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See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE



DIVISION ONE
FILED: 04/05/11
RUTH WILLINGHAM,
ACTING CLERK
BY: DLL

STATE OF ARIZONA,) No. 1 CA-CR 08-0508
)
Appellee,) DEPARTMENT A
)
v.) **MEMORANDUM DECISION**
) (Not for Publication -
ROBERT S. ORTLOFF,) Rule 111, Rules of the
) Arizona Supreme Court)
Appellant.)
)
_____)

Appeal from the Superior Court of Maricopa County

Cause No. CR 2003-032707-001 SE

The Honorable Warren J. Granville, Judge

AFFIRMED

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By Kent E. Cattani, Chief Counsel
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T H O M P S O N, Judge

¶1 Robert S. Ortloff (defendant) appeals his convictions for first degree murder, burglary in the first degree, and arson of a residential structure. Defendant argues that he was denied a fair trial due to prosecutorial misconduct and evidentiary error. For reasons that follow, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 On the morning of October 5, 1984, L.P. and her grandmother were on the sidewalk outside their condominium unit. L.P. heard a door slam and saw a young man near the door of condominium of their next door neighbor, Kathleen Smith. The man ran past L.P. and her grandmother and then disappeared into the interior portion of the complex. L.P. noticed smoke coming from Smith's condominium and called 9-1-1.

¶3 The fire department responded and found the interior of Smith's condominium on fire. After extinguishing the flames, firemen discovered a body of a female victim on the floor of an inside hallway with her face burned beyond recognition and a large laceration on the back of her head. A fire investigator determined the fire had been deliberately set using gasoline poured on the victim as an accelerant.

¶4 The victim was identified through dental records as Kathleen Smith. The medical examiner who performed the autopsy concluded that the cause of death was thermal burns, meaning Smith had been alive when set on fire. However, a second

medical examiner who reviewed the file in 2007, however, reached a different conclusion. Based on the lack of damage to Smith's lungs and airways and the absence of carbon monoxide build-up in her body, this medical examiner opined that Smith had been killed prior to her body being burned and that her death was the result of homicidal violence, which included a blow to the head and blunt force trauma to the chest.

¶5 Almost from the outset, the investigation of Smith's murder focused on Ortloff, Smith's partner in a Subway franchise they were in the process of opening. Family and friends described Smith, a twenty-year-old college student at the time of her death, as a strong woman who would have likely fought with her attacker. When Ortloff was interviewed by the police several hours after Smith's body was discovered, he had scratch marks and abrasions on his neck, bruises on his chest and an injured right foot. When asked about his injuries, Ortloff attributed the abrasions on the right side of his neck to shaving and the scratches on the left to having a shelf fall on him at work. Ortloff further stated that the injury to his foot occurred when he kicked a cabinet after hearing of Smith's death and that he received the bruises on his chest in an automobile accident.

¶6 Later that same day, the police showed L.P. a photograph line-up that included a picture of Ortloff. L.P. was

unable to make a positive identification, but pointed out the picture of Ortloff as being "similar" or "closest in appearance" to the young man she saw running from Smith's condominium that morning.

¶7 A number of months prior to Smith's murder, Ortloff had enlisted Smith in an effort to obtain a Subway franchise after he had been unsuccessful in obtaining a franchise on his own. Smith was attractive as a business partner because the person responsible for approving Subway franchises trusted her and she could obtain funding for the business through her father. Smith's father agreed to finance the venture and co-signed a \$50,000 line of credit for the business, but demanded that authority to write checks on the business account be limited to Smith.

¶8 As part of their partnership, Ortloff and Smith obtained \$25,000 "keyman" insurance policies on each other. In addition, Ortloff arranged for a \$100,000 life insurance policy on Smith with him as the beneficiary that went into effect on October 1, 1984, four days prior to her death. The evidence at trial suggested Smith was unaware of this second insurance policy.

