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**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

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| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>CARLOS MIGUEL GUZMAN,<br><br>Defendant and Appellant. | 2d Crim. No. B275378<br>(Super. Ct. No. 2015016493)<br>(Ventura County) |

A jury convicted Carlos Miguel Guzman of kidnapping (Pen. Code, § 207, subd. (a); count 1) and corporal injury to his girlfriend (Pen. Code, § 273.5, subd. (a); count 2). Guzman admitted that he was on bail at the time he committed the offenses (Pen. Code, § 12022.1, subd. (b)).

Guzman argues that his kidnapping conviction should be reversed because the trial court's admission of the victim's statements to police officers violated his right to confrontation and due process. He also argues that the court erred in failing to give a necessity instruction, that defense counsel rendered ineffective assistance by failing to object to the

admission of Guzman's jail phone call with his friend, and that there was cumulative error. We affirm.

## BACKGROUND

Police officers responded to a report of domestic violence between Guzman and the victim at the home they shared. The victim told police that she was at her friend's house when she called Guzman. Guzman met the victim outside of her friend's house. He punched and kicked the victim, causing her to lose consciousness. He grabbed her by the hair, and dragged her across the street to his car. She did not want to leave, but he forced her into the front passenger seat and drove away. She tried to get out of the car, but he pulled her hair and forced her to stay inside. When they arrived at their house, he hit her multiple times.

The victim had a laceration on her lip, a scratch on her neck, and an abrasion and swelling on her knee. Her boots were scuffed from being dragged.

The next day at the police station, the victim told another officer that Guzman dragged her from her friend's house. She said she told Guzman that she did not want to go with him, tried to leave with her friend, and resisted getting into the car by "drop[ping] her body weight." When she started screaming, he put his hand over her mouth and told her to "be quiet" and "[d]on't make me make you pass out."

The police received three 911 calls reporting the incident outside of the friend's house. The first caller said a man was hitting a woman with his fists and was "throwing her on the floor and dragging her." A second caller reported that the man was "grabbing her," "throwing her on the ground," and kicking her. The caller heard the woman calling the man "Sharky"

(Guzman's nickname). The caller asked the police to hurry because "she might get killed." The third 911 call was from the victim, who said Guzman began attacking her and "dragged me to his house. He put me in the car and dragged me to his house."

When questioned, Guzman told a detective that the victim smelled like alcohol when he met her at her friend's house. He said that he tried taking her to his car by "holding her" and "hugging her and guiding her," but she struggled and pushed him away. He said they fell a few times, but she eventually got into the car. Guzman denied hitting or kicking her. Guzman said that he pulled the victim by her hair or jacket to keep her inside the car while it was moving. He did not let her out because he believed she was not sober or stable. When they got home, she laid down outside, and she squirmed and screamed when he tried to pick her up. He admitted that he choked the victim "a little bit when [he] tried picking her up" and held her in a "sleeper hold." He admitted that he "should have just let her go."

Guzman made jail phone calls to the victim and his friend, Erika Jackson. In the first call, the victim told him that he needed to call Jackson because she was "gonna get [the victim] jumped." She said that Jackson and her associates had already threatened her in retaliation for calling the police. She told him she was "scared shitless" and asked him to talk to Jackson because he knew how to make her stop.

Guzman called Jackson, who said she was going to "fuck [the victim] up" because "she snitched." Guzman responded "[j]ust don't do it right now, fool, like just don't bug her . . . 'cause it's gonna go worse for me." He said "after all this bullshit is done . . . you guys could do whatever. But . . . , just don't jump her, fool, 'cause I still need [the victim]" for money while he was

in jail. Jackson told Guzman the victim was going to testify against him and she needed "to drop [the] charges." Guzman replied, "You could talk to her about that like, you know what I mean, but I don't know. She says she's not." Jackson said, "I was about to kill her." Guzman laughed and said, "Well . . . if that's what you guys are gonna do . . . [l]ike you should've never told me."

In another call, the victim told Guzman that police detectives were at her house asking questions. He told her not to answer, and she said she did not answer.

During closing argument, Guzman admitted the domestic violence charge (Pen. Code, § 273.5), and defense counsel asked the jury to find him guilty on that count. The jury found Guzman guilty on both counts, and the court sentenced him to three years for count 1, two years consecutive for the on-bail enhancement, and two years concurrent for count 2, for a total of five years in state prison.

## DISCUSSION

### *Forfeiture by Wrongdoing Exception*

Guzman contends the trial court erred when it admitted the victim's statements that she made to the officers at her house and at the police station. We disagree.

