

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24



DIVISION ONE
FILED: 09/16/10
RUTH WILLINGHAM,
ACTING CLERK
BY: JT

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,) No. 1 CA-CR 09-0368
)
Appellee,) DEPARTMENT B
)
v.) **MEMORANDUM DECISION**
)
PASQUAL SOSIMO ACUNA,) (Not for Publication -
) Rule 111, Rules of the
Appellant.) Arizona Supreme Court)
)

Appeal from the Superior Court in Mohave County

Cause No. CR-2008-0072

The Honorable Lee Frank Jantzen, Judge *Pro Tempore*

AFFIRMED

Terry Goddard, Attorney General Phoenix
By Kent E. Cattani, Chief Counsel,
Suzanne M. Nicholls, Assistant Attorney General
Criminal Appeals/Capital Litigation Section
Attorneys for Appellee

Mohave County Appellant Defender Kingman
By Jill L. Evans, Deputy Public Defender
Attorneys for Appellant

G E M M I L L, Judge

¶1 Pasqual Sosimo Acuna appeals his convictions and sentences arising out of a confrontation and drive by shooting on December 31, 2007. For the following reasons, we affirm his

convictions and sentences.

FACTS AND PROCEDURAL HISTORY

¶12 "We view the facts and all reasonable inferences therefrom in the light most favorable to sustaining the convictions." *State v. Powers*, 200 Ariz. 123, 124, ¶ 2, 23 P.3d 668, 669 (App. 2001).

¶13 On December 31, 2007, Monica Alvarado, who was dating Raymundo Mendoza at the time, drove Raymundo and her two children to the home of Gustavo Mendoza, Raymundo's brother. When they arrived, Raymundo walked over to talk to Gustavo. About ten minutes later, another truck arrived. The truck was occupied by Pasqual Acuna ("Appellant"), Billie Acuna, Rosario Acuna, Mercedes Acuna, and Blanca -- all siblings except Blanca, who was a friend. The three brothers, Appellant, Billie, and Rosario, got out of the truck and approached Gustavo and Raymundo. Appellant had a gun, Rosario had a knife, and all three were wearing bandanas over their faces.

¶14 The Acuna brothers had come to Gustavo's house to confront someone about an incident involving their sister Raquel.¹ They asked for Conseulas, and when Raymundo identified himself as Conseulas, Billie Acuna took a bat from Gustavo and

¹ Testimony indicates that the Acunas initially asked the Mendoza brothers about someone named Jesus Espinoza. When they were told Jesus was not present, they then asked Raymundo if he was Conseulas.

chased Raymundo into the desert.² Billie caught up to Raymundo and swung the bat at him, hitting him in the arm. When Billie ran after Raymundo, both Appellant and Rosario remained standing with Gustavo. Then Appellant shot the gun into the air. After Appellant shot the gun, the Acuna brothers got back into their truck and drove away.

¶15 On the same day, Rachelle Cline and Elizabeth Webster were driving in a truck on the same dirt road that accessed the trailers where the confrontation between the Acunas and the Mendozas had just occurred. The truck carrying the Acunas approached Rachelle and Elizabeth on the road; Blanca was driving and Appellant was sitting in the passenger seat. The Acunas passed Rachelle and Elizabeth, turned around, and approached them again; as the truck passed the second time, Rachelle and Elizabeth saw a gun come out of the passenger window and heard shooting. Rachelle and Elizabeth quickly ducked down and waited in their parked car until the other truck had driven away. They immediately drove to Rachelle's house and reported the incident to the police.

¶16 On January 7, 2008, Appellant was arrested on unrelated charges during a traffic stop. In connection with the events of December 31, 2007, he was charged with three counts of

² Gustavo was apparently holding a bat because he and his brother were baseball players in Mexico and they were going to practice.

aggravated assault on the Mendoza brothers, one count of aggravated assault on Rachelle, one count of aggravated assault on Elizabeth, and one count of drive by shooting. The State filed a motion to hold Appellant without bond, and the court scheduled an evidentiary hearing on the matter.

¶7 The court held the hearing on March 24, 2008. The victims, Raymundo and Gustavo Mendoza, and Appellant's brother, Rosario Acuna, testified at the bond hearing. Raymundo and Gustavo were excused after testifying. Before Rosario's testimony, however, defense counsel raised the issue that Rosario should be provided an attorney because he was an unrepresented minor who would likely incriminate himself through his testimony. Rosario requested an attorney before further questioning and the court continued the hearing until after he had conferred with counsel.

