FILED BY CLERK
JUL -1 2011
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Petitioner, v. HON. CHRISTOPER C. BROWNING, Judge of the Superior Court of the State of Arizona, in and for the County of Pima, Respondent, and ARTURO MARTIN FLORES, Real Party in Interest,	2 CA-SA 2011-0038 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

SPECIAL ACTION PROCEEDING

Pima County Cause No. CR20092122

JURISDICTION ACCEPTED; RELIEF GRANTED IN PART

Barbara LaWall, Pima County Attorney
By Jacob R. Lines
Tucson
Attorneys for Petitioner

Robert J. Hirsh, Pima County Public Defender
By David J. Euchner
Tucson
Attorneys for Real Party in Interest

B R A M M E R, Presiding Judge.

¶1 In this special action, petitioner State of Arizona challenges the respondent judge's denial on untimeliness grounds of what essentially was a motion in limine the state filed in the underlying criminal prosecution. We also are asked to decide whether the respondent erred when he ruled, notwithstanding the lateness of motion, that the state will be precluded from calling certain witnesses to testify at trial in order to identify real party in interest Arturo Martin Flores as the person depicted in a video recording of the charged offenses. We accept jurisdiction of this special action and, for the reasons stated below, we grant the state special action relief in part.

FACTUAL AND PROCEDURAL BACKGROUND

¶2 Flores has been charged with first-degree murder, attempted first-degree murder, and aggravated assault. He allegedly shot J.G. and shot and killed A.C. at a Tucson car wash. The shootings were captured on a security video surveillance camera. Relying primarily on Rule 701, Ariz. R. Evid., and *State v. King*, 180 Ariz. 268, 883 P.2d 1024 (1994), the state filed a Notice of Intent Re: Witnesses in which it stated it intended to present at trial individuals who knew Flores around the time of the shootings, about two years before they were to testify, and who were expected to identify Flores as the person depicted in the video recording. The state also indicated it intended to call as witnesses individuals who claimed they had seen a person who looked like the shooter in the video a week before the shootings in a vehicle like the one in the video recording.

The state not only maintained the testimony of these witnesses was admissible under Rule 701, but that it was not excludable under Rule 403, Ariz. R. Evid., because its probative value outweighed the danger of any unfair prejudice. Flores filed an objection to the notice, disputing the state's grounds for admission of the evidence, and the state filed a reply.

¶3 In his minute entry addressing Flores's objection to the state's notice, the respondent judge treated the notice as a motion.[1] He then found it had not been filed timely based, presumably, on the time limits set forth in Rule 16.1(b), Ariz. R. Crim. P., and the forty-five-day deadline the respondent had set for filing motions in the case. Even though the respondent denied the motion on this ground and noted in the minute entry that, consequently, he did not need to address whether the proposed testimony would be admissible, he nonetheless addressed that question. Presumably, he did so in order to inform the parties that, were the state to present the witnesses at trial for the purposes stated in its motion and if Flores were to object, the respondent would sustain that objection because he agreed with Flores's interpretation of *King* and rejected the state's contention that *King* supported admission of the testimony under Rule 701. Based on their arguments both below and in this court, the parties seem to have treated the respondent's ruling as a pretrial ruling on the admissibility of this evidence.

¶4 In this special action, the state contends the motion was not untimely and that the respondent judge erred by precluding it from presenting the witnesses' testimony.

[1]For purposes of clarity, we will refer to the state's notice as a motion throughout this decision.

Claiming it has no remedy by appeal, *see* Ariz. R. P. Spec. Actions 1(a), the state asks us to accept jurisdiction and grant relief.

SPECIAL ACTION JURISDICTION AND STANDARD OF REVIEW

¶5 We accept jurisdiction of this special action because, inter alia, as the state correctly asserts, it has "'no other means of obtaining" review of the issues it raises. *State v. Leonardo*, 226 Ariz. 593, ¶ 4, 250 P.3d 1222, 1223 (App. 2011); *see also State v. Miller*, 226 Ariz. 202, ¶¶ 1-2, 245 P.3d 887, 889 (App. 2010) (accepting special action jurisdiction to address state's challenge to trial judges' preclusion of state's proffered voice-recognition testimony at defendants' criminal trial, finding state had no adequate remedy by appeal); *see also* Ariz. R. Spec. Actions 1(a) (special action review proper when petitioner has no equally plain, speedy and adequate remedy by appeal). The state has no remedy by appeal because, not only is the challenged order interlocutory in nature, *see Potter v. Vanderpool*, 225 Ariz. 495, ¶ 7, 240 P.3d 1257, 1260 (App. 2010), but the state has no right to a direct appeal following a trial, *see* A.R.S. § 13-4032 (setting forth limited kinds of orders from which state may appeal directly in criminal proceeding); *see also State v. Bejarano*, 219 Ariz. 518, ¶ 14, 200 P.3d 1015, 1020 (App. 2008).