A defendant has a constitutional right to confront trial witnesses against him. (U.S. Const., 6th Amend.; Cal. Const., art. I, § 15.) But this right is not absolute. Where a defendant engages in wrongdoing that was intended to, and did procure the unavailability of a witness, the right to confrontation is forfeited. (*Giles v. California* (2008) 554 U.S. 353, 374 (*Giles*); *Davis v. Washington* (2006) 547 U.S. 813, 833 ["one who obtains the absence of a witness by wrongdoing forfeits the constitutional

right to confrontation"].) In such a case, the unavailable witness's hearsay statements may be admitted at trial. (Evid. Code, § 1390.)[1]

A witness is unavailable if he or she 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." (§ 240, subd. (a)(5).) The court considers the timeliness of the search, the importance of the witness's testimony, and whether leads to the witness's possible location were reasonably explored in deciding whether reasonable diligence has been used. (*People v. Thomas* (2011) 51 Cal.4th 449, 500.) We review the trial court's resolution of disputed factual issues for substantial evidence, but we independently review whether the facts as determined by the court demonstrate due diligence. (*People v. Herrera* (2010) 49 Cal.4th 613, 623.)

"An appellate court 'will not reverse a trial court's determination [under section 240] simply because the defendant can conceive of some further step or avenue left unexplored by the prosecution. Where the record reveals, . . . that sustained and substantial good faith efforts were undertaken, the defendant's ability to suggest additional steps (usually, as here, with the benefit of hindsight) does not automatically render the prosecution's efforts "unreasonable." [Citations.] The law requires only reasonable efforts, not prescient perfection.' [Citation.] 'That additional efforts might have been made or other lines of inquiry pursued does not affect [a] conclusion [there was due diligence] . . . . It is enough that the People used

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[1] Unspecified statutory references are to the Evidence Code unless otherwise stated.

reasonable efforts to locate the witness.' [Citation.]" (*People v. Diaz* (2002) 95 Cal.App.4th 695, 706.)

The investigator for the prosecution testified about his attempts to locate the victim. He began his search sometime before August 27, 2015,[2] approximately three weeks before the trial was scheduled to begin on September 16, 2015. He attempted to contact her about 15 times.

The investigator called the telephone number listed on the subpoena, but the number was disconnected. There were no "good addresses" associated with the victim that he could visit. He searched the county's case management system and found the contact information for the victim's grandmother, who did not provide him with any helpful information. He later called the grandmother a second time, but, again, he did not get any leads. He also contacted the victim's friend, who was present on the night of the incident, and neither the friend nor the friend's parents knew of the victim's whereabouts.

The investigator listened to Guzman's jail calls, but did not gain any information on the victim's location. He called the sheriff's office to see if she went to visit Guzman, but she did not. He went to a court hearing that the victim was scheduled to appear, but she did not show up. He also monitored her family court dates, but she did not appear at any of those hearings. He faxed the Employment Development Department (EDD) to obtain

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[2] The record is unclear on the exact date the investigator received the request to locate the victim. The reporter's transcript states that he received the request on October 24, 2015, but that date is wrong since the hearing and the trial began October 13, 2015. He states that he visited the victim's friend's home on August 27, 2015.

information about her possible employment, but the EDD did not respond. He also conducted internet searches, including social media accounts, addresses, and telephone numbers associated with the victim, but none of the searches were successful.

The investigator's testimony establishes that he made reasonable efforts to locate the victim. Based on this evidence, we conclude the prosecution exercised reasonable diligence in trying to procure the victim's attendance at court. The trial court properly found the victim was unavailable.

The trial court also properly found the victim's unavailability was a result of Guzman's wrongdoing. For the forfeiture by wrongdoing exception to apply, the prosecutor must establish by a preponderance of evidence that the defendant "engaged, or aided and abetted, in the wrongdoing that was intended to, and did, procure" the witness's unavailability. (§ 1390, subd. (a).) The exception applies not only when the defendant intends to prevent a witness from testifying in court, but also when the defendant attempts to dissuade the witness from cooperating with law enforcement. (*Giles*, *supra*, 554 U.S. at p. 377; *People v. Banos* (2009) 178 Cal.App.4th 483, 491 (*Banos*).)

On appeal, we determine whether there is substantial evidence to support the trial court's finding that the witness's unavailability was procured by the defendant. (See *Banos*, *supra*, 178 Cal.App.4th at p. 502.) If there is substantial evidence supporting the trial court's factual findings, we accept them and we do not reweigh the evidence. (*People v. Brown* (2014) 59 Cal.4th 86, 105-106.)

Guzman's phone conversation with the victim shows that he intended to prevent her from cooperating with the police.

