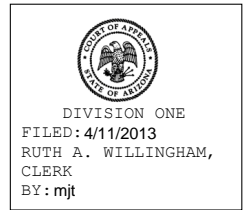


NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES. See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

**IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE**



STATE OF ARIZONA ex rel. WILLIAM) 1 CA-SA 13-0065
G. MONTGOMERY, Maricopa County)
Attorney,) DEPARTMENT B
)
Petitioner,) **MEMORANDUM DECISION**
) (Not for Publication -
v.) Rule 28, Arizona Rules of
) Civil Appellate Procedure)
THE HONORABLE HUGH HEGYI, Judge)
of the SUPERIOR COURT OF THE)
STATE OF ARIZONA, in and for the)
County of MARICOPA,)
)
Respondent Judge,)
)
OSCAR EFREN MONTANE,)
)
Real Party in Interest.)
_____)

Petition for Special Action
from the Superior Court in Maricopa County

Cause No. CR 2011-162910-001

The Honorable Hugh E. Hegyi, Judge

JURISDICTION ACCEPTED; RELIEF GRANTED

William G. Montgomery, Maricopa County Attorney Phoenix
By Keli Luther, Deputy County Attorney
Attorneys for Petitioner

James J. Haas, Maricopa County Public Defender Phoenix
By Jamie A. Jackson, Deputy Public Defender
Attorneys for Real Party In Interest

G O U L D, Judge

¶1 The State seeks special action relief from the trial court's order granting Real Party in Interest Oscar Efren Montane's ("Defendant") motion to depose Matrika Hunter. For the following reasons, we accept jurisdiction and grant relief.

FACTS AND PROCEDURAL BACKGROUND

¶2 Hunter and Albert Perez are the parents of a minor child, A.G.E.P. On October 8, 2011, Perez was shot during a house party and later died. Hunter told law enforcement she was with Perez when he was shot and that she saw Defendant shoot Perez in the torso and back. She later identified Defendant from a line up. Defendant was charged with one count of Second Degree Murder for the death of Perez.

¶3 When defense counsel requested a pre-trial interview with Hunter, she refused based on her rights as a victim under Arizona Revised Statutes ("A.R.S.") Section 13-4433(G) (2013).¹ Defense counsel moved for a court-ordered deposition of Hunter. The trial court granted the motion. The State then filed this special action challenging the trial court's order.

¹ A.R.S. § 13-4433(G), provides: "[t]his section applies to the parent or legal guardian of a minor child who exercises victims' rights on behalf of the minor child." A.R.S. § 13-4433(H) was redesignated as A.R.S. § 13-4433(G) in 2012. Unless otherwise specified, we cite to the current version of the applicable statutes because no revisions material to this decision have occurred.

DISCUSSION

I. Special Action Jurisdiction

¶4 We accept special action jurisdiction because Hunter has no “equally plain, speedy, and adequate remedy by appeal.” Ariz. R.P. Spec. Act. 1(a). Hunter’s right as a victim to refuse a pre-trial interview “would not be capable of protection if the matter were resolved at trial.” *Smith v. Reeves*, 226 Ariz. 419, 421, ¶ 9, 250 P.3d 196, 198 (App. 2011) (citing *Morehart v. Barton*, 225 Ariz. 269, 271, ¶ 5, 236 P.3d 1216, 1218 (App. 2010)).

II. Order Compelling Deposition

¶5 We review the order compelling the deposition of Hunter for an abuse of discretion. *State Farm Mut. Auto. Ins. Co. v Lee*, 199 Ariz. 52, 57, ¶ 12, 13 P.3d 1169, 1174 (2000). “The discretion, however, is a legal discretion. It includes the right to decide controverted factual issues . . . It does not include the privilege of incorrect application of law” *Brown v. Super. Ct.*, 137 Ariz. 327, 332, 670 P.2d 725, 730 (1983). As a result, we review the trial court’s interpretation of the Victim’s Bill of Rights, Article 2, Section 2.1, of the Arizona Constitution, and its implementing legislation, A.R.S. §§ 13-4401 to -4441, de novo. *State v. Ramsey*, 211 Ariz. 529, 532, ¶ 5, 124 P.3d 756, 759 (App. 2005).

¶6 The State argues the trial court abused its discretion in granting Defendant's motion to depose Hunter, because, as the mother of A.G.E.P., Hunter is also a crime victim and has the right to decline a defense interview under A.R.S. § 13-4433(G). Defendant argues Hunter cannot decline a defense interview because the victim's right to refuse an interview does not apply to her. Defendant further asserts that Hunter, as a material witness, is not an appropriate victim representative for A.G.E.P. Finally, Defendant claims that to allow Hunter to remain A.G.E.P.'s representative and thereby avoid submitting to an interview amounts to a violation of Defendant's due process rights.

¶7 We agree with the State and find the trial court abused its discretion in granting Defendant's motion to depose Hunter. In *Lincoln v. Holt*, 215 Ariz. 21, 26, ¶ 14, 156 P.3d 438, 443 (App. 2007), we addressed the issue currently before this court.² In *Lincoln* we held:

...that § 13-4433(H) allows a minor victim's parent or legal guardian who exercises victim's rights on behalf of the minor to also exercise all victim's rights specified in § 13-4433 on the parent or legal guardian's own behalf. This includes the right to refuse an interview on the parent

² We note that, although crucial to the disposition of this issue, neither counsel presented *Lincoln* to the trial court.

or legal guardian's own behalf, not just on behalf of the minor child.

