IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

STATE OF ARIZONA, *Appellee*,

v.

MELVIN KEYSHEA JONES, *Appellant*.

No. 1 CA-CR 16-0076
FILED 1-31-2017

Appeal from the Superior Court in Maricopa County
No. CR2015-101490-001
The Honorable Virginia L. Richter, Commissioner

REVERSED AND REMANDED

COUNSEL

Arizona Attorney General's Office, Phoenix
By Jillian Francis
Counsel for Appellee

Maricopa County Public Defender's Office, Phoenix
By Kevin Heade
Counsel for Appellant

MEMORANDUM DECISION

Judge Paul J. McMurdie delivered the decision of the Court, in which Presiding Judge Kenton D. Jones and Judge Patricia K. Norris joined.

M c M U R D I E, Judge:

¶1 Melvin Keyshea Jones ("Defendant") appeals his conviction and sentence for aggravated assault. For the following reasons, we reverse.

FACTS[1] AND PROCEDURAL BACKGROUND

¶2 Police officers A.D. and M.M. responded to a 9-1-1 call regarding a fight outside of an apartment complex. When the officers arrived, they encountered a group of people in the parking lot, including Hill, who fled on foot when he noticed the officers. A.D. apprehended Hill, and, as he was arresting him for outstanding warrants, Defendant "sprint[ed]" toward the officers. Defendant approached M.M. within an arm's length and angrily yelled, ". . . what the f--- are you doing? You are not taking him to jail." M.M. put her hands up and commanded Defendant to step back. Instead of complying, Defendant pushed M.M. in the chest, causing her to step backward.

¶3 The State charged Defendant with aggravated assault in violation of Arizona Revised Statutes ("A.R.S.") section 13-1204(A)(8)(a). Fourteen-year old C.H., who had witnessed the events giving rise to the alleged crime, testified at the first trial that he did not see Defendant touch the officer. The jury could not unanimously agree on a verdict, and the trial court declared a mistrial.

¶4 C.H. refused to testify at the second trial, and the jury found Defendant guilty as charged. The court imposed a prison term of 1.5 years with 89 days of presentence incarceration credit. Defendant timely

[1] We view the facts in the light most favorable to upholding the verdicts and resolve all reasonable inferences against the defendant. *State v. Harm*, 236 Ariz. 402, 404, ¶ 2, n.2 (App. 2015) (citing *State v. Valencia*, 186 Ariz. 493, 495 (App. 1996)).

appealed, and we have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1), 13-4031, and -4033(A)(1).[2]

DISCUSSION

¶5 Following the first trial, Defendant served C.H. with a subpoena ordering him to testify at the second trial. When C.H. did not appear as ordered, the court granted Defendant's request to issue a civil material witness arrest warrant. Although police officers were immediately dispatched to C.H.'s residence, they did not serve the warrant because it had not "hit the NCIC system[.]"[3] By the time an officer returned to the residence later that evening, the prosecutor had learned that Defendant had not served C.H.'s parent or guardian with a subpoena as procedurally required. Ariz. R. Civ. P. 4.1(d), (e); Ariz. R. Crim. P. 3.4. As a result, the prosecutor instructed the officer not to take C.H. into custody.[4]

¶6 The court allowed Defendant to attempt service on C.H.'s mother over the weekend in order to secure C.H.'s presence at trial the following Monday. C.H.'s mother evaded service after numerous attempts were made to serve her. Defense counsel also explained to the court that, after she learned C.H.'s mother was evading service, counsel personally spoke with the mother by telephone and told her she had to bring C.H. to trial to testify. The mother did not appear with C.H. Consequently, Defendant requested that the trial court allow him to read into evidence

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[2] Absent material changes from the relevant date, we cite the current version of a statute.

[3] We assume the trial transcript dated October 14, 2015, reflects a typographical error stating, ". . . while a warrant has been issued by the Court, it apparently has thought hit the NCIC system, so the officers don't have an actual warrant . . . ." We interpret "thought" to indicate "not" given the context.

