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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

JOHN ROOKS,

Defendant and Appellant.

B237005

(Los Angeles County  
Super. Ct. No. BA369784)

APPEAL from a judgment of the Superior Court of Los Angeles County,  
Charles D. Sheldon, Judge. Affirmed.

Patricia Soung, Johnathan B. Steiner and Elizabeth A. Courtenay, 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, Senior Assistant Attorney General, Steven D. Matthews,  
Supervising Deputy Attorney General, and Herbert S. Tetef, Deputy Attorney General,  
for Plaintiff and Respondent.

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Defendant appeals his conviction of one count of possession of a controlled substance (Health & Saf. Code, § 11350, subd. (a)). He contends the trial court erred in denying him a continuance of his probation revocation hearing in order to locate a key exculpatory witness. We affirm.

### **FACTUAL BACKGROUND AND PROCEDURAL HISTORY**

#### *1. Proposition 36 Probation Case Nos. BA369784 and BA358510*

On July 21, 2009, defendant entered a no contest plea to attempted possession of cocaine in violation of Health and Safety Code section 11350 in case No. BA358510. The trial court placed him on probation under Proposition 36. (Pen. Code, § 1210.1 et seq.) On September 28, 2009, defendant's probation was summarily revoked and a bench warrant was issued.

On April 5, 2010, defendant was charged with possession of cocaine base in violation of Health and Safety Code section 11350 in case No. BA369784. The same day, a motion to revoke defendant's probation in case No. BA358510 was filed.

On April 12, 2010, defendant entered a plea of guilty to the charge in case No. BA369784, was given Proposition 36 probation, and his Proposition 36 probation was reinstated in case No. BA358510.

After defendant failed to appear for in-court progress reports in August, October and December 2010, the court issued a bench warrant and on February 18, 2011, terminated his Proposition 36 probation and placed defendant on formal probation for both cases.

#### *2. April 12, 2011 Petty Theft at WalMart, Case No. NA088615*

On April 12, 2011, at approximately 3:45 p.m., Marquise Ratliff, a loss prevention officer for WalMart on East Fifth Street in Long Beach, observed defendant open his

backpack and place some batteries inside.<sup>1</sup> Defendant also placed some large candy bars in the front of his pants.

Defendant proceeded to the cashier and asked a question. Ratliff did not see defendant pay for anything he had placed in his backpack or his pants. Usually at the front door, there is a uniformed security guard. Ratliff observed defendant briefly talking to the guard before defendant left the store. When defendant left the store, Ratliff apprehended him and took him to the office. As defendant entered the office, he took the candy bars out of his pants and attempted to leave them in a cart. The value of the items defendant had taken but not paid for was approximately \$140. Ratliff did not observe that defendant attempted to go to the customer service department, which was near the entrance.

Sandra Romero, Ratliff's partner in loss prevention, observed defendant on camera put some batteries in his backpack and some chocolate bars in his pants. Defendant selected some additional batteries and candy bars and went to the cash register. Defendant had a gift card<sup>2</sup> that that did not work, so defendant left the items he was attempting to pay for and left the store with the items still concealed in his pants and in his backpack.<sup>3</sup> There was nothing blocking the path from the cashier to customer service.

After Ratliff apprehended defendant, defendant asserted he was going to pay for the items. Romero recovered the candy and batteries from defendant's person. Defendant became aggressive, and Romero called the police. Romero did not attempt to find any video footage of the incident after defendant's arrest.

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<sup>1</sup> Ratliff was unsure how many batteries defendant took because defendant removed some of the batteries from the packaging before putting them in the backpack. His written report did not state that defendant put candy bars in his pants.

<sup>2</sup> The parties stipulated for purposes of the probation violation hearing that the gift card was valid.

<sup>3</sup> Romero testified the batteries were not removed from the backpack.

Officer John Helms of the Long Beach police department responded to the scene and spoke to Ratliff. Helms's report, based upon statements Ratliff made, did not state that Ratliff saw defendant put the candy bars in his pants. Helms observed the batteries recovered from defendant were all in the packages.

Defendant had a gift card and went to the WalMart to buy some batteries and candy. He put these items in his basket. Defendant believed the card had \$267 on it. When he got to the cash register, the cashier was unable to get the card to work. Defendant asked what he should do, and she said to "check at the front door." Defendant went to the security guard at the front door, who was standing a few steps outside. Defendant had too many items in his hands, so he put them in his backpack because the cashier had not given him a bag because he had not paid for anything. The security guard told him to go to customer service. There were a lot of shopping carts between the door and customer service, which defendant asserted made it difficult to get to customer service that way. Defendant had to walk out of the store to speak to the security guard about the problems with his gift card. Defendant denied putting anything in his pants.

On July 5, 2011, an information charged defendant with petty theft with a prior conviction (Pen. Code, § 666, subd. (a)). The matter was trailed pending a probation violation hearing in case No. BA369784 based upon the commission of the petty theft.

The court found defendant in violation of his probation. The court sentenced defendant to two years in jail, and dismissed case No. NA 088615.

### **DISCUSSION**

Defendant contends denial of a continuance to locate the security guard to whom he spoke outside of the WalMart regarding the problems with his gift card denied him his constitutional right to present a defense. He contends the expected testimony from the security guard goes directly to the issue of his intent to pay for the merchandise, and is material, not cumulative, and unobtainable from another source.

### **A. Factual Background**

Defendant's probation revocation hearing commenced October 3, 2011. Defendant's counsel informed the court that the defense investigator had been attempting to locate the security guard defendant spoke to.

On August 8, 2011, the defense investigator served a subpoena on the customer service manager, Alan Taylor, at WalMart. The subpoena specified that the defense needed records necessary to locate a possible witness. Taylor was requested to appear August 22, 2011, but he did not appear.

