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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

A130104

v.

**(Contra Costa County
Super. Ct. No. 51004522)**

LORENZO STEWART,

Defendant and Appellant.

_____ /

A jury convicted appellant Lorenzo Stewart of first degree residential burglary (Pen. Code, §§ 459, 460), first degree residential robbery (Pen. Code, § 211, 212.5), and battery (Pen. Code, § 242). The trial court sentenced appellant to state prison.

Appellant contends the court erred by admitting Mara Rubia Ferreira Galvao's (Galvao) preliminary hearing testimony at trial pursuant to Evidence Code section 1291.¹ He claims the prosecution failed to exercise due diligence in securing Galvao's attendance at trial and, as a result, did not demonstrate Galvao's unavailability within the meaning of section 240. Appellant also argues he did not have an adequate opportunity to cross-examine Galvao at the preliminary hearing under section 1291.

¹ Unless otherwise noted, all further statutory references are to the Evidence Code.

We reverse. We conclude the court erred by admitting Galvao's preliminary hearing testimony because the prosecution failed to demonstrate it exercised due diligence in securing Galvao's attendance at trial pursuant to section 240, subdivision (a)(5). The record shows the prosecution knew Galvao would be on vacation in Brazil from June to September 2010 but did not object when appellant moved to continue trial to a date when Galvao would be out of the country. When the court set a trial date that conflicted with Galvao's vacation, the prosecution mailed Galvao a trial subpoena for a date when she planned to be in Brazil. After Galvao's daughter reminded the prosecutor of Galvao's vacation, the prosecutor did not contact Galvao, urge her to reschedule her vacation, or arrange to pay for her return flight to the United States to enable her to comply with the subpoena and testify at trial. Under the circumstances, we conclude the prosecution failed to demonstrate due diligence in securing Galvao's presence at trial in accordance with section 240, subdivision (a)(5) and the court erred by admitting her preliminary hearing testimony pursuant to section 1291.

FACTUAL AND PROCEDURAL BACKGROUND

The People charged appellant with first degree residential burglary (Pen. Code, §§ 459, 460), first degree residential robbery (Pen. Code, § 211, 212.5) and assault with a deadly weapon and with force likely to produce great bodily injury (Pen. Code, § 245, subd. (a)) arising out of an October 22, 2009 incident at the El Sobrante home Galvao shared with her daughter, Giovana Lemes-Silveira. The information also alleged various sentencing enhancements. Appellant waived his right to a speedy trial.

Galvao and Lemes-Silveira testified at the April 2010 preliminary hearing. At the preliminary hearing, the two women told the district attorney's office Galvao would be in Brazil from June 24, 2010 to September 4, 2010 and that Lemes-Silveira would be in Brazil from August 14, 2010 to September 27, 2010.

Trial was scheduled to commence on June 7, 2010 and the People were ready to begin trial on that date. At the trial readiness conference in late May 2010, appellant requested a continuance. The court granted the request and continued trial to July 12, 2010 — when Galvao would be on vacation. On June 4, 2010, the prosecution mailed

subpoenas to Galvao and her daughter. A few weeks later, Lemes-Silveira reminded the prosecution she would be in Brazil from August 14, 2010 to September 27, 2010 and that Galvao would be in Brazil from June 24, 2010 to September 4, 2010.

The People moved to continue the trial until after September 27, 2010, contending the case would be “severely prejudiced and could not be adequately presented” without the “necessary and essential” testimony of Galvao, who would provide “voluminous evidence” about the incident. The People explained Galvao would testify about the force used during the incident and “that no one had permission to enter her home.” The prosecution alleged it exercised due diligence to secure the testimony of Galvao and Lemes-Silveira and noted their preliminary hearing testimony was available.

In opposition, appellant contended there was no good cause to continue trial because the prosecution had not “exercised due diligence to secure Miss Galvao’s attendance; mailing a subpoena without further information is not sufficient.” In response, the prosecutor stated Galvao “received the subpoena that was sent on the 4th prior to her leaving the country, but she had already scheduled the vacation.” The presiding judge denied the prosecution’s motion to continue, concluding that starting trial on September 27, 2010 was “simply too far under the circumstances.” The judge also questioned whether serving a subpoena by mail constituted “good cause over opposition[.]”

Appellant moved to exclude Galvao’s preliminary hearing testimony and the court held a section 402 hearing to determine whether to admit it. At the hearing, the Contra Costa District Attorney’s acting office manager testified one of her subordinates issued a subpoena for Galvao on June 4, 2012 and served it by regular mail.

