

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

ELVIN ORLANDO ESTRADA,

Defendant and Appellant.

B235543

(Los Angeles County
Super. Ct. No. GA077406)

APPEAL from a judgment of the Superior Court of Los Angeles County,
Darrell S. Mavis, Judge. Affirmed.

Richard C. Neuhoff, under appointment by the Court of Appeal, for Defendant and
Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney
General, Lance E. Winters, Assistant Attorney General, Scott A. Taryle and John Yang,
Deputy Attorneys General, for Plaintiff and Respondent.

Elvin Orlando Estrada appeals from the judgment entered following his conviction by jury on count 1 – first degree murder (Pen. Code, § 187) with personal use of a dangerous or deadly weapon (Pen. Code, § 12022, subd. (b)(1)). The court sentenced appellant to prison for 26 years to life. We affirm the judgment.

FACTUAL SUMMARY

Viewed in accordance with the usual rules on appeal (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206), the evidence established that about 5:00 p.m. on July 16, 2009, Isis Villalobos, Dagoberto Aguilar, and appellant were drinking in a parking lot near a Pasadena restaurant. Villalobos testified as follows. Villalobos had known appellant for a long time. Less than an hour after the three were in the parking lot, they entered the restaurant. Mario Sanchez (the decedent) joined them.

Appellant later gave Sanchez \$20 to get beer, and Sanchez left. When, after 30 minutes, Sanchez failed to return, appellant became angry and left to get beer. Sanchez returned with beer, and appellant later returned with beer. Appellant angrily asked Sanchez why it had taken Sanchez so long to return. Sanchez, Villalobos, Aguilar, and appellant subsequently drank until nighttime.

Villalobos also testified as follows. Villalobos, Aguilar, and appellant exited the restaurant around closing time. The three went to a nearby parking lot and resumed drinking. Sanchez joined them and the four continued drinking. Sanchez offered methamphetamine to appellant and Aguilar. Appellant assaulted Sanchez and Sanchez fell. Appellant grabbed Sanchez by his hair and tried to stab him with a knife. Appellant said he was angry because Sanchez had returned late with the beer. Aguilar intervened and appellant calmed down. Appellant asked Aguilar why he was defending Sanchez.

Appellant later said that they could not let Sanchez go because Sanchez might go to the police because appellant had tried to rob Sanchez. Sanchez told appellant not to worry because Sanchez would not go to the police. The group then resumed drinking. About five minutes later, appellant pushed Sanchez, grabbed him by his hair, and repeatedly stabbed him, mortally wounding him. Appellant left first, then Aguilar, then Villalobos. Villalobos testified appellant had the knife in his hand as he walked away.

Villalobos heard a helicopter, then saw appellant enter a house. Aguilar told appellant to exit the house and appellant complied. Appellant told Villalobos and Aguilar not to say anything to the police, and Aguilar told appellant not to worry and that Villalobos would not say anything. Appellant left in one direction and Aguilar and Villalobos left in another.

On July 21, 2009, Pasadena Police Officer Timothy Bundy interviewed Aguilar. Aguilar initially denied he had been present during the crime, but later provided information about what he had seen. Aguilar told Bundy that appellant had fled and was no longer in Pasadena. Bundy released Aguilar and no longer considered him a suspect.

On July 23, 2009, law enforcement personnel arrested appellant in New Jersey. On August 2, 2009, Pasadena Police Officer Javier Aguilar interviewed appellant. (We will refer to the officer as officer Aguilar to distinguish him from Dagoberto Aguilar, whom we simply refer to as Aguilar.) Officer Aguilar testified as follows. During the interview, appellant offered to show the officer the location of the knife appellant had used. Appellant led the officer to a dumpster behind a liquor store on Madre and Colorado. Appellant pointed towards the dumpster and, referring to the knife, said “ ‘That’s where I dumped it.’ ” It was clear appellant was referring to the knife he had used to stab Sanchez.

The dumpster was empty so officer Aguilar entered the liquor store to ask when the dumpster had been emptied. Officer Aguilar later exited the store and a store employee, Dagoberto Medina, later exited. Medina immediately recognized appellant and asked appellant why he was in custody or if appellant was in trouble. Officer Aguilar testified appellant replied to Medina, “ ‘I killed someone.’ ” Medina shook his head and walked away.