[4] Advising the police officer not to honor the trial court's arrest warrant was error. A prosecutor does not represent the police department or the victim, therefore, it was inappropriate for the prosecutor to advise the officer not to take C.H. into custody. *See State ex rel. Romley v. Superior Court In & For Cty. of Maricopa*, 181 Ariz. 378, 382 (App. 1995). If there was a defect with the warrant, only the court could correct it, and the prosecutor should have alerted the court to the problem so the judge could do so. *See* Arizona Rule of the Supreme Court 42, Ethical Rule 3.3.

C.H.'s testimony from the first trial. The State objected, incorrectly informing the court that Rule 804 "talks about service and good faith efforts, not one or the other[.]" The court denied the request, finding Defendant failed to prove C.H. was unavailable for trial. The court stated: "Given the failure to serve the minor's mother with subpoena for attendance, I do find that . . . the defense has not met the requirements of Rule 804 indicating reasonable means have been . . . followed to obtain the witness's presence[.]"

¶7 Defendant challenges the court's ruling that Defendant had failed to prove that the witness was unavailable. We review a finding of witness availability for abuse of discretion.[5] *State v. Lehr*, 227 Ariz. 140, 148-49, ¶ 30 (2011).

> Statements made under oath by a party or witness during a previous judicial proceeding . . . shall be admissible in evidence if:
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> (i) The party against whom the former testimony is offered was a party to the . . . proceeding during which a statement was given and had the right and opportunity to cross-examine the declarant with an interest and motive similar to that which the party now has . . . and
>
> (ii) The declarant is unavailable as a witness, or is present and subject to cross-examination.

Ariz. R. Crim. P. 19.3(c)(1); *see* Ariz. R. Evid. 804(b)(1).

¶8 "Unavailability" in this context includes situations where the declarant "is absent from the trial . . . and the statement's proponent has not been able, by process *or other reasonable means*, to procure . . . the declarant's attendance." Ariz. R. Evid. 804(a)(5) (emphasis added). A party requesting a finding of unavailability in order to introduce a witness's prior testimony must make a "good-faith" effort to secure the witness's attendance at trial. *State v. Edwards*, 136 Ariz. 177, 182 (1983). "Ordinarily, a good-faith

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[5] The State urges us to apply a fundamental error standard of review, because Defendant did not raise at the time of trial the constitutional issues he now raises on appeal. Although Defendant did not alert the trial court to the possible constitutional issues stemming from its decision, he clearly preserved his challenge to the court's finding of C.H.'s availability for trial. Thus, we review that finding for an abuse of discretion.

effort . . . require[s] issuance of a subpoena and diligent efforts to serve it." *Id*.

¶9 The court abused its discretion in finding Defendant had failed to establish C.H.'s unavailability for trial. As he did before the first trial, Defendant served C.H. personally with a summons, and when C.H. did not appear, Defendant requested a bench warrant for C.H.'s arrest. When Defendant subsequently learned that he was procedurally required to serve C.H.'s mother, Defendant attempted to do so, but the mother evaded service. Defense counsel also spoke with C.H.'s mother, admonishing her to bring C.H. to court. And significantly, C.H.'s failure to appear is arguably attributable to the prosecutor's interference with law enforcement's attempt to arrest C.H. on the bench warrant, specifically directing that the officer not serve the warrant. On this record, the court's finding regarding C.H.'s unavailability was "clearly untenable, . . . or amount[ed] to a denial of justice." *See State v. Chapple*, 135 Ariz. 281, 297, n. 18 (1983) (explaining phrase "abuse of discretion" applies "where the reasons given by the court for its action are clearly untenable, legally incorrect, or amount to a denial of justice"). Based on the court's abuse of discretion in finding Defendant failed to sufficiently establish C.H.'s unavailability for trial, the court committed reversible error in denying Defendant's request to introduce C.H.'s prior testimony.[6]

CONCLUSION

¶10 Defendant's conviction is reversed. This matter is remanded to the superior court for further proceedings consistent with this decision.

AMY M. WOOD • Clerk of the Court
FILED: AA

[6] The State does not argue that the court's error was harmless. Also, based on our resolution of this issue, we need not address the remaining assertions of error raised by Defendant.