ARIZONA EVIDENCE REPORTER

2012 CUMULATIVE EDITION

INCLUDING THE NEW ARIZONA RULES OF EVIDENCE
EFFECTIVE JANUARY 1, 2012
AND THE COMMENTS TO THE 2012 AMENDMENTS

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ARTICLE 1. GENERAL PROVISIONS

Rule 101. Scope; Definitions.

(a) **Scope.** These rules apply to proceedings in courts in the State of Arizona. The specific courts and proceedings to which the rules apply, along with exceptions, are set out in Rule 1101.

(b) **Definitions.** In these rules:

(1) "civil case" means a civil action or proceeding;

(2) "criminal case" includes a criminal proceeding;

(3) "public office" includes a public agency;

(4) "record" includes a memorandum, report, or data compilation;

(5) a "rule prescribed by the Supreme Court" means a rule adopted by the Arizona Supreme Court; and

(6) a reference to any kind of written material or any other medium includes electronically stored information.

Comment to 2012 Amendment

The language of Rule 101 has been amended, and definitions have been added, to conform to the federal restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Comment to Original 1977 Rule

These rules apply in all courts, record and nonrecord, in Arizona.

Cases

101.003 The Arizona Rules of Evidence govern proceedings in courts in the State of Arizona.

State v Campoy (Crockwell), 220 Ariz. 539, 207 P.3d 792, ¶26 n.5 (Ct App. 2009) (court noted that trial court may have based evidentiary rulings on principles of "fundamental fairness"; court stated that supreme court rules govern admissibility of evidence).

101.005 Different tests should not apply in civil and criminal cases; to the contrary, rules determining the competency of evidence should apply across the board, whether the cases is civil or criminal.

Logerquist v McVey (Danforth), 196 Ariz. 470, 1 P.3d 113, ¶¶ 41–42 (2000) (court analyzed *Barefoot v Estelle* and *Daubert/Joiner/Kumho* and concluded it was impossible to reconcile *Kumho* and *Barefoot*, and raised possibility the United States Supreme Court intended to interpret Rule 702 differently in criminal cases, but stated Arizona Rules of Evidence should apply the same in civil and criminal cases).

101.015 The Arizona Supreme Court does not have the authority to delegate to the Administrative Director the authority to make rules on the admissibility of evidence.

In re Jonah T., 196 Ariz. 204, 994 P.2d 1019, ¶¶ 9–21 (Ct. App. 1999) (Arizona Supreme Court adopted Administrative Order 95–20, which authorized the Administrative Director of the Court to distribute certain policies and procedures for drug testing; the procedure adopted provided that if an immunoassay test showed that a juvenile tested positive for drugs but the juvenile denied using drugs, those test results were not admissible unless the positive result was confirmed by a subsequent gas chromatography/mass spectrometry test; court held the administrative procedure conflicted with the Rules of Evidence, and that the administrative procedure could not negate the applicable Rule of Evidence).

101.020 The Arizona Legislature is permitted to enact statutory procedural rules that are reasonable and workable and that supplement the rules promulgated by the Arizona Supreme Court.

David G. v Pollard, 207 Ariz. 308, 86 P.3d 364, ¶¶ 15–17 (2004) (court held that A.R.S. § 8–323, which sets forth procedure for adjudicating certain offenses listed in A.R.S. § 8–323(B), supplements and does not conflict with Arizona Rules of Juvenile Procedure).

State v Vincent, 159 Ariz. 418, 768 P.2d 150 (1989) (A.R.S. § 13–4253, which allows for the presentation of videotaped testimony, is constitutional and admission of such testimony is permissible as long as the trial court makes the necessary findings).

Jilly v Rayes (Carter), 221 Ariz. 40, 209 P.3d 176, ¶¶ 1–8 (Ct. App. 2009) (court held that A.R.S. § 12–2603, which provides that plaintiff suing health care professional must certify whether or not expert opinion testimony is necessary to prove health care professional's standard of care or liability, and if expert opinion testimony is necessary, requires service of "preliminary expert opinion affidavit" with initial disclosures, did not conflict with any court rule, and thus was constitutional).