¶8 On June 5, 2008, the court held the remainder of the evidentiary hearing, and Rosario Acuna testified. Rosario was represented by an attorney, who was present at the hearing, and Rosario was subjected to both direct and cross-examination. Upon the evidence presented, the court found there was proof evident or presumption great that Appellant had committed aggravated assault on the Mendoza brothers -- the counts for which the State sought to hold Appellant without bond. The court also found clear and convincing evidence that Appellant

was a danger to the community and no other release conditions could protect the victims. The court ordered Appellant to be held without bond.

¶19 On April 7, 2009, Appellant's trial began. The prior testimony of Gustavo, Raymundo, and Rosario (from the bond hearing) was admitted because the witnesses were unavailable at trial. Gustavo and Raymundo were not able to be subpoenaed by the State prior to the trial, and it was believed that one or both of them had returned to Mexico. The State moved to admit their testimony from the bond hearing pursuant to Arizona Rule of Evidence 804 and Arizona Rule of Criminal Procedure 19.3. Their prior testimony was admitted. Rosario Acuna had been subpoenaed for trial, but he was not present on the first day of the continued trial. In light of the State's unsuccessful attempts to locate him, the court determined he was unavailable and permitted the State to present Rosario's prior testimony over Appellant's objections.

¶10 Appellant was convicted of two counts of disorderly conduct with a weapon (lesser included offenses of the aggravated assault charges involving victims Raymundo and Gustavo Mendoza), one count of aggravated assault on Raymundo Mendoza as an accomplice to Billie Acuna's assault, one count each of aggravated assault on Rachelle Cline and Elizabeth Webster in connection with the drive by shooting, and one count

of drive by shooting. Appellant was sentenced to 1.75 years on count one, disorderly conduct, and to 5 years on count two, aggravated assault on Raymundo as an accomplice to Billie Acuna. Counts one and two were to be served concurrently. He was also sentenced to 1.75 years on count three, disorderly conduct, and to 6.5 years on count four, aggravated assault. The sentences for counts three and four were ordered consecutive with count three beginning after completion of the sentence for count two. On count five, aggravated assault, Appellant was sentenced to 6.5 years to run concurrently with the sentence of 8.5 years for count six, drive by shooting.

¶11 Appellant timely appeals his convictions and sentences. We have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(1) (2003), 13-4031 (2010), and 13-4033(A) (2010).

DISCUSSION

I. Confrontation Clause

¶12 Appellant first argues that Rosario Acuna's prior testimony was admitted in violation of his Sixth Amendment rights and resulted in the convictions arising out of the drive by shooting. We review Sixth Amendment challenges to the admissibility of evidence de novo. *State v. King*, 212 Ariz. 372, 375, ¶ 16, 132 P.3d 311, 314 (App. 2006). The Sixth Amendment bars admission of testimonial statements made by a

witness who does not appear at trial unless the witness is "unavailable" and there was a prior opportunity for cross-examination. *Crawford v. Washington*, 541 U.S. 36, 68 (2004). We review the trial court's determinations of the witness's unavailability and of Appellant's opportunity for cross-examination for abuse of discretion. *State v. Montano*, 204 Ariz. 413, 420, ¶ 25, 65 P.3d 61, 68 (2003), *supplemented on different grounds by* 206 Ariz. 296, 77 P.3d 1246 (2003); *State v. Schad*, 129 Ariz. 557, 569, 633 P.2d 366, 378 (1981). In addition to viewing the facts in the light most favorable to sustaining the verdict, we take them in the light most favorable to the proponent of the challenged evidence. *State v. Alvarez*, 213 Ariz. 467, 468, ¶ 3, 143 P.3d 668, 669 (App. 2006).

a. Rosario's unavailability

¶13 Former testimony made under oath during a prior judicial proceeding is admissible if the declarant is unavailable and the party against whom the statement is offered was a party in the prior proceeding and had the right and opportunity to cross-examine the declarant. Ariz. R. Crim. P. 19.3. We first consider the trial court's finding that Rosario Acuna was "unavailable."

