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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
THIRD APPELLATE DISTRICT  
(Sacramento)

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THE PEOPLE,

Plaintiff and Respondent,

v.

RONALD W. DEMARTHRA,

Defendant and Appellant.

C074099

(Super. Ct. No. 12F07582)

A jury found defendant Ronald W. Demartha guilty of assault with a firearm and possession of a firearm by a convicted felon and found that he personally used a firearm in the commission of the assault. He was sentenced to prison for seven years consisting of three years for assault plus four years for the personal use enhancement. Sentence on the firearm possession count was stayed pursuant to Penal Code<sup>1</sup> section 654.

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<sup>1</sup> Further statutory references are to the Penal Code unless otherwise indicated.

On appeal, defendant contends: (1) the trial court erred by finding that victim Stefan Bennett was unavailable as a witness and admitting his former testimony into evidence; and (2) defendant's assault conviction is not supported by sufficient evidence. We affirm.

## FACTS

As Bennett and his cousin, Neshanda Culpepper, walked home from a store on September 14, 2012, they saw defendant walking toward them. Within seconds defendant approached them, pulled out a gun, and fired in the direction of Bennett.

Ravneel Dutt witnessed the incident from his aunt's open garage across the street. Dutt saw defendant approach Bennett in an "alpha way," like "a bear attacking somebody." While walking toward Bennett, defendant reached for something in his pocket. Dutt closed the garage door in order to protect his family. While the door was closing, Dutt heard something that sounded like the firing of a shot. He telephoned 911 and reported that "we just seen a guy get shot right now," that "[i]t was a shots fired," and that "I knew someone had a gun and it -- and we heard, ah, shot noise." At trial, Dutt testified that during the 911 call he had "assumed [defendant] had a gun, assumed it," based on "[defendant] reaching for something from his pants."

Dutt did not see any weapons in Bennett's or Culpepper's possession and they did not appear to be the aggressors. Rather, they were "kind of afraid" of defendant in that they were "taking steps back from him."

Culpepper testified that she was walking with Bennett when defendant approached them with one hand in his pocket. Defendant conversed with Bennett about a dispute that defendant's sister had with Culpepper and Bennett regarding a cell phone charger or similar device. Culpepper remembered defendant appearing to be upset and saying "you are going to have to deal with me." Bennett responded by saying, "What's your problem? You going to shoot me or something? You going to shoot me or something?"

Culpepper heard a gunshot. She fled to Dutt's garage without seeing any weapons being drawn.

Dutt or one of his relatives telephoned the police. Culpepper told the dispatcher that defendant "pulled out the gun and he shot" her cousin Bennett.

Bennett did not testify at trial, but his preliminary examination testimony was read to the jury. He described walking with Culpepper and being confronted by defendant. Bennett saw that defendant was reaching for something in his pocket. When Bennett asked defendant whether he was going to shoot him, defendant pulled out a small gun and fired. Bennett heard gunfire and saw smoke coming out of the gun. An object, perhaps a bullet or a rock, struck Bennett's shoe and "stung" his foot. He "hobbled" around the corner and called the police. Bennett told the dispatcher that defendant "just pulled out a gun" and "shot at [Bennett's] foot."

Sacramento police officers responded to the emergency calls and arrived at the scene. Officers interviewed Bennett, Culpepper, and Dutt. In her interview, Culpepper told police that she saw defendant pull out a gun. Officers found a spent .22-caliber shell casing at the scene.

Two days after the shooting, San Jose police officers were dispatched to a service call. They found a Subaru hatchback parked along the sidewalk. Inside the vehicle they found defendant and his girlfriend, Fatima, asleep. Police questioned defendant about the vehicle, and he claimed it belonged to someone named Derrick. Police arrested defendant for having a stolen vehicle. A search of the vehicle revealed a loaded .22-caliber handgun. Police seized the handgun.

