office, testified concerning his efforts to obtain Dominguez's attendance at trial. York first attempted to reach Dominguez in July 2015, at which time he learned from Dominguez's sister Martha that Dominguez was in Mexico. York discovered through further investigation that Dominguez was in

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[3] It was undisputed that the prior-opportunity-for-cross-examination requirement was satisfied. The confrontation question turned solely on the witnesses' unavailability.

[4] The body attachment order was thereafter held multiple times until it was ultimately released on the trailed trial date, August 4, 2015. The warrant was recalled the next day when the case was dismissed, and criminal proceedings against defendant were reinstituted shortly thereafter, with a new preliminary hearing conducted on August 19, 2015, and an information (alleging the sole count of assault with a deadly weapon) filed on September 2, 2015.

Mexico because had been deported from the United States; York did not learn the precise date of deportation, but he believed it may have been in April 2015 (necessarily after the April 10, 2015, preliminary hearing).[5]

York contacted Dominguez by phone and Dominguez said he was willing to return to the United States to testify. York then contacted the Department of Homeland Security and initiated the process for Dominguez to be paroled into the custody of the District Attorney's office for the purpose of testifying at trial. When York contacted Dominguez to confirm details for the trip, he asked if York could arrange, in exchange for Dominguez's testimony, a change in his immigration status that would allow him to remain in the United States. After York informed Dominguez he had no authority to change his immigration status, Dominguez refused to return to the United States to testify—during three or four subsequent phone calls with York and a phone call with York's supervisor.

After the case against defendant had been re-filed and a new trial date set, York resumed efforts to reach Dominguez in September 2015. York called the same phone number he had used previously, but this time York reached Dominguez's aunt. The aunt reported Dominguez still lived in Mexico and she agreed to tell Dominguez that York had called. The following

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[5] When asked whether he was ever able to confirm the date Dominguez was deported, York recounted a conversation he had with an "Agent Bourdas" with the United States Department of Homeland Security: "[W]ell, I didn't inquire as to the date, but Agent Bourdas did tell me [Dominguez] was, in fact, deported from the United States. I think April of this year sounded familiar to me, but . . . ."

day, York spoke with Dominguez's cousin, who told York that Dominguez was aware of the pending trial, but did not want to come to the United States to testify.

Dominguez subsequently called York and informed him he would be willing to testify at trial only if he received some benefit such as a green card—otherwise, he refused to testify. About two weeks before trial, on October 13, 2015, York was at Martha's home when Dominguez called her from Mexico. York asked to speak to Dominguez and he reiterated that he would not testify.

During his efforts to convince Dominguez to return and testify, York consulted with two federal officials. He spoke with Agent Bourdas at the Department of Homeland Security to determine whether it would be possible to compel a witness in Mexico to attend trial to testify in the United States. Agent Bourdas, who was part of the unit responsible for arranging permission for witnesses to be transported to the United States, told York there was no authority to compel a witness in Mexico to travel to the United States to testify at a trial. York also spoke with an officer in the United States Marshals Service's Fugitive Task Force. That officer advised York it would be futile to contact local authorities in Mexico for assistance because "the country was rife with corruption" and they could not be trusted.[6]

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[6] York completed his testimony on the first day of the pre-trial hearing but returned the following day to testify further after learning additional details concerning Dominguez's status. According to York, a recent criminal history database entry indicated Dominguez had been stopped at the border in San Ysidro. The Immigration and Customs Enforcement website portal and San Diego County Sheriff's records both indicated Dominguez was not in custody. York again checked with the same Homeland Security agent he had spoken to earlier, who

In addition to York's testimony, the prosecution submitted a declaration from a Los Angeles County Deputy District Attorney with expertise in extradition and foreign prosecution. The deputy district attorney's declaration states she contacted the United States Department of Justice's Office of Internal Affairs and confirmed that there is no way to compel a witness who is in Mexico and is not a citizen of the United States to testify in Los Angeles County.

Once the prosecution's presentation of evidence was complete, defendant's attorney argued the prosecution had not demonstrated reasonable diligence because it had been derelict in previously holding the body attachment for Dominguez, which might have prevented his deportation if it had been released earlier. Defendant's attorney also emphasized Dominguez had not been cooperative earlier in the case, having testified at the April 2015 preliminary hearing only after being taken into custody, and this was further reason for the prosecution to have attempted to take Dominguez into custody earlier than it did.

