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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. REGINALD WICKMAN, Defendant and Appellant.	B277741 (Los Angeles County Super. Ct. No. VA141177)

APPEAL from a judgment of the Superior Court of Los Angeles County, Olivia Rosales, Judge. Affirmed.

Lori A. Quick, 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, Victoria B. Wilson and Idan Ivri, Deputy Attorneys General for Plaintiff and Respondent.

Reginald Wickman appeals from a judgment which sentences him to four years in county jail for taking a vehicle without consent in violation of Vehicle Code section 10851, subdivision (a). Wickman contends the trial court erred when it found the vehicle owner unavailable to testify and allowed his preliminary hearing testimony to be admitted. Wickman also challenges the trial court's denial of his request for a continuance to permit the vehicle owner to return to the United States for trial. We affirm the judgment.

FACTS

On January 28, 2016, Inderjit Kaushal reported his vintage red 1964 Chevrolet Impala stolen. He had left the $90,000 car locked in his driveway the night before. The car was tracked to Inglewood by a Los Angeles County Sheriff's Department helicopter using a Lojack receiver. The deputy in the helicopter observed a red Impala driving eastbound on Florence Avenue and then turning down a residential street, where it parked. He saw a black male exit the car and walk over to a white Monte Carlo parked in the middle of the street. They began to converse through the passenger side window. When deputies arrived, Wickman was leaning against the passenger side of a white car near the Impala. Deputies matched the VIN number of the Impala to Kaushal and observed exposed wires pulled out from the steering column. There was no key for the ignition.

Wickman admitted he drove the Impala that day. He testified he is a certified mechanic who was asked to work on the car by a man named Keyon, whom he had known for seven or eight years. He was told the car would not start because it had a custom motor newly installed. He was hired to rewire the car to accommodate the new engine. He met a man named Gene Davis,

who introduced himself as the owner of the car, at a residence off of Venice Boulevard in West Los Angeles on the night of January 27, 2016. Davis had a key to unlock the car doors, but did not have one for the ignition since the original key no longer worked. The following morning, Wickman met Keyon and Davis at an apartment building in Inglewood and the Impala was parked in a stall in the complex.

There were wires hanging out of the steering column, which Wickman did not find unusual as he frequently worked on cars in that condition. The car could be driven, but often stalled because the computer in the engine had not been reprogrammed. Wickman stated the new engine was activated with a chip so the original key no longer worked. However, the car had a switch beneath the dashboard which could be used to start the car. Wickman worked on the car for about an hour, rewired it, and got it started just long enough to move it to his mechanic shop.

Wickman, Keyon, and Davis drove to Inglewood in a caravan with Wickman driving the Impala, Davis on a motorcycle, and Keyon driving a blue four-door Buick. Wickman last saw Davis on the freeway. Keyon's car was in front and he arrived in Inglewood with Wickman. When Wickman arrived at his shop, Keyon was in the middle of the street in his car. Wickman's friend, Williams, arrived shortly thereafter to help work on the car.

When the deputies arrived, Wickman was speaking with Williams. Wickman was identified by the deputy in the helicopter as the driver of the Impala. Wickman explained why he had the Impala and that he did not know the car was stolen. He stated it was not unusual for him to work on cars with no keys or a license plate and with wires hanging out of the steering

column. As a result, he did not ask for proof of ownership. At the time of his arrest, however, Wickman told officers the car belonged to a friend and did not mention anyone named Davis. Nor did he give the address of where he picked up the car. He provided a number for the officers to call, but it was disconnected.

Wickman later attempted to contact Davis himself, but his phone number was disconnected and he could not find him at the location off of Venice Boulevard. An investigator for the defense discovered that the location where Wickman initially viewed the Impala was actually Kaushal's address.

Wickman was arrested and charged with one count of driving or taking a vehicle without consent in violation of Vehicle Code section 10851, subdivision (a). It was further alleged that Wickman had previously been convicted of the same offense under Penal Code section 666.5 and he had four prison priors within the meaning of Penal Code section 667.5, subdivision (b).

