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AUG 31 2011
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

GREGORY TRAINOR,

Petitioner,

v.

HON. JOSE ROBLES, Judge Pro Tempore of the Superior Court of the State of Arizona, in and for the County of Pima,

Respondent,

and

THE STATE OF ARIZONA,

Real Party in Interest.

2 CA-SA 2011-0054
DEPARTMENT A

MEMORANDUM DECISION
Not for Publication
Rule 28, Rules of Civil Appellate Procedure

SPECIAL ACTION PROCEEDING

Pima County Cause No. CR20100319

JURISDICTION ACCEPTED; RELIEF GRANTED

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E C K E R S T R O M, Presiding Judge.

¶1 In this special action, petitioner Gregory Trainor, defendant in the underlying criminal proceeding, challenges the respondent judge's denial of Trainor's motion to depose A., his eleven-year-old biological child, pursuant to Rule 15.3(a)(2), Ariz. R. Crim. P. He contends the respondent's order deprives him of his due process rights because it prevents him from investigating the charges against him and adequately preparing his defense. For the reasons stated below, we accept jurisdiction of this special action and grant relief.

FACTS AND PROCEDURAL BACKGROUND

¶2 Trainor has been charged with two counts of sexual conduct with a minor under the age of fifteen years and two counts of child molestation for acts allegedly perpetrated against K., the now adult daughter of Trainor's former wife Kelly. Those acts allegedly occurred between January 1, 2000, and January 1, 2003, but K. did not tell Kelly about them until early 2009. After Kelly reported the matter to the Pima County Sheriff's office, detectives interviewed eleven-year-old A., K.'s half sister and the biological child of Trainor and Kelly. Real party in interest State of Arizona provided Trainor with a transcript of the interview. Although both parties summarize or quote portions of the interview, neither has provided this court with a copy of the transcript.[1] Trainor asserts A. stated "she had not been touched inappropriately by [Trainor], and also advised the interviewer that her sister 'won't tell me anything, honestly.'" According to

[1]Trainor explains in his petition that he did not include the transcript in his special action appendix because the respondent had "ordered [it] sealed." We note that a sealed document transmitted to this court can remain sealed. *See, e.g.*, *Plattner v. State Farm Mut. Auto. Ins. Co.*, 168 Ariz. 311, 319, 812 P.2d 1129, 1137 (App. 1991).

the state, A. said Trainor "had touched her sister" but that K. "would not tell her anything about it." The state asserts that "A. has no direct knowledge about the incidents at issue in this case," and, consequently, is "not a material witness."

¶3 Trainor requested an interview of K. but, exercising her right as a victim pursuant to the Victims' Bill of Rights, she declined. Trainor also asked to interview A. The state filed a notice informing Trainor that Kelly refused to allow A. to be interviewed. Trainor filed a motion for order of deposition pursuant to Rule 15.3, Ariz. R. Crim. P., which the state opposed. The respondent judge denied the motion. Trainor filed a motion for reconsideration and requested, alternatively, that the respondent stay all further proceedings so he could seek special action review of the decision. That motion likewise was denied.[2] This special action followed.

SPECIAL ACTION JURISDICTION AND STANDARDS OF REVIEW

¶4 We accept jurisdiction of this special action for a variety of reasons. First, Trainor has no "equally plain, speedy, and adequate remedy by appeal." Ariz. R. P. Spec. Actions 1(a). The order is interlocutory in nature, and no direct appeal lies from it. *See generally* A.R.S. § 13-4033 (identifying orders from which criminal defendant may take direct appeal); *see also Potter v. Vanderpool*, 225 Ariz. 495, ¶ 7, 240 P.3d 1257, 1260 (App. 2010) (finding it appropriate to accept special action jurisdiction of interlocutory order). Additionally, Trainor's right to a direct appeal, should he be convicted after a

[2]The respondent struck the motion on the ground Trainor had failed to comply with Rule 35.1, Ariz. R. Crim. P., by not providing legal authority to support it. But he also appears to have denied it on the merits, finding no good cause for reconsidering his previous order.

jury trial, would not provide him with an equally adequate remedy, given that he is claiming he must interview A. before trial in order to defend properly against the charges. He contends he is being deprived of his due process rights, including the opportunity to conduct an investigation into available defenses.

