

*This opinion is nonprecedential except as provided by
Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A24-0434**

State of Minnesota,
Respondent,

vs.

Gerald Edward Bolster,
Appellant.

**Filed March 3, 2025
Reversed and remanded
Cleary, Judge***

Dakota County District Court
File No. 19HA-CR-23-1744

Keith Ellison, Attorney General, St. Paul, Minnesota; and

Kathryn M. Keena, Dakota County Attorney, Jessica A. Bierwerth, Assistant County Attorney, Hastings, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, St. Paul, Minnesota; and

Paul J. Maravigli, Special Assistant Public Defender, Minneapolis, Minnesota (for appellant)

Considered and decided by Cochran, Presiding Judge; Larson, Judge; and Cleary, Judge.

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

NONPRECEDENTIAL OPINION

CLEARY, Judge

In this direct appeal from the final judgment of conviction for first-degree burglary, appellant argues that he is entitled to a new trial because the district court violated his rights under the Confrontation Clause by allowing the state to present testimonial statements from non-testifying witnesses. We reverse and remand.

FACTS

Respondent State of Minnesota charged appellant Gerald Edward Bolster with two counts of first-degree burglary in violation of Minn. Stat. § 609.582, subd. 1(c) (2022). At Bolster's first appearance, the district court issued a domestic-abuse-no-contact order (DANCO) preventing Bolster from contacting one of the victims, B.B.

The state moved to admit the out-of-court statements of the victims, arguing that Bolster forfeited his right to confrontation. The state claimed that Bolster contacted B.B. several times from jail, in violation of the DANCO, and discussed his case.

At an evidentiary hearing on the state's motion, the investigating officer identified the two victims involved, B.B. and P.M., and explained law enforcement's efforts to contact the victims. The officer testified that she had been in contact with P.M., but P.M. eventually stopped answering the officer's calls. According to the officer, law enforcement attempted to contact and serve a subpoena on P.M. several times.

The officer also testified that Bolster contacted B.B. several times from jail. In one of the calls, B.B. acknowledged being subpoenaed to testify at Bolster's trial and stated that she did not intend on attending. In other calls, Bolster told B.B., "I don't think you

should [attend trial].” In another call, B.B. told Bolster that law enforcement is “really trying to get” to P.M., and Bolster asked B.B. if she changed her mind and planned on attending trial “because [P.M.] is scared.” Bolster also told B.B. that, if she did not go to trial, he “will give [her] any space or anything else [she] need[s], anything [she] want[s], and [she] won’t have any problems with [him].”

The district court found that: (1) “both alleged victims are unavailable, on having evaded service and the other having chose[n] not to comply with a subpoena”; (2) “Mr. Bolster engaged in wrongful conduct by encouraging a material witness to not comply with a trial subpoena”; (3) “the state proved by a preponderance of evidence that the witness’s unavailability arose from Mr. Bolster’s encouragement to ignore the subpoena and his promises to her if she ignored it”; and (4) “the clear intent of Mr. Bolster was to persuade the witness to ignore the subpoena and not attend trial.” The district court found that the state proved that Bolster’s wrongful conduct procured the unavailability of the witnesses and had therefore forfeited his right to confrontation.

The case proceeded to a jury trial. At trial, the recorded statements of B.B. and P.M. were presented to the jury in lieu of their in-person testimony. The jury found Bolster guilty of both counts of first-degree burglary. The district court accepted the jury’s verdicts and entered convictions on both counts. The district court later imposed a single aggravated sentence of 150 months’ imprisonment.

Bolster appeals.

DECISION

Bolster argues that he is entitled to a new trial because the district court violated his rights under the Confrontation Clause by allowing the state to present testimonial statements from non-testifying witnesses.

Both the United States and Minnesota Constitutions guarantee criminal defendants with the right to confront witnesses. U.S. Const. amend. VI; Minn. Const. art. I, § 6. Whether admitting evidence violates a defendant's confrontation right is a question of law that we review de novo. *State v. Caulfield*, 722 N.W.2d 304, 308 (Minn. 2006).

