IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

JOSEPH JAVIER ROMERO,
Appellant.

No. 2 CA-CR 2018-0140
Filed October 16, 2019

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NOT FOR PUBLICATION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. 31.19(e).

Appeal from the Superior Court in Pima County
No. CR20103531001
The Honorable Deborah Bernini, Judge

AFFIRMED

COUNSEL

Mark Brnovich, Arizona Attorney General
Joseph T. Maziarz, Chief Counsel
By Tanja K. Kelly, Assistant Attorney General, Tucson
Counsel for Appellee

Joel Feinman, Pima County Public Defender
By Abigail Jensen, Assistant Public Defender, Tucson
Counsel for Appellant

MEMORANDUM DECISION

Judge Brearcliffe authored the decision of the Court, in which Chief Judge Vásquez and Judge Eckerstrom concurred.

B R E A R C L I F F E, Judge:

¶1 Joseph Romero appeals from his conviction for second-degree murder. In 2000, Romero was first charged and tried for first-degree murder, resulting in a mistrial. *State v. Romero*, 236 Ariz. 451, n.1 (App. 2014). At his first retrial in 2012, the jury found Romero guilty of second-degree murder. Romero successfully appealed that conviction and was granted a new trial. *State v. Romero*, 240 Ariz. 503, ¶ 22 (App. 2016). Here, after yet a third trial and second conviction in 2018, the trial court sentenced him to sixteen years' imprisonment. We affirm.

Issues

¶2 Romero contends that the trial court abused its discretion in finding that the state made good faith efforts to secure a witness's presence at trial. For this reason, he maintains that the use of that witness's video-recorded deposition violated his constitutional right to confront his accusers. The state contends that it engaged in good-faith efforts to secure the witness's appearance and that the court did not abuse its discretion in finding the witness was unavailable.

Factual and Procedural Background

¶3 "We view the facts in the light most favorable to sustaining the convictions." *State v. Rivera*, 226 Ariz. 325, ¶ 2 (App. 2011). The salient facts of this case are as stated by our supreme court in *State v. Romero*, 239 Ariz. 6, ¶¶ 2-4 (2016):

> In June 2000, [Skeets Matthews] was killed by two gunshots. Although witnesses did not see the shooting, they heard gunshots and saw two or three men flee in a dark Ford Ranger or Mazda pickup truck. Police found six spent .40-caliber shell casings and bullet fragments at the murder scene. A cell phone was also found next to the victim's body.

> Nearly one month later, police officers stopped Romero for reasons unrelated to the murder. He possessed the magazine for a .40–caliber Glock pistol. The officers subsequently found a .40-caliber Glock pistol without its magazine along the path Romero had traveled just before encountering them. Police retained the pistol and the magazine.
>
> Seven years later, a "cold case . . ." investigative unit inspected the cell phone and traced it to [R.E.] and, through him, to Romero. [R.E.] told police that, while a college student in 2000, he had known a person named "Joe" who supplied him drugs and sometimes borrowed [R.E.'s] black Ford Ranger. [R.E.] recalled that he had loaned his pickup truck to Joe in the summer of 2000, possibly June, and [Romero] had kept it longer than expected.

¶4 Before his first trial, Romero had stipulated to the taking and use of the video deposition of witness R.E. based on the state's representation that R.E. "anticipated being out at sea at the time of defendant's trial." The video deposition was also used at Romero's second trial—either pursuant to the prior stipulation or simply without objection. At an August 2017 status conference, Romero's third trial was set for March 2018. The parties then engaged in plea negotiations but, on January 2, 2018, Romero formally invoked his right to a speedy trial, and informed the trial court that he would oppose any further trial continuance "without a showing of due diligence."

¶5 The day before his third trial, Romero filed a motion to preclude the use of R.E.'s video deposition after the state informed him it would seek to prove R.E. unavailable for trial and would ask the trial court again to permit the use of the video deposition. In that motion, Romero challenged the claim of R.E.'s unavailability and asserted that the use of the video deposition would violate his Sixth Amendment right of confrontation. The court held an evidentiary hearing the following day.

¶6 At that hearing, the prosecutor, Nicol Green, told the trial court that, after plea discussions ended in January 2018, she intended to subpoena each witness presented in the first two trials and "believed" that she had so instructed her secretary, A.V. However, Green told the court

that her instruction to A.V. "didn't even go through. So we were scrambling." Ultimately, it was not until March 7, 2018 that Green asked A.V. to contact R.E.