¶6 We consider as well the fact that this special action involves the interpretation of the rules of evidence, a pure question of law. *See State v. Petty*, 225 Ariz. 369, ¶ 7, 238 P.3d 637, 639 (App. 2010). So, too, are questions related to whether a trial court's application of a rule or case law is incorrect as a matter of law. *See Greenwald v. Ford Motor Co.*, 196 Ariz. 123, ¶ 4, 993 P.2d 1087, 1088 (App. 1999). Thus, although a trial court has broad discretion in determining the admissibility of

evidence, *State v. Oliver*, 158 Ariz. 22, 30, 760 P.2d 1071, 1079 (1988), and we do not disturb such rulings absent an abuse of that discretion, *id*., we review de novo its interpretation of procedural rules and the question whether the court has erred as a matter of law in applying both those rules and principles announced in case law, *see Petty*, 225 Ariz. 369, ¶ 7, 250 P.3d at 639. And, when a trial court commits an error of law, it abuses its discretion and special action relief may be appropriate. *See* Ariz. R. P. Spec. Actions 3(c) (abuse of discretion ground for granting special action relief); *Potter*, 225 Ariz. 495, ¶ 14, 240 P.3d at 1262 (court abuses discretion by committing legal error).

DISCUSSION

¶7 Flores never has argued the state's motion was untimely, nor that he either had been unaware of the proposed testimony or surprised by it; thus, in neither its motion nor its reply to Flores's response did the state mention that the motion had been filed outside the period prescribed by Rule 16.1, Ariz. R. Crim. P., and later than forty-five days before trial, the deadline the respondent judge had set in his November 23, 2010, minute entry for filing pretrial motions. The state, however, never offered the respondent any explanation why the motion had not been filed timely, explaining for the first time in its special action petition why it did not file the motion within the prescribed deadline. Relying on Rule 16.1(c), the state contends the motion was, in fact, timely because it had learned only just before filing it that the respondent had precluded similar testimony in another case.

¶8 A party may not base a special action petition on facts not before the trial judge when he entered the challenged order. A trial judge must be given the opportunity

to consider any such facts in ruling on issues before him and cannot be faulted for a ruling that might have been different had he been provided those facts. *Cf. State v. Schackart*, 190 Ariz. 238, 247, 947 P.2d 315, 324 (1997) (appellate court will not consider "materials that are outside the record on appeal"); *Hahn v. Pima County*, 200 Ariz. 167, ¶¶ 13-14, 24 P.3d 614, 619 (App. 2001) (failure to present facts or issues to trial court first constitutes waiver on appeal that challenges grant of summary judgment). The respondent judge treated the state's notice as a motion in limine. The state essentially conceded the parties did not agree on the admissibility of the proffered testimony, necessitating a ruling by the respondent. As such, the motion was subject to the deadline the respondent had set. Because the state provided the respondent no explanation for the untimely filing, we cannot say the respondent abused his discretion by finding the motion inexcusably late, given what was before him at the time he issued his ruling.

¶9 Even though the respondent judge stated he was not required to rule on the merits of the motion because it was untimely, he nonetheless addressed them, issuing what is essentially a pretrial ruling. Because the ruling is in anticipation of the state's attempt to introduce the witnesses at trial, we assume the respondent's ruling will be viewed as the law of the case on this issue in the underlying prosecution. And because we disagree with the respondent's legal conclusions as to the admissibility of this evidence, we address this portion of his ruling as well.

¶10 Rule 701, Ariz. R. Evid., permits a lay person, as opposed to an expert, to provide opinion testimony but limits such testimony "to those opinions or inferences

which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue."[2] In *King*, our supreme court considered whether the trial court had erred in permitting witnesses who were acquaintances of the defendant at the time of the offenses to testify that, in their opinion, the defendant was the person depicted in still pictures of a robbery that were derived from a surveillance camera videotape. 180 Ariz. at 280, 883 P.2d at 1036. The defendant argued that by admitting this evidence at his murder trial, the court had "allowed the witnesses to testify as to the ultimate issue of [his] guilt, which . . . is prohibited by . . . *Fuenning v. Superior Court*, 139 Ariz. 590, 680 P.2d 121 (1984)." *Id.* Rejecting this argument, the court concluded as follows:

> Although the jurors had the pictures before them and could make their own comparison between the person depicted in the pictures and defendant, they, unlike the state's witnesses, did not know defendant at the time the murders occurred. And, because defendant changed his appearance between the time of the crime and the trial, testimony from those who knew defendant at the time of the crime is particularly relevant. Because the state's witnesses knew defendant at the time of the murders, their opinions that the person depicted in the picture was or was not defendant was based on their perceptions. Moreover, their opinions assisted the jury in determining a fact in issue—the identity of the person on the videotape. Thus, this evidence was admissible under rule 701.