The prosecution presented evidence showing the car was owned by Kaushal and that Wickman did not have permission to drive it, including Kaushal's preliminary hearing testimony and the testimony of the police officers involved. Wickman testified in his own defense, as described above. Wickman was found guilty by the jury on the sole count charged and the trial court found true three of the four prior prison allegations after the prosecutor moved to strike one prior prison allegation. Wickman was sentenced to the high term of four years in county jail after the trial court struck the prison priors for sentencing purposes. Wickman timely appealed.

DISCUSSION

Wickman argues his right of confrontation was violated when the trial court allowed the prosecutor to use Kaushal's preliminary hearing testimony at trial and when it refused his request for a continuance to allow Kaushal to return to the country to testify. We find no error.

I. The Preliminary Hearing Testimony was Properly Admitted

A. Proceedings Below

At the March 10, 2016 preliminary hearing, Kaushal testified he parked the Impala in his driveway at approximately midnight on January 28, 2016. He locked the car and brought the keys into the house. Kaushal reported the car missing at 10:00 a.m. the next morning. He confirmed he did not know Wickman and did not give him permission to drive his car. Kaushal further testified the car was in excellent condition before it was stolen. After it was recovered, "the back seat was missing, the wires were everywhere, lot of stuff was missing from my car."

Trial was continued several times and eventually began on August 16, 2016. A subpoena was sent out to Kaushal on June 20, 2016. No response was received. A witness coordinator for the District Attorney's office attempted to call Kaushal in June, but the number had been disconnected. She attempted to call him three more times at a different number on August 2nd, 3rd, and 5th and left messages each time. None of her calls were returned.

An investigator for the District Attorney's office attempted to contact Kaushal prior to trial on August 10, 2016, but she also discovered the phone number listed on the subpoena was no longer in service. The investigator then accessed a database

available to her and found a second phone number. The person who answered the phone was Kaushal's father. He told her Kaushal was in India and did not plan to return until October. She asked Kaushal to return her call and his father assured her he would pass on the message, but warned she may not receive a call until the next day given the time difference. Kaushal, however, never returned her call.

On August 16, 2016, the morning of trial, the investigator and her partner knocked loudly on the security gate at the address listed on the subpoena for about 10 minutes. They also walked around the house. After receiving no response, they went to a second address listed for Kaushal. A woman identifying herself as Kaushal's mother told the investigator that Kaushal left for India in May or June. She believed he was going to return in October. The woman spoke very little English and the investigators were unable to question her further. They requested her husband, who spoke English, to contact them, but he never did.

At the due diligence hearing, the prosecutor informed the court he inherited this case on August 10, 2016. On August 15, he called the number the investigator found. He spoke to a woman who refused to identify herself, but who agreed to translate for Kaushal's mother. Kaushal's mother said Kaushal left for India a few months ago and he would not be back for another few months. He asked for Kaushal's father to return his call.

The next morning, on the first day of trial, the prosecutor received a call from Kaushal's cousin, who confirmed Kaushal had been in Punjab, India since May or June and planned to return in October. The prosecutor also indicated he recently

received discovery showing an investigator for the defense spoke on July 28, 2016 to Kaushal's brother, who indicated Kaushal was in India at the time. Thus, defense counsel was aware he was out of the country. The prosecutor also presented testimony from the investigator and witness coordinator of their efforts, described above, to locate Kaushal.

The trial court found the prosecution had "made a reasonable and good faith due diligence [effort] in trying to secure the presence of the witness." He allowed Kaushal's preliminary testimony to be read at trial.

