

FILED
TIME 11:05AM

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

DEC 09 2015

IN AND FOR THE COUNTY OF MOHAVE

VIRLYNN TINNELL
CLERK SUPERIOR COURT
BY: ASG *DL DEPUTY

HONORABLE LEE F. JANTZEN
DIVISION 4
DATE: DECEMBER 9, 2015

COURT ORDER/NOTICE/RULING

STATE OF ARIZONA,
Plaintiff,

NO. CR-2014-01193

vs.

JUSTIN JAMES RECTOR,
Defendant.

The Court has received and considered the pending Motions and Responses, and makes rulings on the following pending motions.

1. *Defendant's Motion for Confirmation the State Will Not be Utilizing D.N.A. Evidence at Justin Rector's Trial*

The Defendant states that he believes the State will not be using DNA in his case and asks the Court to order the State to confirm this assumption on the record. Although he further states that he is not seeking to waste time, the Defendant fails to certify in his motion that he has made a good faith effort to resolve this outstanding discovery issue before seeking assistance from the Court, as required by Rule CR-8, Local Rules of Practice of Mohave County Superior Court.

Due to the Defendant's failure to abide by Rule CR-8, the Court finds his request for court intervention in discovery to be premature and therefore,

IT IS ORDERED denying the Defendant's Motion for Confirmation the State Will Not be Utilizing D.N.A. Evidence at Justin Rector's Trial.

2. *Defendant's Motion to Preclude State From Offering any Evidence at Penalty Phase Not Specific to Defendant's Mitigation Evidence*

The Defendant asserts that A.R.S. § 13-751(G) was intended to allow the State to offer evidence in the penalty phase to rebut whatever mitigation a Defendant offered and not intended to allow the State to present "non-stop statutory aggravation." (Motion at 2). He asks the Court to prohibit the State from offering any evidence that is not specific to the mitigation he presents in the penalty phase.



FILED

As the State notes in its response, the Defendant has not yet disclosed the mitigating circumstances he intends to prove at the penalty phase, and therefore the State has consequently not yet disclosed its rebuttal evidence. Thus, this motion is premature. The Court will rule only on an objection made to specific evidence. However, to assist the parties, the Court notes that it intends to follow the guidelines for mitigation rebuttal evidence set forth by the Arizona Supreme Court. For example, in *State v. Vanwinkle*, 230 Ariz. 387, ¶28, 285 P.3d 308 (2012), the Court stated:

Under A.R.S. § 13-751, any evidence offered to rebut the Defendant's mitigation must be relevant to show that the Defendant should not be shown leniency. *State v. Boggs*, 218 Ariz. 325, 339 ¶ 65, 185 P.3d 111, 125 (2008). This Court defers to the trial court's determination of relevance so long as the rebuttal is relevant to the "thrust of the defendant's mitigation" and not unduly prejudicial. *Id.* (quoting *State v. Hampton*, 213 Ariz. 167, 180 ¶ 51, 140 P.3d 950, 963 (2006)); see also *State v. Pandeli*, 215 Ariz. 514, 527-28 ¶ 43, 161 P.3d 557, 570-71 (2007) (explaining that Due Process Clause prohibits unbounded and limitless rebuttal evidence).

See also, *State v. Nordstrom*, 230 Ariz. 110, ¶10, 280 P.3d 1244 (2012)(finding that A.R.S. § 13-751(G) and A.R.S. § 13-752(G) "taken together, evince a legislative intent to permit the State to introduce relevant evidence whether or not the Defendant presents evidence during the penalty phase").

Thus, in determining what evidence the State will be allowed to present in rebuttal to the Defendant's mitigation, the Court will first determine what the "thrust" of the mitigation is, and whether the proffered rebuttal is relevant to show that the Defendant should not be shown leniency. The Court will also determine if the rebuttal is unfairly prejudicial. As long as the rebuttal is relevant and not unfairly prejudicial, it will be admitted. If the evidence proffered is hearsay, the Court will determine whether the Defendant had notice and the opportunity to explain or deny the hearsay, as well as whether there are sufficient indicia of reliability to allow its admission.

The Court also will instruct the jury that it cannot consider the State's evidence at the penalty phase as aggravation, and must consider it only in determining whether the Defendant should be shown leniency. See RAJI Capital Case Sentencing Instructions 2.9 Rebuttal Evidence.

