IN THE
# ARIZONA COURT OF APPEALS
DIVISION TWO

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THE STATE OF ARIZONA,
*Appellee,*

*v.*

CHRISTIAN BETZA VASQUEZ,
*Appellant*.

No. 2 CA-CR 2015-0337
Filed May 24, 2016

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THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
*See* Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Crim. P. 31.24.

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Appeal from the Superior Court in Pima County
No. CR20110455002
The Honorable Scott Rash, Judge

**AFFIRMED**

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COUNSEL

Mark Brnovich, Arizona Attorney General
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*Counsel for Appellee*

Nicole Farnum, Phoenix
*Counsel for Appellant*

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**MEMORANDUM DECISION**

Presiding Judge Howard authored the decision of the Court, in which Judge Espinosa and Judge Staring concurred.

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H O W A R D, Presiding Judge:

**¶1** After a jury trial, Christian Vasquez was convicted on twenty-three counts, including but not limited to first-degree murder, first-degree burglary, kidnapping, armed robbery, and aggravated assault. On appeal, Christian argues the trial court erred by allowing his mother's inculpatory, previous-trial testimony to be admitted in her absence because, Christian contends, she was not unavailable and he did not have a prior chance to cross-examine her. Because we find no error, we affirm.

**Factual and Procedural Background**

**¶2** "'We view the facts in the light most favorable to sustaining the convictions.'" *State v. Rivera*, 226 Ariz. 325, ¶ 2, 247 P.3d 560, 562 (App. 2011), *quoting State v. Robles*, 213 Ariz. 268, ¶ 2, 141 P.3d 748, 750 (App. 2006). But we take the facts concerning the first trial from our opinion reversing Christian's first conviction. *State v. Vasquez*, 233 Ariz. 302, ¶¶ 1, 23, 311 P.3d 1115, 1117, 1122 (App. 2013).

**¶3** At their first trial, over their objection, Christian and his brother Orel were tried together. *Id.* ¶¶ 1, 6. The evidence showed that in August 2009, Christian was involved in an armed robbery along with Orel, his cousin J.L., and two other men at a private residence in Tucson. *Id.* ¶ 2. During the commission of this robbery, Orel shot a fifteen-year-old girl with a rifle and killed her. *Id.*

**¶4** At the first trial, J.L. testified against Christian and Orel as part of an agreement with the state. *Id.* ¶ 3. He testified that the brothers participated in the robbery, and that "[a] shot went off." *Id.* Christian's mother also testified, recanting statements she previously made to police indicating that Christian and Orel had

implicated themselves before fleeing to Mexico. *Id.* ¶ 4. Their mother originally told police

> Christian had told her he had been present at the scene of the home invasion, the victim had been accidentally shot with a rifle, he had not pulled the trigger, and he was going to Mexico because he was scared. Orel had told her that he, too, had been present at the crime scene and was going to Mexico because he was "scared for the same thing." [Their mother] further reported that she had overheard her sons talking about going to the house to get drugs before the crimes were committed.

*Id.* These statements were introduced in evidence. *Id.* But, their mother "insisted these statements were all lies she had told in response to threats by police." *Id.* Based on the record on appeal in that case, Orel cross-examined their mother, but Christian did not. Orel focused his cross-examination on how a detective allegedly threatened and pressured their mother into lying.

**¶5** After the close of testimony, the jury found Christian and Orel guilty of all the charged offenses. *Id.* ¶ 6. On appeal, this court held that the trial court erred by denying the motion to sever, and we reversed the convictions and sentences and remanded for further proceedings. *Id.* ¶ 23.

**¶6** As the time of Christian's second trial approached, the state could not locate his mother and moved pretrial to admit her prior testimony. After a hearing, the court ruled her testimony admissible under Rule 804, Ariz. R. Evid.

**¶7** At the second, separate trial against Christian, the state produced basically the same testimony. But Orel testified for the first time and avowed that Christian had not taken part in the crimes. At the conclusion of the trial, a jury again convicted Christian on the same twenty-three charges. This appeal followed.

We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1) and 13-4033(A)(1).

