Filed 10/19/18 P. v. Veiga CA2/2

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. ROBERT VEIGA, Defendant and Appellant.	B286720 (Los Angeles County Super. Ct. No. LA079996)

APPEAL from a judgment of the Superior Court of Los Angeles County. Richard H. Kirschner, Judge. Affirmed.

Vanessa Place, 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, Paul M. Roadarmel, Jr., Supervising Deputy Attorney General, and Daniel C. Chang, Deputy Attorney General, for Plaintiff and Respondent.

* * * * * *

During a criminal defendant's 2017 trial for committing a number of sex crimes against a 13 year old and a young adult in the early 2000's, the trial court allowed the prosecutor to introduce the preliminary hearing testimony of the first victim when she abruptly refused to appear in court on the morning she had been subpoenaed to testify. The jury went on to return guilty verdicts on 23 charges. On appeal, the defendant argues that (1) the prosecutor was not reasonably diligent in trying to secure the victim's presence at trial, and (2) our Supreme Court's decision in *People v. Seijas* (2005) 36 Cal.4th 291 (*Seijas*), which held that prosecutors may use preliminary hearing testimony when a trial witness is shown to be constitutionally unavailable, was wrongly decided. We reject both arguments and affirm.

FACTS AND PROCEDURAL BACKGROUND

I. Facts

A. *The 13-year-old victim in 2000*

In November 2000, Robert Veiga (defendant) snuck into the bedroom of V.S. after dark and while wearing a stocking over his head. V.S. was 13 years old. Defendant covered her mouth with his hand, put a knife to her throat, and threatened to kill her if she moved or screamed. He then removed her pants and underwear. Over the course of the next hour, and while holding V.S. at knifepoint, he forced her legs apart, tried to insert his penis into her vagina four or five times; placed his fingers in her vagina; forced her to orally copulate him twice; shoved his tongue in her mouth; bit her right breast; inserted his tongue into her vagina; inserted his penis into her vagina three times; licked her back; and again forced her to orally copulate him, this time until he ejaculated. When V.S. sobbed during these events, defendant told her to "stop crying like a little bitch." Defendant committed

some of these acts in V.S.'s bedroom, and the remainder in the living room where he moved her to avoid awakening her other family members in the house. Before leaving, defendant threatened to return and kill her if she raised the alarm.

V.S. told her parents, and saliva and sperm samples were collected from her body during a sexual assault exam. Defendant's DNA was in the samples taken from around V.S.'s mouth.

B. *The adult victim in 2002*

Around midnight in April 2002, defendant approached J.O., who was a young adult at the time, as she got out of her car inside her gated apartment complex. Defendant was wearing a mask and wielding a knife. At knifepoint, he got into J.O.'s car, pulled her into the car's driver's seat and ordered her to drive to an empty parking lot behind a commercial building. Once there, he ordered J.O. out of the car, ordered her to remove her clothes and, at knifepoint, forced her to orally copulate him; tried to penetrate her vagina from behind with his penis; penetrated her vagina with his penis after pushing her on her back on the ground; cut her hair with the knife; and forced her to orally copulate him until he ejaculated. When J.O. began to sob, defendant said he would "gut" her if she did not stop. He also called her a whore. Ultimately, he forced J.O. to drive him back to her apartment complex and slipped away as she walked to her apartment.

J.O. reported the incident to the police, who collected a sample of the semen that J.O. spat onto the parking lot ground after defendant ejaculated into her mouth. The DNA in the sperm matched defendant's DNA.

II. Procedural Background

A. *The charges*

In November 2015, the People charged defendant with offenses arising out of these incidents. The operative first amended information charged defendant with 26 counts—15 involving V.S. and 11 involving J.O.

With respect to the various sex acts committed against V.S., the People charged defendant with a single count of aggravated sexual assault on a child by forcible rape and penetration (Pen. Code, § 269, subd. (a)(2),[1] count 1); four counts of aggravated sexual assault on a child by forcible oral copulation (§ 269, subd. (a)(4), counts 2, 4, 5, and 7); one count of aggravated sexual assault on a child by penetration (§ 269, subd. (a)(5), count 3); one count of aggravated sexual assault on a child by forcible rape (§ 269, subd. (a)(1), count 6); two counts of forcible rape (§ 261, subd. (a)(2), counts 8 and 13); four counts of oral copulation with a child under 14 years of age (§ 288a, subd. (c)(1), counts 9, 11, 12, and 14); a single count of sexual penetration by force (§ 289, subd. (a)(1), count 10); and a single count of aggravated kidnapping (to commit rape) (§ 209, subd. (b)(1), count 15).

