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

THE PEOPLE,

Plaintiff and Respondent,

v.

JESSI ANTONIO RODRIGUEZ,

Defendant and Appellant.

A131096

(Solano County
Super. Ct. No. FCR260373)

Upon the conclusion of a second trial convened after the first ended in a hung jury, a jury convicted appellant Jessi Antonio Rodriguez of one count of attempted murder and two counts of assault with an automatic firearm, and found true enhancements that during the commission of the crimes, appellant personally used a firearm and, as to one of the assault charges, that he personally inflicted great bodily injury. The court sentenced appellant to an aggregate determinate term of 12 years four months, plus an indeterminate term of 25 years to life.

Appellant challenges evidentiary decisions and maintains the lower court should have conducted a *Marsden*¹ hearing. We find no error and accordingly affirm the judgment.

¹ *People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*).

I. FACTS

A. *People's Case*

1. *Witnesses Observe Shooting*

On October 16, 2008, Baldemar Solis was proceeding to the onramp of Highway 80 from the Waterman Boulevard intersection in Fairfield. An older white Mustang convertible seating at least three people was near the intersection. A Black male of medium height approached the convertible. When the light turned green, he jumped into the backseat and then fell back on the ground, losing one shoe. The man got up with a gun and fired three or more times. Solis called 911 from the nearby Safeway. He did not get a good look at the shooter's face and could not identify him.

Donald Watts was in the Safeway parking lot at the time. He witnessed a light-colored Mustang convertible with the top down and a dark SUV that cut off the Mustang. A light-skinned male with a ponytail exited the passenger side of the SUV and ran to the passenger side of the Mustang. There was an argument; one man ran one way, another the other way; seven or eight shots were fired. A young male passenger was hit in the side of his head; he went into a restaurant and out its side door. The shooter went back to his SUV and took off. Watts did not get a clear look at the shooter's face and could not identify him. Watts helped the victim.

Emergency medical technician Chris Walsh was also in Safeway. Upon hearing seven shots, he went to treat the victim who was outside the restaurant. The young man suffered a gunshot wound to his eye; the bullet "went in and out" above the victim's eye. Walsh described the shooter as a Black male, wearing a white T-shirt and black jeans, carrying a black handgun. He was of average build, wearing dreadlocks. Walsh could not identify the shooter because of the distance, and he did not get a good look at his face.

Patricia Galgano was driving on Waterman Boulevard near the scene. She heard five or six gunshots and saw flashes when the gun went off. Galgano saw a dark-complected male with a gun, average height, wearing a white T-shirt and jeans or dark pants. He had long, curly unkempt hair.

2. Physical Evidence Recovered from Scene

From the scene police officers located nine shell casings ejected from a semiautomatic weapon. A white Nike shoe was also retrieved and submitted to the DNA section of the Department of Justice (DOJ) Crime Lab, for DNA testing. DNA was extracted from the interior heel of the shoe and compared to appellant's DNA buccal swab² obtained from the Fairfield Police Department. Senior criminalist Stephanie Carter from the DOJ lab testified that the genetic profile from the shoe revealed one major and at least two minor contributors, which was not uncommon for shoes. Carter summarized her report: "The DNA typing results provide strong evidence that Jessi Rodriguez [*sic*] is the major male contributor to the male DNA detected on the sample." The term "strong evidence" denotes a threshold of statistical calculation such that the probability that someone else was a major contributor was approximately one in 1.1 quadrillion African-Americans, one in 65 trillion Caucasians and one in 83 trillion Hispanics. The shoe size was 7Y, an unusual man's shoe size.

3. Victim Andrews's Testimony at First Trial

Damond Andrews was unavailable for the second trial. His testimony from the first trial was read to the jury. The parties stipulated that Andrews identified appellant in court.

On October 16, 2008, Damond Andrews, age 17 at the time, was at the home of appellant's girlfriend. Eight people were there, including appellant, whom he knew as "Grimy" but had never seen before; Sabrina Sablan and her brother; someone named "Q"; and Shig. They were helping Sabrina's father, Paul Sablan (Sablan), move.

Appellant was upset because a necklace was missing. Appellant's girlfriend came out and asked to search everyone's pockets. Andrews would not let her search him but turned his pockets inside out.