Lemes-Silveira testified she and her mother told the district attorney’s office about their respective vacations at the preliminary hearing in April 2010. When she and her mother received their subpoenas, they realized the date for which they were subpoenaed conflicted with Galvao’s trip to Brazil. On June 23, 2010, Lemes-Silveira reminded a deputy district attorney about her mother’s vacation and told the attorney Galvao could not testify because she would be in Brazil. In response, the assistant district attorney told

Lemes-Silveira she would try to work around Galvao's vacation schedule. Lemes-Silveira testified she "asked [the prosecutor to] postpone it so that my mother could be here. And I was informed that they would try to postpone it and try to make it on the date that she could be here for."

Lemes-Silveira talked to her mother on the phone while she was in Brazil; her mother said she would return to the United States to testify if a plane ticket "was provided for her[.]" On July 20, 2010 — the morning of the section 402 hearing — Lemes-Silveira told the district attorney's office about her mother's willingness to return from Brazil to testify at trial. The district attorney's office said it "would try . . . if it was possible." No one from the district attorney's office asked Lemes-Silveira for her mother's contact information in Brazil.

Defense counsel argued the prosecution did not exercise due diligence to secure Galvao's attendance at trial, because the prosecutor knew about Galvao's vacation but made "no efforts . . . to contact her" or "offer to accommodate her for traveling back . . . so that Mr. Stewart had the opportunity to confront his accuser." In addition, counsel for appellant argued she did not have an adequate opportunity to cross-examine Galvao at the preliminary hearing.

The prosecutor argued her office exercised "sufficient due diligence" by serving Galvao with a trial subpoena. Finally, the prosecutor noted the trial was continued at appellant's request and that defense counsel "was well aware that this witness was going to be gone . . . it was not a surprise. . . . [It was brought up] at the initial final readiness conference in this particular case."² In response, defense counsel argued "the lack of phone calls, the lack of any contact whatsoever when the prosecution knew in April [2010] that the witness might be out of the country, the lack of efforts to secure that

² Defense counsel did not respond to the prosecutor's comment about defense counsel's supposed awareness of Galvao's vacation. The court did not solicit a response from defense counsel. On appeal, the People do not argue defense counsel's silence in response to the prosecutor's comment constituted an acknowledgement that counsel knew about Galvao's vacation when she moved to continue the trial.

witness's testimony not only does [] not pass statutory muster but . . . violates [appellant's] Sixth Amendment right and due process rights of confrontation."

The court concluded Galvao had been served with a subpoena and stated, "due diligence is really immaterial at this point in the sense that [Galvao] actually was served with a subpoena." The court found Galvao was "unavailable," and that she "was subject to direct and cross-examination at the preliminary hearing." The court admitted Galvao's preliminary hearing testimony under the former testimony exception to the hearsay rule set forth in section 1291 and a prosecution witness read it to the jury.

Prosecution Evidence

In October 2009, Galvao was living with her daughter, Lemes-Silveira, in El Sobrante. At 1:30 p.m. on October 22, 2009, Galvao's doorbell rang several times. Galvao looked through the peep hole and saw someone she thought was the mailman. She opened the door a "little bit" and a man — later identified as appellant — forced the front door open and came inside the house. He locked the door. Holding a cane in his hand, appellant told Galvao to "[b]e quiet. Be quiet." Galvao screamed "very, very loud[ly]" to try to wake up her daughter, who was sleeping upstairs.

After Galvao screamed, appellant punched her and hit her with his fists and his cane. Appellant tried to strangle Galvao to keep her from screaming; Galvao thought appellant was trying to kill her. At that point, Galvao's daughter came downstairs and started screaming. Galvao told her daughter to call the police, so Lemes-Silveira ran to the kitchen and called 911. Appellant continued to punch Galvao. She urinated on herself because she was afraid. Galvao and appellant slipped in the urine, fell on the floor, and continued struggling with each other. At that point, Lemes-Silveira ran out of the house through the garage and appellant followed her. Galvao unlocked the front door and ran outside, screaming and crying. Galvao had never seen appellant before he came to her house on the day of the incident.

