IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

RAYMOND PANZARELLA ON BEHALF OF
GREGORY GASTELUM GUTIERREZ,
Petitioner,

v.

THE HON. CASEY MCGINLEY, JUDGE 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.

No. 2 CA-SA 2016-0069
Filed December 14, 2016

Special Action Proceeding
Pima County Cause No. C20135376001

JURISDICTION ACCEPTED; RELIEF GRANTED

COUNSEL

Udall Law Firm, LLP, Tucson
By Peter Akmajian
Counsel for Petitioner

Barbara LaWall, Pima County Attorney
By Nicolette Kneup, Deputy County Attorney, Tucson
Counsel for Real Party in Interest

MEMORANDUM DECISION

Presiding Judge Howard authored the decision of the Court, in which Judge Staring concurred and Judge Espinosa dissented.

H O W A R D, Presiding Judge:

¶1 Raymond Panzarella seeks special action review of the respondent judge's sanction imposed pursuant to Rule 15.7, Ariz. R. Crim. P., for Panzarella's failure to disclose to the state a portion of his client's medical records relevant to a defense of "guilty except insane" (GEI) raised pursuant to A.R.S. § 13-502. Because Panzarella has no remedy by appeal, we accept jurisdiction. *See* Ariz. R. P. Spec. Act. 1(a); *State v. Newell*, 221 Ariz. 112, ¶ 5, 210 P.3d 1283, 1285 (2009) (special action jurisdiction proper to review discovery sanction). And, because Panzarella did not "fail[] to make a disclosure required by Rule 15," as required to permit sanctions under Rule 15.7, we grant relief. *See* Ariz. R. Spec. Act. 3.

Facts and Procedural Background

¶2 In December 2013, Gregory Gutierrez was charged with various felonies, including attempted first-degree murder. His initial counsel, Brad Roach, retained Dr. George Goldman to evaluate

whether Gutierrez had a viable GEI defense.[1] Roach provided Goldman with a box of Gutierrez's medical records from his treatment through the United States Department of Veteran's Affairs (VA). Roach ultimately disclosed Gutierrez would raise a GEI defense. He informed the state that Goldman had "looked through a bankers box of Mr. Gutierrez's military records" and offered to make copies of those records available to the state.

¶3 In August 2015, Panzarella replaced Roach as Gutierrez's counsel. He informed the state he was "attempting to organize and synthesize" Gutierrez's "medical/psychiatric reports" and "agree[d]" the state's expert should have the opportunity to review those reports. Panzarella ultimately disclosed a portion of Gutierrez's medical records and informed the state he had provided all records relevant to Gutierrez's mental health or diagnosis of post-traumatic stress disorder (PTSD).

¶4 During trial, Gutierrez's wife, Tracy, testified extensively about changes in Gutierrez's behavior over the last decade, including details about his substance abuse and mental health and medical history. The state asked Panzarella why some of Tracy's testimony covered topics not addressed in the disclosed medical documents, and Panzarella revealed he had not disclosed all of Gutierrez's medical records. The next day, Panzarella informed the state via e-mail that he had reviewed the box of medical records and had found "nothing of relevance to the issue of" PTSD, that he had not provided those records to the state or to experts, and that he did not intend to use them at trial. He also claimed he had "disclosed all of the PTSD related medical/mental health treatment records" to the state and his experts.

¶5 The state notified the respondent judge about the undisclosed records. Panzarella again avowed that he had reviewed the documents and had found no undisclosed records related to PTSD. However, when given the opportunity to review those

[1]Gutierrez also sought a mental health evaluation under Rule 11, Ariz. R. Crim. P. The appointed examiner determined Gutierrez did not meet GEI criteria.

records, the state uncovered numerous documents related to Gutierrez's mental health, including documents suggesting his PTSD was in remission and that his continuing issues were a result of alcohol abuse. The respondent concluded Panzarella was required to disclose the records. After extensive discussion with the parties about how to proceed, the respondent granted Panzarella's motion for mistrial.[2]

