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See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24



DIVISION ONE
FILED: 05/19/2011
RUTH A. WILLINGHAM,
CLERK
BY: GH

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

M.P. Minor Crime Victim, by and) 1 CA-SA 11-0108
through B.P. and R.P., her parents.)
)
Petitioner/Crime Victim,) DEPARTMENT D
)
v.) **MEMORANDUM DECISION**
) (Not for Publication -
The Honorable Bernard C. Owens,) Rule 28, Arizona Rules
Commissioner of the Superior Court of) of Civil Appellate
the State of Arizona, in and of the) Procedure)
County of Maricopa,)
)
Respondent Judge,)
)
THE STATE OF ARIZONA,)
)
Real Party in Interest/Petitioner,)
)
Layne L.,)
)
Real Party In Interest.)

Petition for Special Action for the
Maricopa County Superior Court

Cause No. JV 553951

The Honorable Bernard C. Owens, Commissioner

JURISDICTION ACCEPTED; RELIEF GRANTED

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¶1 After the juvenile court overruled the State's objection to defense counsel's attempt to impeach a victim-witness with evidence that she lied to the police regarding her previous sexual history, the victim filed this special action seeking a determination that such evidence was prohibited by Arizona Revised Statutes (A.R.S.) section 13-1421 (2010), Arizona's rape-shield statute. For the reasons stated below, we accept jurisdiction and grant relief. We further vacate the stay of proceedings previously issued.

FACTUAL AND PROCEDURAL HISTORY¹

¶2 The State charged juvenile Layne L., the real party in interest, with two counts of sexual conduct with a minor under fifteen years of age, one count of sexual assault, one count of attempted sexual assault, one count of attempted sexual abuse of a minor under fifteen years of age, two counts of sexual contact

¹ We grant M.P.'s motion requesting acceptance of the audio CD of the adjudication hearing in lieu of a transcript.

with a minor fifteen years of age or older, and two counts of sexual abuse.

¶13 During the adjudication hearing, the State called M.P., one of the alleged minor victims, to testify. After M.P.'s direct testimony, defense counsel began his cross-examination of M.P. by asking whether she had lied to the police in this matter. M.P. denied that she had lied to the police and counsel then asked M.P. whether she recalled telling a police officer that she had previously participated in only one consensual sexual act. The State objected to defense counsel's question, arguing that defense counsel had "ambushed" the victim regarding her prior sexual conduct in violation of A.R.S. § 13-1421. In response, defense counsel argued that his line of questioning was not subject to A.R.S. § 13-1421 because he was not attempting to elicit evidence regarding M.P.'s lack of chastity. Rather, he was attempting to demonstrate her lack of veracity, that is, that she lied to a police officer when she informed him that she had only participated in consensual sexual conduct on one occasion. The juvenile court overruled the State's objection and ordered that defense counsel could continue his line of questioning for the purpose of demonstrating that M.P. had been untruthful to the police during her interview.

¶14 Petitioner M.P. thereafter filed this petition for special action, which the State subsequently joined.²

JURISDICTION

¶15 The petitioners contend that the juvenile court erred by ruling that defense counsel may question M.P. about her statements to the police regarding her prior sexual conduct. Special action jurisdiction is appropriate when a case presents a pure issue of law and there is "no equally plain, speedy, and adequate remedy by way of appeal." Ariz. R.P. Spec. Act. 1(a). Because an appeal offers a crime victim no adequate remedy for the admission of evidence regarding her prior sexual conduct in violation of A.R.S. § 13-1421, we accept jurisdiction.

DISCUSSION

¶16 The petitioners raise two claims: (1) that evidence of M.P.'s prior sexual conduct is procedurally inadmissible because defense counsel failed to comply with the notice requirement set forth in A.R.S. § 13-1421(B), and (2) that evidence of M.P.'s

² Although defense counsel asserts on page 2 of his response to the petition that M.P. has no standing to bring a special action, he submitted no argument on this issue and therefore it is waived. See *Schabel v. Deer Valley Unified Sch. Dist. No. 97*, 186 Ariz. 161, 167, 920 P.2d 41, 47 (App. 1996) ("Issues not clearly raised and argued in a party's appellate brief are waived."). Moreover, we note that A.R.S. § 8-416 (2007) grants a victim "standing to seek an order, to bring a special action or to file a notice of appearance in an appellate proceeding seeking to enforce any right or to challenge an order denying any right[.]"

prior sexual conduct is substantively inadmissible because it does not fall within any of the five enumerated exceptions outlined in A.R.S. § 13-1421(A). We address each in turn.