In the ensuing months, defendant made several trips to Sacramento. On December 10, 2012, police contacted defendant at his sister's residence and arrested him for the shooting. Sacramento police officers interviewed defendant while he was housed at the county jail. Defendant denied knowing Bennett or Culpepper and denied involvement in the shooting.

Several months after the arrest, Sacramento police learned that the San Jose Police Department had defendant's gun in its possession. The gun was transferred to Sacramento for ballistics testing. A criminalist conducted ballistics testing on the gun and determined that the spent shell casing found at the scene in Sacramento was fired from that gun.

Defendant testified on his own behalf and admitted shooting at Bennett in self-defense. Defendant explained that Bennett was a drug dealer and that defendant's sister owed Bennett \$12 for Vicodin. Bennett had been harassing defendant's sister about the debt. When defendant saw Bennett on the day of the shooting, he confronted Bennett about the harassment. But before approaching Bennett, he armed himself with the gun. Defendant later pulled out that gun and shot at Bennett while Bennett was backing away from him. Defendant testified that he pulled the gun after Bennett tried to pull his own gun.

Defendant admitted that when Bennett pulled up his shirt and reached for his waistband, defendant did not observe what he knew to be a gun; he saw "something chrome" but did not know whether it was a firearm.

## DISCUSSION

### I

#### *Use Of Preliminary Examination Testimony*

Defendant contends the admission of Bennett's preliminary examination testimony at trial in lieu of live testimony violated his confrontation and cross-examination rights under the Sixth and Fourteenth Amendments to the federal Constitution and article I, section 15, of the California Constitution. Specifically, defendant claims the prosecution failed to use due diligence in securing Bennett's attendance at trial, and defendant had no opportunity for effective cross-examination at the preliminary examination. Defendant argues the error was prejudicial and requires reversal. We disagree.

In a pretrial motion, the prosecution sought a ruling that Bennett's preliminary examination testimony could be admitted at trial, because Bennett was not available as a witness. (Evid. Code, §§ 240, 1290, 1291.) Defendant opposed the motion on the ground the prosecution had not shown unavailability.

On March 13, 2013, the trial court held a due diligence hearing. Barbara Barry, a process server for the Sacramento District Attorney's Office, and David Kidd, a criminal investigator for that office, testified about their efforts to locate and serve Bennett.

Barry testified that she was assigned to the case on February 7, 2013. She entered Bennett's name in the office's computer system and obtained an address on Hamburg Way. She visited the address but nobody answered the door. She left her business card at the door.

On February 14, 2013, Barry inquired of the Sacramento Municipal Utility District (SMUD) as to the most recent address where Bennett was receiving service.

On February 19, 2013, Barry inquired whether Bennett was in custody. Bennett was not in custody, but Barry learned that he had a misdemeanor warrant, which allowed her to conduct a welfare inquiry with the Sacramento County Department of Human Assistance (DHA).

On February 25, 2013, while awaiting responses from the two inquiries, Barry returned to the Hamburg Way address and again left her business card.

On February 26, 2013, Barry received a response to her welfare inquiry. She learned that Bennett had an electronic benefits transfer (EBT) card that recently had been used in the north area of Sacramento. Based on this information, Barry entered Bennett's information into an online information system and found an address on Walnut Avenue in Carmichael. Tony To, a process server who works in the north area, attempted service at the Walnut Avenue address. The manager for the Walnut Avenue address informed To that an elderly lady and her daughter lived there, not Bennett.

On February 27, 2013, Barry received a response from SMUD indicating that Bennett last received utilities at an address on Hackberry Lane in Sacramento. However, the utilities for Hackberry Lane had been canceled in May 2012. SMUD also provided a telephone number for Bennett. Barry called the number and the voice mail said she had reached Stefan Bennett. Barry left messages for Bennett but received no response.

Barry spoke to Culpepper regarding Bennett's whereabouts. She confirmed that Bennett no longer lived with her at the Hamburg address. She had no contact information for him. Culpepper agreed to meet Barry at the Hamburg address but no one answered the door when Barry arrived. Between February 7 and February 28, 2013, Barry was unable to contact Bennett.

