IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

DAVID RAY KENNEDY,
Appellant.

No. 2 CA-CR 2015-0082
Filed June 7, 2016

Appeal from the Superior Court in Cochise County
No. CR201200620
The Honorable Wallace R. Hoggatt
The Honorable James L. Conlogue, Judge

AFFIRMED

COUNSEL

Mark Brnovich, Arizona Attorney General
Joseph T. Maziarz, Section Chief Counsel, Phoenix
By Tanja K. Kelly, Assistant Attorney General, Tucson
Counsel for Appellee

Emily Danies, Tucson
Counsel for Appellant

MEMORANDUM DECISION

Judge Miller authored the decision of the Court, in which Presiding Judge Vásquez and Chief Judge Eckerstrom concurred.

M I L L E R, Judge:

¶1 After a jury trial, David Kennedy was convicted of first-degree murder and sentenced to natural life in prison. On appeal, he contends his Confrontation Clause rights were violated when the trial court permitted a witness's preliminary hearing testimony to be read at trial. For the following reasons, we affirm Kennedy's conviction and sentence.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to sustaining the jury's verdict. *State v. Peraza*, 239 Ariz. 140, ¶ 2, 366 P.3d 1030, 1033 (App. 2016). In October 2012, Kennedy and the victim, K.S., fought outside of a party Kennedy was hosting for several teenagers in his trailer home. Friends pulled the two apart and Kennedy went back inside his trailer. K.S. left his friends and started to return to Kennedy's trailer. Kennedy came back out and at some point stabbed K.S. in the torso under his right arm, ultimately killing him.

¶3 Kennedy left the scene, but eventually called one of the girls who had been at the party, saying he thought he had a concussion and he thought he had stabbed K.S. Kennedy was located, taken into custody, and interviewed. He eventually told detectives that K.S.'s death was his fault, but said he had blacked out and did not know what happened. Kennedy was initially charged by information with second-degree murder and later indicted for first-degree murder. The cases were consolidated, and Kennedy was convicted and sentenced as described above.

Confrontation Clause

¶4 Kennedy argues his right to confront witnesses was violated when the preliminary hearing testimony of prosecution witness A.O. was read to the jury. We review de novo a trial court's evidentiary ruling implicating the Confrontation Clause. *State v. Ellison*, 213 Ariz. 116, ¶ 42, 140 P.3d 899, 912 (2006).

¶5 The Confrontation Clause of the Sixth Amendment provides a defendant the right "to be confronted with the witnesses against him." U.S. Const. amend. VI.[1] When the state seeks to admit preliminary hearing testimony of a witness who did not appear at trial, the Confrontation Clause requires that the witness be unavailable and that the defendant had a prior opportunity for cross-examination. *Crawford v. Washington*, 541 U.S. 36, 68 (2004); *see also State v. Prasertphong*, 210 Ariz. 496, ¶¶ 8-9, 114 P.3d 828, 830 (2005).

¶6 The "opportunity" for cross-examination must be more than simply the bare chance; it must also be meaningful based on the situation. *See, e.g.*, *People v. Torres*, 962 N.E.2d 919, ¶¶ 63-65 (Ill. 2012) (where court limited questions and defense counsel not privy to inconsistent statements and immigration status of key witness at time of preliminary hearing, trial court erred in admitting preliminary hearing testimony); *Commonwealth v. Bazemore*, 614 A.2d 684, 687-88 (Pa. 1992) (defendant denied "full and fair opportunity" to cross-examine at preliminary hearing when credibility important to case and defense counsel not aware of witness's prior inconsistent statement to police, witness's criminal record, and charges planned against witness); *see also Watson v. Greene*, 640 F.3d 501, 509 (2d Cir. 2011) (noting "'meaningful'" opportunity required), *quoting Brinson v. Walker*, 547 F.3d 387, 392 (2d Cir. 2008); 2 George E. Dix et al., *McCormick on Evidence* § 302 (Kenneth S. Broun ed., 6th ed. 2006)

[1]Kennedy also cites Article II, § 24 of the Arizona Constitution in his opening brief, but provides no separate argument based on that provision. We therefore address his claim only under the United States Constitution. *Accord State v. Dean*, 206 Ariz. 158, n.1, 76 P.3d 429, 432 n.1 (2003).

(opportunity must be "meaningful in the light of the circumstances prevailing when the former testimony was given"). A lack of a meaningful opportunity is distinguishable from a tactical decision to limit cross-examination or to forego it entirely. *See, e.g.*, *United States v. Zurosky*, 614 F.2d 779, 792-93 (1st Cir. 1979) (when key issue was clear at suppression hearing, decision not to impeach witness statement was tactical); *Havey v. Kropp*, 458 F.2d 1054, 1056-57 (6th Cir. 1972) (defendant's limited cross-examination of witness at preliminary hearing done "at his own risk").

