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**ARKANSAS COURT OF APPEALS**  
DIVISION III  
No. CR-23-687

ANDREA BURCIAGA

APPELLANT

V.

STATE OF ARKANSAS

APPELLEE

Opinion Delivered May 29, 2024

APPEAL FROM THE GARLAND  
COUNTY CIRCUIT COURT  
[NO. 26CR-21-800]

HONORABLE RALPH C. OHM,  
JUDGE

AFFIRMED

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**BART F. VIRDEN, Judge**

A Garland County jury convicted appellant Andrea Burciaga of aggravated robbery, kidnapping, aggravated assault, and misdemeanor theft of property. She was sentenced as a habitual offender to an aggregate term of ninety-five years' imprisonment. Burciaga argues that the trial court abused its discretion in declaring the victim "unavailable" under Ark. R. Evid. 804 and in permitting the State to introduce at trial a transcript of the victim's testimony from Burciaga's probation-revocation hearing. Burciaga also argues that there was insufficient evidence to show that she was an accomplice to the crimes. We find no error and affirm Burciaga's convictions.

I. *Background*

Burciaga's jury trial began on July 10, 2023. After selecting and swearing in a jury, the trial court addressed the fact that the State's "star witness," Amber Franklin, had not appeared that morning for trial. The State requested that Franklin be declared unavailable and that her testimony from Burciaga's probation-revocation hearing held March 30, 2023, be admitted. The trial court held a hearing in chambers at which the following witnesses testified: Tralene Harris, victim-witness coordinator at the Garland County Prosecuting Attorney's Office (GCPAO); Larry Sanders, an investigator with the GCPAO; Detective Mark Fallis with the Hot Springs Police Department; and GCPAO Deputy Prosecuting Attorneys Brock Price and Caitlin Bornhoft.

Harris testified that she had had regular contact with Franklin since 2021 when the charges were filed against Burciaga and the codefendants. She had contacted Franklin by phone, text, and email a dozen times in 2023 and said that Franklin had always responded and that she had always appeared as requested at the prosecuting attorney's office and at court. Detective Fallis testified that he had likewise always been able to reach Franklin by calling or texting her.

Harris further testified that Franklin preferred to have subpoenas emailed to her. She said that on April 28, she sent Franklin an email with two subpoenas attached for probation-revocation hearings and that Franklin had acknowledged receiving those. Shortly afterward on the same day, Harris emailed Franklin a copy of the subpoena to appear at Burciaga's jury trial, but Franklin did not acknowledge having received it. Harris testified that Franklin did, however, appear at a meeting with the prosecutors on June 27, 2023, to prepare for the trial.

Harris testified that she had called Franklin the morning of the trial but that Franklin's phone was no longer in service. Investigator Sanders testified that he had been trying to locate Franklin that morning. He had gone to three addresses for her and had sent Facebook messages to both Franklin and her boyfriend.

Bornhoft and Price testified that they were aware that interested parties had in the past tried to persuade Franklin not to cooperate with police but that Franklin had always appeared for meetings and honored subpoenas. They testified that Franklin had told them at the June 27 meeting that there had been no recent attempts to prevent her from testifying. Investigator Sanders testified that, while he was attempting to locate Franklin that morning, he noticed a stop sign near one of the addresses with the words "talking to cops" written under the word "STOP." The trial court ruled that Franklin was unavailable and that her testimony from Burciaga's probation-revocation hearing could be read to the jury.

The trial then began, and the following was gleaned from the testimony and exhibits. Burciaga and Franklin were friends. When Burciaga went to prison, she had asked Franklin to store some of her possessions, including clothing, a television, and a box of the cremated remains of a man named Rick. When Burciaga was released from prison, she and Franklin had a falling out. Burciaga sent a friend to collect her belongings from Franklin. Burciaga did not get all of the items back, including Rick's ashes, or "cremains." Burciaga later claimed in an interview that it appeared as though Franklin had simply gathered some trash from around her apartment and handed that to Burciaga's friend. On September 22, 2021, at 5:18 a.m., Burciaga sent Franklin the following Facebook message:

Lol u know me a lot better then most and u think that I'm ok with that bullshit u sent me fuck u bitch it's fuck insulting the shit u sent I swear on my kids bitch y'all better not sleep to fucking sound all I know and fuck it if u do cause I don't knock And Both u bitches getting pistol whooped so U fuck with right one[.]