On cross-examination, Barry said she had not been advised of Bennett's employment with the firm he had named at the preliminary examination. Nor had she been advised of any involvement with the military reserves.

On March 4, 2013, criminal investigator David Kidd was assigned to continue the search. After running Bennett's name through several databases, Kidd returned to the Hamburg address and received no response to his knock. Kidd attempted to speak with surrounding neighbors but they did not open their doors. Kidd then drove to the Hackberry address in the north area of Sacramento and discovered that the apartment was vacant.

Kidd contacted investigators at DHA and learned that Bennett had been using his EBT card in the north area of Sacramento and, on the night of March 3, 2013, in Southern California.

On March 5, 2013, Kidd contacted Culpepper who indicated she had received cards from the district attorney's office and had passed the information to Bennett. Culpepper also gave Kidd a more recent telephone number for Bennett. Kidd called the number and heard an announcement in which Bennett stated his name. Kidd left a message but received no response.

On March 7, 2013, Kidd again contacted DHA and learned that Bennett's EBT card had been used at stores in northern Sacramento County. Kidd searched for Bennett at the stores without success. At the hearing, he described that effort as looking for "a needle in a haystack."

Following the testimony, defense counsel argued the search efforts were insufficient because there was no investigation of Bennett's employment and military service and his ties to other states.

The trial court stated: "So just so the record is clear, it appears to me that your objection to the People's motion to use the former testimony is solely based on that they did not show due diligence. You are not asserting that you didn't have an opportunity to effectively cross-examine the witness, or the witness testified under oath, or that essentially defendant has substantially similar motive now, cross-examining the witness that you did at the preliminary hearing, your objection is based on the lack of due diligence; is that correct?" Defendant's counsel answered, "That's correct, Judge and -- that's correct."

In considering the motion, the trial court stated: "And it appears from their testimony, largely, they made reasonable diligence, making untiring efforts and good earnest effort, including even chasing, as the investigator said, a needle in a haystack, by going to the area where there was [a use of the EBT card]." But the court was concerned that there was no exploration of Bennett's claimed employment and military service. The hearing was continued for exploration of those issues.

At the continued due diligence hearing on March 14, 2013, Kidd testified that he had spoken to a supervisor at Nationwide Debt Management Solutions who was familiar with Bennett. Bennett had stopped coming to work the Monday after Christmas 2012 and evidently was attempting to move out of state. Kidd requested that the company provide him with any forwarding information and he was waiting for a response.

The United States Army advised Kidd that Bennett had been discharged from the reserves in 2000 and his last known address was in the Indianapolis area.

Kidd submitted a formal request to the United States Postal Service for forwarding information for Bennett and was awaiting a response.

The prosecutor advised the trial court that she had telephoned Bennett's number several times that morning. After repeatedly failing to answer, Bennett finally did so and told the prosecutor that he lived in Reno. Bennett refused to provide an address. He stated that he had started a new job with AT&T, was having trouble with transportation, and was experiencing financial difficulties.

The trial court ruled: "Based on the analysis and findings of facts the court put on the record yesterday and in addition to this witness' testimony today, the Court finds that the People have shown reasonable due diligence to allow the admission of the prior testimony. So the People's motion is granted. But I understand you may still find him, hopefully, and he'll be here."

Bennett's former testimony was read to the jury without further objection.

"The constitutional right to confront witnesses mandates that, before a witness can be found unavailable, the prosecution must "have made a good-faith effort to obtain his presence at trial." [Citation.] California law and federal constitutional requirements are the same in this regard. [Citation.]" (*People v. Valencia* (2008) 43 Cal.4th 268, 291-292; see *People v. Herrera* (2010) 49 Cal.4th 613, 620-621.) "California allows introduction of the witness's prior recorded testimony if the prosecution has used 'reasonable diligence' (often referred to as due diligence) in its unsuccessful efforts to locate the missing witness." (*People v. Cromer* (2001) 24 Cal.4th 889, 892.)