---

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

With respect to the various sex acts committed against J.O., the People charged defendant with five counts of forcible oral copulation (§ 288a, subd. (c)(2), counts 17, 20, 22, 24, and 26; three counts of forcible rape (§ 261, subd. (a)(2), counts 19, 21, and 25); two counts of attempted forcible rape (§§ 664, 261, subd. (a)(2), counts 18 and 23) and a single count of aggravated kidnapping (to commit rape) (§ 209, subd. (b)(1), count 16).

With respect to all counts, the People further alleged that defendant personally used a dangerous or deadly weapon (§12022, subd. (b)(1)); that he used a deadly weapon in the commission of a sex offense (§ 12022.3, subd. (a), counts 8-14 and 17-26); and that he was eligible for sentencing under the "One Strike" law, which mandates indeterminate sentences of 15 or 25 years to life when a defendant is convicted of certain sex offenses during the commission of burglary or aggravated kidnapping (§ 667.61, counts 8-14 and 17-26).

B. *Preliminary hearing*

On October 5 and November 16, 2015, the trial court held a preliminary hearing. V.S. testified at the hearing, and defendant's attorney cross-examined her. The trial court held defendant to answer.

C. *Trial*

The matter proceeded to a jury trial in May and June of 2017.

1. *Use of V.S.'s preliminary hearing testimony*

After a day and half of jury selection, the prosecutor's opening statement, and two prosecution witnesses, V.S. was scheduled to testify on the morning of the third day of trial, June

2, 2017.[2] That morning, the prosecutor informed the court that V.S. was refusing to come to court in spite of a subpoena, and asked the court to admit V.S.'s preliminary hearing testimony as her "former testimony" under Evidence Code section 1291.

The trial court then convened a "due diligence" hearing to assess whether the People had "exercised reasonable diligence" in trying to "procure [V.S.'s] attendance by the court's process."

The lead detective on the case took the stand.

She testified that V.S. had been cooperative from 2013 up until the morning of June 2. V.S. had voluntarily agreed to be interviewed by law enforcement in 2013, had voluntarily appeared to testify at the preliminary hearing, and never previously indicated an "unwilling[ness] to testify or anything to that effect."

The detective explained that she had served V.S. with a trial subpoena via e-mail 36 days before June 2 (on April 27), that V.S. had responded that she "received" the subpoena, and that the detective told V.S. she would let V.S. know the exact date she would be needed to testify as the trial date got closer. On May 23, the detective e-mailed V.S. and told her that her testimony would be needed on either June 1 or June 2. V.S. expressed a preference for June 2 because it was a Friday, and "she has Fridays off."

On May 31, the detective e-mailed V.S. to confirm that V.S. would be testifying on June 2 at 9:00 a.m.

On June 1, V.S. texted the detective to confirm that she received the May 31 e-mail and also asked for a copy of her preliminary hearing testimony because she "did not remember a

---

[2] For purposes of this discussion, all further dates are in 2017.

lot"; the prosecutor sent V.S. a copy; and V.S. acknowledged receiving it. After 9:00 p.m. on June 1, V.S. texted the detective to ask how long her testimony would take. The detective responded that she would "likely" be done before or soon after lunch. V.S. responded, "Okay." One minute later, V.S. texted, "I am not going to lie. I don't want to and don't feel prepared." V.S. sent a further text: "But I'll be there." The detective responded, "Don't worry. It's been 17 years. You were 13. You're not expected to remember everything. All you have to do is be truthful about what you do remember." There was no further response that evening.

At 8:03 a.m. on June 2, V.S. e-mailed the detective, "I'm sorry. I won't be able to make it after all." At 8:15 a.m. the detective responded via text message, "Please call me. Would like to talk about the options." V.S. did not respond. The detective went to V.S.'s father's house, which was V.S.'s last known address, but no one answered the door. While out in front of the father's house, the detective sent a further text to V.S., "I need to talk to you ASAP. The judge is going to issue a warrant if you fail to come to court. You just have to explain why you don't want to testify. Open the door so we can talk." No one answered.

The detective then called V.S.'s father, and he promised to have V.S. call back the detective. The father also said that V.S. had moved out of his house and that she was living in an apartment complex near a particular intersection (but that he did not have the exact address). The detective drove to that intersection, identified two apartment complexes within a block of that intersection, and checked them both: The tenant registries of each complex did not list V.S.; the manager of one

complex said he was new but did not know V.S.; the manager of the other complex did not answer.