On September 9, 2011, the investigator contacted Jessica Davis, who identified herself as the customer service manager at WalMart. Davis informed the investigator that she would have Michael Bell, the assistant manager, contact him.

On September 15, 2011, the investigator called the store and spoke with Tanisha, who did not provide her last name. Tanisha told the investigator she would look into the situation. The investigator called Tara Pitterson, who worked in corporate security, and faxed her the subpoena from August 8, 2011. Pitterson advised the investigator she would look into it and have someone get back to him.

On September 18, 2011, the investigator received a text message on his cell phone from Pitterson. She advised him that the store, through assistant manager Michael Bell, would be getting the investigator the information he needed. She was going to be on vacation the next week, but would follow up when she returned.

On September 28, 2011, the investigator called and spoke to Michael Bell. Bell told him that he would look into the matter and get back to the investigator.

On October 2, 2011, the investigator called Michael Bell again and was put on hold. No one got back to him and he hung up.

The trial court issued a body attachment for Alan Taylor. Defense counsel advised the court that the sheriff's unit that served body attachments had been disbanded. The district attorney does not enforce body attachments for defendants.

The court continued the matter to October 19, 2011. The defense advised the court that on October 4, 2011, the investigator had called WalMart and asked to speak to the store manager, and spoke to Paula. Paula placed him on hold and hung up on him. The investigator called Tara Pitterson who advised him she would call WalMart's legal department. Pitterson refused to give the investigator the number of the legal department.

On October 5, 2011, defense counsel went with the investigator to WalMart and spoke to the manager, Chris Folmer. Folmer told them what they were asking for "should not be a problem" and that he would look into it and get back to them. They gave him another copy of the subpoena.

On October 7, 2011, the investigator called Folmer again, and was told that he had the necessary information and was waiting to hear back from the legal department so it could be released.

On October 11, 2011, Folmer sent an email requesting some documents, but the investigator did not have the documents Folmer needed, "since we don't have documents to email to them."

On October 15, 2011, the investigator left a message on Folmer's cell phone, but did not hear back from Folmer.

Defense counsel requested a continuance to continue the quest for the security guard.

The court commended defense counsel for his thoroughness in attempting to locate the witness, but denied the request for a continuance because it did not want to stop for "further research at WalMart for some possible witness."

## **B. Analysis**

To establish good cause for a continuance because of the unavailability of a witness, a party must show that he or she "exercised due diligence to secure the witness's attendance, that the witness's expected testimony was material and not cumulative, that the testimony could be obtained within a reasonable time, and that the facts to which the witness would testify could not otherwise be proven." (*People v. Howard* (1992) 1

Cal.4th 1132, 1171.) “The granting or denial of a motion for continuance . . . traditionally rests within the sound discretion of the trial judge, who must consider not only the benefit which the moving party anticipates but also the likelihood that such benefit will result, the burden on other witnesses and the court and above all, whether substantial justice will be accomplished or defeated by a granting of the motion.” (*People v. Fudge* (1994) 7 Cal.4th 1075, 1105.) We will not disturb that exercise of discretion except on a showing that the court acted in a patently absurd, arbitrary, or capricious manner that “resulted in a manifest miscarriage of justice.” (*People v. Jordan* (1986) 42 Cal.3d 308, 316.) However, if there is no ““showing of an abuse of discretion or of prejudice to the defendant, a denial of [a] motion for a continuance cannot result in a reversal of a judgment of conviction.”” (*Fudge*, at p. 1105.)

“When a witness was served with a subpoena but fails to appear as commanded, there is usually good cause for a continuance. . . . ‘We think a subpoenaed material witness’[s] failure to appear for trial may constitute good cause under section 1382 for the continuance of a trial beyond its statutory period.” (*Jensen v. Superior Court* (2008) 160 Cal.App.4th 266, 271.)

Here, the defense investigator made a diligent effort to locate the security guard to whom defendant spoke regarding the problems with the gift card. The record reflects that the effort was coming close to fruition, as the investigator was in contact with the store manager and appeared to be making progress in obtaining the necessary information. Further, it was not defendant’s fault that WalMart was ignoring the subpoena and stonewalling the defense efforts to obtain the identity of an exculpatory witness.

Nonetheless, we do not find an abuse of discretion here in denying defendant’s request for continuance, or that any prejudice to defendant resulted therefrom. A probation violation must be established by a preponderance of the evidence. (*People v. Rodriguez* (1990) 51 Cal.3d 437, 441, 447; *People v. O’Connell* (2003) 107 Cal.App.4th 1062, 1066.) Here, defendant had completed the offense of theft when he secreted the candy bars in his pants and when he put the batteries in his backpack. (*People v.*

*Shannon* (1998) 66 Cal.App.4th 649, 656.) His unlawful intent was apparent when he attempted to purchase some other items with the gift card and left the store without paying for the items that remained hidden in his backpack and pants. Rather than leave the items in the store pending resolution of the gift card problem, defendant left the store and claimed he could not get to customer service from inside the store. When he reentered the store, defendant attempted to place the candy bars in a cart to dispose of the improperly taken items. This conduct is consistent with defendant's intent to unlawfully and permanently deprive the store of its property. The court, sitting as factfinder, concluded that even if defendant had engaged in a conversation with a security guard about the problem with his gift card, he nonetheless would not have produced the secreted items and paid for them had the gift card problem been resolved. Thus, as the court was conducting a probation violation hearing and not a trial, we find no abuse of discretion and no prejudice to defendant from the denial of a continuance to locate a witness who may or may not have testified as defendant claimed.

#### **DISPOSITION**

The judgment is affirmed.

NOT TO BE PUBLISHED.

JOHNSON, J.

We concur:

ROTHSCHILD, Acting P. J.

CHANEY, J.