## Discussion

**¶8** Christian argues that the admission of his mother's prior testimony violated the Confrontation Clause. "The Confrontation Clause prohibits the admission of testimonial hearsay unless (1) the declarant is unavailable and (2) the defendant 'had a prior opportunity to cross-examine' the declarant." *State v. Armstrong*, 218 Ariz. 451, ¶ 32, 189 P.3d 378, 387 (2008), *quoting Crawford v. Washington,* 541 U.S. 36, 59 (2004). In support of this argument, Christian cites Rule 804, Ariz. R. Evid., which makes prior testimony admissible only if the witness is "unavailable" and if the party against whom the testimony is offered "had the right and opportunity to cross-examine the declarant with an interest and motive similar to that which the party now has." We review an unavailability determination in a Confrontation Clause analysis for an abuse of discretion, *Rivera*, 226 Ariz. 325, ¶ 12, 247 P.3d at 564, but "we review 'challenges to admissibility based on the Confrontation Clause' de novo," *State v. Foshay*, 735 Ariz. Adv. Rep. 4, ¶ 29 (Ct. App. Mar. 23, 2016), *quoting State v. Ortiz*, 238 Ariz. 329, ¶ 27, 360 P.3d 125, 133 (App. 2015).

### Witness Unavailability

**¶9** In order for a trial court to find a witness unavailable "'for purposes of the . . . exception to the confrontation requirement'" the state must "'have made a *good-faith effort* to obtain [her] presence at trial.'" *Rivera,* 226 Ariz. 325, ¶ 13, 247 P.3d at 564, *quoting State v. Montano*, 204 Ariz. 413, ¶ 25, 65 P.3d 61, 68 (2003). "And a good faith search means that 'obvious and essential leads must be investigated.'" *Id.*, *quoting State v. Edwards*, 136 Ariz. 177, 182, 665 P.2d 59, 64 (1983). "'The length to which the state must go to produce a witness is a question of reasonableness.'" *Id.*, *quoting Montano*, 204 Ariz. 413, ¶ 26, 65 P.3d at 68. But "[i]t is within the discretion of the trial court to determine whether the State has made a sufficient effort to locate the witness." *Edwards*, 136 Ariz. at 181, 665 P.2d at 63. The defendant must identify the leads the state failed to follow. *Montano*, 204 Ariz. 413, ¶ 31, 65 P.3d at 69.

**¶10** Christian cites *State v. Edwards*, 136 Ariz. 177, 665 P.2d 59, and *State v. Montano*, 204 Ariz. 413, 65 P.3d 61, to support his contention that the state did not make reasonable efforts to locate his mother for the second trial. In *Edwards*, the state put forth evidence that the prosecuting attorney had tasked an investigator with finding a witness two weeks before trial. 136 Ariz. at 181, 665 P.2d at 63. The investigator contacted a utility company, the witness's brother, the witness's mother, checked city police and county sheriff records, telephone directories, and also contacted the Department of Economic Security and the district attorney in Seattle. *Id.* at 181-82, 665 P.2d at 63-64.

**¶11** The court found the search was not conducted in good faith, however, because the investigator did not explore an address included in a bench warrant that was designed to secure the witness's attendance at trial. *Id.* at 182, 665 P.2d at 64. Additionally, it noted the state's investigator failed to check on six additional addresses found in a police record, and did not question the witness's boyfriend, who was known at the time. *Id.* The court reasoned that although "'a good faith search does not mean that every lead . . . must be'" followed, "the obvious and essential leads must be investigated." *Id.*, *quoting State v. Greer*, 27 Ariz. App. 197, 201, 552 P.2d 1212, 1216 (1976), *overruled on other grounds by State v. Hughes*, 120 Ariz. 120, 128, 584 P.2d 584, 592 (App. 1978).

**¶12** In *Montano*, our supreme court considered what constituted a good-faith effort in the context of unavailable witnesses who were, or were believed to be, out of the country. 204 Ariz. 413, ¶¶ 22-28, 65 P.3d at 68-69. In that case, the state suspected that two witnesses had returned to Mexico after testifying at a preliminary hearing. *Id.* ¶¶ 21-22. The state's investigator was able to locate one of them, make contact, and serve him with a subpoena. *Id.* ¶ 23. That witness was in contact with the state up until two weeks before the trial. *Id.* As to the other witness, the investigator was able to make contact with a relative, who informed the state the witness was willing to come back. *Id.* ¶ 22. The state purchased plane tickets, but the witness never boarded the plane. *Id.*