The prosecution argued it was not required to request release of the body attachment immediately upon Dominguez's failure to appear at the April 28, 2015, arraignment simply because he had been uncooperative. According to the prosecutor, it was "often the practice" that the People will hold a body attachment until the case is actually set for trial. This practice

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informed him that their records indicated Dominguez had never been in detention custody and that he was "immediately turned around without court proceedings" at the border and sent back to Mexico the previous day (the first day of the pre-trial hearing). The defense declined to cross-examine York as to this additional information.

avoids "having someone arrested much earlier than would be necessary" and it seeks to avert the effect an arrest can have on a witness's testimony and demeanor at trial. The prosecution also emphasized it learned Dominguez had been deported only "much, much closer to trial," and that it accordingly had no reason before that to believe Dominguez could be deported or had any type of immigration "hold" on him.

The trial court found the prosecution had been reasonably diligent in trying to obtain Dominguez's attendance at trial and further found he was therefore "unavailable" within the meaning of Evidence Code section 240. The court rejected the argument that the prosecution should have released the body attachment when Dominguez first failed to appear for arraignment on April 28, 2015: "Under these circumstances, I don't think it would be reasonable for the prosecution to release [the warrant] and put him in custody that entire time [from April 2015 until August 2015]." The court further found that even if the prosecution should have released the order for a warrant to arrest Dominguez in April 2015, the district attorney's office investigators "certainly have made extensive efforts since then to procure his testimony, starting in July of 2015 until today's date . . . . They tried to reach him, they have diligently worked at trying to procure him since then. It is now October so the[y] worked for several months trying to procure his location. [¶] So I find what they did was reasonable . . . . And in this case they actually talked to him; he said I'm not coming back. So they do know where he is in the sense he's in Mexico. And in reviewing the declarations . . . I don't think we have the ability—California has the ability to compel this witness' testimony and bring him back without his cooperation."

b. analysis

Based on our consideration of the criteria identified in *Cromer*, *supra*, 24 Cal.4th 889, we hold the prosecution exercised reasonable diligence in locating and trying to secure Dominguez as a witness at trial. The prosecution's efforts were timely; investigators competently explored available leads; and Dominguez's testimony, while undeniably significant, was not so crucial as to require a heightened level of diligence.

York first contacted Dominguez on July 21, 2015—two weeks before the August 4, 2015, date on which trial was to commence—and York initially obtained Dominguez's agreement to attend trial. Dominguez did thereafter change his mind, but York and his supervisor made repeated efforts to convince him to reconsider and testify at trial. This approximate two-week timeframe from contact to the trial date is indistinguishable from *People v. Fuiava* (2012) 53 Cal.4th 622, where a detective began an unsuccessful search for a witness approximately two weeks before trial and our Supreme Court held this was sufficient to demonstrate the detective began the search a reasonable period of time before the trial was to commence. (*Id.* at pp. 676-677.) Moreover, trial did not in fact commence in August 2015, but only later on October 28, 2015—after the prosecution had made yet further (ultimately unavailing) efforts to contact Dominguez and convince him to return to testify at trial. Thus, the trial court was correct to find the prosecution had actually "worked for several months" to obtain Dominguez's attendance at trial and this exceeds what *Fuiava* deems sufficient.

Defendant, however, contends the prosecution's efforts were untimely because it should have released the body attachment for Dominguez earlier, which might have prevented

him from being deported in the first place. Noting Dominguez had to be brought into custody to appear at the April 10, 2015, preliminary hearing, defendant argues this put the prosecution on notice he would not be a cooperative witness, which should have led the prosecution or the trial court to release the body attachment issued when Dominguez failed to appear at the April 28, 2015, court date. Had the court done so, defendant argues "it is possible that any deportation proceedings could have been delayed."