¶14 In accordance with Arizona Rule of Evidence 804(a)(5), a witness is unavailable if the witness is not present at the hearing and the proponent of the statement could not procure the

witness's attendance "by process or other reasonable means." To determine whether the State used reasonable means, or made a good-faith effort to locate the witness, we inquire whether any leads were not followed that would have been investigated if the State did not have a transcript of the prior testimony. *Montano*, 204 Ariz. at 420-421, ¶ 26, 65 P.3d at 68-69. The focus of the inquiry is "whether the State made a good-faith effort to locate the witness so that he or she could be put under subpoena." *State v. Edwards*, 136 Ariz. 177, 182, 665 P.2d 59, 64 (1983) (emphasis in original).

¶15 Rosario was subpoenaed to appear for the original trial date, March 23, 2009, and the State sent a letter to Rosario informing him that the trial was postponed and the subpoenas had been continued in force. The record also indicates that Rosario was probably present at a hearing that confirmed the trial date of April 7, 2009.³ When Rosario failed to appear to testify, the court issued a warrant for his arrest. Sergeant McNally spent about three hours searching for Rosario.

³ Regarding Rosario's knowledge of the new trial date, the judge stated, "I believe he was present last week. I thought he was in the back of the courtroom." The judge was likely referring to the status hearing held on April 1, 2009, when the trial date of April 7 was confirmed. This statement was not expressly corroborated by either attorney. We note that even if Rosario was not present at the hearing, a finding of unavailability turns on the State's reasonable efforts to subpoena him and to locate him rather than on proving his actual knowledge of the trial date. See *Edwards*, 136 Ariz. at 182, 665 P.2d at 64.

He searched four different addresses where the Acuna family had been known to stay. At the address where the subpoena had been served, McNally talked with the mother of Rosario's child who said she had not seen Rosario in over a week and did not know where he was.

¶16 The evidence of record supports the trial judge's finding of unavailability. In addition to having been subpoenaed for trial, Rosario was likely present in court at a prior hearing when the trial date was discussed, as noted above. The State pursued available leads in order to locate Rosario after he did not appear. It appears the State was not aware that he would fail to appear to testify until he was absent the day of trial. See *Montano*, 204 Ariz. at 421, ¶ 29, 65 P.3d at 69 (all legal means need not be exhausted "if it does not appear to be necessary, the witness appears likely to testify, or the state's efforts are otherwise reasonable"). Appellant has the burden to show any leads that were not followed, and he has failed to do so. *Id.* at ¶ 31. Appellant's contention that the sergeant should have spoken with more neighbors and family members or sought a forwarding address is not persuasive. Visiting residences where the Acuna family was known to reside and questioning the occupants they did find are the types of obvious and essential leads the State would pursue if they did not have Rosario's prior testimony. See *Edwards*, 136 Ariz. at

182, 665 P.2d at 64 (no good-faith search where State did not speak with a known former live-in boyfriend or check known addresses where the witness might be found). The trial court did not abuse its discretion in finding Rosario "unavailable."

b. Appellant's opportunity to cross-examine

¶17 Arizona Rule of Criminal Procedure 19.3 permits admission of prior recorded testimony of an unavailable witness when the party against whom the testimony is offered was a party at the prior proceeding and had the right and opportunity to cross-examine the witness with a similar interest and motive. "Rule 19.3(c) contains as broad an exception to the hearsay rule for prior recorded testimony as the confrontation clause of the sixth amendment will presently permit." Ariz. R. Crim. P. 19.3(c) cmt. Under the confrontation clause, testimonial evidence can only be admitted if the witness is unavailable and if there was a prior opportunity for cross-examination. *Crawford*, 541 U.S. at 68.

¶18 We conclude the trial court did not err in finding that Appellant had adequate opportunity to cross-examine Rosario. Rosario's prior testimony was taken during an evidentiary hearing to hold Appellant without bond pursuant to A.R.S. § 13-3961(D) (2007). To hold the defendant without bond, the court must find "that the proof is evident or the presumption great that the person committed the offense for

which the person is charged.” *Id.* At the bond hearing, Appellant was represented by counsel, who took advantage of his opportunity to cross-examine Rosario. See *Montano*, 204 Ariz. at 422, ¶ 32, 65 P.3d at 70 (finding adequate opportunity to cross-examine even though the preliminary hearing was held only 43 days after counsel was appointed). Appellant’s interest and motive to cross-examine Rosario was similar to his interest and motive at trial.