B. Applicable Law

"'"The confrontation clauses of both the federal and state Constitutions guarantee a criminal defendant the right to confront the prosecution's witnesses. (U.S. Const., 6th Amend.; Cal. Const. art. I, § 15.)"'" (*People v. Fuiava* (2012) 53 Cal.4th 622, 674 (*Fuiava*).) If, however, the witness is found to be unavailable, the prosecutor may use the witness' previous testimony, provided it was subject to cross-examination in a court proceeding against the same defendant. Under federal law, this testimony is admissible only if the prosecution made a good faith effort to obtain the witness's presence at trial. Similarly, under California law, the prior testimony is admissible if the prosecution exercised reasonable diligence, but was unable to procure the witness's attendance by use of court process.[1]

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[1] Wickman contends the trial court erroneously ruled prior testimony was admissible even absent a showing of unavailability. Although the trial court seemed to indicate at one point during the hearing that the admission of prior testimony did not depend on whether the witness was unavailable, it is obvious from the entirety of the hearing that the trial court

(*Fuiava, supra,* 53 Cal.4th at pp. 674-675; *People v. Bunyard* (2009) 45 Cal.4th 836, 848-849 (*Bunyard*); Evid. Code, §§ 1291, subd. (a) & 240, subd. (a)(5).) The prosecution bears the burden to show its efforts to locate and produce the witness for trial were reasonable under the circumstances. (*Ohio v. Roberts* (1980) 448 U.S. 56, 74, overruled on another ground by *Crawford v. Washington* (2004) 541 U.S. 36, 58-63; *People v. Smith* (2003) 30 Cal.4th 581, 609.)

To determine whether the prosecution exercised reasonable diligence, a court may consider "'"'whether the search was timely begun,'" . . . the importance of the witness's testimony . . . , and whether leads were competently explored.'" (*Fuiava, supra*, 53 Cal.4th at p. 675.) "[I]n those cases in which courts have not found adequate diligence, the efforts of the prosecutor or defense counsel have been perfunctory or obviously negligent. . . . On the other hand, diligence has been found when the prosecution's efforts are timely, reasonably extensive and carried out over a reasonable period." (*Bunyard, supra*, 45 Cal.4th at pp. 855-856.) "'When, as here, the facts are undisputed, a reviewing court decides the question of due diligence independently, not deferentially. [Citation.]' [Citation.]" (*Fuiava, supra*, 53 Cal.4th at p. 675.)

C. The Prosecutor was Diligent in his Efforts to Secure Kaushal's Presence at Trial

The prosecution's efforts were reasonably diligent and not perfunctory or obviously negligent. Kaushal willingly testified at

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correctly interpreted the law notwithstanding its one misstatement. Its ruling to admit the prior testimony because "the People have met their burden of reasonable and good faith due diligence" reflects its understanding of the law.

the preliminary hearing on March 10, 2016. He was not a reluctant witness and there was no indication he intended to leave the country for an extended period of time. The matter was set for trial "at the very earliest mid July of 2016." As a result, a subpoena was sent to Kaushal on June 20, 2016. Trial was continued multiple times in June and July. On August 1, 2016, trial was reset for August 12, 2016. The case was called for trial on August 12, 2016, and a jury panel was ordered for August 16, 2016.

When no response was forthcoming after the June 20 subpoena was sent, the witness coordinator attempted to call Kaushal four times at two different numbers beginning two weeks before the August 16, 2016 trial date. Six days before trial, the prosecutor left a message for Kaushal and spoke with his cousin the day of trial, who stated Kaushal was in India. Meanwhile, an investigator accessed a database to find a different phone number for him and spoke with Kaushal's father, who informed her Kaushal was in India. The investigator also went to Kaushal's physical residence on the morning of trial in an attempt to locate him, finding his mother instead. His mother confirmed Kaushal was in India. Thus, three separate people from the District Attorney's office attempted to locate and secure Kaushal's presence at trial over a two week period.

The efforts made by the District Attorney's office in this case matched or exceeded those made by the prosecution in cases in which reasonable diligence was found. (*Fuiava*, *supra,* 53 Cal.4th at pp. 676-677; *People v. Herrera* (2010) 49 Cal.4th 613 (*Herrera*).) In *Fuiava,* the detective began looking for the witness two weeks before the trial date, which was found to be a reasonable period. He checked her two last known addresses and

searched D.M.V. records. He checked hospital and jail records. The court found the prosecution acted with reasonable diligence to secure the witness at trial. (*Fuiava, supra,* 53 Cal.4th at pp. 675-677.)