Id.

[2]Although the state's motion and Flores's objection addressed the admissibility of the witnesses' testimony under Rule 403 in addition to Rule 701, the respondent judge did not address Rule 403 in his minute entries and the state has not mentioned it in its special action petition. Therefore, we do not address whether the testimony is excludable on the ground that its "probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury." Ariz. R. Evid. 403.

¶11 In its motion, the state relied on *King* and contended the testimony of its proposed witnesses would assist the jury because the witnesses, unlike the jurors, knew Flores at the time of the shooting.[3] The state noted the witnesses' testimony could be based not only on Flores's appearance, but "the way he moves, the type of clothes he wears, the way he wears his clothes, or other body language characteristics." In his objection to the state's motion, Flores argued *King* is distinguishable because, unlike the defendant in that case, his "appearance has not substantially changed since his arrest on May 27, 2009." He asserted that *United States v. Langford*, 802 F.2d 1176, 1179 (9th Cir. 1986), on which the state also had relied, similarly is distinguishable because "unlike in *Langford*, the State has presented no evidence that the witnesses it intends to call will identify Mr. Flores based on their familiarity with . . . 'characteristics' of his that will not be immediately observable to the jurors themselves." In its reply, the state asserted Flores's appearance in fact had changed because Flores has "gained weight" since the shooting. The state asserted it is "reasonable to believe that the jury will have difficulty determining whether the person in the video is Defendant based on Defendant's obvious weight gain." The state also reiterated and further developed its contention that the witnesses had unique knowledge about Flores, specifically, the way Flores runs or "grabs his pants."

[3]As we noted above, the state mentioned in its motion that it intended to introduce testimony of witnesses who, a week before the shootings, had seen a person in a car that looked like the one in the video recording and that the person looked like the shooter in the video. But its reply to Flores's objection to the state's motion and its special action petition focus entirely on Flores's acquaintances. We do not address the admissibility of the other witnesses' testimony and express no opinion as to the admissibility of that evidence.

¶12 The respondent judge agreed with Flores, concluding "[*King*] does not provide authority for the relief which the State seeks." The respondent reasoned that the holding in *King* was "predicated upon the Court finding that such testimony was 'particularly relevant' given that the Defendant's appearance had changed between the time of the alleged crime and the time of trial. . . . Here, the State has not alleged any significant change in the Defendant's appearance." In a footnote, the respondent commented that the State had mentioned Flores had gained weight for the first time in its reply to Flores's objection to the state's motion, and "[n]o specifics were offered." The respondent added that "such a vague claim as made by the State in the matter at bar is not the type of 'change in appearance' referred to by the Court in *King*." The respondent further noted "the Defendant has affirmatively stated that the Defendant's appearance has not changed substantially between the time of the event and the time of trial."

¶13 In its petition for special action relief, the state argues the respondent judge misinterpreted *King* to require a party proffering such evidence to establish the appearance of the person to be identified has changed substantially. It then provides this court with more detail about the purported change in Flores's appearance than it had presented to the respondent, alleging Flores has gained eighty-six pounds since the time of the offense. The state reiterates its arguments that the witnesses have special knowledge about Flores's characteristics that the jurors will not, and that information will be helpful to the jurors by assisting them in determining whether the person in the videotape is Flores.

¶14 After the state filed its special action petition, the respondent judge issued a second minute entry in order "[t]o ensure that the record is both clear and accurate." The respondent pointed out in that minute entry that the state previously had not specified how much weight Flores had gained, nor had it "add[ed] any meaningful detail to its allegation" that he had gained weight or provided "factual support for its claim [that Flores had gained weight], such as an Affidavit, a medical record or some similar document(s)." The respondent stated that, even without such documentation, he "likely would have accepted for purposes of resolving a motion" an avowal from counsel about the weight gain.