¶5 Second, questions of law are particularly appropriate for review by special action. *See State v. Nichols*, 224 Ariz. 569, ¶ 2, 233 P.3d 1148, 1149 (App. 2010). This special action requires us to interpret Rule 15.3, Ariz. R. Crim. P., which is a question of law. *See State ex rel. Thomas v. Gordon*, 213 Ariz. 499, n.2, 144 P.3d 513, 515 n.2 (App. 2006). So, too, is the question whether the respondent judge has applied the rule correctly or has employed an incorrect standard. *See Greenwald v. Ford Motor Co.*, 196 Ariz. 123, ¶ 4, 993 P.2d 1087, 1088 (App. 1999). Thus, although we generally review for an abuse of discretion a trial court's denial of a party's request to depose a witness pursuant to Rule 15.3, *see State v. Fuller*, 143 Ariz. 571, 574, 694 P.2d 1185, 1188 (1985); *State v. Reid*, 114 Ariz. 16, 27, 29, 559 P.2d 136, 147, 149 (1976), we review de novo its interpretation of procedural rules and the question whether the court erred as a matter of law in applying the rules. *See State v. Petty*, 225 Ariz. 369, ¶ 7, 238 P.3d 637, 639-40 (App. 2010); *see also State v. Talmadge*, 196 Ariz. 436, ¶ 12, 999 P.2d 192, 195 (2000) (acknowledging trial court has discretion whether to grant motion to compel deposition).

¶6 Finally, we may grant a party special action relief if the respondent judge abused his or her discretion. *See* Ariz. R. P. Spec. Actions 3(c). And "[w]hen a trial court predicates its decision on an incorrect legal standard . . . it commits an error of law

and thereby abuses its discretion." *State v. Mohajerin*, 226 Ariz. 103, ¶ 18, 244 P.3d 107, 112 (App. 2010); *see also Potter*, 225 Ariz. 495, ¶ 14, 240 P.3d at 1262 (court abuses discretion by committing legal error). We conclude the respondent judge did so here.

DISCUSSION

¶7 We employ the same principles when interpreting procedural rules as we do when interpreting statutes. *Petty*, 225 Ariz. 369, ¶ 7, 238 P.3d at 640. Consequently, we must determine and give effect to the intent of our supreme court in promulgating a rule, "keeping in mind that the best reflection of that intent is the plain language of the rule." *Potter*, 225 Ariz. 495, ¶ 8, 240 P.3d at 1260. Unless a rule is unclear or ambiguous, we will not employ principles of construction to determine its meaning. *Id.*

¶8 Rule 15, Ariz. R. Crim. P., relates generally to disclosure and discovery in criminal prosecutions. Rules 15.1 and 15.2 prescribe the disclosure obligations of the state and the defendant, respectively. Rule 15.3 governs depositions. Worded in the disjunctive, it provides in subsection (a) three distinct circumstances in which a trial court may, in the exercise of its discretion, "order the examination of any person except the defendant and those [persons] excluded by Rule 39(b), [Ariz. R. Crim. P.]"[3] Trainor requested an order compelling A.'s deposition pursuant to Rule 15.3(a)(2). Rule 15.3(a)(2) provides, in relevant part, that the trial court may, in its discretion, order a person to submit to a deposition if the party seeking the deposition "shows that the person's testimony is material to the case or necessary adequately to prepare a defense or

[3]Rule 39(b) sets forth the rights of victims guaranteed by the Victims' Bill of Rights, *see* Ariz. Const. art. II, § 2.1, among which is the right to refuse to be interviewed. It is undisputed that A. is not a victim.

investigate the offense, that the person was not a witness at the preliminary hearing . . . and that the person will not cooperate in granting a personal interview."

¶9 In his minute entry denying the motion for deposition, the respondent judge squarely addresses only the first of the three criteria. The respondent observed that the offenses allegedly were committed between January 1, 2000, and January 1, 2003, and that A. was born on January 27, 2000. The respondent pointed out the state does not intend to call A. as a witness and has not included A. "in any of the Trial Witness Lists filed . . . that may trigger the application of Rule 15.1." Noting that A. was an infant when Trainor allegedly began to sexually abuse K. and only two or three when the alleged abuse stopped, the respondent concluded A. is "not a material witness and has no direct knowledge of the offenses."