The problems with this argument are readily apparent. First, the prosecution had no reason to believe Dominguez would be deported, and the prosecution of course had no obligation to anticipate a development that could not be reasonably foreseen. (*Wilson*, *supra*, 36 Cal.4th at 342 ["[T]he prosecution is not required, absent knowledge of a 'substantial risk that [an] important witness would flee,' to 'take adequate preventative measures' to stop the witness from disappearing"], citations omitted; see also *Hovey*, *supra*, 44 Cal.3d at p. 564 [prosecution is not required to keep "periodic tabs" on every material witness].) Second, defendant's argument is unduly speculative. His opening brief proceeds on the understanding defendant was deported in April 2015. He further assumes Dominguez may have been deported in the two days in April that remained after the April 28, 2015, arraignment when he failed to appear, rather than on a date earlier in April before that arraignment. Of course, if Dominguez had instead been deported before arraignment, which strikes us as the more likely scenario if he indeed was deported in April, the decision to hold the body attachment order would have made no difference and the foundation for defendant's argument fails. (Cf. *Sanchez*, *supra*, 63 Cal.4th at p. 442 [holding due

diligence shown in part because "[i]t is speculative to believe that additional efforts would have resulted in finding [the witness] and convincing him to return voluntarily to the United States to testify"].) Third, insofar as defendant argues Dominguez's uncooperativeness prior to the preliminary hearing means that the prosecution should have either kept him in custody throughout the remainder of the pre-trial proceedings or sought his arrest immediately after he failed to appear at arraignment, we are unpersuaded. The "unjustified deprivation of a material witness's liberty is a violation of the due process clause of the federal and state Constitutions" (*People v. Bunyard* (2009) 45 Cal.4th 836, 850), and we decline to endorse a rule that would require prolonged detention of reluctant witnesses throughout essentially all pre-trial proceedings in a case of this nature. (*Sanchez*, *supra*, at p. 447; *People v. Cogswell* (2010) 48 Cal.4th 467, 477-478 ["To have a material witness who has committed no crime taken into custody, for the sole purpose of ensuring the witness's appearance at a trial is a measure so drastic that it should be used sparingly"].) The prosecution and the trial judge, who were in the best position to assess Dominguez's cooperativeness after his preliminary hearing testimony, made the judgment he could be released with an order to appear at the next court date.[7] We cannot now say that determination, or the decision to refrain from immediately seeking Dominguez's arrest, is somehow indicative of a lack of reasonable diligence.

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[7] We see no indication in the record before us that the defense lodged a contemporaneous objection when the trial court agreed to release Dominguez from custody after he testified at the April 10, 2015, preliminary hearing.

As to the prosecution's pursuit of relevant leads to obtain Dominguez's presence, we hold the efforts made were competent. Investigator York spoke with Dominguez's family members in the United States (his mother and sister) to track down Dominguez in Mexico. York also spoke with family members in Mexico (an aunt and cousin) to reach Dominguez by phone. York spoke with the Department of Homeland Security about the possibility of compelling a witness in Mexico to attend trial in the United States and with the United States Marshals Service about requesting assistance from Mexican authorities. When he was initially unable to persuade Dominguez to testify at trial, York did not stop but made repeated efforts to convince him to return, even bringing in his supervisor to help make the case.

Defendant protests, however, that the prosecution failed to contact Mexican authorities or to attempt to invoke provisions of the Mutual Legal Assistance Treaty with Mexico. In this case, the record indicates it is unlikely either avenue would have made any difference. The reason for contacting foreign authorities is ordinarily to assist with locating a witness or arranging to transport the witness to the United States. Neither of these were impediments in this case; the prosecution's investigator was in communication with Dominguez on a number of occasions and the investigator had already made transportation arrangements. Rather, the problem was that Dominguez insisted on an immigration status benefit in exchange for his testimony, a request the prosecution could and would not accommodate. Our Supreme Court's observation in *Smith*, *supra*, 30 Cal.4th 581 is thus equally applicable here: "The prosecution must take reasonable steps to locate an absent witness, but need not do 'a

futile act.' [Citation]"[8] (*Smith*, *supra,* at p. 611 [holding that once a witness was located in Japan and not subject to the court's jurisdiction, further efforts to produce his attendance would be futile].)