Sabrina drove off in the Mustang with "Q" and Shig. Andrews, Sabrina's brother and Sablan drove off in another car. As they were getting ready to "hop on the freeway,"

² A buccal swab is a scraping from the inside of the cheek.

another car came alongside and tried to cut them off. Sabrina pulled over as did Sabrina's brother. Appellant got in the back seat of the Mustang. Andrews and Sablan got out of the other car and went over to the Mustang. Andrews's friend told appellant to get out of the car; as appellant exited, he fell to the ground. As appellant got up, Andrews saw "something shiny" in the waistband of appellant's pants. People yelled that appellant had a gun. Andrews tried to grab the back of the Mustang to get in, but Sabrina drove off. Appellant pointed at the car and started shooting, about three times. Andrews and Sablan ran. Looking back, Andrews saw the gun pointed in his direction. At some point something hit Andrews's head and he felt his head ringing, but kept running. He felt pain over his eye and realized he was bleeding when Sablan said his head was bleeding. Andrews ran to a restaurant. He was taken by helicopter to John Muir Hospital, where he gave a statement to the police. Several days later he identified appellant from a photographic lineup.

Andrews described appellant as mixed race, about 19 years old. His hair was long and pulled back in a ponytail. Andrews thought appellant might want to hurt him because "[h]e thought we had his chain."

Andrews said that most of the time he did not look at or open the subpoenas he received. He was not scared to testify, but he preferred to not be in court.

3. Testimony of Sablan and Detective DeTomasi

At the time of trial, Sablan was serving a sentence in Alameda County for felony assault with force likely to cause great bodily injury. Back in October 2008 he was moving from Fairfield to Alameda. He remembered a shooting and giving a statement to the police, but did not remember all the details; he might have been on drugs. He did not identify the shooter in the courtroom; the shooter was "probably . . . three times uglier" than appellant.

Thereafter Sablan reviewed the videotape of his interview with Detective DeTomasi. Apparently Sablan told DeTomasi he was living in a house in Fairfield that a "Jenny" and her father owned, and "Grimy" was also living there. Even after viewing the

videotape, his answers were very equivocal. However, Sablan did admit to picking out a photo from a lineup.

The court indicated its opinion that Sablan's claimed lack of memory was not an honest lack of memory, and therefore the prosecution could impeach him with his statement to Detective DeTomasi. Detective DeTomasi testified that Sablan did not appear to be under the influence of alcoholic beverages or drugs when interviewed, seemed able to comprehend questions and spoke clearly. DeTomasi related that Sablan told him Jenny came outside and accused those present of stealing Grimy's necklace. Sablan related that Grimy was following the two cars, and he was scared for his daughter. Andrews got out of the car and was later shot. When Grimy jumped out of the car, he fell down, and also removed a nine-millimeter silver semiautomatic handgun with a clip. Grimy first pointed the gun at Sablan and fired one round; Sablan dodged the bullet and told Sabrina to leave. Next, the shooter turned toward Andrews and unloaded the clip.

DeTomasi showed Sablan a photographic lineup with approximately 20 photos. He identified appellant very quickly from the lineup.

B. Defense Case

Appellant testified that he went to Mexico in October 2008 because he was on bail on another case. His public defender told him he would have to take a deal for two years in prison; he was scared and decided to leave the country. He found a studio apartment in Tijuana from Craigslist. He signed a lease on October 9, 2008, on the left side of each page. The lease was written in Spanish. Appellant paid \$400 to Gustavo, the landlord. He lived there "eight or nine months," hanging out, riding dirt bikes and playing a video game.

Appellant decided to return to the United States because he had a daughter, and his mother was ailing. He told the border agents that he "had a warrant for evading." He was arrested for attempted murder. Appellant stated he did not shoot Damond Andrews and did not live at a residence with his girlfriend and Sablan; in fact he did not have a girlfriend. He lived with his mother in Richmond. He did not have an SUV vehicle or ever lose a white shoe.