¶6 The state moved for sanctions, citing Rule 15.7 as well as Rule 33, Ariz. R. Crim. P., governing criminal contempt. It argued Panzarella had been required to disclose a list of the documents pursuant to Rule 15.2(c)(3) and had violated Ethical Rules 3.3 and 4.1, Ariz. R. Sup. Ct. 42, by misleading the state and the respondent. In his response, Panzarella again insisted that he was not required to disclose the records pursuant to Rule 15.2(c)(3) because he did not intend to use them at trial. He also claimed he did not "lie to the court or to counsel" but instead "simply has an honest disagreement with the prosecution whether the undisclosed records are of any real importance." Panzarella later filed an affidavit by Goldman in which he stated he had "no recollection of reviewing a large amount, or a box, of data in connection with the . . . case."

¶7 After a hearing on the state's motion, the respondent judge granted the state's motion for sanctions under Rule 15.7, requiring Panzarella to pay $620 to the Pima County Attorney's Office for "costs associated with witness testimony and victim transport for a second trial" and $2,552.27 to the Pima County Jury Commissioner "for jury fees associated with the first trial." The respondent concluded the records were subject to disclosure under Rule 15.2 because they were relevant to Gutierrez's GEI defense, citing *State v. Thornton*, 187 Ariz. 325, 929 P.2d 676 (1996). The respondent also found the records had been provided to Goldman and, thus, he had "potentially used them in forming his opinion" and, additionally, that the records were "'used' at trial" because they "contained information relating to Mr. Gutierrez' treatment or provided proper context for

[2]Panzarella withdrew from representing Gutierrez, and the respondent judge appointed new counsel.

understanding the testimony of Mrs. Gutierrez" and "contain[ed] numerous points of discussion of PTSD."

¶8 The respondent determined, however, that "contempt proceedings are not appropriate in this matter" because he did not "believe that Mr. Panzarella's conduct was necessarily intentional with an intent to hide evidence or otherwise impugn the integrity of the court." After the respondent denied Panzarella's motion for reconsideration, Panzarella petitioned this court for special action relief.

Discussion

¶9 Although we review a trial court's decision whether to impose discovery sanctions for an abuse of discretion, *see State v. Naranjo*, 234 Ariz. 233, ¶ 29, 321 P.3d 398, 407 (2014), "the question whether a particular basis for [imposing that sanction] applies at all is an issue of law that we review de novo," *State v. Shipman*, 208 Ariz. 474, ¶ 3, 94 P.3d 1169, 1169 (App. 2004). *See also State v. Roque*, 213 Ariz. 193, ¶ 21, 141 P.3d 368, 380 (2006) (scope of disclosure under Rule 15 is a question of law). And legal error constitutes an abuse of discretion. *State v. Peoples*, 240 Ariz. 245, ¶ 7, 378 P.3d 421, 424 (2016).

¶10 In interpreting a rule, we look first to the rule's plain language because that is "the best and most reliable index of [the rule's] meaning." *State v. Hansen*, 215 Ariz. 287, ¶ 7, 160 P.3d 166, 168 (2007), *quoting Deer Valley Unified Sch. Dist. No. 97 v. Houser*, 214 Ariz. 293, ¶ 8, 152 P.3d 490, 493 (2007). Relevant here, Rule 15.2(c)(2) requires a criminal defendant to disclose "[t]he names and addresses of experts whom the defendant intends to call at trial, together with the results of the defendant's physical examinations and of scientific tests, experiments or comparisons that have been completed." Rule 15.2(c)(3) requires disclosure of "[a] list of all papers, documents, photographs and other tangible objects that the defendant intends to use at trial." Additionally, Rule 15.2(e) requires the defendant to make available, upon request, any item specified in the list provided pursuant to Rule 15.2(c)(3) and "[a]ny completed written reports, statements and examination notes made by [the] experts" identified pursuant to Rule 15.2(c)(2). Rule 15.7(a) permits a trial court to

impose sanctions, including imposing costs, "[i]f a party fails to make a disclosure required by Rule 15."

