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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.

DEVONDAS D. JOHNSON,

Defendant and Appellant.

A136139

(Alameda County
Super. Ct. No. H49297)

I.

INTRODUCTION

Appellant appeals after a jury convicted him of two counts of committing a lewd and lascivious act upon a child under the age of 14 (Pen. Code, § 288, subd. (a)¹). After the jury returned its verdict, appellant admitted the habitual sex offender allegation as to both counts (§ 667.71). On appeal, appellant contends the trial court erred in admitting the preliminary hearing testimony of two of appellant’s prior sex abuse victims on the ground the prosecution failed to exercise due diligence in securing the witnesses’ presence at trial (Evid. Code, § 1291). We affirm.

II.

FACTS AND PROCEDURAL HISTORY

The evidence at trial established appellant sexually molested John Doe when he was six years old. Appellant started a relationship with John Doe’s guardian, J.T., who is

¹ All statutory references are to the Penal Code.

also Doe's biological aunt. Doe testified appellant came into his room at night, made him pull his pajama pants down, and put his fingers in Doe's anus two separate times.

Appellant was on parole at the time of the sexually inappropriate conduct due to his prior 2007 conviction for a violation of section 288, subdivision (a). As part of his parole conditions, he was not allowed to be around minor children. He was also required to wear a tracking device on his ankle. At trial, appellant admitted being around Doe in violation of his parole. However, he denied touching Doe in a sexual manner. He testified, "I don't like boys. I like females."

J.T. is also the biological aunt of Doe's cousin, C.W. C.W. frequently picked Doe up from their aunt's house to spend the weekend at C.W.'s home. Doe testified that he told C.W. about the molestation "[b]ecause she was nice and because she takes care of me." C.W. testified that she picked Doe up on February 20, 2010, to spend the night with her. She noticed Doe was "fearful" and "withdrawn," which was unusual behavior for him. When it came time to take a bath, C.W. noticed Doe was bruised. Doe refused to get in the water. She asked Doe what was going on. Doe told her that appellant had been hitting him and touching him inappropriately. C.W. testified she got a doll in order for Doe to demonstrate exactly what appellant had done to him. Doe said, "He was touching me like this." Doe had two fingers poking the doll's bottom.

C.W. contacted the police. As directed, C.W. took Doe to Children's Hospital in Oakland to have a medical examination. The next day Doe was taken for a videotaped interview where he described the sexual molestation. The videotaped interview was played for the jury.

The jury learned that appellant was previously convicted in 2007 of violating section 288, subdivision (a). The victims in that case were sisters.² They were unavailable for appellant's trial, and their 2007 preliminary hearing testimony was read to the jury. The older sister testified she and appellant had a "romantic" relationship, which

² For privacy reasons, we refer throughout this opinion to the victims of this 2007 case as "the sisters."

involved sexual intercourse, when she was 14 years old and appellant was 37 years old. She loved him, and she believed he loved her. They continued to have sex for a little over a year.

The younger sister testified at the preliminary hearing that when she was 11 years old, appellant touched her breasts, made her orally copulate him, and attempted to have sexual intercourse with her. She testified she did not like appellant and he would call her names and hit her. Following the 2007 preliminary hearing at which the sisters both testified, appellant entered a plea of no contest to violating section 288, subdivision (a).

On February 22, 2012, the jury found appellant guilty of two counts of violating section 288, subdivision (a) in the current case. On June 26, 2012, the court sentenced appellant to two concurrent prison terms of 25 years to life.

III.

DISCUSSION

A. Admissibility of Preliminary Hearing Testimony

Appellant contends the trial court violated his constitutional due process right to a fair trial by admitting the 2007 preliminary hearing testimony of the sisters describing sexual offenses committed against them by appellant when the young women were minors. (See Evid. Code, § 1108, subd. (a).)³ As noted, the sisters both testified at appellant's preliminary hearing in November 2007, which resulted in his no-contest plea and his prior conviction for violating section 288, subdivision (a). When the sisters could not be located for appellants' 2012 trial on the instant charges, the district attorney sought to introduce their preliminary hearing testimony into evidence. To that end, the trial

³ Character or disposition evidence is generally inadmissible to prove a defendant's conduct on a specified occasion. (Evid. Code, § 1101, subds. (a), (b).) Evidence Code section 1108 creates an exception: "In a criminal action in which the defendant is accused of a sexual offense, evidence of the defendant's commission of another sexual offense or offenses is not made inadmissible by Section 1101, if the evidence is not inadmissible pursuant to Section 352." (Evid. Code, § 1108, subd. (a); *People v. Soto* (1998) 64 Cal.App.4th 966, 982-986; *People v. Nguyen* (2010) 184 Cal.App.4th 1096, 1115-1116.)

court conducted a hearing on February 10, 2012, to determine whether the district attorney had used “due diligence” in attempting to locate them. Appellant’s sole contention on appeal is that the district attorney’s showing was inadequate, and therefore the trial court erred in admitting the sisters’ preliminary hearing testimony at his trial.