C. *Rebuttal*

Ibrahim Mohammad testified that he worked at Major Market in Fairfield. In October 2008, a police officer showed him a picture of appellant and his car, indicating the police were looking for him as the suspect in a shooting near Safeway. Mohammad began keeping notes, recording that appellant came into the store on October 14, arriving in the Mercedes with a girl. The store was equipped with a camera system; Mohammad was sure appellant was in the store “because his picture is in my record.” Appellant last patronized the store on October 26, 2008.

II. DISCUSSION

A. *The Trial Court Properly Admitted Andrews’s Preliminary Hearing Testimony*

Appellant complains that the trial court violated his constitutional rights to confrontation, due process and a fair trial by admitting Andrews’s preliminary hearing testimony at trial because the prosecution did not exercise due diligence in attempting to procure his presence at the second trial. We disagree.

1. *Legal Background*

The confrontation clause renders testimonial statements offered against a criminal defendant inadmissible, unless the witness is unavailable at trial and the defendant has had a prior opportunity to cross-examine. (*Crawford v. Washington* (2004) 541 U.S. 36, 59.) A witness is unavailable, when, among other situations, the declarant 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.” (Evid. Code, § 240, subd. (a)(5).) Reasonable diligence “ ‘connotes persevering application, untiring efforts in good earnest, efforts of a substantial character.’ [Citations.]” (*People v. Cromer* (2001) 24 Cal.4th 889, 904.) Relevant factors include the timeliness of commencing the search, the importance of the witness’s testimony, and whether leads were completely explored. (*Ibid.*) Other factors are whether the prosecution reasonably believed the witness would appear willingly at trial and therefore did not subpoena the witness when he or she was available; and whether the witness

would have been produced with the exercise of reasonable diligence. (*People v. Sanders* (1995) 11 Cal.4th 475, 523.)

In the last analysis, “ ‘ “[t]he lengths to which the prosecution must go to produce a witness . . . is a question of reasonableness.[”] [Citation.] The ultimate question is whether the witness is unavailable despite good-faith efforts undertaken prior to trial to locate and present that witness.’ [Citations.]” (*People v. Herrera* (2010) 49 Cal.4th 613, 622.) We review the trial court’s resolution of disputed factual matters under the substantial evidence standard, but independently review whether the facts amount to good faith and due diligence on the part of the prosecutor. (*Ibid.*)

2. *Factual Background*

The trial court conducted an evidentiary hearing on the matter of due diligence. Aaron Dillon, a criminal investigator for the Solano County District Attorney’s Office, testified that subpoenas are usually served by process servers, but when a witness is difficult to locate, the district attorney will assign an investigator to locate and serve that person, which is what occurred in the case of Damond Andrews.

Dillon had been assigned to escort Andrews back and forth from court during the first trial, and spoke with him in September 2009. Thereafter he was asked in early November 2010 to locate Andrews for the December 6, 2010 retrial.

Dillon did not have a current telephone number for Andrews, but knew he lived with his mother in Vallejo. Therefore, he first contacted Andrews’s mother on November 4, 2010, by phone and asked that she have Andrews call him. Next, he called her at work on November 10, again requesting that she have Andrews call him. The mother indicated she had told Andrews to call Dillon, and would relay the request again. The mother seemed cooperative on the phone, and had been cooperative in the past. However, she did not volunteer whether Andrews was still living with her.

On November 22, 2010, Dillon went to the mother’s residence and waited for 15 or 20 minutes. There were no lights on in the house and no activity. On December 3, he went back at 7:15 a.m. and waited for an hour and a half; again, no activity. Dillon knocked on three doors in the court to no avail, but on the fourth door a resident did

answer. Dillon inquired if Andrews or his mother still lived at the address in question. The resident thought someone had moved in within the last two or three weeks. The neighbor was not familiar with Andrews. Dillon also left a business card at Andrews's prior address, asking that the residents give him a call. A lady responded and said she had moved in three weeks earlier.

Dillon also used several databases in his efforts to find Andrews. He checked the local system to ascertain if Andrews were on probation or had been arrested, and ran a Department of Motor Vehicles check to see if there were any updated addresses. As well, Dillon processed Andrews's personal information through the "Accurint" database. Further, he checked the "ARIES" database for arrest records or criminal justice contact information for Solano, Alameda and Contra Costa Counties. He searched the mother through Department of Motor Vehicles records. None of these searches were fruitful in terms of locating a current address for Andrews.