¶19 Appellant argues that the brevity of his cross-examination of Rosario indicates he did not have a similar motive at the bond hearing. He contends the questioning was limited to the actions of the occupants of the other truck, rather than examining Rosario’s credibility or motive to lie. Although Appellant’s case strategy may have motivated him to limit his cross-examination at the bond hearing, his interest in refuting the prosecution’s proof that he had committed the offense was similar to his interest in rebutting the prosecution’s evidence at trial. See *Schad*, 129 Ariz. at 569, 633 P.2d at 378 (defendant had opportunity and similar motive to cross-examine at suppression hearing where the issue was voluntariness but the issue at trial was guilt). For these reasons, we affirm the trial court’s finding that Appellant had an opportunity to cross-examine Rosario and a similar motive to do so.

¶20 Because Rosario was unavailable at trial and Appellant had an opportunity to cross-examine him at the preliminary hearing, admission of his prior testimony complied with the confrontation clause and with our rules. See *Crawford*, 541 U.S. at 68. We find no error in the court's admission of Rosario's prior testimony, and we affirm his convictions and sentences arising out of the drive by shooting.

II. Accomplice Liability

¶21 Appellant also challenges the sufficiency of the evidence to support his conviction for aggravated assault as an accomplice to Billie Acuna's assault on Raymundo with the baseball bat. We review a court's denial of a Rule 20 motion for acquittal for an abuse of discretion. *State v. Latham*, 223 Ariz. 70, 72, ¶ 9, 219 P.3d 280, 282 (App. 2009). Viewing the evidence in the light most favorable to sustaining the verdict and resolving all inferences against the defendant, we determine whether there was substantial evidence to support each element of the offense. *Id.*

¶22 Appellant was convicted of aggravated assault on Raymundo via accomplice liability. The statute determining accomplice liability in relevant part provides:

B. If causing a particular result is an element of an offense, a person who acts with the kind of culpability with respect to the result that is sufficient for the commission of the offense is guilty of that

offense if:

. . .

2. The person aids, counsels, agrees to aid or attempts to aid another person in planning or engaging in the conduct causing such result.

A.R.S. § 13-303(B)(2) (2001). In 2002, our supreme court ruled that an accomplice is criminally accountable only for the offenses he intended to aid or aided in planning or committing.⁴ *State v. Phillips*, 202 Ariz. 427, 436, ¶ 37, 46 P.3d 1048, 1057 (2002), *supplemented on different grounds by* 205 Ariz. 145, 67 P.3d 1228 (2003). The accomplice's criminal liability depends on "the intent of the one charged as an accomplice, rather than the intent of the main actor." *State v. Wall*, 212 Ariz. 1, 5, ¶ 20, 126 P.3d 148, 152 (2006); *see also State v. Garnica*, 209 Ariz. 96, 102, ¶ 28, 98 P.3d 207, 213 (App. 2004) ("[T]he intent requirement applies to 'the offense' that is charged rather than simply 'an offense' for which a defendant may be criminally accountable.") (Emphases in original). Thus, under *Phillips*, Appellant must have knowingly aided or intended to aid his

⁴ In 2008, the legislature amended A.R.S. § 13-303 to broaden accomplice liability. The statute now holds an accomplice liable for any offense that is the "natural and probable or reasonably foreseeable consequence of the offense for which the person was an accomplice." A.R.S. § 13-303(A)(3) (2010). This statutory language went into effect on September 26, 2008. Thus, for offenses that occurred between May 24, 2002, and September 26, 2008, accomplice liability applies only for offenses the defendant intended to aid or actually aided.

brother in assaulting Raymundo with the baseball bat.

¶23 Appellant and his brothers arrived at the Mendozas' residence to confront Consuelas regarding an incident with their sister. All three were wearing bandanas over their faces. Appellant was armed with a gun, and Rosario had a knife. During the confrontation between the Acuna brothers and the Mendoza brothers, Billie Acuna took the bat from Gustavo and assaulted Raymundo with it. Appellant's intent to confront Consuelas (Raymundo) and his wearing of a bandana as a mask provide support for his conviction for the assault on Raymundo. Additionally, the jury could reasonably infer that Appellant aided Billie's assault on Raymundo by holding a gun. Raymundo's arm was injured, and the bat constitutes a dangerous instrument. Therefore, all elements of aggravated assault are supported by sufficient evidence and we affirm Appellant's conviction.

CONCLUSION

¶24 For the reasons above, Appellant's convictions and sentences are affirmed.

_____/s/_____
JOHN C. GEMMILL, Presiding Judge

CONCURRING:

_____/s/_____
MICHAEL J. BROWN, Judge

_____/s/_____
PHILIP HALL, Judge