Around midnight on September 22, Franklin was leaving her apartment complex when she saw Burciaga's car parked in front of the apartment of a mutual friend, Sumer Campbell, who lived in the same apartment complex. Campbell told Franklin to come inside. Franklin believed a confrontation with Burciaga was inevitable and wanted to get it over, so she went inside and sat on a couch across from Burciaga with her back to the door. As Franklin and Burciaga were arguing over the cremains, Lilly Repaso entered the apartment and sat beside Burciaga. Shortly afterward, Kaylee "Pineapple" Harris and Cameron Whitworth entered the apartment, and Whitworth immediately struck Franklin on the back of her head with his gun, which caused the gun to discharge. Franklin dropped her cell phone, and Whitworth picked it up and began asking Franklin what she had done with Rick's ashes.

For nearly two hours, the five people in Campbell's apartment smoked methamphetamine and continued to question Franklin about the missing ashes. Franklin had been told to get on her knees at one point and was then moved to a metal chair positioned between the couches. Whitworth asked Burciaga what he should do to Franklin, and Burciaga asked Franklin why she should save her or help her. Whitworth and Harris took turns pointing a gun at Franklin and striking her on her face and the back of her head. Whitworth had a duffle bag full of guns, pulled out a rifle, and then put a plastic drop cloth

around the metal chair where Franklin was sitting, saying that he did not want to get blood on the floor. He then shoved the barrel of the rifle down Franklin's throat and asked her if she was ready to die. Harris took several rings off of Franklin's fingers and eventually gave them to Burciaga.

Franklin begged Burciaga to allow her to look at her (Burciaga's) place for Rick's ashes because she was sure they were in a white trash bag that she had handed to Burciaga's friend. Burciaga warned Franklin that she would be leaving in a box if they did not find those ashes. Franklin and the five other people got into two vehicles belonging to Burciaga and Repaso, and Harris continued to point the gun at Franklin. They stopped at an E-Z Mart. Whitworth and Repaso began arguing, and Repaso drove off by herself, so Franklin and Harris got into Burciaga's car with the others and drove to Repaso's place where Whitworth and Repaso continued arguing. Franklin later said that Burciaga had been worried about having drawn too much attention and about the guns in the car.

Burciaga finally said that she would let Franklin go home but that she had better return Rick's ashes by 5:00 p.m. that day or "we're all coming back and it's gonna be worse." Franklin's phone was then returned to her, and she was warned that they would kill her family if she went to the police. Burciaga told Franklin that she would get her rings back when Franklin returned the ashes. Later, Franklin saw that Whitworth had used her phone to transfer \$25 from her CashApp account to his CashApp account.

On September 23 around 10:00 a.m., Franklin received the following Facebook message from Burciaga:

Bitch if u think getting pistol whipped and getting the barrel of a gun shoved down your throat by the 4 of us last night wait and see what we do next. And I promise u this much. If I find out u snitched and talk to the police about anything that happened last night u will be the next box of ashes someone is looking for[.]

Franklin went to the police and gave a statement. That interview with Detective Fallis was played for the jury as well as his subsequent interview with Burciaga. Franklin's testimony from Burciaga's probation-revocation hearing was read to the jury. The video footage from the EZ Mart was also played, and still photos from the convenience store were introduced. Photographs were admitted into evidence depicting Franklin's facial injuries, the interior of Campbell's apartment, the apartment complex where Franklin and Campbell lived, Whitworth's duffle bag, and the guns and ammunition. The jury convicted Burciaga of aggravated robbery, kidnapping, aggravated assault, and misdemeanor theft of property.

## II. Discussion

### A. Sufficiency of the Evidence

Although it is her second point on appeal, we address Burciaga's sufficiency argument first because of double-jeopardy concerns. *Badger v. State*, 2019 Ark. App. 490, 588 S.W.3d 779. When reviewing a challenge to the sufficiency of the evidence, we must assess the evidence in the light most favorable to the State and consider only the evidence that supports the verdict. *McKisick v. State*, 2022 Ark. App. 426, 653 S.W.3d 839. Moreover, when reviewing the sufficiency of the evidence, this court considers all of the evidence, whether admitted properly or erroneously. *Badger, supra*. Even if the trial court abused its discretion in admitting certain evidence, we will nevertheless consider it in determining whether the

verdict is supported by substantial evidence. *Id.* Here, we consider Franklin's testimony from Burciaga's probation-revocation hearing, which is discussed in the next section.

A conviction will be affirmed if substantial evidence exists in the record to support it, which is evidence of sufficient force and character that it will, with reasonable certainty, compel a conclusion one way or the other without resorting to speculation or conjecture. *McKisick, supra.* Circumstantial evidence may provide a basis to support a conviction if it is consistent with the defendant's guilt and is inconsistent with any other reasonable conclusion. *Id.* Whether the evidence excludes every other reasonable conclusion is a matter for the fact-finder to decide. *Id.* Witness credibility is also an issue for the fact-finder, which can believe all or part of any witness's testimony and may resolve questions of conflicting testimony and inconsistent evidence. *Id.*

Burciaga does not challenge the elements of the individual crimes of which she was convicted. Instead, she argues that there was no evidence that she was an accomplice to those crimes. A person can be criminally liable for the conduct of another person if he is an accomplice of another person in the commission of an offense. Ark. Code Ann. § 5-2-402(2) (Repl. 2013). A person is an accomplice of another person in the commission of an offense if he has the purpose of promoting or facilitating the commission of an offense and he solicits, advises, encourages, or coerces the other person to commit the offense; or he aids, agrees to aid, or attempts to aid the other person in planning or committing the offense. Ark. Code Ann. § 5-2-403(a)(1), (2) (Repl. 2013). There is no distinction between principals on the one hand and accomplices on the other, insofar as criminal liability is concerned.