Dillon did not search Andrews's John Muir Hospital medical records; check for change of address with the post office or voter registration files; or check for claims of restitution. Dillon did not contact the mother at the work place again because he did not want to upset her; she was not pleased when he called her there before. Dillon figured she would be more cooperative and have Andrews contact him if he stayed away from her work place.

Dillon testified that a month after the first trial, Andrews told him he "did his homework" and realized who appellant and his friends were. Andrews was from Vallejo, not Fairfield. After finding out about appellant from "the street," he did not want to testify, dropped out of high school because he was scared, and was afraid to leave his house. Andrews's mother confirmed this state of affairs.

The trial court found due diligence and allowed Andrews's testimony from the first trial.

3. *Analysis*

Appellant asserts that the prosecution failed to exercise reasonable diligence in securing Andrews's presence at the second trial. He faults the investigator for not

attempting to contact Andrews's mother at her place of employment, not using a reverse directory to obtain an address, not asking her if Andrews still lived with her, and not checking with the post office for a change of address or with voter registration records.

That additional efforts might have been undertaken or other lines of inquiry pursued does not mean that the prosecution failed to exercise due diligence. (*People v. Wilson* (2005) 36 Cal.4th 309, 342.) Under all the circumstances, we conclude that the above facts amounted to due diligence as a matter of law.

To begin with, the search was timely begun and entailed a range of efforts to explore leads. Dillon reasonably believed Andrews was still living with his mother in Vallejo. Mother and son had a good relationship, and Dillon had contacted Andrews there in the past. Dillon made two phone calls to his mother urging her to have Andrews contact him, went to the home on two occasions, and canvassed the neighborhood for information about their whereabouts. Dillon also effected numerous database searches for updated information. On December 3, 2010, three days before the second trial, Dillon learned that Andrews's mother had moved.

It is also undisputed that Andrews's testimony was important. Further, there was no evidence that he could have been located or would have appeared if further efforts had been made.

Appellant relies on *People v. Cromer, supra*, 24 Cal.4th 889, arguing that as in that case, the facts do not demonstrate that the prosecution exercised reasonable diligence. In *Cromer*, the prosecution had lost contact with the witness after the preliminary hearing and thereafter learned of her disappearance, but made no serious effort to locate her for several months. When the prosecution obtained promising information that the witness was living with her mother in another location, investigators waited two days to check out the information and, learning the mother would return the next day, never bothered to return to speak to her. (*Id.* at p. 904.) Here, Dillon reasonably believed Andrews was still living with his mother, made contact with her, and did not learn that the family had moved until three days before trial. Databases were

searched and the neighborhood was canvassed. *Cromer* does not render the prosecution's efforts wanting in this case.

B. Appellant Cannot Demonstrate Ineffective Assistance of Counsel

Appellant contends that he was denied the constitutional right to a fair trial and to present a defense because the trial court denied his request to admit evidence of a lease that he purportedly entered into in Mexico. He maintains that the trial court should have had the lease, which was written in Spanish, translated and admitted at trial.

Alternatively, appellant asserts that if the issue is deemed waived for failure of trial counsel to request translation, then he was denied effective assistance of counsel.

At the commencement of trial, the prosecutor stated he would object to entering the lease into evidence, arguing that the lease was in Spanish and appellant could not establish a foundation "as to what [this] is" "because I don't think he reads Spanish," and he did not generate the document. Further the prosecutor argued the lease was hearsay that did not appear to come within a business records exception. Defense counsel stated at that time that she was not seeking to admit the lease unless she could establish a basis for it. At that point the court noted that there was no issue with the lease. At the close of trial, the court indicated its understanding that the defense was not seeking admission of the lease. However, counsel asked for its admission. The court refused, stating: "There's no transcription. It's in a foreign language, so it won't be admitted."