¶9 In the days immediately prior to her murder, Smith noticed that money was missing from the business account and that one of the business checkbooks was missing. Smith informed

a friend that she intended to go to the bank to check on the missing money and the friend told Ortloff about Smith's intentions. The police reviewed bank statements and cancelled checks for the business account following Smith's death and discovered that on October 1, 1984, Ortloff wrote a check on the business account in the amount of \$7,000 payable to his father. The check was deposited by Ortloff that same day in his father's account. When questioned by the police, Ortloff admitted to writing the check for expenses and for a debt he owed to his parents.

¶10 Ortloff's girlfriend initially told the police that Ortloff had been with her the morning of the murder. She later admitted this was not true and stated she lied at Ortloff's request. At trial, she also testified that sometime between October 1 and October 4, 1984, she found a checkbook for the Subway business account in the Ortloff's family flower shop where she and Ortloff worked. When she asked Ortloff about the checkbook, he told her that he had written a check and was waiting for it to clear before returning it to Smith. She further testified that in April or May 1985, Ortloff suggested that they go to Las Vegas and get married because a wife does not have to testify against a husband.

¶11 In 1986, the findings of the police investigation into Smith's murder were forwarded to the Maricopa County Attorney's

Office with a request that Ortloff be charged with her murder, but prosecution was declined. Later that same year, Ortloff was convicted on federal charges stemming from an unrelated attempt to murder a U.S. Army soldier with a mail bomb and sentenced to federal prison.

¶12 In 1999, F.T., a federal inmate serving life in prison for murder, contacted investigators with information concerning Smith's death. F.T. was an ex-prosecutor and ex-judge imprisoned in the same federal facility as Ortloff. At trial, F.T. testified that Ortloff approached him for legal assistance in filing a habeas petition in regards to his federal convictions. According to F.T., over the course of several meetings during which they discussed how to proceed with Ortloff's habeas petition, Ortloff confessed to killing Smith to silence her as a witness to his theft from the business account and to obtain the insurance proceeds. F.T. also testified that Ortloff prepared eighty-eight pages of handwritten notes during their time together and gave F.T. a photocopy for his use in assisting with the habeas petition. F.T. turned over the copy of the notes to investigators and it was admitted as an exhibit to corroborate his testimony.

¶13 In May 2003, Ortloff was indicted in the Smith case for first degree murder, a class 1 dangerous felony; burglary in the first degree, a class 2 dangerous felony; and arson of an

occupied structure, a class 2 dangerous felony. The state gave notice of intent to seek the death penalty, but the notice was withdrawn after the determination by the second medical examiner that Smith was dead before her body was doused with gasoline and set on fire. In March 2004, J.B., a former federal inmate who was a cellmate of Ortloff for six months from late 1986 to early 1987, contacted investigators and provided additional information regarding statements and conduct by Ortloff while in prison evidencing his involvement in Smith's murder.

¶14 Upon trial to a jury in early 2008, Ortloff was found guilty as charged on all counts. Ortloff moved for a new trial alleging various grounds, including prosecutorial misconduct. The trial court denied the motion for new trial and sentenced Ortloff to life in prison on the murder conviction, a concurrent seven-year term of imprisonment on the burglary conviction, and a consecutive seven-year term of imprisonment on the arson conviction. The trial court further directed the sentences be served consecutive to Ortloff's federal sentences. Ortloff timely appealed. We have jurisdiction pursuant to Article 6, Section 9 of the Arizona Constitution and Arizona Revised Statutes (A.R.S.) sections 12-120.21(A)(1) (2003), 13-4031, and -4033(A) (2010).

DISCUSSION

A. Allegations of Prosecutorial Misconduct

¶15 Ortloff contends he was denied due process and a fair trial due to prosecutorial misconduct. The trial court rejected the claims of prosecutorial misconduct raised by Ortloff in his motion for new trial based on findings that there had been no improper conduct by the prosecutor. A trial court's ruling denying a motion for new trial alleging prosecutorial misconduct will not be reversed absent abuse of discretion. *State v. Hansen*, 156 Ariz. 291, 297, 751 P.2d 951, 957 (1988).