¶7 In 1998, the Arizona legislature enacted A.R.S. § 13-1421, which provides:

A. Evidence relating to a victim's reputation for chastity and opinion evidence relating to a victim's chastity are not admissible in any prosecution for any offense in this chapter. Evidence of specific instances of the victim's prior sexual conduct may be admitted *only if* a judge finds the evidence is relevant and is material to a fact in issue in the case and that the inflammatory or prejudicial nature of the evidence does not outweigh the probative value of the evidence, *and if* the evidence is one of the following:

1. Evidence of the victim's past sexual conduct with the defendant.
2. Evidence of specific instances of sexual activity showing the source or origin of semen, pregnancy, disease or trauma.
3. Evidence that supports a claim that the victim has a motive in accusing the defendant of the crime.
4. Evidence offered for the purpose of impeachment when the prosecutor puts the victim's prior sexual conduct in issue.
5. Evidence of false allegations of sexual misconduct made by the victim against others.

B. Evidence described in subsection A shall not be referred to in any statements to a jury or introduced at trial without a court order

after a hearing on written motions is held to determine the admissibility of the evidence. If new information is discovered during the course of the trial that may make the evidence described in subsection [A] admissible, the court may hold a hearing to determine the admissibility of the evidence under subsection A. The standard for admissibility of evidence under subsection A is by clear and convincing evidence.

(Emphasis added). We construe a statute to give effect to its plain meaning unless the language is ambiguous or would create an absurd result. *Bilke v. State*, 206 Ariz. 462, 464, ¶ 11, 80 P.3d 269, 271 (2003).

¶18 Under the express terms of subsection B, no evidence of a victim's prior sexual conduct may be introduced at trial unless the court has held a "hearing on written motions" to determine its admissibility or there is new information discovered during trial that would render the information admissible pursuant to subsection A. Here, it is undisputed that the "evidence" and "information" at issue was known in advance of trial and defense counsel never filed a motion to admit the evidence. Instead, defense counsel contends that he did not have to abide by the procedural requirements of A.R.S. § 13-1421 because he was not introducing the evidence to demonstrate that the victim is unchaste, but to prove that she is dishonest. Section 13-1421, however, governs *all* evidence relating to a victim's prior sexual conduct; and a defendant may

not circumvent the notice requirements set forth in subsection B based on his purported purpose for using such evidence. Therefore, juvenile is procedurally barred from introducing evidence of the victim's prior sexual acts and the juvenile court erred by allowing him to do so.

¶19 Likewise, evidence of M.P.'s prior sexual conduct is substantively barred by A.R.S. § 13-1421. Subsection A permits evidence of specific instances of the victim's prior sexual conduct *only if* the judge finds the evidence is relevant and material *and* that its probative value outweighs its prejudicial effect *and if* the evidence falls within one of the five enumerated exceptions. Here, defense counsel does not claim that the evidence falls within any of the exceptions. Indeed, defense counsel expressly conceded in the juvenile court that the prosecutor had not put the victim's prior sexual conduct at issue as required if the evidence is offered for the purpose of impeachment. A.R.S. § 13-1421(A)(4). Instead, he maintains that his purpose in using the evidence falls outside the scope of the statutory prohibition. As explained above, however, all evidence of a victim's prior sexual conduct is governed by A.R.S. § 13-1421, and only evidence that falls within one of the enumerated exceptions may be admitted.

¶10 Therefore, defense counsel's proposal, accepted by the juvenile court, that he could avoid introducing any direct evidence of the victim's prior sexual conduct by having her read the passage of her police interview discussing her sexual history and then asking her whether she was truthful and, if she maintained that her statements were indeed truthful, then having other witnesses read her statements to police and state whether they believed she was lying, nonetheless violates the statutory prohibition against introducing evidence of the victim's prior sexual conduct. The statute contemplates that a victim's prior sexual conduct may be relevant, probative, and useful for impeachment purposes. It bars the use of such impeachment evidence, however, unless the State places the victim's prior sexual conduct at issue, which was not done here. Defense counsel's proffered strategy for introducing the impeachment evidence, if permitted, would nullify A.R.S. § 13-1421(A)(4). Moreover, defense counsel's reliance on the Rules of Evidence and *Hernandez v. State*, 203 Ariz. 196, 199, 52 P.3d 765, 768 (2002), for the proposition that relevant, probative evidence of a witness's credibility should be admitted is misplaced. Here, A.R.S. § 13-1421's express bar to evidence of a victim's prior sexual conduct controls, not the general Rules of Evidence. See *Seisinger v. Siebel*, 220 Ariz. 85, 92, ¶ 26, 203 P.3d 483, 490

(2009) (explaining that when a statute conflicts with a rule on a substantive matter, "the statute must prevail"). Therefore, the juvenile court erred by allowing defense counsel to question M.P. regarding her prior sexual conduct.

CONCLUSION

¶11 For the foregoing reasons, we accept jurisdiction and grant relief. Based on the record thus far developed at trial, none of the exceptions enumerated in A.R.S. § 13-1421(A) apply. Therefore, we direct the juvenile court to sustain the State's objection and not permit defense counsel to directly or indirectly, question the petitioner, or any other witness, or otherwise introduce any evidence, regarding specific instances of M.P.'s prior sexual conduct.

PHILIP HALL, Judge

CONCURRING:

PATRICK IRVINE, Presiding Judge

JOHN C. GEMMILL, Judge