¶7 After being instructed by Green to contact R.E., A.V. tried to contact him using the three phone numbers the prosecutor's office had used in the past. She then called and left a voicemail for R.E.'s wife, N.E., mailed a subpoena to R.E.'s last-known address, and sent a scan of the subpoena to his last-known email address. She also asked the prosecutor's office investigators to find alternate numbers or a different address. The investigators found the same phone numbers and a phone number for R.E.'s parents. A.V. left a voicemail with the number provided for R.E.'s parents and called N.E. a second time.

¶8 According to A.V., on March 20, N.E. returned A.V.'s call, apologizing for not returning it earlier, telling her that she thought the call—with its 520 area code—was from the University of Arizona seeking donations. N.E. told A.V. that her husband "was out at sea at an oil tanker and that he wasn't available." Specifically, that R.E. was in the Pacific, had left on January 22, and would not return until late April. A.V. further testified that, she believed that N.E. and R.E. were texting during the call, and that R.E. tried to call N.E. by satellite but the connection was bad. A.V. stated that she could hear N.E. trying to talk to her husband before the call went dead, saying "I can't understand you. I can't hear you." A.V. testified that, according to N.E., because of the poor satellite connection, the only way that R.E. and N.E. communicate is by text.

¶9 In a follow-up email from N.E. to A.V., N.E. repeated that "due to [her] husband's work schedule he will not be available to answer the subpoena." As part of that email, in a separate message directed to the trial court, N.E. explained that R.E. was "unavailable to assist the Court and the Pima County Attorney's Office because he is working on an oil tanker out at sea." And that "[h]is assignments are approximately between 90-120 days long" and that he has been aboard the ship since January 22, 2018 and would not be released until "sometime at the end of April."

¶10 Romero argued that N.E.'s statements betrayed an uncooperative "attitude," and that this should have made the state "very suspicious" that R.E. and N.E. were merely resisting his giving live testimony and were holding back information. The trial court did not share Romero's opinion of N.E.'s "attitude." The court found "that good faith efforts were made in attempting to obtain the appearance of [R.E.] and

despite those efforts he is unavailable." Thus, the court denied the motion to preclude use of R.E.'s video deposition in lieu of live testimony.

¶11 In accord with the trial court's denial of the motion, the state used R.E.'s video deposition at trial in lieu of his live testimony. Romero was convicted and sentenced as described above. We have jurisdiction under A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A).

Analysis

¶12 We review an unavailability determination in a Sixth Amendment Confrontation Clause analysis for abuse of discretion. *State v. Rivera*, 226 Ariz. 325, ¶ 12 (App. 2011). "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 (2008) (quoting *Crawford v. Washington*, 541 U.S. 36, 59 (2004)).[1] In order for a trial court to find a witness unavailable, the state must "have made a *good-faith effort* to obtain his presence at trial." *Rivera*, 226 Ariz. 325, ¶ 13 (quoting *State v. Montano*, 204 Ariz. 413, ¶ 25 (2003)). Once the state demonstrates such efforts, it is up to the defendant to identify the "obvious and essential" leads the state failed to follow. *State v. Edwards*, 136 Ariz. 177, 182 (1983); *see also Montano*, 204 Ariz. 413, ¶ 31.

¶13 Ultimately, "[i]t is within the discretion of the trial court to determine whether the [s]tate has made a sufficient effort to locate the witness." *Edwards*, 136 Ariz. at 181. "The length to which the state must go to produce a witness is a question of reasonableness." *Montano*, 204 Ariz. 413, ¶ 26. "An appropriate standard to apply is to ask whether the leads which were not followed would have been the subject of investigation if the [s]tate had been trying to find an important witness and had no transcript of prior testimony." *Edwards*, 136 Ariz. at 182.

¶14 In the usual circumstance in such a case, the question is whether the state made sufficient efforts to locate a witness in the first instance. *E.g.*, *id.*; *Rivera*, 226 Ariz. 325, ¶ 18. Here, the evidence demonstrated that the witness was located, but that he was at sea, on an oil tanker, and would not return until the trial was over. Thus, the efforts by the state to locate R.E. were sufficient. The issue here, then, is whether the

[1]Romero does not dispute that he had a prior opportunity to cross-examine R.E. in the video deposition.

state made sufficient good-faith efforts, once his location was determined, to secure his presence at trial.

¶15 Romero suggests that R.E. may not have even been at sea at the time of the trial. Yet Romero does not direct us to any evidence supporting that theory. On appeal, Romero argues that R.E.'s statements establishing his unavailability were hearsay. But "the trial court is not bound by the rules of evidence in an unavailability hearing as it is essentially deciding the admissibility of evidence." *Rivera*, 226 Ariz. 325, ¶ 17; *see also* Ariz. R. Evid. 104. Nonetheless, whether to believe A.V. or N.E. is the type of credibility determination we leave to the trial court. *See State v. Buccheri-Bianca*, 233 Ariz. 324, ¶ 38 (2013) ("It is not the province of the appellate court to reweigh evidence or reassess the witnesses' credibility.").