On cross-examination, Galvao testified she had never talked to appellant on the phone or given him her telephone number. Galvao also said appellant "never came to [her] house before" the incident. She said, "I don't know him. I didn't see him before

that date.” She testified that her daughter — and no one else — calls her “Moms.” She emphatically stated she did not know what methamphetamine was and testified she had never sold “anything” to appellant. She denied selling heroin to appellant or smoking cocaine with him, stating, “I never smoke cocaine in my whole life with anybody.” She also testified no one uses illegal drugs in her house.³

One of Galvao’s neighbors was in his garage on the afternoon of October 22, 2009 when he heard a man shaking the handle of the garage door. The neighbor went outside and saw a man, whom he later identified as appellant, holding a cane and a laptop computer. As appellant started to walk away, the neighbor asked, ““Why are you trying to get in my house[?]”” A second neighbor saw Galvao and her daughter running from their house, screaming. He also saw appellant leave Galvao’s house carrying a cane and a laptop computer. Two neighbors wrestled appellant to the ground and held him there until the police arrived.

Defense Evidence

Appellant testified a methamphetamine dealer introduced him to Galvao as “Moms” in 2008. Appellant and “Moms” exchanged telephone numbers because they lived close to each other. They used methamphetamine and cocaine together a few times. On the day before the incident, appellant called “Moms” to tell her he was coming over to her house. When he arrived that evening, he and “Moms” drank; she smoked cocaine and he ingested methamphetamine. When they ran out of drugs, “Moms” drove appellant to Richmond to buy cocaine. Then they returned to Galvao’s house. Appellant left the house at 6:30 a.m. on the day of the incident after “Moms” asked him to buy more drugs.

³ At trial, Galvao’s son testified he did not know appellant, had not seen him at his mother’s house, and had never heard his mother mention his name. He also testified his mother did not ingest or sell illegal drugs. Galvao’s son helped his mother start a cleaning service that advertised in mailings and flyers and listed Galvao’s residential address and home telephone number. An inspector from the district attorney’s office analyzed the incoming and outgoing calls on appellant’s cell phone and determined appellant did not call “Moms” or receive a call from her in the 30 days preceding the incident.

Appellant returned to Galvao's house with the drugs and "Moms" let him inside. When he asked "Moms" to reimburse him for the money he spent on the drugs, she started "flipping out" and they began to argue about how she would repay him. "Moms" offered appellant a laptop computer, but he did not want it. Appellant described the physical altercation with Galvao. He claimed Lemes-Silveria called him a racial epithet and assaulted him.

Verdict and Sentencing

The jury convicted appellant of first degree residential burglary (Pen. Code, §§ 459, 460), first degree residential robbery (Pen. Code, § 211, 212.5), and battery (Pen. Code, § 242) and found true a special allegation. The court found various sentencing enhancements true and sentenced appellant to 17 years in state prison.

DISCUSSION

Appellant claims the court erred by admitting Galvao's preliminary hearing testimony pursuant to section 1291 because the prosecution failed to establish due diligence in securing Galvao's appearance at trial. We agree.

"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.) That right is not absolute, however. An exception exists when a witness is unavailable and, at a previous court proceeding against the same defendant, has given testimony that was subject to cross-examination." (See *People v. Cromer* (2001) 24 Cal.4th 889, 892.) "In California, the exception to the confrontation right for prior recorded testimony is codified in section 1291, subdivision (a), which provides: 'Evidence of former testimony is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness and: [¶] . . . [¶] (2) The party against whom the former testimony is offered was a party to the action or proceeding in which the testimony was given and had the right and opportunity to cross-examine the declarant with an interest and motive similar to that which he has at the hearing.'" (*Id.* at p. 898.)

Before a court admits the prior testimony of a witness against a criminal defendant pursuant to section 1291, the prosecution must first establish the witness is unavailable

under section 240. (*People v. Carter* (2005) 36 Cal.4th 1114, 1172.) 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).) We review the trial court’s diligence determination de novo. (*Cromer, supra*, 24 Cal.4th at p. 892; *People v. Friend* (2009) 47 Cal.4th 1, 68, quoting *People v. Wilson* (2005) 36 Cal.4th 309, 341 [“we independently review a trial court’s due diligence determination”].)

I.

Appellant Did Not Invite Error by Moving to Continue the Trial Date

We first address the People’s contention that appellant forfeited his claim regarding the admission of Galvao’s preliminary hearing testimony under the invited error doctrine. The People note appellant moved to continue the trial to a date when Galvao was out of the country and objected to the People’s request to continue the trial so Galvao could attend the trial; they contend appellant “received what he asked for, and he should not now be able to complain about the known consequence of that decision.”

