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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, **Plaintiff and Respondent,** **v.** **JOHNNY DENENG,** **Defendant and Appellant.**	**A126867** **(Alameda County Super. Ct. No. H43391)**

Appellant was pushed to the ground during an altercation outside a bar. Angry and drunk, he resisted his brother-in-law's efforts to drive him home and instead approached the men who had confronted him, firing several shots from a semi-automatic handgun. The shooting left two bystanders dead and wounded several others.

A jury convicted appellant of two counts of second degree murder and two counts of attempted murder without premeditation and found true various enhancement allegations. In this appeal from the judgment sentencing him to prison, appellant makes two contentions: (1) the trial court violated his rights under the federal confrontation clause when it admitted the preliminary hearing testimony of an eyewitness without an adequate showing of his unavailability at trial; and (2) defense counsel should have objected when the prosecutor read portions of the preliminary hearing transcript that referred to the jail clothing appellant was wearing at the time of that hearing. We affirm.

I. *Facts and Procedural History*

On the night of December 22, 2006, appellant met his sister and brother-in-law and two other friends at the Lucky Star Lounge in San Leandro. A birthday party was being held in the bar and it was very crowded inside. Appellant had several shots of cognac and appeared to be drunk.

Manuel Nahsonhoya and his friend Raymond Dazhan were also drinking at the bar. Dazhan thought he heard appellant say something disparaging about Nahsonhoya while they were smoking outside. Nahsonhoya, who was much larger than appellant and had been drinking to the point that he felt "buzzed," confronted appellant about talking "shit" about him. An argument began between Nahsonhoya and Dazhan on the one hand,[1] and appellant and his friends on the other. Both sides were yelling and cursing.

Someone in Nahsonhoya's group pushed appellant to the ground. Nahsonhoya held a broken beer bottle in each hand, gesturing toward the other group. The bartender came outside with her boyfriend and tried to calm everyone down. She told appellant that he should leave and his group started walking toward their cars. Nahsonhoya called someone a bitch, which seemed to make appellant even more upset.

Appellant's brother-in-law Youeth Pek decided to drive appellant home because appellant was too drunk to get behind the wheel. When they reached the car, Pek sat in the driver's seat but appellant refused to get in. Appellant paced for a few minutes and then walked toward the front of the bar, saying he would be right back. Shortly afterward, Pek heard gunshots.

About 15 people were standing outside the front of the bar when appellant returned and began shooting with a semi-automatic handgun. Ruby Vega, who had been talking to Nahsonhoya that evening, was shot in the head and fatally wounded. Daniel Camarillo, who had been attending the birthday party at the bar, was shot in the chest and died of his wound. Several others were wounded but survived: Nahsonhoya was shot in

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[1] Some witnesses claimed that at least one other person was involved in the altercation along with Nahsonhoya and Dazhan, but Nahsonhoya and Dazhan testified that they did not know such a person.

the upper left thigh; Raymond Jacquez was shot in the leg; William Tril was shot in the torso and arm; Calvin Le was shot in the thigh; and Keith Asazawa was shot in the thigh. According to Alex Law, who had come to the bar to meet his friend Asazawa and others, appellant was the shooter.

Appellant stopped shooting when his gun jammed. Dazhan went over and grabbed him, calling to Nahsonhoya for help. Nahsonhoya, who was still able to walk despite his gunshot wound, went to assist Dazhan and together they knocked appellant to the ground in the middle of road. They beat appellant until he was unconscious, with Nahsonhoya using a broken bottle to stab and slash him. They ran away because they feared they would be arrested for the beating.

When police arrived they found appellant lying unconscious and bloody in the road. A semiautomatic handgun that had jammed was also found in the road.

Appellant was charged with two counts of first degree murder and six counts of attempted murder with premeditation, along with enhancement allegations based on the use of a firearm and the infliction of great bodily injury. Ruby Vega and Daniel Camarillo were the named victims in the murder counts; Dazhan, Nahsonhoya, Jacquez, Tril, Le and Asazawa were the named victims in the attempted murder counts. During the jury trial on the charges, the defense position was that appellant had acted in a heat of passion, having been provoked during the confrontation with Nahsonhoya and Dazhan. Defense counsel urged the jury to convict appellant of two counts of voluntary manslaughter and six counts of attempted voluntary manslaughter rather than murder and attempted murder as charged.