In *Herrera,* an investigator attempted to locate the witness at his last known address and searched for additional information on law enforcement databases, but learned the witness had been deported eight months before trial. (*Herrera, supra,* 49 Cal.4th at pp. 631-632.) Although the prosecution waited until the last business day before trial to search for the witness, the high court found additional time to be unnecessary and further efforts futile given his deportation. Further, authorities did not know the witness' location in El Salvador and there was no indication he had returned to California in the interim. Accordingly, the trial court found the prosecution satisfied its obligation in demonstrating the witness' unavailability and properly admitted his preliminary hearing testimony at trial. (*Id.* at p. 632.) We likewise find the prosecution satisfied its obligation to demonstrate Kaushal's unavailability in this matter.

The cases relied upon by Wickman, on the other hand, are distinguishable. In each, the prosecution knew where the witness was located, yet failed to utilize its powers to produce his or her attendance at trial. In *People v. Foy* (2016) 245 Cal.App.4th 328, for example, the prosecution contacted the out-of-state witness, who refused to return to California to testify at trial. The prosecution thus knew her location, yet failed to exercise its powers under the Uniform Act to Secure the Attendance of Witnesses from without the State in Criminal Cases under Penal Code section 1334, et seq. (*See also Barber v.*

Page (1968) 390 U.S. 719 [witness in custody outside of the state]; *People v. St. Germain* (1982) 138 Cal.App.3d 507 [prosecution spoke with witness].) Here, Kaushal never returned the calls made to him. His family also failed to specify where he was in Punjab.

Wickman's assertions that the prosecution should have done more are unavailing. That additional efforts might have been made or other lines of inquiry pursued does not change our conclusion. (*People v. Wilson* (2005) 36 Cal.4th 309, 342.) First, Wickman contends the District Attorney's office failed to make any effort to locate Kaushal between June and August of 2016. Everyone with whom the District Attorney's office spoke, however, indicated that Kaushal left for India in May or June and would remain there until October at the earliest. As in *Herrera,* any additional efforts during this time would have been futile as Kaushal's family failed to disclose his address in India, merely stating he was in Punjab, a large state in India. As noted in *People v. O'Shaughnessy* (1933) 135 Cal.App. 104, 110, "no good could be accomplished by requiring that an officer make a pretense of looking for the witness in a number of places where he could not reasonably be expected to be found or by requiring that an extensive or expensive search be made in every county of the state. There is nothing to indicate that any greater degree of diligence in this case would have secured the presence of this witness or that the diligence used was not reasonable under the circumstances."

Second, Wickman argues the prosecution made no effort to confirm that Kashaul was in fact in India. Again, this appears to be a futile act. Even if Kashaul was not in India, but actually in hiding in California, "'it 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.' [Citation.]" (*People v. Diaz* (2002) 95 Cal.App.4th 695, 706.)

II. The Continuance was Properly Denied

Wickman contends the trial court erred in denying his request for a continuance. According to Wickman, "the crux of this issue is that it was the prosecution who was not ready to proceed as it did not have a material witness under subpoena." Wickman complains the trial court held him to an unreasonable standard, requiring him to waive his right to a speedy trial in exchange for his right to confront his accuser, Kaushal. We disagree.

After the trial court issued its ruling at the due diligence hearing, defense counsel requested a continuance to allow Kaushal time to return from India to testify. Earlier in the proceeding, defense chose not to waive time "to see if he comes back." After the trial court found the prosecution had exercised reasonable diligence in attempting to locate Kaushal, defense counsel requested a continuance "because we have been told he is going to be back in October. And, unfortunately, I need to ask him questions regarding his knowledge of an individual which is my defense." Defense counsel later clarified that she "investigated and based on that investigation found out that there is a witness who has a connection to the victim." She planned to ask Kaushal about the connection and "because [she] basically ha[d] additional information from the brother," she would bring in Kaushal's brother to "confront him with regards to whether he knows the individual."