¶16 In reviewing claims of prosecutorial misconduct, our "focus is on the fairness of the trial, not the culpability of the prosecutor." *State v. Bible*, 175 Ariz. 549, 601, 858 P.2d 1152, 1204 (1993). "[Prosecutorial] [m]isconduct alone will not cause a reversal, but only where the defendant has been denied a fair trial as a result of the actions of counsel." *State v. Hallman*, 137 Ariz. 31, 37, 668 P.2d 874, 880 (1983). "To prevail on a claim of prosecutorial misconduct, a defendant must demonstrate that the prosecutor's misconduct 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" *State v. Hughes*, 193 Ariz. 72, 79, ¶ 26, 969 P.2d 1184, 1191 (1998) (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974)).

¶17 Ortloff's principal claim of prosecutorial misconduct revolves around a shoeprint left in a flower bed situated next to the sidewalk outside L.P.'s condominium and photographed by

the police during their investigation. Based on witness statements that the young man who ran from Smith's condominium slipped in some mud in the area of the shoeprint, the prosecutor believed that the shoeprint may have been left by Ortloff while fleeing the scene. After examining Ortloff's feet, however, a podiatrist retained by the state concluded that the shoeprint could not be Ortloff's because his foot size is substantially larger than that of the shoeprint.

¶18 Ortloff contends the prosecutor engaged in misconduct by altering his pre-trial theory that the shoeprint was left by the killer after it was determined that the shoeprint could not be his. Ortloff argues that the advancement of inconsistent and irreconcilable factual theories during his prosecution rendered his trial fundamentally unfair and a denial of due process. We find no merit to this argument.

¶19 In support of his argument, Ortloff cites decisions holding that a due process violation occurs when the government uses inconsistent, irreconcilable theories to secure convictions against two or more persons. See, e.g., *Smith v. Goose*, 205 F.3d 1045, 1051 (8th Cir. 2000); *Thompson v. Calderon*, 120 F.3d 1045 (9th Cir. 1997), rev'd, 523 U.S. 538 (1998); *In re Sakarias*, 106 P.3d 931, 944 (Cal. 2005). The California Supreme Court explained the reasoning for finding a due process violation under such circumstances as follows:

By intentionally and in bad faith seeking a conviction or death sentence for two defendants on the basis of culpable acts for which only one could be responsible, the People violate "the due process requirement that the government prosecute fairly in a search for truth." (*Smith, supra*, 205 F.3d at p. 1053.) In such circumstances, the People's conduct gives rise to a due process claim (under both the United States and California Constitutions) similar to a claim of factual innocence. Just as it would be impermissible for the state to punish a person factually innocent of the charged crime, so too does it violate due process to base criminal punishment on unjustified attribution of the same criminal or culpability-increasing acts to two different persons when only one could have committed them. In that situation, we know that someone is factually innocent of the culpable acts attributed to both. (See *Prosecutorial Inconsistency, supra*, 89 Cal. L.Rev. at p. 425 ["When the prosecution advances a position in the trial of one defendant and then adopts an inconsistent position in the trial of another on the same facts, the prosecution is relying on a known falsity"].)

Sakarias, 106 P.3d at 944.

¶20 Here, there was no was no inconsistent theory of guilt advanced by the prosecutor. Throughout the prosecution, the state never changed its theory that Ortloff and only Ortloff was the person who murdered Smith. The fact that the prosecutor at one point entertained the belief that the shoeprint might help link Ortloff to the crime and sought to have that possibility investigated did not in any sense deprive Ortloff of due process or a fair trial. The determination by the podiatrist that the

shoeprint could not have been left by Ortloff was promptly disclosed to the defense more than two years before trial. Furthermore, the state presented the podiatrist's conclusions regarding the shoeprint at trial for the jury's consideration in deciding the issue of guilt. Under these circumstances, we fail to perceive how the prosecutor's original belief about the evidentiary value of the footprint prejudiced Ortloff at trial. See *State v. Cruz*, 218 Ariz. 149, 165, ¶¶ 90-95, 181 P.3d 196, 212 (2008) (holding no denial of due process in conflicting opinion by member of prosecution team on exculpatory value of DNA evidence).