When the victim told him that police detectives were at her home, he told her not to answer any questions. There was also evidence that defendant "engaged, or aided and abetted" in wrongdoing with the intent to prevent her from testifying in court. (§ 1390, subd. (a).) The victim told Guzman that Jackson and her associates were threatening her in retaliation for calling the police and that she was scared. Nonetheless, he told Jackson that she could talk to the victim about dropping charges or not testifying at trial. He said "You could talk to her about that like, you know what I mean . . . ." Moreover, although Guzman told Jackson to hold off on threatening the victim because he needed her while he was in jail, he also told her that "after all this bullshit is done . . . you guys could do whatever." The trial court properly found, by a preponderance of evidence, that Guzman's wrongdoing caused the victim's unavailability. There was no error in admitting the victim's statement.

Even if the trial court erred in admitting the evidence under section 1390, any error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.) The kidnapping offense was supported by other compelling evidence, such as photographs of the victim's injuries and her boots with scuff marks showing that she was dragged, the 911 phone calls, and Guzman's own statements. He admitted that while he held the victim and took her to his car, she struggled against him. He also said that he held her in a "sleeper hold" and that he may have choked her. Additionally, he admitted that he held onto her hair and jacket to prevent her from leaving the car and that he did not stop the car to let her out. He acknowledged that he should have let her go.

*Necessity Instruction*

Guzman argues that the trial court erred by failing to instruct sua sponte on a necessity defense. Because there was insufficient evidence to support a necessity defense, no instruction was required.

A trial court has the duty to instruct on principles of the law and defenses not inconsistent with the defendant's theory only when there is substantial evidence to support giving such an instruction. (*People v. Crew* (2003) 31 Cal.4th 822, 835.) For an instruction on a necessity defense, "there must be evidence sufficient to establish that defendant violated the law (1) to prevent a significant evil, (2) with no adequate alternative, (3) without creating a greater danger than the one avoided, (4) with a good faith belief in the necessity, (5) with such belief being objectively reasonable, and (6) under circumstances in which he did not substantially contribute to the emergency. [Citations.]" (*People v. Pepper* (1996) 41 Cal.App.4th 1029, 1035 (*Pepper*).) The necessity defense is designed to apply narrowly. (*People v. Verlinde* (2002) 100 Cal.App.4th 1146, 1164 (*Verlinde*), disapproved on other grounds by *People v. Cook* (2015) 60 Cal.4th 922, 939.) It applies when criminal action is necessary to avoid "'an imminent peril'" and there is no time to resort to legal alternatives or such alternatives would be futile. (*Ibid.*)

Guzman argues that his statement to the police established that he held onto the victim and could not let her out of his car because she was not sober or stable. But even assuming the victim was intoxicated, there is insufficient evidence that there was a "significant evil" that required Guzman to act. (*Pepper*, *supra*, 41 Cal.App.4th at p. 1035.) The victim had been at her friend's house when Guzman dragged her across

the street to his car. There was no indication that she was in "'imminent peril.'" (*Verlinde*, *supra*, 100 Cal.App.4th at p. 1164.) Moreover, Guzman did not provide any evidence that there were no adequate alternatives. Guzman could have left the victim at her friend's house or waited for her to become sober. He provides no explanation why it was necessary to immediately take her away from the home. In fact, he admitted that he should have let her go.

*Ineffective Assistance of Counsel*

Guzman argues that his trial counsel rendered ineffective assistance by failing to object to the jail phone call between him and Jackson. We disagree.

A defendant claiming ineffective assistance of counsel has the burden to show (1) counsel rendered deficient performance, and (2) prejudice as a result of counsel's deficient performance. (*Strickland v. Washington* (1984) 466 U.S. 668, 687 (*Strickland*); *People v. Riel* (2000) 22 Cal.4th 1153, 1175.)

Generally, trial counsel's failure to object is considered a trial tactic that the reviewing court will not second guess. (*People v. Kelly* (1992) 1 Cal.4th 495, 520.) "If the record on appeal sheds no light on why counsel acted or failed to act in the manner challenged, the claim on appeal must be rejected unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation." (*People v. Lawley* (2002) 27 Cal.4th 102, 133, fn. 9.) Here, the record is silent. Counsel was not asked for an explanation and did not provide one.

In any event, the ineffective assistance of counsel claim fails because Guzman fails to establish prejudice. Guzman contends that the phone call was "extremely prejudicial" in

nature, so its omission would have changed the outcome of the case. But, in light of the photographs of the victim's injuries, her statements recounting the assault, the 911 calls, the other jail phone calls, his admissions during his police interview, and his concession to the domestic violence charge, there is no reasonable probability that the phone call with Jackson would have swayed the jury's decision and resulted in a different outcome. (*Strickland*, *supra*, 466 U.S. at p. 694.)

*Cumulative Error*

Finally, Guzman claims cumulative error. Because we have determined that all his claims are meritless and that error, if any, was harmless, there is no cumulative error. (*People v. Avila* (2006) 38 Cal.4th 491, 608.)

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

TANGEMAN, J.

We concur:

GILBERT, P. J.

PERREN, J.

Ryan J. Wright, Judge

Superior Court County of Ventura

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