**¶13** As to the subpoenaed witness, the court held that the state had made a good-faith effort, noting that in a good-faith search analysis, "'[t]he true issue is whether the state made a good faith effort to *locate* the witness so that he . . . could be put under subpoena.'" *Id.* ¶ 29, *quoting State v. Gonzales*, 181 Ariz. 502, 509, 892 P.2d 838, 845 (1995). As to the non-subpoenaed witness, the court found that, although the state had not "contacted the Mexican legal authorities to enlist their assistance," the trial court did not abuse its discretion in finding the state had acted in good faith in attempting to locate the witness for trial. *Id.* ¶¶ 30-31. The court ruled "[t]he [defendant] ha[d] not convincingly pointed out, as *Edwards* requires, what 'leads . . . were not followed.'" *Id.* ¶ 31, *quoting Edwards*, 136 Ariz. at 182, 665 P.2d at 64.

**¶14** Christian's case is distinguishable from *Edwards* and similar to *Montano*. Here, the state's investigator testified at a hearing that, while attempting to subpoena Christian's mother, he "went several times to [a possible] address," "left a card" for her to contact him, and eventually contacted the witness's other son. The son said that his mother had since moved to live with "some boyfriend," and because of a falling out, he was unaware who this boyfriend was or where he lived. The investigator attempted to follow the son, but he did not leave the house at any time while the investigator was conducting surveillance.

**¶15** The investigator then attempted to find any known associates with help from an analyst at the Pima County Attorney's Office. This analyst "check[ed] Border Patrol, . . . [Arizona Crime Information Center], [National Crime Information Center]," and driver's license records but this search returned no useful results. The investigator could not find any other address for the mother, and his request for assistance from the Tucson Police Department, which included a utilities check and a department of corrections check by a second analyst, did not produce any further addresses. Based on the information compiled by these analysts, the investigator attempted to contact a person believed to be the mother's sister or sister-in-law, but he was unable to reach this person at their home.

**¶16** The investigator also "requested the visitor log from the jail," from which he learned that "a couple of friends were visiting [Christian]" but that the mother had not been to the jail in ten months. Based on his review of the visitor log, the investigator attempted to follow up with two individuals, one of whom was possibly the mother's boyfriend or ex-husband, but he was unable to contact either of these individuals directly. One of the analysts also checked the visitation log at the prison where Orel is incarcerated, to no effect. The investigator also had Christian and Orel's cells searched in an attempt to find information regarding the mother, but these searches produced no information.

**¶17** Finally, the investigator ran the registration information for a pickup truck associated with one of the addresses he had been investigating in conjunction with his search for the mother. This truck was found to be registered in Nogales, so the investigator contacted the Nogales Police Department to determine whether the owners of the truck had any information about the mother or her whereabouts; the Nogales police were unable to provide any information.

**¶18** On cross-examination, the investigator admitted he did not make contact with the mother's nephew, one of her sisters, her mother-in-law, or Christian's father, because he did not have information about them. He also testified he had been unaware that the mother and her family were from Magdalena, Mexico. The investigator did either contact or attempt to contact the mother's sister or sister-in-law and three of her sons. Further, the investigator admitted he did not attempt to locate the mother in Mexico, but said he never had any information placing her in Mexico. Based on this testimony, the trial court found the state demonstrated it had made a good-faith effort to locate the mother.

**¶19** We cannot say that the trial court abused its discretion here. Based on *Edwards* and *Montano*, the state was required to show that it made a good-faith effort, and Christian needed to demonstrate that the state failed to pursue "obvious and essential leads." *Edwards*, 136 Ariz. at 182, 665 P.2d at 64; *see also Montano*, 204 Ariz. 413, ¶ 31, 65 P.3d at 69 (defense must show uninvestigated leads). Christian asserts that the state knew or should have known

that his mother's family lived in Mexico because Christian and his co-defendants were apprehended in Mexico. He also claims "[t]here were several other people the State also could have contacted such as neighbors, relatives, and employers."

**¶20** But Christian misconstrues either the state's burden or the investigator's testimony. As to his argument that the state failed to investigate whether his mother was residing in Mexico, Christian has not pointed to any "obvious and essential" leads that she had fled to Mexico. *Edwards*, 136 Ariz. at 182, 665 P.2d at 64. In fact, none of the evidence the state accrued suggested this; neither her son nor the Border Patrol gave any indication that she was residing in Mexico, and her son indicated she was living with a "boyfriend." And although Christian and his co-defendants were apprehended in Mexico, their mother was residing in the United States at the time of the first trial.