Bundy also testified as follows. On August 2, 2009, appellant, in jail, had a telephone conversation with someone. Bundy listened to a recording of that conversation. During the conversation, appellant said “people had already laid him out and he didn’t have a choice but to tell the truth, . . .” Appellant expressed displeasure at Villalobos and Aguilar for “throwing dirt” on appellant.

A transcript of the above telephone conversation reflects that at one point appellant said “. . . I had to tell the truth. Well, you know what, no shit, I ripped the dude. It was me, I said.” The transcript also reflects appellant suggested Aguilar “ratted [appellant] out.” An autopsy revealed Sanchez died from seven stab wounds in his neck, three of which were fatal, and he had no defensive wounds on his hands.

Aguilar’s preliminary hearing testimony was admitted into evidence at trial. His preliminary hearing testimony as to the events up to and including the stabbing of Sanchez was similar to Villalobos’s testimony and, at the preliminary hearing, Aguilar identified appellant as the person who stabbed Sanchez.¹ Appellant presented no defense evidence.

ISSUES

Appellant claims (1) the admission into evidence of Aguilar’s preliminary hearing testimony violated appellant’s constitutional right to confrontation because Aguilar was not constitutionally unavailable, (2) the trial court erroneously failed to instruct that the jury must view with caution an accomplice’s testimony, (3) the trial court erroneously failed to instruct that accomplice testimony must be corroborated, (4) appellant was denied effective assistance of counsel at trial, and (5) cumulative prejudicial error occurred.

DISCUSSION

1. Aguilar’s Preliminary Hearing Testimony Was Properly Admitted Into Evidence.

a. Pertinent Facts.

(1) Relevant Prior Proceedings.

On February 11, 2010, appellant’s preliminary hearing occurred, and Aguilar testified at that proceeding. Later in February 2010, the trial court filed the information in this case. The trial court continued the case multiple times for trial or trial setting,

¹ At the preliminary hearing, Aguilar also testified that he got blood on his clothing after this incident, and it seemed he threw away that clothing. He believed someone took his shirt from the parking lot. He gave conflicting testimony as to whether he left the shirt in the parking lot, and said he did not know what happened to it.

including to March 28, 2011, for trial. The court later continued the case multiple times for trial, including to the May 4, 2011, trial date. On May 6, 2011, the jury was sworn.

(2) *The May 6, 2011, Admissibility Hearing.*

(a) *Court Exhibits.*

On May 6, 2011, before the jury was sworn, the prosecutor proffered Aguilar's preliminary hearing testimony as evidence at trial. On that day, the court conducted an Evidence Code section 402 due diligence hearing and received court exhibit Nos. 1 and 2 into evidence.

Court exhibit No. 2, fairly read, reflects as follows. In April 2006, Aguilar violated federal law by illegally reentering the United States following his conviction for an aggravated felony (8 U.S.C. § 1326(a)). In that matter, a federal court in Florida committed him to federal prison on November 9, 2009, and his scheduled prison release date was September 1, 2010.

The exhibit also reflects that on January 5, 2010, the United States Immigration and Naturalization Service (INS) lodged a detainer for Aguilar with the Federal Bureau of Prisons (Bureau). The charge was "deportation." (Capitalization omitted.) A "prior notifies" (capitalization omitted) section of the exhibit suggests that, on January 5, 2010, the Bureau received notice from the Pasadena Police Department (Pasadena) that Pasadena wanted the Bureau to notify Pasadena concerning Aguilar. The exhibit does not reflect the content of the notification that Pasadena wanted. The exhibit also suggests that on July 29, 2010, the Bureau issued the above notification to Pasadena. The exhibit indicates that on September 1, 2010, the Bureau released Aguilar to United States Immigrations and Customs Enforcement (ICE).

Court exhibit No. 1, fairly read, reflects as follows. Omar Charris, an ICE agent, sent to Pasadena Police Officer Jason Van Hecke a document reflecting, inter alia, Aguilar had been in ICE custody from September 1, 2010, to October 13, 2010. On October 13, 2010, Aguilar was released, and the exhibit reflects the "release type" (capitalization omitted) as "DEP." We will present additional facts below concerning court exhibit No. 1.

(b) *Van Hecke's Testimony.*

Van Hecke testified at the admissibility hearing as follows. At some point prior to the hearing, Pasadena Police Detective Curry, the investigating officer in this case, was injured on duty. Prior to May 2, 2011, Van Hecke had not been involved with the present case. On May 2, 2011, Curry's partner, Pasadena Police Detective Gomez, asked Van Hecke to follow up on the whereabouts of Aguilar. The only task assigned to Van Hecke was for him to locate INS documents, and he was unaware of any other efforts to secure Aguilar's attendance at trial.