Regarding the third consideration identified in *Cromer*, *supra*, 24 Cal.4th 889, courts have held the prosecution to a higher standard of diligence where the testimony of a witness is deemed "critical" or "vital" to the prosecution's case. (*Hovey*, *supra*, 44 Cal.3d at p. 564.) To be sure, Dominguez's testimony was by no means of trivial importance: he was the victim of the crime. But his testimony was not so critical on this record that we would require an extraordinary showing of diligence by the prosecution. There was quite substantial incriminating evidence apart from Dominguez's testimony—most prominently, defendant's own admission to stabbing Dominguez (prompted only by a verbal dispute), as related by Deputy Kabanjin, a witness who did testify at trial. In addition, Detective Saylor testified to Jackson's interview statements, including overhearing

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[8] Defendant suggests that the authorities might have arranged for testimony by teleconference, but there is no basis on this record to think Dominguez would have agreed. Rather, the suggestion amounts to another hypothesis of "additional efforts [that] might have been made or other lines of inquiry pursued," which do not undermine our conclusion that the prosecution exercised reasonable diligence. (*Sanchez*, *supra*, 63 Cal.4th at p. 448; see also *Hardy v. Cross* (2011) ___ U.S. ___ [132 S.Ct. 490, 495] ["[W]hen 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"].)

Dominguez's exclamation that he had been stabbed by defendant, seeing a knife on the ground near defendant, and overhearing defendant's explanation that he had stabbed Dominguez because he looked at pictures of defendant's girlfriend, or something to that effect. There was also testimony at trial from the physician who treated Dominguez at the hospital for two wounds, one to his left arm and a stab wound to his left armpit that resulted in a punctured lung.

All told, investigators made timely, reasonably diligent efforts to obtain Dominguez's attendance at trial, which were ultimately unsuccessful. We therefore conclude Dominguez was unavailable as a witness and accordingly reject defendant's confrontation claim.

3. The prosecution made reasonably diligent efforts to secure Giacoman's presence at trial

a. facts

Arthur Choi (Choi), an investigator with the Los Angeles County District Attorney's Office, testified about the prosecution's efforts to procure Giacoman as a witness for trial. Choi testified he began an investigation to locate Giacoman in July 2015. He started by looking through public records and found two driver's licenses for Giacoman, one from California and the other from Florida. The addresses for California came to a dead-end. The addresses in Florida enabled Choi to locate Giacoman's half-brother, Salvador Giacoman (Salvador).

Salvador informed Choi he hadn't spoken to Giacoman for several years due to a falling out within the family. Salvador was, however, able to report that Giacoman was in Nicaragua. Choi confirmed with the Federal Bureau of Investigation (FBI)

that Giacoman boarded a flight from Florida to Nicaragua in 2009 and there was no return flight back into the United States since then.

Salvador also provided Choi with information about a Facebook account used by Giacoman, under the name "Cristian Sotello." The last entry in the account was made in November 2014 and indicated Giacoman was employed with a company called "Accedo." Choi reached an Accedo human resources officer in Nicaragua and learned that Giacoman stopped showing up to work in December 2013 and was later terminated. Accedo refused Choi's request for Giacoman's emergency contact information. So rebuffed, Choi then contacted Salvador again to advise him of the importance of Giacoman's attendance at the trial. Salvador said he would attempt to get in touch with Giacoman and have him call Choi, but Choi never heard back from Giacoman.

Choi later resumed efforts to find Giacoman. He called Salvador, who said that earlier in September 2015, his sister had seen Giacoman at a family wedding in Nicaragua. Salvador refused to provide Choi with his sister's phone number and said he would be more comfortable contacting his sister himself. Choi told Salvador how important it was for him to speak to Giacoman about the upcoming trial and implored Salvador to get a hold of Giacoman. Salvador said he and Giacoman were not on speaking terms, but that he understood Choi's position and would try to help. Choi, however, was not contacted by Giacoman, or by Salvador after that last conversation.

Choi also attempted to contact several other people possibly connected to Giacoman through a Spanish speaking District Attorney's office investigator, but this did not lead to any

additional information. Choi testified he did not attempt to contact any Nicaraguan government authorities because a source he spoke to at the FBI told him there was no legal right to compel a victim to return to the United States to testify, so he believed he would not get "any kind of cooperation regarding the case" and there was nobody he could contact to locate Giacoman.