¶21 In conjunction with his claim that the prosecutor advanced inconsistent, irreconcilable theories, Ortloff argues that the prosecutor further engaged in misconduct by presenting witnesses with "wholesale material changes" in their testimony pertaining to the shoeprint. Specifically, Ortloff asserts that L.P. and three detectives testified inconsistently with their prior statements to minimize the shoeprint evidence. Ortloff contends the prosecutor was responsible for manipulating their testimony regarding the shoeprint and violated his duty to disclose the changes in their testimony under Rule 15.1 of the Rules of Criminal Procedure.

¶22 A conviction obtained by the knowing use of perjured testimony is fundamentally unfair and requires reversal. *United*

States v. Agurs, 427 U.S. 97, 103 (1976). Mere inconsistency in testimony by governmental witnesses, however, does not establish knowing use of false testimony. *United States v. Sherlock*, 962 F.2d 1349, 1364 (9th Cir. 1989). Indeed, the Rules of Evidence contemplate that differences will exist between trial testimony and prior statements of a witness and expressly authorize the admission of prior inconsistent statements for non-hearsay use. Ariz. R. Evid. 801(d)(1). The record in the present case is devoid of any evidence that the prosecutor knowingly induced or encouraged the witnesses to alter their testimony or to testify to anything but the truth, and "we do not presume that the prosecutor used false testimony." *Sherlock*, 962 F.2d at 1364.

¶23 As for the argument that the prosecutor violated his disclosure obligations under Rule 15.1 of the Rules of Criminal Procedure by not informing the defense that the witnesses might testify inconsistent with their prior statements, Ortloff cites no authority for this proposition and we are not aware of any such requirement. "The criminal discovery rules do not require the state to provide a word-by-word preview to defense counsel of the testimony of the state's witnesses." *State v. Guerrero*, 119 Ariz. 273, 276, 580 P.2d 734, 737 (App. 1978) (quoting *State v. Wallen*, 114 Ariz. 355, 361, 560 P.2d 1262, 1268 (App. 1977)). Rule 15.1(a)(1) only requires that the state disclose the names and addresses of all the state's witnesses together with their

relevant written or recorded statements. *State v. Williams*, 183 Ariz. 368, 379, 904 P.2d 437, 448 (1995). No allegation is made that the prosecutor failed to comply with these disclosure requirements.

¶24 We further reject Ortloff's claim that the prosecutor engaged in misconduct by improperly manipulating the testimony of L.P. regarding the photographic line-up. L.P. was fourteen-years old when she observed the man run from Smith's condominium and subsequently viewed the photographic line-up that included Ortloff. Detectives involved in showing the photographic line-up to L.P. testified that L.P. did not make a positive identification, but instead selected a picture of Ortloff as well as a picture of another man as being "closest in appearance" to the man she saw running. In her testimony at trial, L.P. stated that she only recalls selecting one picture of Ortloff as being "similar" to the man she saw and does not remember selecting a second person from the line-up. She further testified that she "believes" that the picture she selected was that of the man she saw running.

¶25 Ortloff argues that, in light of the other testimony that L.P. did not make a positive identification of him, the prosecutor engaged in misconduct in offering testimony from L.P. that she does not recall selecting more than one photograph from the line-up and that she believes the picture she selected was

the man she saw the morning of the murder. We disagree. The prosecutor merely presented all the testimony available on this subject at trial. No effort was made to mislead or deceive the jury regarding her testimony. The jury was fully apprised that L.P. did not have a good memory of the photographic line-up and that portions of her testimony were contradicted by the detectives' testimony. No claim is made by Ortloff that L.P. did not testify truthfully to the best of her ability and memory. Absent some showing that L.P. was in fact committing perjury in her testimony regarding the photographic line-up and the prosecutor was aware of her perjury, there was nothing improper in the prosecutor presenting her testimony for the jury's consideration. *United State v. Baker*, 850 F.2d 1365, 1371-72 (9th Cir. 1988).