¶11 The respondent judge did not specify what subsection of Rule 15.2 Panzarella purportedly had violated by failing to disclose the medical records. Seemingly referring to Rule 15.2(c)(3), however, he noted the medical records had been "'used' at trial," apparently because they were relevant to Tracy Gutierrez's trial testimony. But subsection (c)(3) does not hinge on relevancy; it hinges on the defendant's decision whether to use the document at trial. Had our supreme court intended the rule to require disclosure of all relevant evidence, it would have so indicated in the rule's plain language. *See, e.g.,* Ariz. R. Civ. P. 26(1)(A) (permitting discovery of "any matter, not privileged, which is relevant to the subject matter involved in the pending action"). And, although Panzarella acknowledged Tracy Gutierrez had reviewed many of those records in advance of her testimony, we find no authority suggesting such review means a document was used at trial and thus subject to disclosure. Despite the dissent's contrary assertion, nothing in the text of the rule suggests it requires disclosure of any document a witness has reviewed that relates to the subject matter of that witness's testimony. Rule 15.2(c)(3) encompasses only "tangible objects" that "the defendant will offer at trial." Ariz. R. Crim. P. 15.2 cmt.

¶12 Rule 15.2(c)(2) also did not require Panzarella to list the documents or make them available under Rule 15.2(e). Like subsection (c)(3), this subsection is limited to evidence the defendant "will offer at trial." Ariz. R. Crim. P. 15.2 cmt. Panzarella did not fail to disclose any evidence he intended to offer at trial.[3] And we

[3]Rule 15.1(b)(4) governs expert disclosure by the state. It is broader than Rule 15.2(c)(2), requiring the state to disclose "[t]he names and addresses of experts who have personally examined a defendant or any evidence in the particular case, together with the results of physical examinations and of scientific tests, experiments or comparisons that have been completed," irrespective of whether the expert will testify or the evidence will be used at trial. Ariz. R. Crim. P. 15.1(b)(4); *see also* Ariz. R. Crim. P. 15.2 cmt. We note, however, that the comment to Rule 15.1(a) states that "[m]ental examinations and

disagree with the dissent's suggestion that this rule required Panzarella to disclose any historical medical record reviewed by Dr. Goldman. Instead, viewed as a whole, the rule requires disclosure of examinations and tests performed in preparation of the expert's testimony. *See Bolding v. Hantman*, 214 Ariz. 96, ¶ 6, 148 P.2d 1169, 1172 (App. 2006) (court must consider entire rule in construing supreme court's intent). Had our supreme court intended otherwise, it would have said so. *See, e.g.*, Ariz. R. Civ. P. 26.2(a) (requiring parties in medical malpractice action to exchange "copies of all of plaintiff's available medical records relevant to the condition which is the subject matter of the action"). The purpose of the rule is not to absolve the state of its obligation to investigate a disclosed defense. Instead, our disclosure rules are intended to prevent the state from being surprised by that defense. *State v. Rienhardt*, 190 Ariz. 579, 586, 951 P.2d 454, 461 (1997). Our interpretation is entirely consistent with that purpose. And, although Rule 15.2(e)(2) requires disclosure of any report prepared by an expert, it does not require a defendant to disclose documents relied on by the expert in preparing that report.

¶13 Relying in part on *Thornton*, the respondent judge reasoned that disclosure was required under Rule 15 because Gutierrez had put his mental health at issue by raising a GEI defense. *Thornton* does not support that conclusion. There, the court addressed only whether the Fifth Amendment prohibited compelled disclosure of "the names of psychiatrists and mental health records," and concluded it did not. *Thornton*, 187 Ariz. at 331, 929 P.2d at 682. Although the court broadly stated "[t]he records were discoverable because [Thornton] put insanity at issue," it did not discuss the reason or authority for the compelled disclosure in that case and, indeed, expressly stated it was considering only the "limited question" of

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reports are not covered by this section," referring to Rule 11.4(b), Ariz. R. Crim. P. Rule 15.2, however, includes no parallel comment. We therefore assume, without deciding, that a defendant's pretrial disclosure of reports by a mental health expert is governed solely by Rule 15.2(c)(2). But, in any event, the disclosure obligations for mental health experts and examinations under Rule 11.4(b) are no broader than under Rule 15.2(c)(2).