**¶21** As to the mother's neighbors and relatives, the state contacted her son and attempted to contact an individual believed to be her ex-husband or boyfriend, as well as one of her friends. Christian does not identify any "obvious or essential" information suggesting anyone else who would have had information regarding her whereabouts. And as to her previous employers, the investigator testified he did not attempt to contact anyone because her other son had informed him she was not working.

**¶22** Finally, Christian contends the state would have successfully served his mother had they attempted service sooner. In September 2014, the trial court originally set Christian's second trial date for May 5, 2015. But the date was continued to August 11 on a motion from the State in which defense counsel joined. The investigator testified he attempted to serve the mother on July 10, 2015. B.V. said his mother had left the house where they had lived together in February 2015.

**¶23** Christian has not pointed to any evidence that the state knew or should have known his mother was going to be unavailable later in the year. And he has not cited any authority suggesting the state has a duty to serve witnesses more than two months before the first re-trial setting, as would have been required here. Thus,

Christian has failed to explain how any delay in attempting to serve his mother constitutes a lead that the state failed to investigate, and he has waived the argument to the extent it is offered for any other purpose. *See State v. Bolton*, 182 Ariz. 290, 298, 896 P.2d 830, 838 (1995) (insufficient argument on appeal constitutes wavier of that argument).

**¶24** In sum, Christian has not identified any evidence that the state knew or should have known that his mother was residing in Mexico at the time of the second trial; nor has he persuaded us that the state failed to reasonably follow available leads in the United States. *See Montano*, 204 Ariz. 413, ¶ 31, 65 P.3d at 69. Christian has not met his burden and the trial court did not abuse its discretion in finding his mother unavailable to testify.

**Opportunity to Cross-Examine**

**¶25** Christian also contends that his mother's testimony should not have been admitted because he did not cross-examine her during the first trial. He claims that, because Orel testified at the second trial that he had not been involved in the crimes, his defense strategy had changed and "his interest and motive was not similar to his first trial."

**¶26** As noted above, the Confrontation Clause requires that a "defendant 'had a prior opportunity to cross-examine' the [unavailable] declarant." *Armstrong*, 218 Ariz. 451, ¶ 32, 189 P.3d at 387, *quoting Crawford*, 541 U.S. at 59. Rule 19.3(c)(1)(i), Ariz. R. Crim. P., and Rule 804(b)(1)(a), Ariz. R. Evid., permit admission of prior recorded testimony of an unavailable witness when the party against whom testimony is offered had a right to cross-examine the witness "with an interest and motive similar to that which the party now has." We review a trial court's decision on whether "defense counsel had sufficient opportunity to cross-examine [a] witness at [a] prior proceeding" for an abuse of discretion. *State v. Schad*, 129 Ariz. 557, 569, 633 P.2d 366, 378 (1981).

**¶27** Christian's attempt to explain how Orel's favorable testimony affected his trial strategy is unpersuasive. He strategically chose not to cross-examine his mother at the first trial, although his

motive and interest at that time were to demonstrate he was not present at the commission of the crime. In both cases, Christian faced felony-murder charges, and therefore had the same interest and motive to challenge his mother's statements to police that he had admitted being involved in the crime. *See Schad*, 129 Ariz. at 568-69, 633 P.2d at 377-78 (holding interest and motive similar where issue at prior proceeding was voluntariness and later issue was guilt). Additionally, his mother insisted her earlier statements to police were untrue, *Vasquez*, 233 Ariz. 302, ¶ 4, 311 P.3d at 1117, and Christian does not explain how any further cross-examination could have strengthened this testimony. Although his strategy may have changed at trial, his motive and interest were the same; therefore, he was afforded an adequate opportunity at his first trial to cross-examine his mother. The admission of her statements was not a violation of the Confrontation Clause or the rules of evidence. *See Armstrong*, 218 Ariz. 451, ¶ 32, 189 P.3d at 387; *see also Crawford*, 541 U.S. at 59; Ariz. R. Evid. 804(b)(1)(a); Ariz. R. Crim. P. 19.3(c)(1)(i).

## Disposition

**¶28** For the foregoing reasons, we affirm Christian's convictions and sentences.