¶126 In addition, we find no merit in Ortloff's claim that the prosecutor engaged in misconduct by presenting evidence and advancing arguments that were allegedly subject to refutation by witnesses who died prior to trial and were therefore unavailable to testify on his behalf. First, our review of the record fails to find support for his assertion that these witnesses would necessarily refute the state's evidence against him. Second, as the trial court observed in denying this claim in the motion for new trial, the Rules of Evidence provide for the admission of evidence of unavailable witnesses, and it was Ortloff's

obligation to preserve their testimony in accordance with the Rules of Evidence in order to present it at trial. It is axiomatic that a defendant wanting to refute the state's case must do so by offering contrary evidence at trial, not by alleging a claim of prosecutorial misconduct based on out-of-court statements of non-testifying witnesses.

¶27 Ortloff also alleges that the prosecutor engaged in various miscellaneous acts of misconduct such as attempting to get the jury to promise to consider convicted felon jailhouse informants the same as any other witness, referring to inadmissible evidence during jury selection, attempting to introduce undisclosed evidence, saving vital evidence to his case for rebuttal so it could not be confronted by defense counsel, expressing his personal opinion, having witnesses vouch for other witnesses, repeatedly denigrating defense counsel, and posing leading questions. The allegations are listed serially in one paragraph with no serious effort made to develop any argument on each point. A review of the portions of the record cited by Ortloff in connection with the allegations reveals that many of the allegations are devoid of support in the record. For example, with respect to the allegation that the prosecutor attempted to get the jurors to promise to consider informants the same as any other witness, the trial court found there was no such effort made by the prosecutor. Similarly, the record

does not support Ortloff's claims that the prosecutor referred to inadmissible evidence during jury selection, that he attempted to present evidence in violation of disclosure rules, or that he repeatedly denigrated defense counsel. As for the other allegations, we find either nothing improper in the prosecutor's conduct or if there was anything improper such as a leading question and an objection was raised, the trial court sustained the objection so as to cure any prejudice.

¶28 Ortloff additionally argues that we should consider the cumulative effect of all of his claims of prosecutorial misconduct in reviewing the trial court's denial of his motion for new trial. Arizona recognizes the cumulative error doctrine with respect to claims of prosecutorial misconduct. *Hughes*, 193 Ariz. at 79, ¶ 26, 969 P.2d at 1191. Prosecutorial misconduct is defined as conduct that "is not merely the result of legal error, negligence, mistake, or insignificant impropriety, but, taken as a whole, amounts to intentional conduct which the prosecutor knows to be improper and prejudicial." *Pool v. Superior Court*, 139 Ariz. 98, 108-09, 677 P.2d 261, 271-72 (1984)). Thus, we will reverse a conviction for prosecutorial misconduct "if the cumulative effect of the alleged acts of misconduct 'shows that the prosecutor intentionally engaged in improper conduct and did so with indifference, if not specific intent, to prejudice the defendant.'" *State v. Bocharski*, 218

Ariz. 476, 492, ¶ 74, 189 P.3d 403, 419, (2008) (quoting *State v. Roque*, 213 Ariz. 193, 228, ¶ 155, 141 P.3d 368, 403 (2006)).

¶29 Whether Ortloff's claims are considered separately or cumulatively, our review of the record fails to disclose any intentional misconduct by the prosecutor that was "so pronounced and persistent that it permeate[d] the entire atmosphere of the trial" so as to make the resulting convictions a denial of due process. *Hughes*, 193 Ariz. at 79, ¶ 26, 969 P.2d at 1191. Accordingly, there was no abuse of discretion by the trial court in denying the motion for new trial based on allegations of prosecutorial misconduct.

¶30 Finally, Ortloff's reliance on the *State v. Krone*, 182 Ariz. 319, 897 P.2d 621 (1995), as further evidence of a history of misconduct on the part of the prosecutor is misplaced. In *Krone*, the conviction was reversed, not for prosecutorial misconduct, but rather for late disclosure of a demonstrative videotape and the refusal of the trial court to grant a continuance to permit the defense time to respond to this evidence. *Id.* at 322, 897 P.2d at 624. Although the disclosure was unquestionably tardy, coming only three days before trial, the record indicated that the prosecutor delivered the videotape to defense counsel the same day he came into possession of it. *Id.* at 320, 897 P.2d at 622. Thus, *Krone* adds nothing to Ortloff's claims of prosecutorial misconduct.