Aguilar was present at the February 11, 2010, preliminary hearing, but was also in the custody of federal prison authorities in Colorado. Gomez told Van Hecke that Aguilar had been deported in 2010, but Gomez did not tell Van Hecke when Gomez found out Aguilar had been deported.

On May 2, 2011, Van Hecke contacted Kimberly Worsham, a clerk in the federal prison in Colorado. Worsham's database reflected Aguilar had been in custody in Colorado until September 2010, when he was released to immigration authorities. Worsham told Van Hecke that the reference in court's exhibit No. 2 to "deportation" (with a release date of September 1, 2010) indicated federal prison authorities released Aguilar to the custody of immigration authorities for purposes of deportation.

On May 5, 2011, Charris told Van Hecke the following. Court's exhibit No. 1 reflected information from Charris's computer. The reference to "DEP" in the exhibit meant Aguilar was deported on that date (i.e., October 13, 2010). The exhibit reflected Aguilar was born in, and deported to, El Salvador. Aguilar "currently was deported" at the time Van Hecke spoke with Charris.

(c) *Argument at the Admissibility Hearing.*

During argument, the People asked the court to find that Aguilar was unavailable as a witness for purposes of Evidence Code section 240, subdivision (a)(4) because he had been deported to El Salvador. Although appellant did not expressly refer to the federal Constitution, he argued the People had not demonstrated due diligence to secure Aguilar's attendance at trial. In particular, appellant argued the People failed to exercise

due diligence to prevent Aguilar from being deported and failed to exercise due diligence in that the People failed to consult databases to determine if Aguilar had illegally reentered the United States after he was deported.

The court found under Evidence Code section 240, subdivision (a)(4) that the court could not compel Aguilar's attendance at trial and he was unavailable. The court stated it had no evidence, and the court could not assume, Aguilar had illegally reentered the United States, and the court indicated it had evidence Aguilar had not reentered.

(d) *Evidence Presented at Trial.*

Bundy testified at trial as follows. On July 21, 2009, Bundy interviewed Aguilar. Bundy told Aguilar that Bundy was not concerned with whether Aguilar was in the United States illegally and that Bundy just wanted to talk. Aguilar knew he would be in ICE custody in federal prison, and Aguilar "was confident he was going to be turned over to immigration." Bundy released Aguilar shortly after the interview. However, Aguilar still had an immigration hold on him, so he was transferred from Pasadena custody to ICE custody.

Aguilar testified at the February 11, 2010, preliminary hearing that he was afraid he would be deported based on the Sanchez murder.

b. *Analysis.*

Appellant claims the admission into evidence of Aguilar's preliminary hearing testimony violated appellant's constitutional right to confrontation because Aguilar was not constitutionally unavailable. Appellant argues the People (1) failed to exercise due diligence to prevent Aguilar from becoming absent as a consequence of deportation, (2) failed to exercise due diligence in that the People failed to consult databases to determine if Aguilar had illegally reentered the United States after he was deported, and (3) failed to do anything to locate Aguilar until two days before trial. We reject appellant's claim.²

² There is no dispute that as a matter of state law Aguilar was " 'unavailable as a witness' " within the meaning of Evidence Code section 240, subdivision (a)(4) and Aguilar's preliminary hearing testimony was therefore admissible as against a state law

In *People v. Herrera* (2010) 49 Cal.4th 613 (*Herrera*), our Supreme Court stated, “A witness who is absent from a trial is not ‘unavailable’ in the constitutional sense unless the prosecution has made a ‘good faith effort’ to obtain the witness’s presence at the trial. [Citation.]” (*Herrera*, at p. 622.) The prosecution must exercise due diligence. (*Ibid.*) Considerations relevant to the due diligence inquiry include the importance of the proffered testimony. (*Ibid.*)

The proponent of the evidence has the burden of showing that the witness is unavailable. (*People v. Smith* (2003) 30 Cal.4th 581, 609.) “We review the trial court’s resolution of disputed factual issues under the deferential substantial evidence standard [citation], and independently review whether the facts demonstrate prosecutorial good faith and due diligence [citation].” (*Herrera, supra*, 49 Cal.4th at p. 623.)