“The Confrontation Clause bars the admission of out-of-court statements unless the witness is unavailable and the defendant had a prior opportunity to examine the witness.” *State v. Cox*, 779 N.W.2d 844, 850 (Minn. 2010) (citing *Crawford v. Washington*, 541 U.S. 36, 38 (2004)). But the right is not absolute. *State v. Tate*, 985 N.W.2d 291, 297 (Minn. 2023). “There is a narrow exception to the confrontation right, referred to as forfeiture by wrongdoing, which extinguishes confrontation claims on essentially equitable grounds.” *Cox*, 779 N.W.2d at 850 (quotation omitted).

The forfeiture-by-wrongdoing exception requires the state to prove by a preponderance of the evidence: “(1) that the declarant-witness is unavailable, (2) the defendant engaged in wrongful conduct, (3) that the wrongful conduct procured the unavailability of the witness and (4) that the defendant intended to procure the unavailability of the witness.” *Id.* at 851.

Bolster argues that the state failed to prove that B.B. and P.M. were unavailable for trial, claiming that the state did not make reasonable efforts to procure their presence at trial. We agree.

The state bears the burden of proving that a witness is unavailable. *Id.* at 852. “A witness is not ‘unavailable’ for Confrontation Clause purposes ‘unless the prosecutorial authorities have made a good-faith effort to obtain his presence at trial.’” *Id.* (quoting *Barber v. Page*, 390 U.S. 719, 724-25 (1968)). The good-faith effort requirement does not demand that the prosecution “exhaust every avenue of inquiry, no matter how unpromising.” *Hardy v. Cross*, 565 U.S. 65, 71-72 (2011). “The prosecution must, however, exhaust some avenues.” *State v. Trifiletti*, 6 N.W.3d 79, 91 (Minn. 2024). The extent to which the state must go to ensure that a witness appears for trial “is a question of reasonableness.” *Cox*, 779 N.W.2d at 852 (quotations omitted).

The state subpoenaed B.B. to testify at Bolster’s trial. Although B.B. told Bolster that she did not plan on attending his trial, there is nothing in the record indicating that she would have refused to testify had she been compelled to attend trial and called as a witness. *See id.* (noting that the state did not establish that a subpoenaed witness would refuse to testify if called as a witness). And at the start of trial, the state did not follow up with phone calls or a check of her residence—she was, after all, in contempt of court for not appearing. Based on this record, the state failed to establish that it exhausted reasonable efforts to procure B.B.’s presence at trial such that she was unavailable to testify at Bolster’s trial for Confrontation Clause purposes.

P.M. was not under subpoena. The record shows that the state attempted to subpoena P.M., but it is not clear how many times law enforcement attempted service, nor is it clear whether the state was in contact with P.M. beyond its service efforts. This record is also insufficient to show that the state exhausted sufficient efforts to procure P.M.'s presence at Bolster's trial.

Because the state failed to establish unavailability, the forfeiture-by-wrongdoing exception did not apply and admitting the recorded statements of B.B. and P.M. violated Bolster's right to confrontation.

"Confrontation Clause violations are subject to a constitutional harmless-error-impact analysis." *Id.* at 853. "An error is harmless beyond a reasonable doubt if the guilty verdict actually rendered was 'surely unattributable' to the error." *State v. Courtney*, 696 N.W.2d 73, 80 (Minn. 2005) (quoting *State v. Juarez*, 572 N.W.2d 286, 292 (Minn. 1997)).

The state does not claim that admitting the out-of-court statements of B.B. and P.M. was harmless. Because the statements provide a first-hand account of the underlying incident, we are not convinced that the guilty verdicts were "surely unattributable" to those statements. The error in admitting the statements was therefore not harmless, and we reverse Bolster's convictions and remand for a new trial.

Reversed and remanded.