Questioning why the defense announced they were ready for trial despite knowing Kaushal was not in the country, the trial court commented, "Isn't this basically playing games like you know he is not here so, therefore, this case will be dismissed and, therefore, I don't have to deal with it instead of just coming forward and saying 'I need this witness.'" The trial court denied the motion to continue "because it's complete speculation as to whether this person is coming in. There is word of mouth from people who then became very recalcitrant and reluctant and not forthcoming in terms of the information of where he was at, the address, any returned phone calls, even identifying themselves. So I think it's speculation, especially since both sides have announced ready."

Penal Code section 1050, subdivision (e) provides: "'Continuances shall be granted only upon a showing of good cause.' . . . [¶] An important factor for a trial court to consider is whether a continuance would be useful." (*People v. Beeler* (1995) 9 Cal.4th 953, 1003 (*Beeler*).) A party must demonstrate the usefulness of a continuance by showing both the materiality of the evidence necessitating the continuance and that such evidence could be obtained within a reasonable time. (*Ibid.*) The court may also consider the likelihood a continuance would benefit the movant as well as any burdens on witnesses, the jury, or the court. (*People v. Jenkins* (2000) 22 Cal.4th 900, 1037.) "'"[A]bove all, [the court must consider] whether substantial justice will be accomplished or defeated by a granting of the motion."'" (*Ibid.*)

"'The trial court's denial of a motion for continuance is reviewed for abuse of discretion.' [Citation.] 'There are no mechanical tests for deciding when a denial of a continuance is so

arbitrary as to violate due process. The answer must be found in the circumstances present in every case, particularly in the reasons presented to the trial judge at the time the request is denied.' [Citations.]" (*People v. Mungia* (2008) 44 Cal.4th 1101, 1118; *People v. D'Arcy* (2010) 48 Cal.4th 257, 287-288.) "'[A]n order of denial is seldom successfully attacked.' [Citation.]" (*Beeler, supra,* 9 Cal.4th at p. 1003.)

We conclude the trial court did not abuse its discretion in denying defense counsel's request for a continuance. Wickman failed to establish that a continuance would have been useful. First, defense counsel failed to show how Kaushal's testimony would have been material to his defense, only vaguely indicating she needed "to ask him questions regarding his knowledge of an individual which is my defense." She failed to identify the individual or how he was connected to Kaushal. She also failed to specify how Kaushal's knowledge about the individual would have exonerated Wickman.

Even if she had made a sufficient offer of proof to show Kaushal's testimony was material to Wickman's defense, she failed to demonstrate due diligence in securing Kaushal's attendance at trial, since she knew Kaushal was in India by July 28, 2016. (*People v. Wilson* (1965) 235 Cal.App.2d 266, 273 [defendant moving for continuance has burden to show he exercised due diligence to secure witness's attendance by legal means]; *see also People v. Mickey* (1991) 54 Cal.3d 612, 660.) This is a different issue than whether the prosecution was ready to proceed. Contrary to Wickman's contentions on appeal, the prosecution's ability to prove its case was irrelevant to whether good cause was demonstrated by the defense for a continuance.

Further, the trial court properly found it was speculative whether Kaushal would appear even if trial was continued until October. Although he willingly testified at the preliminary hearing, he failed to return any calls made by the District Attorney's office. Indeed, his family stated he "planned" to return in October, but failed to provide any specific date or assurance that he would do so. Since voir dire had already begun, the burden on the court, the other witnesses, and the jury outweighed any speculative benefit to Wickman's defense. Accordingly, the trial court did not abuse its discretion in declining to continue the matter.

DISPOSITION

The judgment is affirmed.

BIGELOW, P.J.

We concur:

FLIER, J.

GRIMES, J.