1. Background Facts

At the due diligence hearing, the district attorney’s investigator, Veronica Ibarra, described the efforts she made to secure the sisters’ attendance at trial. Beginning on November 7, 2011 (over three months before trial), Ibarra performed database searches for the older sister (who was over 18) and the younger sister (who had just turned 18), and the girls’ mother, D.H.⁴ Ibarra searched law enforcement databases for all three women, social networking sites like Facebook and Myspace, and the “people finder” website Spokeo. She sent a message to someone who she believed was the younger sister on MySpace, but never received a response. Her search was largely unproductive, but it produced one actionable lead—a residential address in Oakland.

On November 9, 2011, Ibarra went to the Oakland address and took down license plate information for all of the vehicles in the area. She ran the plates in the California Department of Motor Vehicles database and found that one of the cars was registered to D.H. On November 15, 2011, Ibarra—who was in the area for another purpose—stopped by the address listed for D.H. and knocked on the door. Ibarra testified that she did not have subpoenas for the sisters with her because it was approximately three months before trial, and she had not been planning to stop by their house that day. A woman answered and identified herself as D.H. D.H. was “very nervous” talking to Ibarra at that time, so Ibarra gave her a card and asked D.H. to call her.

D.H. called Ibarra’s cell phone later that same day and expressed a willingness to have her daughters meet with Ibarra. She claimed the girls had not been offered any compensation for their earlier testimony and expressed a desire to be relocated should the

⁴ Because the sisters share the same last name as their mother, and to protect the sisters’ privacy, we refer to their mother throughout this opinion as “D.H.”

sisters testify against appellant again. Ibarra said that she would have to discuss possible relocation with the district attorney. At the due diligence hearing, Ibarra testified that she “felt comfortable at that point that she would come in to talk to us . . . especially because she called me [back] so quickly.”

Ibarra called D.H. again on November 22, 2011, but D.H. told her that she was busy getting ready for Thanksgiving and could not talk. Ibarra called D.H. on November 30, 2011, December 2, 2011, and December 7, 2011, and left at least one voicemail. D.H. returned her calls on December 13, 2011, and they spoke briefly. Ibarra described D.H. as sounding “very drowsy” and “very hard to understand.” Ibarra did not feel that it was a productive conversation and told D.H. that she would call her in the coming days.

Ibarra called D.H. five times between December 15, 2011, and January 6, 2012, but D.H. did not return her calls. Ibarra also stopped by D.H.’s Oakland residence several times during this period and knocked on the front door. No one answered. On January 25, 2012, after a trial date had been set and the court had made its ruling allowing the sisters to testify regarding appellant’s prior sexual misconduct, the district attorney asked Ibarra to go to the Oakland residence and serve subpoenas. Ibarra went to the residence the next day but found it vacant with a “For Sale” sign in the front yard.

On January 27, 2012, Ibarra called D.H., who called her back and agreed to come to the district attorney’s office to discuss “relocation help.” Ibarra asked D.H. where she lived so that Ibarra could pick her up and take her to the office. D.H. refused to provide Ibarra with the new address.

Ibarra arranged to meet D.H. on January 31, 2012. Ibarra called her on January 30, 2012, to arrange a pickup time and location but D.H. immediately told her, “Oh, this—this week is going to be bad. . . . I’m trying to get all moved in and I have way too many other things going on.” D.H. agreed to meet with Ibarra on February 3, 2012, or February 6, 2012. Ibarra called D.H. on February 2, 2012, to arrange a pickup, but D.H. did not answer. Ibarra tried calling D.H. again on February 8, 2012, with no success.

Ibarra also performed new database searches for all three women once she knew that D.H. had moved, but she did not find any new contact information. Finally Ibarra ran custody searches before the due diligence hearing, but none of the women were in custody.

Based on this testimony, the trial court ruled, that the “prosecution has exercised due diligence in an effort to locate [the sisters] and has not been successful.” Because the sisters were unavailable as witnesses, the trial court granted the district attorney’s motion to allow the Evidence Code section 1108 evidence “to be presented to the jury by way of the preliminary hearing transcript”

2. Relevant Law

Under the state and federal Constitutions, a criminal defendant has the right to confront the prosecution’s witnesses. (U.S. Const., 6th Amend.; Cal. Const., art. I, § 15; *People v. Herrera* (2010) 49 Cal.4th 613, 620 (*Herrera*)). “Although important, the constitutional right of confrontation is not absolute. [Citations.]” (*Id.* at p. 621; accord, *People v. Thomas* (2011) 51 Cal.4th 449, 499.) An exception exists when a witness is unavailable, the witness testified against the defendant at a prior proceeding, and the witness was subjected to cross-examination. (Evid. Code, § 1291, subd. (a)(2)⁵; *Herrera, supra*, 49 Cal.4th at p. 621.)