After hearing argument from counsel, the court found the prosecution had been diligent in pursuing Giacoman's presence at trial and that he was therefore unavailable pursuant to Evidence Code section 240. The court emphasized investigators started looking for Giacoman back in July 2015, and the court also summarized the efforts made from that point forward, which it found were sufficient: "All the public databases were identified. [The investigator] contacted family members . . . . [¶] He researched Facebook. He found a location of employment [ ] at Accedo Technologies, and that the individual failed to appear [at work] in December of 2014 [*sic*], didn't show up, and he was terminated. And the investigator recontacted other family members and they've not heard from [Giacoman] since then . . . . And just last week [the investigator] was able to verify that . . . the last [Giacoman] was seen was in September 2015 and he was still in Nicaragua." The trial court further found it did not matter whether "there may be a treaty [between the United States and Nicaragua] . . . because [the prosecution] does not have specific enough information and enough cooperation from the family to identify this individual and cannot effectuate any treaty if it so exists."

b. analysis

We conclude, analyzing the same three factors (timeliness, pursuit of leads, and importance of testimony), Giacoman was likewise unavailable as a witness at trial.

The prosecution first attempted to contact Giacoman in July 2015, and resumed the search about a week before the October 2015 trial date. Having begun its search sufficiently in advance (whether considering either the original trial date in August 2015 or the actual trial date later in October), the prosecution's efforts were timely under *Fuiava*, discussed *ante* in connection with our analysis of the efforts to procure Dominguez as a witness for trial. (*Fuiava*, *supra,* 53 Cal.4th at p. 675 [detective charged with locating and serving a non-critical witness with a subpoena started two weeks before trial by checking the witness's last known address and her brother's house, which was empty].)

The prosecution's search for Giacoman was just as diligent as that found sufficient for the witnesses at issue in *Fuiava* and *Sanchez*. Investigator Choi began with Giacoman's last known address, searched public records and the internet, spoke to an out-of-state family member, and was able to document Giacoman's flight to Nicaragua several years earlier. He then contacted a former employer in Nicaragua and family members. Although Choi was unsuccessful in locating Giacoman, he competently followed up on available leads. Defendant's sole argument to the contrary is that the prosecution might have also tried contacting "local authorities in Nicaragua."[9] However, as

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[9] Defendant does not identify which local authorities, and understandably so. Without more definite information as to where defendant was in Nicaragua, the prosecution would have

noted in connection with our earlier discussion of Dominguez's unavailability, the possibility that additional efforts might have been made or other lines of inquiry pursued does not change our conclusion that the prosecution used reasonable efforts to locate a witness. (*Sanchez*, *supra*, 63 Cal.4th at p. 448.)

As to the importance of Giacoman's testimony, which the prosecution presented in rebuttal after defendant testified, it was significantly less critical than Dominguez's testimony. We believe the efforts made by the prosecution to try and secure Giacoman's attendance at trial were commensurate with his importance as a witness, and were both timely and reasonably diligent. The trial court did not err in finding him to be an unavailable witness, and defendant's right to confront witnesses against him was therefore not infringed.

B. The Court Properly Refused to Instruct the Jury on Self-Defense

1. Trial court proceedings

Near the end of the trial, when discussing jury instructions, the defense asked the court to give CALCRIM No. 3470, Right to Self-Defense or Defense of Another (Non-Homicide). Defendant's attorney stated the request was "based on Carlos Saa's testimony that David Dominguez was antagonizing [defendant]" before defendant's assault with the knife took place. The prosecution argued there was no substantial evidence supporting self-defense based on Carlos Saa's testimony and, in any event, a self-defense

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little idea which authorities in that country would be the relevant authorities to attempt to contact.

instruction would be inconsistent with defendant's own testimony in which he denied stabbing Dominguez.

The court found that the "only thing that the defendant's brother stated was that [Dominguez] was antagonizing the defendant. Shortly thereafter, [Dominguez] was yelling, I've been stabbed and at that point the witness grabbed the defendant and that's all we have." The court concluded the testimony offered by Carlos was not substantial evidence of self-defense and denied the defense's request for the instruction.