¶10 Quoting *Santosky v. Kramer*, 455 U.S. 745, 753 (1982), the respondent judge emphasized, "'Freedom of personal choice in matters of family life is a fundamental liberty interest protected by the Fourteenth Amendment.'" He added, quoting *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923), this right "secures the right to 'establish a home and bring up children.'" Although it is unclear how these decisions are implicated here, we presume the respondent viewed them as supporting Kelly's decision, as A.'s mother, to decline Trainor's efforts to interview or depose A.

¶11 The respondent judge then concluded as follows:

> The State has disclosed a transcript of an interview of [A.] providing information that she is not a percipient witness of the allegations charged in the Indictment. "It is wholly speculative" that Defendant would obtain information that would assist him in the preparation of his defense,

> considering the date of the allegations in the Indictment range from when she was a newborn up to two years of age, and is presently 11 years of age. *Cf. Stewart v. Superior Court*, [163 Ariz. 227,] 232[, 787 P.2d 126, 131 (App. 1989)].

¶12 In so ruling, the respondent judge erred in several respects. First, although the materiality of a person's testimony is among the bases the rule provides for compelling a potential witness to submit to a deposition, it is not a condition precedent to such an order, as the state contends and the respondent's ruling implies. Rather, as noted, the first clause of subsection (a)(2) of Rule 15.3 is phrased in the alternative. Thus, a court may order the deposition if the person's testimony is material, *or* "necessary adequately to prepare" the defense of the case, *or* "necessary adequately to . . . investigate the offense." Ariz. R. Crim. P. 15.3(a)(2).

¶13 To the extent the respondent judge's order can be construed to address the second two criteria, it does so exclusively in the context of evaluating A.'s potential to provide relevant information as a percipient witness to the alleged criminal acts. But, as the state concedes, nothing in the text of Rule 15.3(a)(2) nor in any other pertinent authority supports the respondent's implicit conclusion that a person must be a percipient witness of the charged offenses in order to be deposed pursuant to that rule. To the contrary, as our rules of evidence make clear, information can be relevant and admissible at trial even if it relates to conduct, events, or observations after an offense was committed. *See* Ariz. R. Evid. 401 ("'Relevant evidence'" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable that it would be without the evidence.").

¶14 Based solely on the statements A. had made when the state interviewed her, the respondent judge reasonably could find that Trainor has not yet established whether her testimony will be material to the case. But Rule 15.3(a)(2) was not designed only to give a party the opportunity to question an indisputably material witness. It also expressly provides the parties a mechanism to "investigate the offense"—an endeavor which necessarily involves the process of determining whether a witness possesses relevant information. Ariz. R. Crim. P. 15.3(a)(2).

¶15 Although our criminal discovery rules "are not meant to be used for 'fishing expeditions,'" *State v. Hatton*, 116 Ariz. 142, 150, 568 P.2d 1040, 1048 (1977), *quoting State ex rel. Corbin v. Superior Court*, 103 Ariz. 465, 469, 445 P.2d 441, 445 (1968), Trainor has presented a sound basis to believe that A. might possess information relevant to the charges against him. A. was a resident of the same household as the victim, the victim's mother, and the defendant, during three pertinent time windows: (1) when the alleged crimes were committed, (2) six years later when the allegations first surfaced, and (3) between those two occurrences. Given A.'s close family ties with both the victim and the perpetrator in these relevant time frames, one might reasonably question the competence of any pretrial investigation that did not explore A.'s knowledge of the case.[4] And, although we agree with the respondent judge's conclusion that A. was too young to be a material witness in the first time window, we can draw no similar inference as to the other two.

[4]Not surprisingly, the state considered A. a potentially fruitful witness. Our record demonstrates that its investigation involved conducting a recorded interview of her.

¶16 As Trainor points out, A. had lived her entire life in the same home as "the parties to this conflict," which "unquestionably created a reasonable potential for her to be witness to actions or inactions, statements or silences, conflicts and motivations within the household for almost a decade." At minimum, Trainor must be permitted to question A. in order to determine the basis for her statement that Trainor "had touched her sister" and what she meant when she said K. "would not tell her anything about it." Had K. told A. she did not want to discuss what had happened? Or, had K. said to A. she had nothing to tell her because nothing had occurred? We agree with Trainor that he must be permitted to question A. as to how she came to know about the allegations and the circumstances in the home that might have prompted K. to report the alleged acts in 2009.