Due diligence depends upon the facts of the individual case. The term is incapable of mechanical definition. The court must consider the totality of efforts of the proponent to achieve the presence of the witness. (*People v. Sanders* (1995) 11 Cal.4th 475, 523.) Relevant considerations include whether the search was timely begun, the importance of

the witness's testimony, and whether leads were competently explored. (*People v. Cromer, supra*, 24 Cal.4th at p. 904.)

Due diligence may require the prosecution to use the Uniform Act to Secure Attendance of Witnesses from Without the State (Uniform Act) to procure a witness's attendance at trial. The Uniform Act has been adopted by California (§ 1334 et seq.) and Nevada (Nev. Rev. Stats., § 174.395 et seq.).

The good faith obligation to use the Uniform Act arises only when the prosecution knows the location of the witness. "If the witness cannot be located, application of the Uniform Act is impossible. In cases in which the witness disappears, the prosecution only has a good faith obligation to find the witness." (*Dres v. Campoy* (9th Cir. 1986) 784 F.2d 996, 999; *Ohio v. Roberts* (1980) 448 U.S. 56, 75-77 [65 L.Ed.2d 597, 613-615], overruled on other grounds in *Crawford v. Washington* (2004) 541 U.S. 36, 68-69 [158 L.Ed.2d 177, 203].)

In the trial court, the proponent has the burden of proving by competent evidence that the witness is unavailable. (*People v. Stritzinger* (1983) 34 Cal.3d 505, 516.) The standard of proof is preponderance of evidence. (*People v. Williams* (1979) 93 Cal.App.3d 40, 51, overruled on other grounds in *Coito v. Superior Court* (2012) 54 Cal.4th 480, 499.)

On appeal, "the judgment of the trial court is presumed correct. All intendment and presumptions are indulged to support it on matters as to which the record is silent and error must be affirmatively shown." (*People v. Malabag* (1997) 51 Cal.App.4th 1419, 1422 (*Malabag*)). The trial court's due diligence determination is subject to independent review. (*People v. Cromer, supra*, 24 Cal.4th at pp. 893-894.)

As noted, defense counsel expressly limited his objection to the issue of due diligence and eschewed any objection related to motive or opportunity for prior cross-examination. His express waiver at trial forfeits his appellate contention that he had no opportunity for effective cross-examination at the preliminary examination.

The People read trial counsel's remarks more broadly, as a waiver and consequent forfeiture of the entirety of defendant's "confrontation clause claim." But the issue of good faith or reasonable diligence arises under the confrontation clause as well as under California law. As to that issue, there is no forfeiture.

Defendant contends the prosecution's showing of due diligence was inadequate because the first month of searching was conducted by Barry, the process server, rather than by Kidd, the investigator. The point is asserted without argument or citation of authority and requires no further discussion. (*People v. Harper* (2000) 82 Cal.App.4th 1413, 1419, fn. 4.)

Defendant next claims the prosecution had a current active telephone number for Bennett as early as February 27, 2013, but "did not undertake a persistent effort to contact Bennett telephonically until the prosecutor herself called repeatedly on March 14th, at which point she met with success." The record does not support this claim.

Berry testified that she called Bennett's telephone and left an unspecified number of messages for him. Kidd testified that Culpepper gave him a more recent telephone number for Bennett which he called and heard an announcement in which Bennett stated his name. Kidd left a message but received no response.

There was no evidence that Bennett answered the prosecutor's calls because she had placed so many of them or, conversely, that Bennett had ignored the calls of Barry and Kidd because there had been so few of them. Defendant has not "affirmatively shown" that Barry and Kidd had been insufficiently diligent. (*People v. Malabag, supra*, 51 Cal.App.4th at p. 1422.)

Defendant complains that Kidd did not use a "reverse directory" available on the Internet to obtain a physical address for Bennett's telephone number. Kidd testified that he did not do so because the inquiry would cost money. But the evidence did not establish whether defendant's service provider, Metro PCS, reveals subscriber

information for a fee on the Internet. Whether a fee-based inquiry would have yielded useful information on Bennett is speculative on this record.