Thornton's waiver of his privilege against self-incrimination by putting his sanity at issue. *Id.*

¶14 The state also reasons that Panzarella had a duty to disclose the records because Gutierrez raised an insanity defense. The state relies on *State v. Tallabas*, 155 Ariz. 321, 746 P.2d 491 (App. 1987), *State v. Hegyi*, 240 Ariz. 252, 378 P.3d 428 (App. 2016), and *Wells v. Fell*, 231 Ariz. 525, 297 P.3d 931 (App. 2013). But none of those cases impose a disclosure obligation. The state has conflated two issues: whether the rules require disclosure and whether certain evidence is exempt from disclosure that otherwise would be required by the rules or by court order.

¶15 The court in *Tallabas* addressed a claim of privilege, not a disclosure issue, concluding a defendant waives the physician-patient privilege and Fifth Amendment protections by placing his or her sanity in issue. 155 Ariz. at 324-25, 746 P.2d at 494-95. The court in *Hegyi,* addressing disclosure under Rule 11.4, Ariz. R. Crim. P., similarly did not find a disclosure obligation for medical records. 240 Ariz. 252, ¶ 19, 378 P.3d at 433. Instead, the court determined only that the defendant raising an insanity defense was not entitled to redact expert reports subject to disclosure under Rule 11.4(b). *Id.* The state makes much of the court's statement in *Hegyi* that unredacted "disclosure is a matter of fundamental fairness, so that the State can be prepared to address the affirmative defense at trial." *Id.* ¶ 20. But nothing about that statement creates a new disclosure obligation beyond those described in our Rules of Criminal Procedure.

¶16 Last, the state claims *Wells* is analogous because the defendant in that case was required to disclose before trial an interview of a police officer that counsel had undertaken without the state's knowledge, rather than reveal the interview for the first time during cross-examination pursuant to Rule 613, Ariz. R. Evid. *Wells*, 231 Ariz. 525, ¶¶ 2-3, 13, 15, 297 P.3d at 932-35. We observed that the interview was not subject to disclosure pursuant to Rule 15.2(a) through (e), but held a court could require discovery pursuant to Rule 15.2(g). *Id.* ¶ 13. Like the other authority cited by the respondent and the state, nothing in *Wells* creates a new disclosure requirement. The state has not argued that it was entitled to disclosure under Rule 15.2(g), and nothing in the record before us

suggests it could have met its burden of showing "substantial need" for the evidence and that it cannot "without undue hardship . . . obtain the substantial equivalent by other means." And, even if the record reflected that a request for discovery under Rule 15.2(g) would have been successful, there would be no reason to award sanctions against counsel if the state did not request, and the respondent did not order, discovery on that basis.

Disposition

¶17 Although it appears Panzarella may have misled the state and the respondent judge about the extent and content of Gutierrez's medical records, he did not fail to provide disclosure mandated by Rule 15. The respondent's imposition of sanctions pursuant to Rule 15.7 was therefore improper. We accept jurisdiction and vacate the respondent's order imposing sanctions. We express no opinion, however, whether Panzarella's conduct warrants sanction on any other basis.

E S P I N O S A, Judge, dissenting:

¶18 I respectfully disagree with my colleagues because the trial court's interpretation of Rule 15.2(c) is not necessarily inconsistent with its plain language, and because the record suggests strategic gamesmanship by defense counsel. I therefore would conclude extraordinary relief by special action is not merited when the court did not clearly err in finding Panzarella violated the rule and in holding him accountable for the mistrial he caused.