“The doctrine of invited error is designed to prevent an accused from gaining a reversal on appeal because of an error made by the trial court at his behest. If defense counsel intentionally caused the trial court to err, the appellant cannot be heard to complain on appeal. . . . [I]t also must be clear that counsel acted for tactical reasons and not out of ignorance or mistake.” (*People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 49, quoting *People v. Wickersham* (1982) 32 Cal.3d 307, 330, disapproved on other grounds in *People v. Barton* (1995) 12 Cal.4th 186, 200.)

We decline to apply the invited error doctrine here for several reasons. First, the doctrine typically “bars a defendant from challenging [on appeal] an instruction given by the trial court when the defendant has made a “conscious and deliberate tactical choice” to “request” the instruction.” (*People v. Riazati* (2011) 195 Cal.App.4th 514, 529, quoting *People v. Lucero* (2000) 23 Cal.4th 692, 723.) Though the doctrine applies in other situations, the only case the People cite, *People v. Marshall* (1990) 50 Cal.3d 907, 931, concerns instructional error and therefore does not apply here. Second, the “error”

at issue here is the court's admission of Galvao's testimony at trial, not the grant of appellant's motion to continue or the denial of the People's motion to continue. We fail to see how appellant's motion to continue the trial caused the court to "err" by concluding the prosecution used due diligence to secure Galvao's attendance at trial.

Third, the "[e]rror is invited only if defense counsel affirmatively causes the error and makes 'clear that [he] acted for tactical reasons and not out of ignorance or mistake' or forgetfulness." (*People v. Lara* (2001) 86 Cal.App.4th 139, 165, quoting *Wickersham, supra*, 32 Cal.3d at p. 330.) Here, the record is silent about the reason why defense counsel moved to continue the trial date. On appeal, the People do not argue counsel for appellant had a tactical reason for moving to continue trial, nor do they claim defense counsel moved to continue the trial to prevent Galvao from testifying.⁴ We conclude the invited error doctrine does not bar appellant's claim of error.

II.

The Prosecution Failed to Demonstrate Due Diligence in Securing Galvao's Attendance at Trial

Next we consider appellant's claim that the prosecution failed to establish it exercised due diligence to secure Galvao's attendance at trial. As stated above, to establish unavailability under section 240, subdivision (a)(5), "the proponent of the evidence, here the prosecution, must establish that the witness is absent from the hearing and . . . that the proponent 'has exercised reasonable diligence but has been unable to procure his or her attendance by the court's process' ([] § 240, subd. (a)(5))." (*People v. Smith* (2003) 30 Cal.4th 581, 609.) "Although section 240 refers to 'reasonable diligence,' [the California Supreme] court has often described the evaluation as one involving 'due diligence.'" (*Cromer, supra*, 24 Cal.4th at p. 898, quoting *People v. Sanders* (1995) 11 Cal.4th 475, 523; see also *Simons, Cal. Evidence Manual* (2012 ed.) § 2:26, pp. 97-100 (Simons).)

⁴ Appellant's counsel did not "invite error" by opposing the prosecution's motion to continue trial. The law did not require appellant to relinquish his right to a speedy trial to secure his right to confront prosecution witnesses.

Reasonable diligence is “‘incapable of a mechanical definition,’ but it ‘connotes persevering application, untiring efforts in good earnest, efforts of a substantial character.’” (*Cromer, supra*, 24 Cal.4th at p. 904, quoting *People v. Linder* (1971) 5 Cal.3d 342, 346-347; see also *People v. Cogswell* (2010) 48 Cal.4th 467, 477.) “‘Considerations relevant to this inquiry include the timeliness of the search, the importance of the proffered testimony, and whether leads of the witness’s possible location were competently explored.’” (*Friend, supra*, 47 Cal.4th at p. 68, quoting *Wilson, supra*, 36 Cal.4th at p. 341.) “[B]efore a witness can be found unavailable, the prosecution must ‘have made a good-faith effort to obtain his [or her] presence at trial.’” (*People v. Smith* (2003) 30 Cal.4th 581, 609, quoting *Barber v. Page* (1968) 390 U.S. 719, 725.)