¶15 As we previously noted in this decision, a party seeking special action relief may not rely in the petition on facts that were not before the trial judge when he entered the order being challenged. As we stated, the trial judge must be given the opportunity to consider those facts; we will not fault the trial judge for a ruling that might have been different had he, too, been presented them. *See Schackart*, 190 Ariz. at 247, 947 P.2d at 324; *Hahn*, 200 Ariz. 167, ¶¶ 13-14, 24 P.3d at 619. Nonetheless, even disregarding the fact Flores purportedly has gained eighty-six pounds since the time of the offenses, the respondent erred.

¶16 The respondent judge, like Flores, appears to read *King* as standing for the proposition that in order to permit a lay person to identify a defendant from a video recording or a photograph, the proponent of the evidence must establish as a condition precedent to admitting the evidence that the appearance of the person depicted changed significantly between the time of the offense or arrest and the time of trial. The

respondent suggests the jury here is equally capable of viewing the video recording and deciding for itself whether the person depicted in the video is Flores.

¶17 We do not read *King* this narrowly. There, the supreme court reiterated the well-established principle that Rule 701 "permits non-expert witnesses to give their opinions if their opinions are rationally based on their perception and helpful to the determination of a fact in issue." *King*, 180 Ariz. at 280, 883 P.2d at 1036. The court acknowledged that, although "the jurors had the pictures before them and could make their own comparison between the person depicted in the pictures and defendant, they, unlike the state's witnesses, did not know defendant at the time the murders occurred." *Id*. The court added, "because defendant changed his appearance between the time of the crime and the trial, testimony from those who knew defendant at the time of the crime is particularly relevant." *Id*. Thus, in that case, the court found the change in the defendant's appearance "particularly relevant" to the analysis but did not announce a general rule that made this a condition precedent to admitting the evidence.

¶18 In *Miller*, we employed this analysis in analogous circumstances. We accepted jurisdiction of the state's special action petition and concluded the respondent judges had erred in precluding the state from presenting at trial a witness who was to identify the defendants' recorded voices. *Miller*, 226 Ariz. 202, ¶ 2, 245 P.3d at 889. Although not the primary reason we granted the state relief in that case, we noted that the testimony was admissible as proper lay opinion under Rule 701. The defendants had argued the jury readily could listen to the recordings themselves and decide whether the persons recorded were the defendants. *Id.* n.7. We pointed out that the witness, who had

been employed by the state as a translator, was expected to identify the defendants' recorded voices "based on her perceptions from having heard all the recordings of the defendants' voices and the familiarity she gained through hearing them over a two-month period," rather than based on her expertise as a translator. *Id.* Thus, it was her special knowledge or experience as a lay person that made her testimony helpful to the jury in deciding whether the defendants were the persons whose conversations had been recorded.

¶19 Here, as we noted above, the state argued that identification of Flores by these witnesses was justified not only on the ground that he had gained what apparently was a significant amount of weight but also because they were familiar with distinctive characteristics of Flores's that helped them and, therefore, would help the jury, determine whether Flores was the person in the video recording. As we also noted, the state had contended in its motion, for example, that "the witnesses have a broader knowledge of Defendant than the jury will be able to see in Court" and "are in a better position to identify [him] in the video than the jurors." It added that their "identification of Defendant may be based on his appearance coupled with the way he moves, the type of clothes he wears, the way he wears his clothes, or other body language characteristics." And in its reply to Flores's objection to the motion, the state further explained that Flores is running in the video and, because the witnesses "have seen the way Defendant moves[,] . . . their perception of Defendant is different from the jury's perception." Thus, eliminating Flores's weight gain as a reason for permitting the witnesses to testify, there remains ample information justifying admission of this testimony under Rule 701.

Conclusion

¶20 Although the respondent judge erred in interpreting *King* and applied an incorrect standard when he ruled on the merits of the state's motion, he did not abuse his discretion when he denied the motion on the ground that it had been filed untimely.[4] We therefore accept jurisdiction of this special action and deny relief related to the respondent's finding that the motion was filed untimely, but grant relief as otherwise provided herein.

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

CONCURRING:

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

[4]In upholding this portion of the court's ruling, we do not suggest that motions in limine filed after normal motion deadlines are improper or discouraged. Indeed, strict adherence to Rule 16.1 may be ill advised when there are valid reasons for the filing of such a motion. In situations where the moving party provides the trial court with a satisfactory explanation, judicial economy and resources may be well served by entertaining the motion, even though the deadline has long passed. *See* Ariz. R. Crim. P. 16.1(c); *State ex rel. Collins v. Superior Court*, 132 Ariz. 180, 182, 644 P.2d 1266, 1268 (1982). As earlier noted, however, the state apparently failed to do so here.