As to the People’s alleged failure to exercise due diligence to prevent Aguilar from becoming absent as a consequence of deportation, the pertinent facts reveal the following. On July 21, 2009, Bundy interviewed Aguilar concerning the present case while he was in the custody of Pasadena but, a few days later, Pasadena released him to INS custody. He was in federal prison in Colorado on an immigration offense from November 9, 2009 to September 1, 2010, inclusive. As of February 11, 2010, when Aguilar testified at appellant’s preliminary hearing, Aguilar was in custody of federal prison authorities and subject to an INS detainer.

On September 1, 2010, federal prison authorities released Aguilar to INS custody. INS commenced deportation proceedings. On October 13, 2010, INS deported Aguilar. We assume without deciding that the People knew at least as early as February 11, 2010, that there was a substantial risk INS would deport Aguilar, and that this triggered a prosecutorial duty to use reasonable means to prevent his absence. (See *People v. Wilson* (2005) 36 Cal.4th 309, 342.)

In *People v. Roldan* (2012) 205 Cal.App.4th 969, cited by appellant, a witness in the custody of federal immigration authorities testified at the defendant’s preliminary

hearsay objection because the former testimony hearsay exception (Evid. Code, § 1291, subd. (a)(2)) applied.

hearing and, shortly thereafter, was deported. (*Id.* at pp. 973, 976-977.) The defendant claimed the admission into evidence of the witness’s preliminary hearing testimony at the defendant’s trial violated his right to confrontation because the witness was not constitutionally unavailable at the time of trial. (*Id.* at p. 975.)

Roldan concluded the People had failed to exercise due diligence in attempting to secure the witness’s attendance at trial. (*Roldan, supra*, 205 Cal.App.4th at p. 978.) *Roldan* observed the People had a duty to use reasonable means to prevent a present witness from becoming absent (*id.* at p. 980) and *Roldan* identified several legal remedies the People might have attempted to employ.³ *Roldan* concluded based on its facts that the People, having failed to attempt to use any of those means, had not exercised due diligence. (*Id.* at p. 985.)

However, not every failure by the People to secure the attendance of a witness at trial constitutes a failure to exercise the requisite due diligence, and *Roldan* is distinguishable from the present case. *Roldan* acknowledged that one of the considerations relevant to the due diligence inquiry was the importance of the proffered testimony. (*Roldan, supra*, 205 Cal.App.4th at p. 979.) In *Roldan*, the witness, Barrera, was a key witness for the People and, absent Barrera’s preliminary hearing testimony, there was no direct evidence the defendant committed the shooting at issue in that case. *Roldan* characterized the remaining evidence implicating the defendant as “circumstantial and minimal.” (*Id.* at p. 980, fn. 3.)

We have recited in our Factual Summary the pertinent facts concerning appellant’s offense. It is not true that, absent Aguilar’s preliminary hearing testimony, there was no direct evidence appellant fatally stabbed Sanchez. Aguilar’s preliminary hearing testimony was cumulative on that issue. Villalobos identified appellant as the person who stabbed Sanchez. Moreover, there was overwhelming evidence of appellant’s guilt,

³ The procedures included the videotaping of a witness’s testimony, judicial detention of a material witness, reliance on federal regulations pertaining to alien material witnesses, and federal writs of habeas ad testificandum. (*Roldan, supra*, 205 Cal.App.4th at pp. 980-984.)

e.g., Villalobos’s testimony, appellant’s statements to the effect he threw the murder weapon in a dumpster, appellant’s statement to Medina that “*I killed someone*,”⁴ (italics added) appellant’s statements during his telephone conversation in jail, and his flight from Pasadena to New Jersey as evidence of consciousness of guilt. Aguilar’s testimony was not vital or critical to the prosecution’s case. (Cf. *People v. Hovey* (1988) 44 Cal.3d 543, 564.) We conclude the People did not, prior to the deportation of Aguilar, fail to use reasonable diligence to secure his attendance at trial.

As to the People’s alleged failure to exercise due diligence in that the People failed to consult databases to determine if Aguilar had illegally reentered the United States after he was deported, the pertinent facts reveal INS deported Aguilar on October 13, 2010, and he remained deported as of May 5, 2011. The due diligence admissibility hearing in this case occurred the next day.