Appellant urges that the trial court had a duty to call an interpreter to translate the lease and admit it into evidence. Evidence Code section 753, subdivision (a) (section 753)³ provides: "When the written characters in a writing offered in evidence are incapable of being deciphered or understood directly, a translator who can decipher the

³ The deputy attorney general does not refer to or discuss section 753 at all, instead hanging her argument that appellant forfeited the issue on "California Rules of Court, rule 311(e) [which] provides, in relevant part: 'Exhibits written in a foreign language shall be accompanied by an English translation, certified under oath by a qualified interpreter.'" Of course there is no current version of rule 311(e), a Rule of Court that has not existed for years. The proper number is rule 3.1110(g), which is part of division 11 of the civil rules pertaining to civil law and motion.

characters or understand the language shall be sworn to decipher or translate the writing.” Although the trial court did not follow the dictates of section 753, it was lulled into thinking there was no issue with the lease. Appellant’s counsel waited until the last minute to ask for admission and had not put anything in motion to translate a document which was offered in support of her client’s alibi defense.

To prevail on a claim of ineffective assistance of counsel, the defendant must demonstrate both that (1) counsel’s performance was deficient; and (2) the deficient performance prejudiced the defendant, the prejudice inquiry asking whether there was a reasonable probability that counsel’s conduct had an adverse effect on the outcome. (*Strickland v. Washington* (1984) 466 U.S. 668, 687-688; *People v. Huggins* (2006) 38 Cal.4th 175, 248.) Where it is apparent that the prejudice prong cannot be satisfied, we need not consider whether trial counsel’s performance was deficient. (*People v. Price* (1991) 1 Cal.4th 324, 440.)

The evidence against appellant was overwhelming. Andrews testified that appellant shot him. Sablan identified appellant as the shooter and told Detective DeTomasi that appellant fired a shot at him. The shooter lost a shoe at the scene. DNA evidence confirmed it was appellant’s shoe. Other witnesses testified consistently to the shootout. Mohammad testified that appellant was a customer in his store on October 14 and 26, 2008—during the time appellant claimed to be in Mexico—and had a video camera system to support his records. Moreover, from a procedural point of view, had the trial court entertained the possibility of admitting the lease at the last minute, the prosecutor’s foundational objections remained an obstacle. In any event, it is not reasonably probable that appellant would have been acquitted had the lease been translated into English and admitted into evidence. Nor can appellant establish prejudice under the constitutional standard articulated in *Chapman v. California* (1967) 386 U.S. 18, 24.

C. *No Marsden Hearing Was Required*

In the middle of the sentencing hearing, appellant indicated he wanted private counsel appointed to explore a new trial motion, and did not want to proceed with

sentencing. The court denied the request as untimely. Appellant was removed from the courtroom for spitting in a way that “got counsel” and was placed in a holding cell equipped so that he could hear the proceedings.

A criminal defendant is entitled to competent representation at all stages of trial. (*Marsden, supra*, 2 Cal.3d at p. 123; see *People v. Smith* (1993) 6 Cal.4th 684, 690.) When a defendant seeks to discharge his or her appointed counsel and substitute another attorney and asserts inadequate representation, the trial court must allow the defendant a chance to explain the basis of the contention, and relate specific instances of inadequate performance. A defendant may be entitled to substituted appointed counsel upon showing that, without the substitution, his or her Sixth Amendment right to assistance of counsel would be denied or impaired substantially. Accordingly, a defendant is entitled to relief if the record is clear that appointed counsel is not providing adequate representation or that the defendant and counsel are in the midst of such an irreconcilable conflict that ineffective assistance is likely to result. (*People v. Memro* (1995) 11 Cal.4th 786, 857.)

In the present case, appellant did not make a *Marsden* motion. And, as the People point out, he was aware of what such a motion entails because he unsuccessfully pursued a *Marsden* motion earlier in the proceedings. Appellant did not express dissatisfaction with counsel, having neither related, nor offered to relate, any instances of misconduct. Nor did he suggest a fundamental breakdown had occurred in the attorney-client relationship. (See *People v. Padilla* (1995) 11 Cal.4th 891, 926-927, overruled on another point in *People v. Hill* (1998) 17 Cal.4th 800, 823, fn. 1.) Appellant merely asked for appointment of private counsel to explore a motion for new trial. In these circumstances, the trial court did not abuse its discretion in denying appellant’s request.

III. DISPOSITION

We affirm the judgment.

Reardon, J.

We concur:

Ruvolo, P.J.

Rivera, J.