Defendant also complains that Kidd failed to request subscriber information directly from Metro PCS. But the record does not establish whether Metro PCS, like SMUD and unlike PG&E, would have been willing to work with investigators. Whether Kidd could have obtained Bennett's address from Metro PCS is speculative. No error is affirmatively shown. (*People v. Malabag, supra*, 51 Cal.App.4th at p. 1422.)

Defendant next contends that, regardless of the prosecution's efforts prior to March 14, 2013, the fact the prosecutor spoke with Bennett that day by telephone and established his employer's name and city of residence "rendered the prior showing of 'due diligence' moot." Defendant has forfeited this contention because his trial counsel never renewed his objection or addressed the due diligence issue in the new factual context set forth in the prosecutor's remarks.

"Evidence Code section 353, subdivision (a) requires that an objection to evidence be 'timely made and so stated as to make clear the specific ground of the objection or motion . . . .' As we have explained: 'Specificity is required both to enable the court to make an informed ruling on the . . . objection and to enable the party proffering the evidence to cure the defect in the evidence.' " (*People v. Mills* (2010) 48 Cal.4th 158, 207.) Here, trial counsel never asked the court to address the practicalities of sending an investigator to Reno or the adequacy of the prosecutor's oral efforts to persuade Bennett to appear at trial.

In any event, the record shows that Bennett withheld his home address from the prosecutor and in all likelihood would have withheld his work address as well. Nothing in the record suggests that AT&T would have emulated SMUD, rather than PG&E, in its willingness to reveal employee or subscriber information. Whether investigators could have staked out every AT&T facility in the Reno area in order to search for Bennett was not explored at trial. On this record it is not reasonably probable that, but for counsel's

failure to object, a determination more favorable to defendant would have resulted. (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1126.)

Defendant argues that, “once the prosecutor knew where Bennett was,” she was obligated to use the procedures of the Uniform Act. But the obligation to use the Uniform Act arises only when the prosecution knows the location of the witness. (*Dres v. Campoy, supra*, 784 F.2d at p. 999; *Ohio v. Roberts, supra*, 448 U.S. at pp. 75-77 [65 L.Ed.2d at pp. 613-615].) Contrary to defendant’s argument, Bennett was “hiding” in that he did not reveal his home address and there was no suggestion he would disclose his work address. The prosecution was not required to do everything possible to obtain Bennett’s timely attendance; it was required only to use reasonable diligence. (*People v. Lopez* (1998) 64 Cal.App.4th 1122, 1128.) No error is shown.

## II

### *Sufficiency Of Evidence Of Assault*

Defendant contends his assault conviction is not supported by sufficient evidence that he did an act that by its nature would directly and probably result in the application of force to a person. We disagree.

“On appeal, the test of legal sufficiency is whether there is substantial evidence, i.e., evidence from which a reasonable trier of fact could conclude that the prosecution sustained its burden of proof beyond a reasonable doubt. [Citations.] Evidence meeting this standard satisfies constitutional due process and reliability concerns. [Citations.] [¶] While the appellate court must determine that the supporting evidence is reasonable, inherently credible, and of solid value, the court must review the evidence in the light most favorable to the [judgment], and must presume every fact the jury could reasonably have deduced from the evidence. [Citations.] Issues of witness credibility are for the jury.” (*People v. Boyer* (2006) 38 Cal.4th 412, 479-480.)

“To prove that the defendant is guilty of this crime, the People must prove that: [¶] 1. The defendant did an act with a firearm that by its nature would directly and

probably result in the application of force to a person; [¶] 2. The defendant did that act willfully; [¶] 3. When the defendant acted, he was aware of facts that would lead a reasonable person to realize that his act by its nature would directly and probably result in the application of force to someone; AND [¶] 4. When the defendant acted, he had the present ability to apply force with a firearm to a person.” (*People v. Velasquez* (2012) 211 Cal.App.4th 1170, 1176, italics omitted; CALCRIM No. 875.)