Like the present case, *Herrera* involved the deportation of an El Salvadoran witness. (*Herrera, supra*, 49 Cal.4th at pp. 617, 619.) *Herrera* observed the El Salvadoran witness in its case had been deported after the preliminary hearing; the witness was in El Salvador at the time of trial and therefore beyond the court’s own process; attempts to locate the witness in El Salvador proved unsuccessful; and even if the witness could have been found there, the United States and El Salvador had no treaty or agreement providing for an alternative means to compel or facilitate his attendance at trial. (*Id.* at p. 629.)

Herrera held that, under the circumstances, the People fulfilled their obligation of good faith and due diligence, the witness was unavailable, and the admission of his preliminary hearing testimony at trial was proper. (*Herrera, supra*, 49 Cal.4th at p. 629.) Significantly, *Herrera* rejected as pure conjecture the suggestion the witness might have returned to California. (*Id.* at p. 631.)

⁴ Appellant asserts “the jury *could* well have concluded that appellant actually *meant* to say that ‘*they claim* I killed someone’ and that the officer misunderstood the remark or was predisposed to hear a law-enforcement favorable remark.” (First and second italics added.) There is no support in the record for appellant’s assertion.

We similarly conclude the People did not fail to exercise due diligence by not consulting databases to determine if Aguilar had illegally reentered the United States after he was deported. Our previous conclusion that there was overwhelming evidence of appellant's guilt informs our present due diligence analysis as well. Moreover, the fact Van Hecke began his efforts to locate Aguilar on May 2, 2011, does not affect the analysis. And *Herrera* refrained from deciding what, if any, prosecutorial efforts might be constitutionally required when, after a witness has been deported, there is no contact between the People and the witness. (Cf. *Herrera*, *supra*, 49 Cal.4th at p. 627, fn. 8.)

Aguilar was constitutionally unavailable and the trial court properly admitted into evidence his preliminary hearing testimony. (*Herrera*, *supra*, 49 Cal.4th 613, 624-625, 627-628, fn. 9.) Finally, even if the admission into evidence of Aguilar's preliminary hearing testimony was error, there was, as previously discussed, overwhelming evidence of appellant's guilt; therefore, any such error was harmless beyond a reasonable doubt. (Cf. *People v. Louis* (1986) 42 Cal.3d 969, 993.)

2. No Instructional Error Occurred Regarding the Issue of Accomplices.

Appellant presents related claims the trial court erred by failing to instruct the jury that the jury must view with caution an accomplice's testimony and by failing to instruct that accomplice testimony must be corroborated. Appellant argues the trial court erred by failing to give these instructions as to the testimony of Villalobos and the preliminary hearing testimony of Aguilar. We reject appellant's claims.

We have recited the pertinent facts in our Factual Summary. Simply put, there was no substantial evidence that either Villalobos or Aguilar was an accomplice. The trial court was not required to give the instructions.⁵ (Cf. *People v. Lewis* (2001) 26 Cal.4th 334, 369-370 (*Lewis*).)

⁵ *People v. Hernandez* (2003) 30 Cal.4th 835, cited by appellant, does not compel a contrary conclusion as to the omission of the cautionary instruction in this case. In that case, the person, Rodrigues, whom *Hernandez* concluded was an accomplice to a killing told people that the defendant and Rodrigues were going to commit the killing. (*Id.* at p. 874.) In light of our analysis in this opinion, we reject appellant's claims that he was

Moreover, our previous analysis that there was overwhelming evidence of appellant's guilt compels the conclusion there was sufficient corroborating evidence. Appellant concedes the jury legitimately could have concluded appellant's statements corroborated the testimony of Villalobos and Aguilar. Any erroneous failure to instruct on the accomplice corroboration requirement was not prejudicial (cf. *Lewis, supra*, 26 Cal.4th at pp. 370-371) and did not violate appellant's constitutional right to due process, right to a fair trial, or right to present a defense. (*Id.* at p. 371.)

Further, because there was overwhelming evidence of guilt and the trial court gave CALCRIM No. 226 concerning a willfully false witness, and concerning witness credibility, any erroneous failure to instruct that accomplice testimony must be viewed with caution was not prejudicial. (*Lewis, supra*, 26 Cal.4th at p. 371.)

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

KITCHING, J.

We concur:

KLEIN, P. J.

ALDRICH, J.

denied effective assistance of counsel (see *People v. Ledesma* (2006) 39 Cal.4th 641, 746) and cumulative prejudicial error occurred.