The jury convicted appellant of the second degree murder of Vega and Camarillo and the attempted murder without premeditation of Dazhan and Nahsonhoya, and found true the enhancement allegations attached to those counts. (Pen. Code, §§ 187, 664/187, 12022.53, subds. (b)-(d), 12022.7, subd. (a).) It acquitted him of the four other attempted

murder counts. The court sentenced appellant to prison for an aggregate term of 105 years to life plus 34 years.[2]

II. *Discussion*

A. *Admission of Alex Law's Preliminary Hearing Testimony*

Appellant argues that the trial court violated his rights under the federal Confrontation Clause when it admitted the preliminary hearing testimony of Alex Law, a customer of the Lucky Star Lounge who witnessed the shooting. He contends the prosecution did not establish that it had exercised reasonable diligence to procure Law's attendance at trial. We reject the claim because appellant failed to lodge a timely objection to the evidence.

Under Evidence Code section 1291, subdivision (a), former testimony such as that given at a preliminary hearing is admissible at trial notwithstanding its hearsay nature when the witness is unavailable at the time of trial and the party against whom the evidence is offered had the right and opportunity to cross-examine the witness at the earlier proceeding. (*People v. Herrera* (2010) 49 Cal.4th 613, 621.) A witness may be deemed unavailable only when the proponent of the former testimony 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); see also *People v. Cromer* (2001) 24 Cal.4th 889, 904 (*Cromer*); *People v. Sanders* (1995) 11 Cal.4th 475, 523.) When the criteria of Evidence Code section 1291 are met, a criminal defendant's rights under the federal confrontation clause are satisfied. (See *Crawford v. Washington* (2004) 541 U.S. 36, 59; *People v. Wilson* (2005) 36 Cal.4th 309, 340.)

We do not reach the substantive issue of whether the prosecution exercised due diligence to procure Law's attendance at trial because appellant did not lodge a timely objection on this ground. On the day before the first trial witness was called, and after

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[2] Although the sentence is characterized by the parties as a term of "139-years-to-life," it contains both determinate and indeterminate components that must be separately computed. (See *People v. Dotson* (1997) 16 Cal.4th 547, 553; *People v. Neely* (2009) 176 Cal.App.4th 787, 798.)

the motions in limine were concluded, the prosecutor informed the court that he had spoken to Law's father the day before and to his sister approximately a week ago. Both said that Law had traveled to China to stay with a grandparent who was dying, that he intended to spend as much time there as possible while the grandparent was still alive, and that they did not know when he would return. The prosecutor said he did not believe there was any way to bring Law to court in time for trial and he asked to introduce his preliminary hearing testimony instead. The court noted that a finding of unavailability was constitutionally required before such testimony could be admitted and asked defense counsel whether an evidentiary hearing was necessary. Defense counsel responded, "No, I'll accept [the prosecutor's] representation," and stated that he would "submit the issue today" based on the prosecutor's offer of proof. Counsel acknowledged that he had been appellant's defense attorney at the preliminary hearing and that he had "cross-examined Mr. Law fully." Base on this exchange, the court ruled that Law's testimony at the preliminary hearing was admissible.

Questions relating to the admissibility of evidence generally will not be reviewed on appeal absent a specific and timely objection in the trial court on the same grounds as are urged on appeal. (*People v. Alvarez* (1996) 14 Cal.4th 155, 186; *People v. Singleton* (2010) 182 Cal.App.4th 1, 20.) This is so even when the challenge is based on an alleged violation of the defendant's rights under the confrontation clause. (*People v. D'Arcy* (2010) 48 Cal.4th 257, 290.) Appellant did not object to Law's preliminary hearing testimony and has forfeited his confrontation clause challenge to that evidence. (*People v. Dykes* (2009) 46 Cal.4th 731, 756-757; *D'Arcy*, at pp. 289-290.)