While the detective was checking the complexes, V.S. responded via text message, "I never said I wasn't. I couldn't today." When the detective asked V.S. to call the prosecutor, she responded, "I got a lot going on. I can't just waltz in there when you guys want." The detective reminded V.S. that she had received a subpoena[3] and had agreed to be there, pointed out that V.S. had "actually requested [to testify]" on June 2, and told her that "[t]he judge will issue the warrant if you don't come into court now." V.S. said she would call when she could and then added, "I don't have to testify if I don't want to. Hounding me is not going to help." The detective pressed, "You just have to understand how serious this is. You need to call soon. I've been ordered back to court to testify to our conversations." V.S.'s final text was: "Oh, you mean for you guys[. W]hat's happened has happened and I can never get that innocence back. I've been more than cooperative. I'll call when I can."

Defendant declined to cross-examine the detective.

The trial court ruled that V.S. was an "unavailable witness" because the People had acted with "sufficient diligence" and because defendant "had an opportunity to cross-examine" V.S. during her preliminary hearing testimony.

Defendant objected on the ground that defendant's attorney during the preliminary hearing had done an "incomplete job" of cross-examining V.S. The trial court overruled this objection, finding that defendant's prior counsel had "both the right and the opportunity to cross-examine" V.S.

---

3 The detective's text mistakenly used the word "warrant" instead of "subpoena."

The prosecutor read all of V.S.'s preliminary hearing testimony into evidence at trial, including the direct, cross, redirect, and recross-examinations.

2. *Verdicts*

Except for counts 20, 22, and 24 (on which the jury returned not guilty verdicts), the jury returned guilty verdicts on the remaining 23 counts and found all of the enhancements to be true, including the One Strike allegations.

D. *Sentencing*

The trial court imposed a total sentence of 444 years and four months, comprised of an indeterminate sentence of 307 years to life and a determinate sentence of 137 years and four months. The 307-years-to-life sentence is the sum of 12 consecutive sentences of 25 years to life (counts 8-14, 17, 19, 21, 25, and 26), and one sentence of seven years to life (count 15). The determinate sentence of 137 years and four months is the sum of 12 ten-year enhancements for use of a deadly weapon during a sex offense (counts 8-14, 17, 19, 21, 25, and 26); a one-year enhancement for personal use of a deadly weapon (count 15); a 14-year sentence for attempted forcible rape (count 18), comprised of the high term of four years plus a 10-year enhancement for use of a deadly weapon during a sex offense; and a two-year four-month sentence for attempted forcible rape (count 23), comprised of the one-third the midterm of one year plus 16 months for use of a deadly weapon during a sex offense.

E. *Appeal*

Defendant filed a timely notice of appeal.

DISCUSSION

Defendant's sole claim on appeal is that the trial court erred in allowing the People to introduce V.S.'s preliminary

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

In this appeal, defendant makes two arguments: (1) the trial court erred in concluding that V.S. was "unavailable"; and (2) our Supreme Court's decisions in *Seijas*, *supra*, 36 Cal.4th 291 and its progeny—all of which consistently hold that an absent witness's preliminary hearing testimony may be admitted because a defendant's "interest and motive" to cross-examine are "similar"—are wrongly decided. We need not consider the merits of defendant's second argument because we lack the authority to reconsider the decisions of our Supreme Court. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) As to the first issue, we review the trial court's factual findings for substantial evidence, and its determination of reasonable diligence de novo. (*Cromer*, *supra*, 24 Cal.4th at pp. 900-901.)

As pertinent here, a witness is "unavailable" to testify if she is "[a]bsent from the hearing and the proponent of . . . her statement has exercised reasonable diligence but has been unable

to procure . . . her attendance by the court's process." (Evid. Code, § 240, subd. (a)(5); *Cromer*, *supra*, 24 Cal.4th at p. 898 [using this definition for confrontation clause purposes].) The prosecution bears the burden of establishing reasonable diligence. (*Herrera*, *supra*, 49 Cal.4th at p. 623.)

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

We independently agree with the trial court's assessment that the prosecution exercised reasonable diligence in attempting to secure V.S.'s presence in court. The detective's efforts were timely: She served V.S. with a trial subpoena nearly five weeks before trial and, although not legally required to do so (*People v. Fuiava* (2012) 53 Cal.4th 622, 675-676), kept tabs on V.S. in the intervening weeks leading up to trial. As late as June 1, the