*Martin v. State*, 2021 Ark. App. 463. When two people assist one another in the commission of a crime, each is an accomplice and criminally liable for the conduct of all. *Id.* One cannot disclaim accomplice liability simply because he or she did not personally take part in every act that went to make up the crime as a whole. *Id.* Relevant factors in determining the connection of an alleged accomplice to a crime include the presence of the accused in proximity to the crime, the opportunity to commit the crime, and an association with a person involved in the crime in a manner that suggests joint participation. *Id.* Concert of action to commit an unlawful act may be shown by circumstantial evidence without direct proof of a conspiracy agreement. *Id.* Mere presence at the scene of a crime, even combined with actual knowledge that a crime is being committed, is not sufficient to make a person an accomplice in the absence of any purpose to further the accomplishment of the offense. *F.C. v. State*, 2014 Ark. App. 196.

Burciaga argues that she was simply present when Whitworth and Harris kidnapped, robbed, beat, and threatened Franklin. Burciaga contends that Whitworth is the one who stuck the barrel of a rifle down Franklin's throat and stole \$25 from her CashApp account and that Harris is the one who took Franklin's rings. She states that it is clear that Whitworth and Harris "took [Burciaga's] displeasure with Franklin over Rick's ashes to a criminal level" and that there was no evidence that she "did anything to coordinate, oversee, or choreograph what happened to Franklin." Burciaga relies on Campbell's testimony that she (Burciaga) "never moved off the couch" and just sat there quietly. She also states that she told Detective Fallis during her interview that she "told [Whitworth and Harris] to stop and stuff."



Viewing the evidence in the light most favorable to the State, Burciaga had reason to be angry with Franklin. She threatened Franklin—specifically, with pistol whipping—on the day of the incident. Whitworth and Harris came into Campbell’s apartment, and Whitworth immediately struck Franklin on her head with his gun, also known as “pistol-whipping,” and demanded to know what she had done with Rick’s ashes. Whitworth asked Burciaga what he should do to Franklin. The whole incident centered on the missing ashes of someone who was apparently important to Burciaga, yet it appears that no one else had any connection to Rick. Burciaga was present during the events at each location and made key decisions about going to look for the ashes, returning to Campbell’s apartment, and letting Franklin go with the warning that she find Rick’s ashes. Moreover, Burciaga admitted in her interview with Detective Fallis that she was holding Franklin’s rings until they could be exchanged for the missing ashes. Perhaps the strongest evidence of joint participation is Burciaga’s message to Franklin after the incident describing what had happened to Franklin. Burciaga specifically mentioned the pistol-whipping and a “gun shoved down [Franklin’s] throat *by the 4 of us.*” (Emphasis added.) We hold that there was substantial evidence to show that Burciaga was an accomplice to the crimes of which she was convicted.

#### B. Hearsay Exception: Declarant Unavailable

This court reviews evidentiary rulings on hearsay under an abuse-of-discretion standard and will not reverse absent a manifest abuse of that discretion and a showing of prejudice. *Furlow v. State*, 2023 Ark. App. 192, 664 S.W.3d 457. Hearsay is a statement, other than one made by the declarant while testifying at trial or a hearing, offered into evidence to

prove the truth of the matter asserted. Ark. R. Evid. 801(c). Hearsay evidence is generally inadmissible under Ark. R. Evid. 802 unless it falls within an exception to the hearsay rule. Former testimony is not excluded by the hearsay rule if the declarant is unavailable as a witness. Ark. R. Evid. 804(b)(1).

“Unavailability as a witness” includes situations in which the declarant is absent from the hearing and the proponent of her statement has been unable to procure her attendance by process or other reasonable means. Ark. R. Evid. 804(a)(5). The party offering a declarant’s former testimony has the burden of proving that the witness is unavailable and that the party has made good-faith efforts to procure the witness. *Johnson v. State*, 2020 Ark. App. 157, 596 S.W.3d 83. A good-faith effort does not require that every possible avenue for locating a witness be employed. *Id.* The trial court has some discretion in deciding if a good-faith effort was made and whether a witness cannot be procured by process or other reasonable means. *Id.*

Rule 804(b)(1) further provides that “former testimony” of an unavailable declarant means “[t]estimony given as a witness at another hearing of the same or a different proceeding if the party against whom the testimony is now offered, or, in a civil action or proceeding a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.” Similar motive does not mean identical motive, and the inquiry is inherently factual. *Dennis v. State*, 2016 Ark. 395, 503 S.W.3d 761 (concluding that the motive to develop previous testimony at a suppression hearing was sufficiently similar for admission of that testimony at trial); *see also Vick v. State*, 314 Ark.