Appellant argues that the issue was preserved because we can infer that defense counsel made an off-the-record objection to admitting Law's preliminary hearing testimony. We are not persuaded. Appellant relies on the trial court's observation that "certain constitutional requirements [] need to be met before such hearsay can be presented here at trial. So we have hearsay issues and confrontation issues, both of which would require, among other things, a showing of unavailability of this witness before his former testimony can be admitted. . . ." This statement simply reflects the court's

awareness of the legal standard for admitting the preliminary hearing testimony; it cannot be reasonably construed to mean that defense counsel had lodged an objection on the ground that the standard had not been met.

Appellant alternatively suggests that no objection was necessary because the trial court fully understood the issue presented and the record is sufficient to allow this court to rule as a matter of law. Again we disagree. Appellant argues in his appeal that Law was not "unavailable" because the prosecutor failed to exercise reasonable diligence in locating him and bringing him back into this country for the trial. (See Evid. Code, §§ 240, 1291; *Cromer*, *supra*, 24 Cal.4th at p. 904 ["reasonable diligence" under Evid. Code, § 240 requires " 'persevering application, untiring efforts in good earnest, efforts of a substantial character.' "].) But because defense counsel submitted the issue to the court without objection, the prosecutor had little incentive to establish a detailed timeline and describe the efforts made to locate or contact Law. If defense counsel had objected to the showing of diligence (or lack thereof), the prosecutor might have been able to make a more complete record concerning his efforts to locate Law and bring him to court. Indeed, it may well be that defense counsel did not object on the record because he assured himself during off-the-record communications with the prosecutor that reasonable diligence had been exercised. This case vividly illustrates the reason for requiring a timely objection.

Even if the issue had not been forfeited, any error in admitting Law's preliminary hearing testimony was harmless beyond a reasonable doubt. (*People v. Jennings* (2010) 50 Cal.4th 616, 652.) That testimony can be summarized as follows: Law went to the Lucky Star Lounge with a group of friends and saw a confrontation take place outside between three "Mexican guys" and an "Asian guy." One of the "Mexican guys" wore his hair in a ponytail and was carrying a beer bottle. Law identified appellant in court as the "Asian guy." A man dressed in an Oakland A's jacket pushed appellant to the ground. The bartender, who was dating one of Law's friends, tried to break up the argument and asked appellant to leave. The two groups moved toward the parking lot and the "Mexican" group returned to stand on the sidewalk in front of the bar. Law testified that

he heard a female voice scream and appellant came running toward them, firing several shots from a gun.

Appellant complains that the admission of this testimony was prejudicial because Law was the only witness to directly identify appellant in court as the shooter. But defense counsel's strategy at trial was to admit that appellant was the shooter and try to convince the jury that the crimes he committed were voluntary manslaughter and attempted voluntary manslaughter. Appellant argues that his trial strategy might have been different if Law's preliminary hearing testimony had been excluded, but this is pure speculation in light of the overwhelming evidence that appellant was the person who fired the shots: the testimony by several witnesses about appellant's altercation with Nahsonhoya and Dazhan, which included appellant's being pushed to the ground; the testimony by appellant's brother-in-law that appellant would not get into the car to leave and instead went back toward the bar shortly before shots were fired; Nahsonhoya's and Dazhan's testimony that the man they beat and left lying unconscious (appellant) was the shooter; and the discovery of the murder weapon in the street where appellant was found lying unconscious. Given the strong evidence of identification, Law's testimony was actually beneficial to the defense to the extent it tended to show the shooting was the result of provocation rather than premeditation.

Appellant contends that Law's testimony was prejudicial because it made the jury less likely to accept his theory that he acted in the heat of passion and that his crimes were no greater than voluntary manslaughter and attempted voluntary manslaughter. We disagree. Law testified about the altercation that led to the shooting, and he did not describe it as somehow less "provocative" when compared to the testimony of other witnesses. The jury simply did not accept the theory that appellant reacted in the manner of an ordinarily reasonable person under the given facts and circumstances, as is required for a conviction of voluntary manslaughter under a heat-of-passion theory. "[N]o defendant may set up his own standard of conduct and justify or excuse himself because in fact his passions were aroused, unless further the jury believe that the facts and

circumstances were sufficient to arouse the passions of the ordinarily reasonable man.' [Citation.]" (*People v. Steele* (2002) 27 Cal.4th 1230, 1252-1253.)