B. Evidentiary Issues

¶31 Ortloff also argues that the trial court erred in two evidentiary rulings. One relates to limitations on the cross-examination of F.T. The other involves the admission of hearsay statements by the victim.

1. Limitation on Cross-Examination

¶32 In an effort to discredit F.T.'s testimony, Ortloff sought to demonstrate that the eighty-eight pages of handwritten notes F.T. claimed Ortloff prepared with his assistance in 1999 were actually prepared by him prior to meeting F.T. To accomplish this, Ortloff moved to introduce certified copies of pleadings, including habeas petitions, filed by him in 1993 and 1999 in his federal bombing case to show that the language in the memoranda of these pleadings was similar, if not verbatim, in many instances to the notes. The trial court ruled that Ortloff was permitted to question F.T. with respect to any excerpts in the 1993 memorandum relating to the Smith murder to demonstrate the parallel between the documents, but precluded cross-examination on comparisons that dealt solely with the bombing case or admission of the pleadings as exhibits pursuant to Rules 402, 403, 608 and 611 of the Rules of Evidence.

¶33 Ortloff contends the trial court improperly restricted his right to cross-examine F.T. by refusing to admit the federal pleadings as exhibits and precluding him from reviewing the

comparisons between those pleadings and the handwritten notes unrelated to the Smith murder, claiming that such evidence is relevant to F.T.'s credibility.

¶34 A defendant's right to confront witnesses is guaranteed by the constitutions of the United States and Arizona. U.S. Const. amend. VI; Ariz. Const. art. 2, § 24; *Pointer v. Texas*, 380 U.S. 400, 403 (1965); *State v. Moody*, 208 Ariz. 424, 458, ¶ 136, 94 P.3d 1119, 1153 (2004). This right includes the right to cross-examine witnesses. *Pointer*, 380 U.S. at 404; *Moody*, 208 Ariz. at 458, ¶ 136, 94 P.3d at 1153. The right to cross-examine "does not confer, however, a license to run at large." *State v. Fleming*, 117 Ariz. 122, 125, 571 P.2d 268, 271 (1977). Rather, the right merely "guarantees an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." *Delaware v. Fensterer*, 474 U.S. 15, 20 (1985).

¶35 A trial court may impose reasonable limits without infringing on a defendant's right of confrontation. *Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986); *Moody*, 208 Ariz. at 458, ¶ 137, 94 P.3d at 1153. "[T]rial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about . . . interrogation that is repetitive or only marginally

relevant.” *Van Arsdall*, 475 U.S. at 679. In determining whether there has been an unreasonable restriction on cross-examination, the test is “whether the defendant has been denied the opportunity of presenting to the trier of fact information which bears either on the issues in the case or on the credibility of the witness.” *Fleming*, 117 Ariz. at 125, 571 P.2d at 271. We review a trial court’s limitation of cross-examination for an abuse of discretion. *Id.*

¶136 “Although relevant, evidence may be excluded if its probative value is substantially outweighed by . . . confusion of the issues . . . or considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” Ariz. R. Evid. 403. Further, the trial court is required to “exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, [and] (2) avoid needless consumption of time.” Ariz. R. Evid. 611(a).

¶137 Here, the pleadings Ortloff sought to introduce as exhibits were one-sided presentations by him on the propriety of his federal convictions. The trial court could reasonably conclude their introduction would only serve to confuse the issues and that, to the extent they had relevance to F.T.’s credibility, Ortloff could effectively put the relevant portions

of this evidence before the jury by displaying and read those portions during the cross-examination of F.T. There was likewise no abuse of discretion by the trial court in limiting the cross-examination of F.T. in regards to the similarities between the notes and prior filings to comparisons related to the Smith murder. Ortloff had more than an ample opportunity to make the comparisons he sought to demonstrate without the need of using references unrelated to the facts in the present case. Indeed, Ortloff spent one trial day cross-examining F.T. with the Smith murder comparisons. Under these circumstances, the trial court could properly conclude that presentation of other comparisons between the handwritten notes and the federal pleadings would simply be cumulative and an unnecessary waste of time. Thus, there was no unreasonable restriction on Ortloff's ability to present the all the information relevant to the jury's consideration of F.T.'s credibility.