The prosecution does not have “an obligation to keep ‘periodic tabs’ on every material witness in a criminal case, for the administrative burdens of doing so would be prohibitive.” (*People v. Hovey* (1988) 44 Cal.3d 543, 564; see also *Simons, supra*, § 2:26, p. 98, citing cases.) As the Second District Court of Appeal has explained, “[a]n appellate court ‘will not reverse a trial court’s determination [under § 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.’” (*People v. Diaz* (2002) 95 Cal.App.4th 695, 706, quoting *People v. McElroy* (1989) 208 Cal.App.3d 1415, 1428, disapproved on other grounds in *Cromer, supra*, 24 Cal.4th at p. 901, fn. 3.)

Here, the record reveals no such “sustained and substantial good faith efforts[.]” (*Diaz, supra*, 95 Cal.App.4th at p. 706.) It is undisputed the prosecution knew Galvao would be in Brazil in July 2010, yet it did not object when appellant moved to continue trial to July 12. The prosecution then mailed Galvao a trial subpoena, knowing she would be in Brazil during trial. It then made no effort whatsoever to compel her

attendance at trial beyond serving the subpoena. The prosecution concedes it was aware of Galvao's travel schedule when the court continued the trial; it also concedes it knew of Galvao's vacation when it mailed her trial subpoena. After being reminded of Galvao's vacation, the prosecution moved to continue the trial but did not ask Galvao to reschedule her vacation, urge her to return early to testify, or offer to pay for her return flight to the United States enable her to testify. Under the circumstances, we cannot conclude the prosecution's attempt to continue the trial to late September 2010 constitutes "sustained and substantial good faith efforts" to obtain Galvao's testimony at trial.

The People's reliance on *People v. Martinez* (2007) 154 Cal.App.4th 314, 328, is misplaced. In *Martinez*, the defendant fatally stabbed a convenience store clerk; at the defendant's second trial, the court admitted a surviving clerk's preliminary hearing testimony under section 1291 and the jury convicted the defendant of second degree murder. (*Martinez*, at p. 317.) On appeal, the defendant argued the "trial court violated his constitutional rights by admitting the preliminary hearing testimony of the surviving clerk without the prosecution having exercised due diligence in attempting to obtain the presence of that clerk to testify at trial." (*Ibid.*)

The *Martinez* court rejected this argument and held the prosecution "used reasonable diligence in attempting to obtain the presence of the clerk as a witness[.]" (*Martinez, supra*, 154 Cal.App.4th at p. 317.) The court noted that after the clerk testified at the preliminary hearing, he went to Canada, where he applied for asylum. The prosecutor contacted various governmental agencies in the United States and Canada and communicated with the clerk in Canada and with the clerk's uncle in Los Angeles in an attempt to obtain the necessary paperwork and arrange for the clerk to attend the trial. The clerk, however, refused to attend the trial, claiming it would jeopardize his asylum application. (*Id.* at pp. 325-326.) The *Martinez* court explained, "the prosecution had no reason to believe that [the clerk] had left the jurisdiction or would be unavailable at trial," and, upon learning the clerk "was in Canada, it used reasonable efforts to arrange for his appearance at trial" by calling the "Federal Bureau of Investigation, the Department of Homeland Security, the Bureau of Immigration and Customs, the Canadian Consulate in

Los Angeles, and Canadian immigration authorities in Canada. [The prosecution] also spoke directly with [the clerk] in Canada and to his uncle . . . in Los Angeles.” (*Id.* at p. 328, 329.)

Here and in contrast to *Martinez*, the prosecution did have reason to believe Galvao would leave the country a few months after the preliminary hearing because Galvao told the prosecution about her vacation at the preliminary hearing. And after the trial was continued to a date the prosecutor knew would conflict with Galvao’s vacation, the prosecution mailed a trial subpoena to her, knowing she would not be able to attend the trial. The prosecutor then made no effort to arrange for Galvao’s appearance at trial beyond continuing the trial date. This case bears no resemblance whatsoever to *Martinez*, where the prosecutor spoke to various government agencies, to the witness, and to a member of his family to try to secure the witness’s presence at trial.

Because we conclude court erred by admitting Galvao’s preliminary hearing testimony, we reverse the judgment and remand the matter to the trial court. Appellant does not argue there was insufficient evidence to support his conviction when considering all of the evidence admitted during the trial. On remand, therefore, retrial is permissible. (*People v. Story* (2009) 45 Cal.4th 1282, 1296-1297.)

DISPOSITION

The judgment is reversed and the matter is remanded to the trial court.

Jones, P.J.

We concur:

Simons, J.

Needham, J.