¶17 We find our supreme court's decision in *Murphy v. Superior Court*, 142 Ariz. 273, 689 P.2d 532 (1984), analogous and instructive in this regard. There, the trial court had denied the defendant's request to depose the victim assistance caseworker who had met with the victim the night she was sexually assaulted. *Id*. at 277-78, 689 P.2d at 536-37. Accepting special action jurisdiction, the supreme court stated that although a criminal defendant does not have a constitutional right to conduct discovery, "Rule 15.3 is intended to effectuate the constitutional right of cross-examination contained in the [C]onfrontation [C]lause of the Sixth Amendment of the United States Constitution." *Id.* at 278, 689 P.2d at 537. The court acknowledged the state's contention that the caseworker was not a material witness because, as the caseworker stated in his affidavit, he had not discussed the details of the incident with the victim. *Id*. "Nonetheless," the

supreme court stated, "we believe it is entirely possible that a victim assistance caseworker, who is frequently in close contact with a distraught victim only moments after an incident, will learn details of the incident which would make the caseworker a proper subject for discovery as a potential impeachment witness." *Id*.

¶18 Noting the legislature had not enacted a statutory privilege protecting communication between a victim and the caseworker, the court concluded "victim assistance caseworkers generally fall within Rule 15.3 as being 'material to the case or necessary adequately to prepare a defense or investigate the offense.'" *Murphy*, 142 Ariz. at 278, 689 P.2d at 537, *quoting* Ariz. R. Crim. P. 15.3(a)(2). Thus, even though A. is a minor, as the respondent judge noted in his minute entry, she is a competent witness. Like the caseworker in *Murphy*, she falls within the scope of Rule 15.3(a)(2), and given her relationship to K. and Trainor, she is "a proper subject for discovery." *Murphy*, 142 Ariz. at 278, 689 P.2d at 537.

¶19 Finally, we fail to see how the authorities the respondent judge cited support his denial of Trainor's motion for deposition. Those cases recognize that a parent's rights to the care, custody, and control of their children are fundamental, *Santosky*, 455 U.S. at 753,[5] and that a parent has the right to "establish a home and bring

[5]The Supreme Court acknowledged the tension between the state's interest in protecting children and an individual's fundamental parental rights. It held that the Due Process Clause of the Fourteenth Amendment required that before a parent's rights may be severed, the state must support its allegations by evidence that is clear and convincing, not simply by a preponderance of evidence. *Santosky*, 455 U.S. at 758-60, 767, 769.

up children." *Meyer*, 262 U.S. at 399.[6] Although both of these decisions acknowledge the fundamental nature of parenting rights, neither addresses how those rights are to be balanced against a criminal defendant's procedural right under Arizona law to prepare a defense through investigation and discovery.[7]

¶20 If the respondent judge was attempting to protect A. from the embarrassment and discomfort of a deposition, he has other means of doing so. The rule gives the court the authority to determine the circumstances in which a deposition is to be conducted. *See, e.g.*, Ariz. R. Crim. P. 15.3(c), (d). A judge may limit the scope of the deposition and decide its location. *See id.* But nothing in the text of that rule, nor any other authority provided to this court, suggests that a parent's right to shield a non-victim child from the inconvenience and emotional discomfort of a deposition outweighs the defendant's right to conduct such discovery when necessary to "prepare a defense" or investigate the charged offense. Ariz. R. Crim. P. 15.3(a)(2).

¶21 In sum, the respondent judge applied erroneous standards and relied on inapposite case law in denying Trainor's motion to depose A. Based on the record with

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[6]The Supreme Court acknowledged a parent's duty to provide children with an education and found unconstitutional a Nebraska law that prohibited schools from teaching in a language other than English and prohibited schools from teaching a foreign language to children who have not yet passed the eighth grade. *Meyer*, 262 U.S. at 400-01, 403.

[7]*Stewart* is similarly inapposite. There, Division One of this court held the trial court had erred by appointing a guardian ad litem to represent non-victim children at pretrial interviews in criminal proceedings against the children's parents absent "a showing that [the] child's parents, by conflict of interest or for other reasons, may be unable or unwilling to perceive or advance the child's best interest." 163 Ariz. at 228, 787 P.2d at 127. It does not support the respondent's denial of Trainor's request to depose A. simply because Kelly prohibits it.

which we have been provided and the undisputed facts, Trainor sustained his burden under Rule 15.3(a)(2). Consequently, we reverse the respondent's order and direct him to conduct further proceedings consistent with this decision.

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Presiding Judge

CONCURRING:

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Judge

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Judge