2. *Admission of Hearsay Testimony*

¶38 Ortloff contends the trial court erred in allowing the state to introduce testimonial hearsay statements by Smith, claiming his right of confrontation was violated because of his inability to cross-examine Smith. We generally review a trial court's ruling on the admissibility of hearsay for abuse of discretion. *State v. Bronson*, 204 Ariz. 321, 324, ¶ 14, 63 P.3d

1058, 1061 (App. 2003). Claims of Confrontation Clause violations, however, are reviewed *de novo*. *Id.*

¶39 Prior to trial, the state filed a motion *in limine* seeking admission at trial of hearsay statements by Smith under the forfeiture by wrongdoing doctrine. After conducting an evidentiary hearing on the motion, the trial court granted the motion, finding the evidence was sufficient to establish that Ortloff killed Smith and did so with intent to prevent her from testifying against him in regards to possible theft and forgery charges. At trial, the state introduced hearsay statements by Smith about her relationship with Ortloff and her concerns and intentions regarding money taken from the business account and the missing checkbook.

¶40 As a general rule, the Confrontation Clause prohibits admission of out-of-court testimonial statements against a criminal defendant unless the declarant is available at trial for cross-examination. *Crawford v. Washington*, 541 U.S. 36, 68 (2004). If the declarant is unavailable at trial, testimonial statements are admissible only if the defendant has had a prior opportunity to cross-examine the declarant. *Id.*

¶41 One exception to this general rule recognized by both the United States and Arizona Supreme Courts is the forfeiture by wrongdoing doctrine. *Id.* at 62; *State v. Prasertphong*, 210 Ariz. 496, 502, ¶ 24, 114 P.3d 828, 834 (2005). Under this

doctrine, if the defendant is responsible for silencing a witness, the "defendant is deemed to have waived both his Confrontation Clause and his hearsay objections to the admission of that witness's statements." *State v. Valencia*, 186 Ariz. 493, 498, 924 P.2d 497, 502 (App. 1996). Prior to admitting testimony pursuant to this doctrine, the trial court must hold a hearing at which the state bears the burden of proof that the defendant was responsible for the witness's absence. *Id.* The state's proof must include a showing that the defendant "engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness." *Giles v. California*, 554 U.S. 353, 367 (2008) (quoting Fed. R. Evid. 804(b)(6)).

¶42 Ortloff challenges the trial court's ruling admitting Smith's statements, asserting that the evidence offered by the State to support admission under the forfeiture by wrongdoing doctrine -- F.T.'s claim that Ortloff confessed to killing Smith to keep her from testifying -- was not reliable. In particular, Ortloff notes that F.T.'s recitation of the alleged confession included five other motives for the murder and also that F.T. had access to his legal papers from which he could have learned the facts reported. As the trial court correctly observed in its ruling, the fact that there may have been more than one motive for the killing does not detract from the evidence that

one of the intended purposes was to make Smith unavailable as a witness. With respect to the reliability of F.T.'s claim that Ortloff confessed to killing Smith, while leaving the ultimate issue of F.T.'s credibility to the jury, the trial court found there was no factual dispute that F.T. was in a position to hear the statements he attributes to Ortloff and that the evidence was unclear which of Ortloff's legal papers F.T. may have read. The trial court's extensive minute entry ruling setting forth its findings of fact and conclusions of law with respect to the admissibility of Smith's hearsay statements demonstrates that the trial court properly considered the credibility of the evidence presented by the state at the hearing and found it sufficient to support admission of the Smith's statements under the forfeiture by wrongdoing doctrine. On this record, there was no error in the admission of the hearsay statements under the forfeiture by wrongdoing doctrine.

CONCLUSION

¶43 For the foregoing reasons, we affirm.

/s/

JON W. THOMPSON, Judge

CONCURRING:

/s/

PHILIP HALL, Presiding Judge

/s/

LAWRENCE F. WINTHROP, Judge