Bennett testified that defendant pulled out a firearm, pointed it toward him, and fired. An object, perhaps a bullet or a rock, struck Bennett’s shoe and “stung” his foot.

Thus, the evidence showed that physical force *was* applied to Bennett’s foot, causing it to sting; and that the source of that physical force was the bullet striking the shoe itself or the nearby ground and propelling an object, such as a rock, onto the shoe. Nothing in the evidence suggests that the application of force from the bullet to the foot was insufficiently natural, probable, and direct.

This court has noted that “[a]ssault with a deadly weapon can be committed by pointing a gun at another person [citation], but it is not necessary to actually point the gun directly at the other person to commit the crime.” (*People v. Raviart* (2001) 93 Cal.App.4th 258, 263.) Defendant’s argument that a “single shot aimed at the ground” cannot satisfy this standard has no merit.

Defendant admitted aiming the gun in “the distance between” him and Bennett. Defendant also admitted firing the gun “right in the middle” of the space that separated them. There was no dispute that the act of firing the gun was willful.

“[A] defendant guilty of assault must be aware of the facts that would lead a reasonable person to realize that a battery would directly, naturally and probably result from his conduct.” (*People v. Williams* (2001) 26 Cal.4th 779, 788.)

As we have seen, defendant was aware that he was aiming and firing the gun in the space that separated him from Bennett. Even if defendant honestly believed that firing the gun in such a manner was not likely to result in a battery, he is guilty of assault

because a reasonable person viewing these facts would find that such a shooting would directly, naturally, and probably result in a battery.

Finally, defendant argues the prosecution failed to bring forth evidence to counter defendant's testimony that he fired the gun in self-defense. We disagree.

The prosecution had the burden to prove that defendant did not act in self-defense. (*People v. Adrian* (1982) 135 Cal.App.3d 335, 340-341.) The prosecution may do so by proving that defendant lacked an “ ‘honest *and reasonable* belief’ ” that he was in imminent danger of bodily injury. (*People v. Minifie* (1996) 13 Cal.4th 1055, 1064-1065.) Here, the prosecution presented evidence that no weapons were visible in Bennett's or Culpepper's possession and they did not appear to be the aggressors. Rather, they were “kind of afraid” of defendant in that they were “taking steps back from him.” Bennett confirmed that he was walking backwards at the time of the incident.

Defendant admitted in his testimony that when Bennett pulled up his shirt and reached for his waistband, defendant did not observe what he knew to be a gun; he saw “something chrome” but did not know whether it was a firearm or another object.

The jury could conclude that, even if defendant honestly believed he was in imminent danger of bodily injury, his belief was not reasonable under all these circumstances. (*People v. Boyer, supra*, 38 Cal.4th at pp. 479-480; *People v. Minifie, supra*, 13 Cal.4th at pp. 1064-1065.) The jury had no duty to speculate that Bennett was an armed “drug dealer” merely because he had sold prescription medicine to a person who evidently lacked a prescription.

Defendant contends the prosecutor “improperly shifted the burden [of proof] to [defendant] to prove that he acted in self-defense. Defendant claims the prosecutor did so, not by securing jury instructions that in fact shifted the burden, but simply by cross-examining defendant as to why he had not asserted his claim of self-defense when he was interviewed by police. Defendant did not object to the question; instead, he acknowledged that he “didn't tell the detective the truth.”

As noted, “Evidence Code section 353, subdivision (a) requires that an objection to evidence be ‘timely made and so stated as to make clear the specific ground of the objection or motion.’ ” (*People v. Mills, supra*, 48 Cal.4th at p. 207.) Because defendant did not object to the question on the ground it shifted the burden of proof, his claim is not properly before us. In any event, nothing in the question or answer remotely suggested that the jury should disregard its instructions allocating the burden of proof.

DISPOSITION

The judgment is affirmed.

ROBIE, Acting P. J.

We concur:

DUARTE, J.

HOCH, J.