Appellant argues that the prosecution could have compelled Law's attendance at trial, asking that we take judicial notice of the Agreement Between the Government of the United States of America and the Government of the People's Republic of China on Mutual Legal Assistance in Criminal Matters, signed at Beijing June 19, 2000 and entered into force March 8, 2001. Given our conclusion that appellant's claim was forfeited and that any error was harmless, we deny the request for judicial notice as unnecessary to our resolution of the appeal.

B. *Reference to Appellant's Jail Clothing During Preliminary Hearing*

Appellant was in custody during the preliminary hearing and wore jail clothing when attending that hearing. When Alex Law testified at the preliminary hearing, he identified appellant as the Asian man involved in the altercation outside the Lucky Star Lounge and described him as "wearing the yellow outfit." The magistrate clarified that this referred to appellant, "who's wearing a yellow Santa Rita Jail top at counsel table." Law later identified appellant as the shooter by describing him as "[t]he guy in the yellow jumpsuit." These statements were read to the jury as part of Law's preliminary hearing testimony with no objection by the defense.

Appellant argues that his trial counsel provided ineffective assistance when he failed to object to the references to his jail clothing in the preliminary hearing transcript. He acknowledges that he was dressed in civilian clothing during his trial , but claims that the jury would have inferred that he had been held in custody for the duration of the case. We disagree.

A defendant claiming ineffective assistance of counsel has the burden of showing: (1) counsel's performance was deficient, falling below an objective standard of reasonableness under prevailing professional norms; and (2) the deficient performance resulted in prejudice, i.e., a reasonable probability that the result of the proceeding would have been different were it not for the error. (*Strickland v. Washington* (1984) 466 U.S.

668, 686, 688; *People v. Ledesma* (1987) 43 Cal.3d 171, 216, 218.) Prejudice must be established as a demonstrable reality. (*People v. Clark* (1993) 5 Cal.4th 750, 766.)

Appellant has not established that he was prejudiced by the brief references to his jail clothing during the preliminary hearing. A defendant may not be compelled to stand trial before a jury while dressed in identifiable jail clothing because "[j]urors may speculate that the accused's pretrial incarceration, although often the result of his inability to raise bail, is explained by the fact he poses a danger to the community or has a prior criminal record." (*Estelle v. Williams* (1976) 425 U.S. 501, 518, dissenting opn. of Brennan, J.; see also *People v. Taylor* (1982) 31 Cal.3d 488, 494; *People v. Pena* (1992) 7 Cal.App.4th 1294, 1304; *People v. Meredith* (2009) 174 Cal.App.4th 1257, 1262-1263.) Appellant wore civilian clothing at his trial, and contrary to his suggestion, there is no reason the jury would have inferred that he remained in custody as opposed to having been released on bail.

Moreover, the defense strategy at trial was to admit that appellant was the shooter, and to argue that the crimes were voluntary manslaughter and attempted voluntary manslaughter based on a heat of passion/provocation theory. Because the jury knew appellant was admittedly guilty of some type of homicide offense, information that he had been in custody at the outset of the case would be neither surprising nor particularly prejudicial. Isolated comments that a defendant is in custody "simply [do] not create the potential for the impairment of the presumption of innocence that might arise were such information *repeatedly* conveyed to the jury." (*People v. Bradford* (1997) 15 Cal.4th 1229, 1336.) It is not reasonably probable the jury would have reached a more favorable verdict had those brief references to his jail clothing been omitted from the transcript that was read.

Finally, we note that appellant was originally charged with two counts of first degree murder and six counts of attempted murder with premeditation, but was convicted of two counts of second degree murder and only two counts of attempted murder without premeditation. This strongly suggests that the jury considered the evidence

dispassionately and was not influenced by appellant's custody status at the time of the preliminary hearing.

III. *Disposition*

The judgment is affirmed.

NEEDHAM, J.

We concur.

SIMONS, Acting P. J.

BRUINIERS, J.