¶19 As my colleagues note, Rule 15.2(c)(2) requires disclosure of "[t]he names and addresses of experts whom the defendant intends to call at trial, together with the results of the defendant's physical examinations and of scientific tests, experiments or comparisons that have been completed." But the rule's "plain language" on its face does not limit the disclosure of test "results" solely to any that are offered at trial although such a stricture easily could have been added to its language. Indeed, an entirely different subsection, Rule 15.2(e), covers that situation. And the trial court at no time determined that Dr. Goldman had not utilized the undisclosed reports in preparing for his trial testimony, even if he said

he did not remember receiving them. In my view, Panzarella violated both the letter and the intent of Rule 15.2(c)(2) by withholding the most relevant evidence in the case—medical reports going directly to the heart of the defendant's PTSD defense, contained in records only selectively disclosed to the state.

¶20 Moreover, Rule 15.2(c)(3) was also in play because the withheld documents arguably were "use[d]" for trial. *See* Ariz. R. Crim. P. 15.2(c)(3) (requiring defendant to list "all papers, documents, photographs and other tangible objects" he "intends to use at trial"). The defendant's wife, who had acted as defense counsel's "paralegal" in preparing for trial and had reviewed all of the medical reports to identify the ones to be disclosed, testified about some of them and the medical diagnoses they contained, demonstrating she was aware of, and "used" the records in testifying, as the trial court expressly found. Thus, at the very least, the underlying intent of the rule in avoiding surprise at trial and promoting justice was thwarted, if not its literal terms violated. *See Wells v. Fell*, 231 Ariz. 525, ¶ 13, 297 P.3d 931, 934 (App. 2013) (underlying principle of disclosure rules is avoidance of surprise or undue delay, and to assist search for truth by providing "all the evidence possible so that the crucial facts may be presented at trial and a just decision made"), *quoting State v. Helmick*, 112 Ariz. 166, 168, 540 P.2d 638, 640 (1975).

¶21 But even if the trial court's interpretation of Rule 15.2 is deemed erroneous, we should not reverse if its ruling can be justified on other grounds supported by the record, whether or not argued by the parties. *See State v. Cañez*, 202 Ariz. 133, ¶ 51, 42 P.3d 564, 582 (2002) (although certain arguments abandoned by state for lack of argument, court of appeals obliged to uphold trial court's ruling if legally correct for any reason), *abrogated on other grounds by State v. Valenzuela*, 239 Ariz. 299, 371 P.3d 627 (2016); *see also State v. Kinney*, 225 Ariz. 550, n.2, 241 P.3d 914, 918 n.2 (App. 2010) (appellate court will address waived issue when upholding trial court's ruling). I believe my colleagues too readily discount the state's substantial need for the concealed evidence in the truth-finding process here, as well as its patent inability to otherwise obtain such privileged information—information that was known only to the defendant and was under his sole control. *See* Ariz. R. Crim. P. 15.2(g). Although

my colleagues fault the state, it can hardly be blamed for relying on Panzarella's affirmative misrepresentations and then being surprised during trial as a result, again, a troubling situation the disclosure rules are designed to prevent. *See Wells*, 231 Ariz. 525, ¶ 13, 297 P.3d at 934.

¶22 Finally, our special action jurisdiction is highly discretionary, *see State v. Felix*, 214 Ariz. 110, ¶ 10, 149 P.3d 488, 490 (App. 2006), particularly where the issues are extremely fact-bound as is the case here, *see Sierra Tucson, Inc. v. Bergin*, 239 Ariz. 507, ¶ 6, 372 P.3d 1031, 1033 (App. 2016), and discovery sanctions fall within the trial court's broad discretion, *see State v. Fenton*, 21 Ariz. App. 193, 194, 517 P.2d 1086, 1087 (1974). Today's ruling is not only unnecessary, but it may inspire, if not encourage, similar sharp practices and gamesmanship in the future. *See Wells*, 231 Ariz. 525, ¶ 13, 297 P.3d at 935 ("Disclosure, like all discovery, is not a game."), *quoting Bryan v. Riddel*, 178 Ariz. 472, 477, 875 P.2d 131, 136 (1994).

¶23 Accordingly, for all of the foregoing reasons I would conclude the trial court did not clearly err and I would decline jurisdiction of this special action.