A witness is unavailable if the prosecution “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).) Due diligence connotes persevering application, untiring efforts in good earnest, efforts of a substantial character. (*Herrera, supra*, 49 Cal.4th at p. 622; *People v. Valencia* (2008) 43 Cal.4th 268, 292 (*Valencia*)). “Considerations relevant to the due diligence inquiry ‘include the timeliness of the search, the importance of the

⁵ Evidence Code section 1291, subdivision (a), provides in relevant part: “(a) 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.”

proffered testimony, and whether leads of the witness’s possible location were competently explored.’ [Citation.]” (*Herrera, supra*, at p. 622; *Valencia, supra*, at p. 292.) As long as “ ‘substantial good faith’ ” efforts are undertaken to locate a witness, the fact that “ ‘additional efforts might have been made or other lines of inquiry pursued’ ” does not indicate lack of diligence because “ ‘[t]he law requires only reasonable efforts, not prescient perfection.’ [Citation.]” (*People v. Diaz* (2002) 95 Cal.App.4th 695, 706.)

On appeal, “[w]e 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.)

3. Reasonable Diligence in Attempting to Secure Presence at Trial

“[D]iligence has been found when the prosecution’s efforts are timely, reasonably extensive and carried out over a reasonable period. [Citations.]” (*People v. Bunyard* (2009) 45 Cal.4th 836, 856 (*Bunyard*)). In contrast, diligence has found to be lacking where the prosecution’s efforts were “perfunctory or obviously negligent. [Citations.]” (*Id.* at p. 855.)

Appellant does not challenge the timeliness of the prosecution’s efforts to find the sisters, which commenced approximately three months before the trial began. Furthermore, appellant concedes Ibarra “diligent[ly] searched police databases and social network websites for [the sisters] and their mother, [D.H.],” which resulted in one solid lead—“locat[ing] [D.H.] at an address on . . . in Oakland.” Instead, appellant argues that as the situation evolved and appellant’s trial date loomed closer, the sisters’ “mother was being [increasingly] dilatory and unresponsive.” Appellant claims “[b]y the end of December, Ibarra should have realized that she was no closer to subpoenaing [the sisters] than she had been at the time of her first visit with [D.H.] on November 9th.” Appellant complains, “It was at that point when the objective facts known to Ibarra required her to make reasonable efforts to actually subpoena [the sisters], rather than rely solely on the demonstrably unproductive telephone communications with their mother.”

Appellant's argument would have more persuasive force if there was *any* evidence Ibarra knew or should have known the girls whereabouts or if there was any possibility of speaking to them separate and apart from using their mother as a contact. Instead, the evidence at the due diligence hearing established that throughout her investigation, the investigator made numerous efforts to locate the sisters, including checking various databases, leaving messages on social websites, checking records of various state and local agencies, and using every resource available to her. The only productive lead was an address, which lead to the girls' mother, D.H., who Ibarra reasonably believed was likely to know their whereabouts. Ibarra kept in contact with D.H. for several months, and was given assurance on more than one occasion that D.H. intended to produce the girls so they could be interviewed for the purpose of testifying at appellant's trial. However, D.H. abruptly moved, refused to give Ibarra her new address, and eventually terminated contact. She left no clue where she relocated. In the meantime, Ibarra continued to search on databases and law enforcement records for any information on the sisters, but these efforts proved as unsuccessful as the earlier efforts to locate them.

Appellant claims that Ibarra should have taken more aggressive steps, such as "waiting with subpoenas at the . . . residence" until either sister appeared. However, on this record, Ibarra had no reason to suspect that she could not count on continued cooperation from D.H. as an effective means for securing the sisters' testimony. Despite being somewhat evasive and conniving, D.H. had continued to stay in contact with Ibarra over several months, even returning Ibarra's telephone calls on several occasions. D.H. also gave every impression that she had access to the sisters, and that she was willing to bring her daughters in for an interview if the district attorney would arrange for the family to be relocated. There was no evidence that Ibarra had advance notice that D.H. was planning on moving nor was there any reason to suspect that D.H. would refuse to inform Ibarra of any change of address. Therefore, Ibarra had no reason to step up her investigative efforts in anticipation that D.H. would cease all communication. (See *People v. Lopez* (1998) 64 Cal.App.4th 1122, 1128 [the prosecution had no reason to believe that the missing witness would not cooperate and therefore the prosecution had

“no reason to keep in closer contact.”]; compare, *People v. Louis* (1986) 42 Cal.3d 969, 974, 989 [witness known by the parties and the court to be highly unreliable and likely to disappear].)

An appellate court “will not reverse a trial court’s determination simply because the defendant can conceive of some further step or avenue left unexplored by the prosecution. Where the record reveals, as here, 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. McElroy* (1989) 208 Cal.App.3d 1415, 1428, disapproved on other grounds by *People v. Cromer* (2001) 24 Cal.4th 889, 901, fn. 3.)

Therefore, we agree with the trial court that the prosecution established due diligence with evidence that its efforts to locate the sisters were timely, reasonably extensive, and that any and all leads were competently explored. (See *Herrera, supra*, 49 Cal.4th at p. 622; *Bunyard, supra*, 45 Cal.4th at p. 856.) Because the sisters were unavailable within the meaning of Evidence Code section 240, subdivision (a)(5), appellant’s constitutional rights were not violated by the admission of their prior preliminary hearing testimony.

**IV.
DISPOSITION**

The judgment is affirmed.

RUVOLO, P. J.

We concur:

REARDON, J.

RIVERA, J.