¶16 The evidence, however, does not reflect that the state made any efforts beyond contacting R.E.'s wife to ensure his presence at trial. While it secured a subpoena for his attendance at trial, it made no effort to serve him with the subpoena apart from scanning a copy of the subpoena and emailing it to him at his last known email address, and mailing a copy of the subpoena to his last known street address. Even so, it is unclear from the record, and unknown to this court, what more the state could have done to legally compel R.E.'s presence. Certainly, beyond the efforts the state did undertake, Romero did not identify below any formal procedures the state could have employed to effectively compel R.E. to appear.[2]

¶17 Nonetheless, as Romero argues, at least one court has held that "[e]ven if [a] formal procedure is not available, good faith would require at least a diligent effort to have the witnesses appear voluntarily." *State v. Mokake*, 171 Ariz. 179, 180 (App. 1992) (relying on a federal 10th Circuit and a Washington state appellate opinion). But in assessing the state's diligence, we have never required that all conceivable avenues to secure a witness's voluntary presence at trial be pursued. Even so, Romero argues that the state "was not without options" as the state had "made no

[2]Contrary to Romero's contention, the state was not required to make use of the Uniform Act to Secure the Attendance of Witnesses From Without a State in Criminal Proceedings when any attempt to do so would have been futile while R.E. was at sea because the Act applies only to a state, including "any territory of the United States and the District of Columbia." A.R.S. § 13-4091(2); *State v. Ray*, 123 Ariz. 171, 173 (1979) (holding state not required to utilize the Act if to do so would be futile).

attempt to contact [R.E.'s employer]." Romero points to a number of possibilities arising from such contact, speculating that R.E. "could be airlifted from his ship to an airport for a flight back to the U.S.; or even whether it might be possible to have [R.E.] testify via internet link or satellite phone." Moreover, even if the state were to have contacted R.E.'s employer, there is no showing that the employer would have been willing to make an accommodation for his testimony, nor that R.E. would have been willing to appear voluntarily. Romero has not presented any reasonable avenue that would likely have been successful in securing R.E.'s attendance and live testimony, voluntarily or otherwise. *See Montano*, 204 Ariz. 413, ¶ 31 ("The only thing lacking was a request for the assistance of local authorities, and there is no showing that such action would likely have brought success."); *see also State v. Greer*, 27 Ariz. App. 197, 201-02 (1976) ("A good faith search does not mean that every lead, no matter how nebulous, must be tracked to the ends of the earth . . . ." (quoting *Poe v. Turner*, 490 F.2d 329, 331 (10th Cir. 1974)), *overruled on other grounds by State v. Hughes*, 120 Ariz. 120 (App. 1978).

¶18 Romero also contends that the state had "ample time [before R.E. went to sea on January 22] to subpoena [him] and ensure his appearance at trial." Romero asserts that the state negligently failed to begin seeking R.E.'s appearance until three weeks before trial and that the prosecutor knew R.E. was essential to the state's case and knew he might be hard to procure for trial. However, the real question is—because R.E.'s being at sea made him unavailable for trial—whether the state acted unreasonably in failing to subpoena R.E. before January 22, when he went to sea. Romero has not persuaded us that it did. Although the state could have issued and served subpoenas for each witness as soon as a trial date was set—here, some seven months in advance—and done so while serious plea negotiations were underway, to do so in the vast majority of cases is impractical. Here, plea negotiations were formally terminated by Romero on January 2. Requiring the assigned prosecutor, who was then busy in trial, to both identify R.E. as a necessary witness and then subpoena him within the next twenty days, on the off-chance that he might be going to sea as early as January 22, is not reasonable. And, although the prosecutor's failed communication with her assistant caused R.E.'s subpoena to be neglected until March 7, it is unclear whether, even with perfect communication, R.E. would have been subpoenaed before he became unavailable.

¶19 Although being at sea does not conclusively establish a witness's unavailability, under the circumstances here and in light of the evidence presented, the trial court did not abuse its discretion in

determining that the state engaged in good-faith efforts to secure R.E.'s attendance at trial.[3] Neither did it then, therefore, abuse its discretion in allowing the use of R.E.'s video deposition at trial.

Disposition

¶20 For the foregoing reasons, we affirm Romero's conviction and sentence.

[3]And based on our determination there was no error, we need not address Romero's argument that any error was not harmless.