618, 863 S.W.2d 820 (1993) (determining that the motive to develop testimony at a federal habeas corpus hearing was sufficient for the admission of the testimony at trial); *Scroggins v. State*, 312 Ark. 106, 848 S.W.2d 400 (1993) (holding that a confidential informant's testimony from a suppression hearing was sufficiently reliable and admissible under Ark. R. Evid. 804); *Bertrand v. State*, 363 Ark. 422, 214 S.W.3d 822 (2005) (holding that there was a similar motive for developing unavailable witness's testimony from a suppression hearing such that transcript could be admitted at trial). *But see Beasley v. State*, 370 Ark. 238, 258 S.W.3d 728 (2007) (holding that the defendant lacked a similar motive to develop witness's testimony at a bond-reduction hearing, and, thus, that her former testimony was inadmissible hearsay); *Proctor v. State*, 349 Ark. 648, 79 S.W.3d 370 (2002) (holding that the defendant did not have a similar motive in cross-examining a police officer at a bond-revocation hearing arising from some of the presently charged offenses, so confession was inadmissible); *Scott v. State*, 272 Ark. 88, 612 S.W.2d 110 (1981) (holding that there was no similar motive to develop testimony at a brief preliminary hearing such that the transcript of that witness's testimony was not admissible at trial).

Burciaga argues that Franklin was not “unavailable”—she did not wish to be in court or was unable to attend—and that the State failed to serve Franklin with a subpoena to compel her attendance. Burciaga argues that there was “a last-minute scramble to find Franklin after she was a no-show at [Burciaga's] trial.” She also contends that there was no good-faith effort to locate Franklin. Burciaga argues that the State counted on Franklin's willingness to appear voluntarily and did not serve her with a subpoena, even though

Franklin had attended a meeting with prosecutors two weeks before the trial. Burciaga also argues that the prosecutors knew that Franklin was reluctant to testify because of threats she had received.

Rule 804(a)(5) requires the State to show that it was unable to procure Franklin's attendance at trial by process *or other reasonable means*. The State did not serve Franklin with a subpoena, but a copy of it had been emailed to her, which was Franklin's preferred method of receiving subpoenas. Franklin was aware of the trial date given Harris's email and the meeting with prosecutors two weeks before the trial—the purpose of which was to prepare her for trial. Franklin had always been reachable by phone, text, email, and Facebook Messenger since September 2021. The State called, texted, emailed, and messaged her the morning of the trial, and the State had an investigator go to several addresses to try to locate Franklin. We cannot say that the trial court abused its discretion in determining that Franklin was unavailable and that the State made good-faith efforts to locate her.

Burciaga further argues that counsel did not have a similar motive for developing Franklin's testimony at the probation-revocation hearing. She points out that there is a lower burden of proof at a probation-revocation hearing and that any infraction—just socializing with other felons—would have been sufficient to revoke her probation. She argues that counsel would have had a motive to impeach Franklin's credibility “more thoroughly than was necessary at a probation revocation hearing.” Burciaga compares her revocation hearing to a bail-bond-reduction or a bail-bond-revocation hearing and says there was not a similar motive to develop Franklin's testimony.

Burciaga's freedom was at stake at both the revocation hearing and at her trial. Further, Franklin testified at the revocation hearing about the same sequence of events that occurred in late September 2021 as she would have testified to at trial. Defense counsel had an opportunity and a similar motive to develop Franklin's testimony. In fact, the transcript shows that defense counsel—the same counsel as at trial—thoroughly cross-examined Franklin and got her to testify that Burciaga never actually struck her and got her to admit some discrepancies and inconsistencies. Burciaga does not explain how she would have further developed Franklin's testimony on cross-examination at trial. Moreover, the revocation hearing was a full-fledged hearing; Franklin was under oath; and the testimony was captured by a court reporter. We conclude that the trial court did not abuse its discretion in permitting the State to use Franklin's former testimony from Burciaga's probation-revocation hearing at her later trial.

Affirmed.

HARRISON, C.J., and BARRETT, J., agree.

*Sharon Kiel*, for appellant.

*Tim Griffin*, Att'y Gen., by: *Rebecca Kane*, Ass't Att'y Gen., for appellee.