2. Analysis

"'A trial court has no duty to instruct the jury on a defense—even at the defendant's request—unless the defense is supported by substantial evidence.' (*People v. Curtis* (1994) 30 Cal.App.4th 1337, 1355 [37 Cal.Rptr.2d 304].) 'In other words, "[t]he court should instruct the jury on every theory of the case, but only to the extent each is supported by substantial evidence." [Citation.]' (*People v. Flannel* (1979) 25 Cal.3d 668, 685 [160 Cal.Rptr. 84, 603 P.2d 1].)" (*People v. Hill* (2005) 131 Cal.App.4th 1089, 1101, disapproved on other grounds in *People v. French* (2008) 43 Cal.4th 36, 48, fn. 5; see also *People v. Stitely* (2005) 35 Cal.4th 514, 551.) Evidence is substantial so as to warrant an instruction when it is "sufficient to 'deserve consideration by the jury,' that is, evidence that a reasonable jury could find persuasive." (*People v. Barton* (1995) 12 Cal.4th 186, 201, fn. 8.)

"[A] defendant acts in lawful self-defense if 'one, the defendant reasonably believed that he was in imminent danger of suffering bodily injury . . . or was in imminent danger of being touched unlawfully; two, the defendant reasonably believed that the immediate use of force was necessary to defend against that

danger; and three, the defendant used no more force than was reasonably necessary to defend himself against that danger.' (CALCRIM No. 3470.)" (*People v. Clark* (2011) 201 Cal.App.4th 235, 250; accord, *People v. Hernandez* (2011) 51 Cal.4th 733, 747; *People v. Minifie* (1996) 13 Cal.4th 1055, 1064-1065 [defendant must have honest and reasonable belief that bodily injury is about to be inflicted].)

Carlos's testimony, which is what defendant cited when asking the trial court to give a self-defense instruction, was not substantial evidence that would allow a jury to conclude defendant reasonably believed he was in imminent danger of suffering bodily injury or an unlawful touching at Dominguez's hands. Carlos testified Dominguez verbally antagonized defendant, but in a regular tone of voice—saying, for example, "Oh, yeah, you think you're better than me?" Such mere verbal antagonism could not have allowed the jury to find defendant was justified in stabbing Dominguez with the knife. (*People v. Hardin* (2000) 85 Cal.App.4th 625, 629-630 ["'[D]eadly force or force likely to cause great bodily injury may be used only to repel an attack which is in itself deadly or likely to cause great bodily injury . . . .'"].)

Defendant's request for a self-defense instruction in the trial court was not expressly predicated on his own trial testimony, just the testimony of his brother Carlos.[10] However, if we consider defendant's testimony and assume for the sake of

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[10] During the defense case at trial, defendant testified in narrative fashion because his attorney represented she could not question defendant while fulfilling her ethical obligations to the court.

argument it would constitute substantial evidence warranting a self-defense instruction, we do not believe defendant would have achieved a more favorable outcome if the instruction had been given. Defendant denied he ever stabbed Dominguez, and it is therefore unlikely (to say the least) the jury would have found the charged stabbing was an act of self-defense. Defendant's testimony was also marred with inconsistencies, both internally and when contrasted with other witnesses—including his brother Carlos (e.g., on the question of whether Dominguez was already bleeding when he arrived at defendant's apartment).[11] Defendant had previously been convicted of assault with a deadly weapon (the Giacoman incident), which further undermined his self-defense claim. And as we have already emphasized, the other evidence against him was quite substantial, including Deputy Kabanjin's testimony recounting defendant's admission that he stabbed Dominguez because defendant thought Dominguez was taking photos of defendant's tattoos.

We are confident it is not reasonably probable the jury would have returned a more favorable verdict had the court instructed on self-defense. (*People v. Salas* (2006) 37 Cal.4th 967, 984; *People v. Watt* (2014) 229 Cal.App.4th 1215, 1219-1220 [applying *People v. Watson* (1956) 46 Cal.2d 818 test for harmless error]; *People v. Villanueva* (2008) 169 Cal.App.4th 41, 53 [failure to instruct on self-defense evaluated under *People v. Watson* standard].) Indeed, on this record, we can go further and say our

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[11] At sentencing, when considering a defense motion pursuant to *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, the trial judge stated: "I found the defendant to be completely incredible. I find that he had lied."

conclusion that defendant would not have obtained a more favorable result is one we reach beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18.)[12] There was no prejudicial error in refusing the request for a self-defense instruction.

DISPOSITION

Defendant's conviction is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

BAKER, J.

We concur:

TURNER, P. J.

KRIEGLER, J.

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[12] We reject defendant's contention that the failure to instruct on an affirmative defense is per se reversible error. (*People v. Salas*, *supra*, 37 Cal.4th at p. 984.)