¶7 Kennedy does not dispute A.O.'s unavailability to testify at trial. He contends, as he did below, that although he had the opportunity to cross-examine A.O. at the preliminary hearing, he did not have a *meaningful* opportunity do so. He correctly observes that the state had disclosed limited information before the preliminary hearing and trial counsel had been appointed two weeks earlier.[2] From those facts, he concludes it was not possible to conduct an effective cross-examination of A.O.

¶8 Kennedy's argument, however, does not explain the effect of A.O.'s testimony or how cross-examination might have limited it. For instance, he does not refer to any later-disclosed evidence that would have been used in cross-examination, or show how additional time would have provided a better opportunity for cross-examination at the preliminary hearing. *Cf. Torres*, 962 N.E.2d 919, ¶¶ 62-65 (error in admitting preliminary hearing testimony when prior inconsistent statements and immigration status of witness had not been disclosed at time of hearing). In contrast, although Kennedy's counsel did not cross-examine A.O. during his brief testimony at the hearing, he did cross-examine the other fourteen witnesses. Moreover, at that time, counsel did not object to or otherwise indicate that the absence of cross-examination of this particular witness was due to problems in preparation.

¶9 Kennedy also relies on *State v. Montaño*, 204 Ariz. 413, ¶ 32, 65 P.3d 61, 69-70 (2003), in which our Supreme Court held that

[2]He also notes that counsel was out of town for four days of those two weeks.

appointment of counsel six weeks prior to the preliminary hearing was adequate to prepare for cross-examination. He reasons that if six weeks is sufficient, ten days is significantly less and cannot pass constitutional muster. But *Montaño* does not stand for the proposition that six weeks is a minimum time, or that there is a minimum time for any case. This is not to say that ten days will be enough time in every case; rather, Kennedy does not show why it was insufficient in light of the circumstances here by offering some explanation of what he would have asked A.O., or what evidence had not yet been disclosed. We cannot say the trial court abused its discretion by admitting the preliminary hearing testimony of A.O.

¶10 Even had the trial court erred, any error here would be harmless. *See State v. Bass*, 198 Ariz. 571, ¶ 39, 12 P.3d 796, 805-06 (2000) (reviewing Confrontation Clause violation for harmless error). "In deciding whether error is harmless, the question 'is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in this trial was surely unattributable to the error.'" *State v. Leteve*, 237 Ariz. 516, ¶ 25, 354 P.3d 393, 401 (2015), *quoting Sullivan v. Louisiana*, 508 U.S. 275, 279 (1993). We must find any error was harmless beyond a reasonable doubt to avoid reversal. *State v. Bible*, 175 Ariz. 549, 588, 858 P.2d 1152, 1191 (1993). An evidentiary error may be harmless if the evidence admitted is cumulative to other evidence admitted at trial. *See Bass*, 198 Ariz. 571, ¶ 40, 12 P.3d at 806. Evidence is cumulative it if it is "otherwise established by existing evidence." *Id.*

¶11 A.O.'s testimony generally established that K.S. and Kennedy had been fighting before the fatal stabbing. Specifically, A.O. testified that he was at Kennedy's house when K.S. arrived. He observed Kennedy go into his bedroom for a half hour and emerge looking angry. K.S. and a girl, R.P., went into the bathroom and came out, at which point Kennedy told K.S. to "get the fuck out of [his] house," because he had "touched one of [his] girls." Kennedy and K.S. started fighting outside, and Kennedy was on top of K.S. "smashing [his] face," with "something in his palm, some solid object." A.O. helped separate Kennedy, after which A.O. left. He did not know K.S. had been stabbed until the next day.

¶12 Seven other witnesses, including three defense witnesses, testified that they saw Kennedy get into a physical fight with K.S. outside the trailer. Three witnesses said it started with some sort of argument between K.S. and R.P., five testified that Kennedy told K.S. not to bother "[his] girls," and Kennedy told investigators during an interview that he was angry and "sticking up for" R.P. after she fought with K.S. Kennedy also admitted repeatedly during interviews with investigators that he told K.S. to "get the fuck out of" his trailer.