IT IS ORDERED denying defendant's Motion to Preclude State From Offering any Evidence at Penalty Phase not Specific to Defendant's Mitigation Evidence.

3. *Defendant's Motion for Discovery of Victim Impact Evidence*

The Defendant seeks discovery of all victim impact statements the State intends to offer at trial. Although pursuant to A.R.S. §13-4426.01, victims cannot be compelled to disclose their impact statements, the State responds that it has already disclosed victim impact evidence to the Defendant and is currently compiling additional victim impact evidence that it intends to disclose soon. As such, the Court finds Defendant's motion to be moot.

IT IS ORDERED denying defendant's Motion for Discovery of Victim Impact Evidence as moot.

4. *Defendant's Motion for Court to Place on Record its Reasoning/Rationale for Rejection of Defense Objections at Trial*

The Defendant asks the Court to state on the record during trial its reasoning for overruling any defense objections. As with similar motions the Defendant has previously made, the Court finds this motion to be anticipatory and therefore premature. If an objection is made at trial, the Court will appropriately respond to it.

IT IS ORDERED denying defendant's Motion for Court to Place on Record its Reasoning/Rationale for Rejection of Defense Objections at Trial.

5. *Defendant's Motion to Exclude Venirepersons Who Cannot Fairly Consider Mitigating Evidence and/or Who Would Automatically Vote for Death Upon a Finding of Guilty in the Trial's Culpability Phase*

The Defendant moves the Court to excuse for cause all prospective jurors who cannot fairly consider mitigation and/or would automatically vote for a death verdict based upon a guilty verdict in the trial's culpability phase. The Court finds this motion to be anticipatory and premature because no prospective jurors have been summoned to appear for jury selection in this case. The Court intends to follow the law respecting selecting jurors to be empaneled in a capital case and will rule on a party's challenge for cause of a specific juror made at the appropriate time.

IT IS ORDERED denying the Defendant's Motion to Exclude Venirepersons Who Cannot Fairly Consider Mitigating Evidence and/or Who Would Automatically Vote for Death Upon a Finding of Guilty in the Trial's Culpability Phase.

6. *Defense Motion to Allow Independent Access to the Alleged Victim(s) Without Any Interference from the Prosecution*

The Defendant seeks an order permitting his defense team to directly contact the victims in this case without first making the request to the prosecution as required by A.R.S. §13-4433(B). He asserts that the statutory requirement is unconstitutional.

The Defendant concedes that victims have a right to refuse to be interviewed by the defense; he claims that requiring him to go through the prosecution to request such an interview violates his rights to free speech, due process and confrontation.

The Arizona Supreme Court recently noted that the Victim's Bill of Rights (VBR) "broadly recognizes that victims are entitled '[t]o be treated with fairness, respect, and dignity, and to be free from intimidation, harassment, or abuse, throughout the criminal justice process.' Ariz. Const. art. 2, §2.1." *J.D. v. Hegyi*, 236 Ariz. 39, 335 P.3d 1118 (2014). To that end, the Court stated:

The VBR also empowers the legislature to amend procedural and evidentiary rules "to ensure the protection of [victims'] rights," *id.* § 2.1(A)(11), and "to enact substantive and procedural laws to define, implement, preserve and protect the rights guaranteed to victims by [the VBR]." *Id.* § 2.1(D); see also *State v. Hansen*, 215 Ariz. 287, 290 160 P.3d 166, 169 (2007) (discussing scope of legislature's rulemaking power).

... The legislature also directed that the implementing legislation be "liberally construed to preserve and protect the rights to which victims are entitled." *Id.* § 13-4418.

... The VBR and its implementing legislation were adopted "to provide crime victims with basic rights of respect, protection, participation" and to aid the "healing of their ordeals." *Champlin v. Sargeant*, 192 Ariz. 371, 965 P.2d 763, 767 (1998) (quoting 1991 Ariz. Sess. Laws, ch. 229, § 2(2) (1st Reg.Sess.)) (internal quotation marks omitted). Consistent with these goals, the right to refuse a defense interview allows a victim to avoid contact with the defendant before trial. See *State v. Riggs*, 189 Ariz. 327, 330, 942 P.2d 1159, 1162 (1997). The right also respects the victim's privacy, *id.*, at least in the sense of preventing unwelcome questioning by the defense before the victim testifies in court. Such contact or questioning by the defense could subject the victim to further trauma. See *Draper*, 162 Ariz. at 438, 784 P.2d at 264 (recognizing defense interviews may result in further trauma).