Id.

¶8 Our decision in *Lincoln* is supported by the plain language of the Victim Rights Act and its implementing legislation. *Id.*, 215 Ariz. at 24-26, 156 P.3d at 441-443. The definition of a victim set forth in Section 2.1(C) of the Arizona Constitution and A.R.S. § 13-4401(19), encompasses minor children such as A.G.E.P., e.g., minor children of a person who has been murdered. A.R.S. § 13-4403(C) enables the minor victim's parent to exercise all of the victim's rights on behalf of the victim. Finally, based on A.R.S. § 13-4433(G), Hunter, as A.G.E.P.'s mother, may exercise the same rights as A.G.E.P., including the right to refuse an interview.

¶9 Defendant raises other arguments in favor of compelling Hunter's deposition, namely: Hunter is not the proper representative for A.G.E.P., because she is a material witness in this case and allowing Hunter to remain A.G.E.P.'s representative would deprive Defendant of his due process rights and his constitutional right to confront witnesses against him. Because Defendant failed to present these issues to the trial court, these issues are not properly before us. *Cf. State v. Wilson*, 200 Ariz. 390, 398, ¶ 24, 26 P.3d 1161, 1169 (App. 2001) (issues not presented to the trial court are waived on appeal).

¶10 Although Defendant waived the arguments on which he now relies, we exercise our discretion and address the merits of his position. See *State v. Smith*, 203 Ariz. 75, 79, ¶ 12, 50 P.3d 825, 829 (2002) (court has discretion to consider arguments even if waived). We reject Defendant's arguments on substantive grounds. Defendant contends that A.R.S. § 13-4403(D)(4)³ and this Court's holding in *State ex rel. Romley v. Dairman*, 208 Ariz. 484, 95 P.3d 548 (App. 2004), permit a court to utilize its discretion, if the circumstances require, to appoint a representative for a minor victim other than the minor's parent or legal guardian. The State argues *Dairman* is inapplicable because its holding is limited to a situation in which the parent or legal guardian of the minor victim is not acting in the best interests of the minor.

¶11 We agree with the State's position. In *Dairman*, the minor victims' parents and legal guardians did not believe the children had been injured by the defendant and believed the defendant was innocent. 208 Ariz. at 487, ¶ 7, 95 P.3d at 551. We held that, under the circumstances, the parent was not acting in the best interests of the minor, and that in such a situation,

³ A.R.S. § 13-4403(C) allows the court to appoint a representative for a minor victim in situations where the criminal offense is alleged against a member of the minor's immediate family. Section 13-4403(D) provides guidelines for the court to consider in appointing that representative, including "[t]he likelihood of the representative being called as a witness in the case."

§ 13-4403(C) did not limit the court's power to appoint a victim's representative for the minor. *Id.* at 488, ¶ 15, 95 P.3d at 552.

¶12 Here, there have been no allegations that Hunter is acting contrary to the best interests of A.G.E.P. In the absence of such a showing, the record does not support Defendant's claim to remove Hunter as A.G.E.P.'s victim representative.

¶13 Finally, Defendant argues that to allow Hunter to remain as A.G.E.P.'s representative would deprive Defendant of his due process rights and violate his constitutional right to confront witnesses against him. Defendant cites *Brady v. Maryland*, 373 U.S. 83 (1963) to support the proposition that he has a right to "discover material information going to the determination of guilt or innocence," which includes the right to interview Hunter. We disagree.

¶14 Defendant's due process rights do not include a right to discovery, including the right to conduct a pre-trial interview of Hunter. See *Norgord v. State ex rel. Berning*, 201 Ariz. 228, 233, ¶ 21, 33 P.3d 1166, 1171 (App. 2001) (quoting *State v. O'Neil*, 172 Ariz. 180, 182, 836 P.2d 393, 395 (App. 1991) ("[I]t is well-established that there is neither a federal nor a state constitutional right to pretrial discovery."); *Weatherford v. Bursey*, 429 U.S. 545, 559 (1977) (holding there is

no due process right to pre-trial discovery in a criminal case).⁴ In addition, Hunter's refusal to submit to an interview does not violate the confrontation clause. The Supreme Court has held that confrontation clause rights are trial rights that do not afford criminal defendants a right to pretrial discovery. *Pennsylvania v. Ritchie*, 480 U.S. 39, 53 (1987); *State ex rel. Romley v. Super Ct.*, 172 Ariz. 232, 240, 836 P.2d 445, 453 (App. 1992). Here, Defendant is not deprived of his confrontation clause rights because he may still cross-examine Hunter at trial.

CONCLUSION

¶15 For the reasons discussed in this decision, we grant relief and reverse the trial court's order granting Defendant's motion for deposition.

/s/

ANDREW W. GOULD, Judge

CONCURRING:

/s/

PATRICIA K. NORRIS, Presiding Judge

/s/

RANDALL M. HOWE, Judge

⁴ We note that Hunter was not the only alleged witness to the subject incident. The State has listed as witnesses three other individuals who were eyewitnesses to the shooting.