¶13 At trial, Kennedy's only apparent challenge to A.O.'s version of the first fight was a brief discussion in closing argument that there was insufficient evidence Kennedy beat K.S. with a stick. A.O.'s testimony was only that he saw something in Kennedy's hand, not that it was a stick. Moreover, at trial, three witnesses, including one defense witness, testified that they saw Kennedy hitting K.S. with a stick, and a stick found at the scene tested positive for K.S.'s blood. Because A.O.'s preliminary hearing testimony was cumulative to other evidence at trial, and the majority of it was not in dispute, any error in admitting it would have been harmless. *See State v. Williams*, 133 Ariz. 220, 226, 650 P.2d 1202, 1208 (1982) (erroneous admission of hearsay harmless where cumulative to testimony at trial).

Donald Hearing and Sentencing

¶14 In our review of the record, we noted a discrepancy between the range of possible sentences stated by the judge at the *Donald*[3] hearing and the mandatory sentence indicated in the judgment.[4] At the *Donald* hearing, the trial court informed Kennedy that if he was convicted of first-degree murder, he could be sentenced to natural life or life without the possibility of release until the completion of twenty-five calendar years. After his

[3]*See State v. Donald*, 198 Ariz. 406, 10 P.3d 1193 (App. 2000).

[4]The judge at the *Donald* hearing was different from the judge who presided over trial and sentencing.

conviction, however, the presentence report,[5] the sentencing minute entry, and the court's general statements all indicated that a natural life sentence was mandatory. We ordered supplemental briefing to address whether Kennedy's natural life sentence was mandatory.

¶15 Section 13-752(A), A.R.S., provides that when the state has not filed a notice of intent to seek the death penalty, the defendant was at least eighteen years old at the time of the commission of the offense, and the defendant is convicted of first-degree murder pursuant to A.R.S. § 13-1105(A)(1), as Kennedy was, "the court shall impose a sentence of natural life." The statute was amended in 2012; the previous version required the court to "determine whether to impose a sentence of life or natural life." 2012 Ariz. Sess. Laws, ch. 207, § 3.[6] The effective date of the change was August 2, 2012, and Kennedy committed first-degree murder on October 21, 2012. The trial court did not err by sentencing Kennedy to a mandatory term of natural life.

¶16 Further, because the trial court's misstatement does not involve the trial that occurred, but the defendant's decision to go to trial made with advice of counsel, the effect of the misstatement cannot be considered on direct appeal. The purpose of a pre-trial *Donald* hearing is to ensure that the defendant is aware of the plea offer and consequences of conviction, and provide a record in the

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[5] The presentence report incorrectly states the sentence is mandatory pursuant to A.R.S. § 13-751(A)(1), but that subsection details that the trial court must choose between the death penalty or natural life when the state files a notice of intent to seek the death penalty. The mandatory imposition of natural life sentences is found in A.R.S. § 13-752(A).

[6] As a result of the statutory change, the choice between life and natural life when the state has not filed a notice of intent to seek the death penalty is now limited to cases in which the defendant was under the age of eighteen at the time of the offense or is convicted of first-degree murder pursuant to the felony murder statute, § 13-1105(A)(2). § 13-752(A).

event of a later claim of ineffective assistance of counsel.[7] *See State v. Donald*, 198 Ariz. 406, ¶¶ 14, 17, 10 P.3d 1193, 1200 (App. 2000); *see also Missouri v. Frye*, ___ U.S. ___, ___, 132 S. Ct. 1399, 1408-09 (2012) (noting Arizona courts hold *Donald* hearings to make "formal [plea] offers . . . part of the record," and "to help ensure against late, frivolous, or fabricated claims [of ineffective assistance] . . . after a trial"). Analysis of the effect of the trial court's statement on Kennedy's decision requires analysis of trial counsel's performance, which must be raised in proceedings pursuant to Rule 32, Ariz. R. Crim. P. *State v. Spreitz*, 202 Ariz. 1, ¶ 9, 39 P.3d 525, 527 (2002).

Disposition

¶17 For the foregoing reasons, we affirm Kennedy's conviction and sentence.

[7]As noted in *Donald*, there is "no constitutional right to [a] plea bargain." 198 Ariz. 406, ¶ 14, 10 P.3d at 1200. Although entering a guilty plea is a waiver of federal constitutional rights that must be done knowingly and voluntarily, *see Boykin v. Alabama*, 395 U.S. 238, 242-43 (1969), the Supreme Court has never extended this requirement to the rejection of plea offers, *United States v. Forrester*, 616 F.3d 929, 939 (9th Cir. 2010). A claim that a defendant would not have rejected a plea bargain if properly advised, however, is cognizable within a claim of ineffective assistance of counsel. *Donald*, 198 Ariz. 406, ¶ 14, 10 P.3d at 1200.