J.D. v. Hegyi, 236 Ariz. at ¶¶13-14, 16.

The Defendant has not explained how complying with the requirement to not contact victims directly violates his free speech, confrontation and due process rights. The Court finds that prohibiting direct contact between defense team members and a victim does not violate any of these rights and does not interfere with defense counsel's duty to conduct an independent investigation. The requirement is within the scope of the VBR's mandate to the legislature to implement legislation protecting a victim's right to privacy and to refuse to be contacted by the defense.

IT IS ORDERED denying Defense Motion to Allow Independent Access to the Alleged Victim(s) Without Any Interference from the Prosecution.

7. *Defendant's Motion in Limine//Pretrial Objections//To Improper Prosecutorial Arguments that Unduly Inflame a Jury*

The Defendant moves *in limine* for an order precluding the State making improper arguments during trial that can unduly inflame the jurors. He clarifies in his reply that this motion was filed "to put the State on notice that inflammatory arguments will be anticipated and objected to." (Reply at 2). The State responds that the motion is premature and, in any event, it has "no intention of making improper argument during any phase of the proceeding, will base presentations on facts and law relevant to the case, and will adhere to all ethical responsibilities." (Response at 1).

The purpose of a motion *in limine* is to obtain a pretrial ruling on evidentiary disputes and to avoid the admission of unduly prejudicial evidence to a jury. *State ex rel. Berger v. Superior Court*, 108 Ariz. 396, 499, P.2d 152 (1972) ("The primary purpose of a motion in limine is to avoid disclosing to the jury prejudicial matters which may compel a mistrial. It should not, except upon a clear showing of non-admissibility, be used to reject evidence."). The Defendant's motion is not directed to any specific evidence anticipated to be presented in this case; arguments of counsel are not evidence. As such, it is not a proper use of a motion *in limine*. In addition, the Defendant's anticipatory objection to an event that has not yet occurred is premature. If an objection is made at the appropriate time, the Court will rule on it.

IT IS ORDERED denying Defendant's Motion *in Limine//Pretrial Objections//To Improper Prosecutorial Arguments that Unduly Inflame a Jury*.

8. *Defendant's Motion to Preclude Victim Impact Statements*

The Defendant argues that victim impact evidence (VIE) should be precluded from the penalty phase. The Arizona Constitution, statutes and case law, as well as settled federal case law, allow the presentation of victim impact statements at the penalty phase of a capital trial so long as the statement is relevant to the proceeding. See, e.g., Article II, § 2.1, Ariz.Const.; A.R.S. §13-4426.01; A.R.S. §13-752(R).

Contrary to the Defendant's assertion that VIE is not relevant, the Arizona Supreme Court has held that VIE is admissible during the penalty phase of a capital trial to rebut a Defendant's mitigation evidence. *State v. Burns*, 237 Ariz. 1, ¶138, 344 P.3d 303 (2015). "Even if victim impact statements are not offered to rebut any specific mitigating fact, they are 'generally relevant to rebut mitigation' and thus admissible in the penalty phase." *State v. Gallardo*, 225 Ariz. 560, 567 ¶28, 242 P.3d 159, 166 (2010)(quoting *State v. Garza*, 216 Ariz. 56, 163 P.3d 1006, (2007)). Although victim impact testimony may not request imposition of a particular sentence, it may properly describe the victim and the impact of the murder on family members. *Id.* at 567 ¶27, 242 P.3d at 167.

The Court will comply with the applicable statute in terms of the type of VIE allowed. A.R.S. §13-752(R) and (S). See also, *Burns*, 237 Ariz. at ¶142 (“While we understand the strong emotions that senseless murders generate in surviving family members and communities, we again caution victims and prosecutors about piling on impact evidence ‘lest they risk a mistrial.’ [State v.] *Rose*, 231 Ariz. at 511 ¶ 47, 297 P.3d at 917 [2013]. The trial court should take an active role in pre-screening the nature and scope of victim impact evidence to ensure it does not ‘cross the line.’”).