detective had V.S.'s assurance that she will "be there" to testify. And once V.S. voiced the intent not to appear on the morning of her anticipated testimony, the detective immediately began trying to persuade her to come to court and to physically locate her. V.S.'s testimony was certainly important in setting forth the precise sex acts defendant committed against her and their order. But the presence of defendant's DNA around V.S.'s mouth independently—and, in light of defendant's decision to testify without any explanation of how his DNA got there, forcefully—established defendant's identity as V.S.'s assailant. The People also introduced evidence of injuries to V.S.'s neck and trauma to her genitals, chest, and right breast consistent with being poked with a knife and forcibly penetrated, respectively. And once the detective got wind of V.S.'s unwillingness to testify, she chased down every lead she had: She called V.S., texted her, and went to her last known address; when these turned up no further leads, she called V.S.'s father and, upon learning of V.S.'s possible current location, went to the two possible apartment complexes to search for V.S. She also encouraged V.S. to meet with her through messages that conveyed understanding as well as the gravity of V.S.'s noncompliance. The totality of the prosecution's conduct constitutes "reasonable efforts to locate" V.S. (*Cummings*, *supra*, 4 Cal.4th at p. 1298; accord, *People v. Valencia* (2008) 43 Cal.4th 268, 292-293 [reasonable diligence where investigator attempted to reach the witness by phone, visited his home once, checked DMV records and visited two other apartments listed in those records, and spoke with neighbors but received no leads].)

Defendant offers three categories of reasons why, in his view, the trial court erred in finding that V.S. was unavailable to testify.

First, he argues that V.S. never said she would *never* testify, only that she "couldn't" testify "today." This argument is factually and legally without merit. Factually, defendant ignores V.S.'s subsequent text messages in which she stated that she "do[esn't] have to testify if [she] do[esn't] want to," that she "can never get [her] innocence back," that she had been "more than cooperative," and that she would "call [the detective] when [she] can" without any further communication. These statements evince a more definitive refusal to testify. Legally, all that is required is a refusal to testify at the time that testimony is needed, not *permanent* unavailability. (*People v. Gomez* (1972) 26 Cal.App.3d 225, 229 ["To require proof that a witness's unavailability is permanent would be, except in case of death, to require speculation"].)

Second, defendant asserts that the detective's efforts to locate V.S. on the morning of June 2 were inadequate because (1) she never asked V.S. *why* she was unavailable (which defendant states could have been attributable to work obligations, transportation issues, or child care issues) and thus never tried to remedy that reason, and (2) she reminded V.S. of the gravity of her noncompliance with the subpoena. These assertions misunderstand the nature of the reasonable efforts inquiry, which looks to the reasonableness of what the prosecution did and not whether additional efforts or other lines of inquiry would have been more fruitful. (*Wilson*, *supra*, 36 Cal.4th at p. 342.) Even if we were to ignore the applicable legal standard, defendant's assertions still do not call into

question the reasonableness of the detective's efforts. The detective was not lax for failing to ask V.S. why she did not want to come to court because V.S. had already explained that she was not coming because she had "a lot going on," that she had already "been more than cooperative," and that she "can never get [her] innocence back." Defendant's supposition that V.S.'s statements were really a smokescreen for car trouble or other reasons is purely speculative. Nor was the detective lax for pointing out the significance of V.S.'s noncompliance: The detective accurately informed V.S. what would happen if she did not come to court. Indeed, if the detective had *not* explained these consequences, she would no doubt be faulted for not doing so.

Lastly, defendant contends that the trial court erred in declaring V.S. to be unavailable without first (1) issuing a body attachment for V.S. and having the detective inform V.S. of this fact, (2) ordering the detective to arrest V.S. (either at V.S.'s place of work or wherever V.S.'s father said she lived), or (3) continuing the trial or otherwise postponing V.S.'s testimony. Each of these contentions lacks merit. The trial court *did* issue a body attachment for V.S., and the detective had already told V.S. that the "judge is going to issue a warrant if you fail to come to court." Ordering the detective to arrest V.S. was not an option because (1) the detective had already tried to locate V.S. and had failed, (2) there was no reason to believe V.S. was at work because she had *requested* June 2 as the day to testify because it was her day off, (3) V.S.'s father had already provided the information he was willing to provide about V.S.'s current whereabouts, and (4) the law prohibits the incarceration of the victim of a sex crime as a means of inducing the victim to testify (Code Civ. Proc., § 1219, subd. (b) ["victim of a sexual assault" may not be imprisoned for

contempt in "refusing to testify"]; *People v. Cogswell* (2010) 48 Cal.4th 467, 477-479). And the trial court did not err in declining to continue the trial or take matters out of order because defendant never asked for such a continuance (*People v. Alcala* (1992) 4 Cal.4th 742, 782 ["The trial court was under no obligation to volunteer, sua sponte, that the defense could have an unrequested continuance"]) and because there was no evidence that a continuance would have yielded V.S.'s testimony (*People v. Winbush* (2017) 2 Cal.5th 402, 469-470 [denial of continuance to locate witness appropriate when there was "no proffered basis to expect success" in finding that witness]).

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
HOFFSTADT

We concur:

_____, P. J.
LUI

_____, J.
CHAVEZ