The Court also will properly instruct the jury that they may consider victim impact evidence only as rebuttal to mitigation. See RAJI Capital Case Sentencing Instructions, Instruction 2.5, Victim Impact Information.

IT IS ORDERED denying Defendant’s Motion to Preclude Victim Impact Statements.

9. Defense Motion to Preclude Death as a Possible Punishment

In this motion, filed September 11, 2015, the Defendant raises ten challenges to the constitutionality of Arizona’s death penalty scheme. He raised many of these challenges in a similar motion he filed on August 28, 2015, which the Court denied on October 2, 2015. As in that motion, he again acknowledges that the United States Supreme Court and/or the Arizona Supreme Court have rejected his claims. This Court is bound to follow appellate precedent.

In addition, respecting his challenges to execution by lethal injection, the Arizona Supreme Court has held that any lethal injection protocol claim should be raised in a Rule 32 Petition for Post-Conviction Relief.

IT IS ORDERED denying Defense Motion to Preclude Death as a Possible Punishment.

10. Defense Motion in Limine/Pretrial Objections/to Improper Prosecutorial Arguments that Misstate the Role of a Juror in a Death Penalty Case

The Defendant seeks an order from the Court precluding the State from presenting any argument that misstates the role of a juror in a death penalty case. The State responds that it has no intention of making such improper arguments to the jury.

The purpose of a motion *in limine* is to obtain a pretrial ruling on evidentiary disputes and to avoid the admission of unduly prejudicial evidence to a jury. *State ex rel. Berger v. Superior Court*, 108 Ariz. 396, 499, P.2d 152 (1972) (“The primary purpose of a motion in limine is to avoid disclosing to the jury prejudicial matters which may compel a mistrial. It should not, except upon a clear showing of non-admissibility, be used to reject evidence.”). The Defendant’s motion is not directed to any specific evidence anticipated to be presented in this case; arguments of counsel are not evidence. As such, it is not a proper use of a motion *in limine*. In addition, the

Defendant's anticipatory objection to an event that has not yet occurred is premature. If an objection is made at the appropriate time, the Court will rule on it.

IT IS ORDERED denying Defense Motion in Limine/Pretrial Objections/to Improper Prosecutorial Arguments that Misstate the Role of a Juror in a Death Penalty Case.

11. *Defense Motion to Permit Execution Impact Evidence*

The Defendant asks the Court to allow presentation of evidence and argument in the penalty phase regarding "the highly negative impact that the State's execution of Justin Rector would have on his children, his family and friends." (Motion at 1). The Arizona Supreme Court has held that the impact of an execution on a Defendant's family is not relevant to mitigation, because it is not related to the Defendant, the Defendant's character, or the circumstances of the offense. *State v. Rose*, 230 Ariz. 500, ¶¶64, 297 P.3d 906 (2013); *State v. Chappell*, 225 Ariz. 229, 236 P.3d 1176 (2010); *State v. Roque*, 213 Ariz. 193, 222, ¶¶119, 141 P.3d 368, 397 (2006)). In so holding, the Court noted that "[a]lthough similar evidence has been admitted in some cases, in none of those cases was the admissibility of the execution impact evidence at issue on appeal." *Rose*, 230 Ariz. at ¶¶65 (citing *Chappell*, 225 Ariz. at 238, ¶¶30 n.8).

This ruling does not preclude the Defendant's family, friends, associates or representatives from expressing support and/or mitigation. This ruling simply restricts anyone on behalf of the family from expressing views regarding the impact upon the family should the Defendant be executed. See, *Rose*, 230 Ariz. at ¶¶65 n.3 ("To the extent *Rose* argues that 'his family ties and the love of a Defendant's family has been held by this Court to be mitigation,' we agree that '[t]he existence of family ties is a mitigating factor.' *State v. Moore*, 222 Ariz. 1, 22 ¶¶ 134, 213 P.3d 150, 171 (2009).").

IT IS ORDERED denying Defense Motion to Permit Execution Impact Evidence.

cc:

Mohave County Attorney*

Gerald Gavin*
Attorney for Defendant

Mohave County Legal Defender*
Attorney for the Defendant

Mohave County Jail*

Honorable Lee F Jantzen
Division 4