Bertleson v Tierney, 204 Ariz. 124, 60 P.3d 703, ¶¶ 20–22 (Ct. App. 2002) (A.R.S. § 12–2602, which deals with notice whether expert testimony will be necessary in claim against licensed professional supplements existing procedural rules and is reasonable and workable, and therefore constitutional).

State v Gilfillan, 196 Ariz. 396, 998 P.2d 1069, ¶¶ 17–28 (Ct. App. 2000) (court held A.R.S. § 13–1421, which prescribes when sexual assault victim's prior sexual conduct may be admitted in evidence, was reasonable and workable supplement to court's procedural rules and thus was permissible statutory rule of procedure).

Martin v Reinstein, 195 Ariz. 293, 987 P.2d 779, ¶¶ 104–07 (Ct. App. 1999) (Arizona's Sexually Violent Persons Act provides that Arizona Rules of Evidence apply to proceedings; court held this was reasonable and workable and supplemented rules promulgated by Arizona Supreme Court, and thus was permissible).

In re Maricopa Cty. Juv No. JD–6123, 191 Ariz. 384, 956 P.2d 511 (Ct. App. 1997) (Juvenile Rule 16.1(f) is a reasonable and workable supplement to the Arizona Rules of Evidence).

State v Nihiser, 191 Ariz. 199, 953 P.2d 1252 (Ct. App. 1997) (A.R.S. § 28–692(F), which provides method for establishing foundation for breath test results, was a reasonable and workable supplement to the rules).

101.025 Although the Arizona Legislature is permitted to enact statutory rules that are reasonable and workable and that supplement the rules promulgated by the Arizona Supreme Court, when a conflict arises, or a statutory rule tends to engulf a rule that the court has promulgated, the court rule will prevail.

* *Lear v Fields*, 226 Ariz. 226, 245 P.3d 911, ¶¶ 14–22 (Ct. App. 2011) (A.R.S. § 12–2203 (Arizona *Daubert*) does not alter any substantive law, but instead is attempt to control admissibility of expert witness testimony in all cases and such controls procedural matters; because it conflicts with existing rules of evidence, it is unconstitutional).

State v Taylor, 196 Ariz. 584, 2 P.3d 674, ¶¶ 4–11 (Ct. App. 1999) (A.R.S. § 13–4252 allows for admission of pretrial videotaped statement made by minor, this statute is both more restrictive and less restrictive than existing hearsay exceptions, and so it engulfs Rules of Evidence and is therefore unconstitutional).

101.027 Although a statute may have the effect of precluding certain evidence and may appear to be in conflict with a court rule, if the statute in question controls a matter of substantive law, then the statute will prevail over the court rule.

Seisinger v Siebel, 220 Ariz. 85, 203 P.3d 483, ¶¶ 22–44 (2009) (defendant moved to preclude testimony of plaintiff's expert witness; trial court ruled that plaintiff's expert witness did not meet requirements of A.R.S. § 12–2604, which provides additional qualifications for expert witness in medical malpractice actions, and granted defendant's motion; court held that A.R.S. § 12–2604 set forth what was required for plaintiff to meet burden of proof in medical malpractice case and thus was matter of substantive law, which meant statute would prevail over contrary court rule).

March 11, 2012

Rule 102. Purpose.

These rules should be construed so as to administer every proceeding fairly, eliminate unjustifiable expense and delay, and promote the development of evidence law, to the end of ascertaining the truth and securing a just determination.

Comment to 2012 Amendment

The language of Rule 102 has been amended to conform to the federal restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Cases

102.015 The courts interpret the Arizona Rules of Evidence according to the principles of statutory construction.

State v Aguilar, 209 Ariz. 40, 97 P.3d 865, ¶¶ 23–24 (2004) (court looked at plain language of rule to inperpret Rule 404(c)).

102.020 Because the Arizona Rules of Evidence were adopted from the Federal Rules of Evidence, federal court interpretation of the Federal Rules of Evidence is persuasive, and uniformity in interpretation of the Federal rules and the Arizona rules is highly desirable.

Hernandez v State, 203 Ariz. 196, 52 P.3d 765, ¶ 10 (2002) (in interpreting Rule 408, court noted it looks to federal law when Arizona rule is identical to corresponding federal rule).

State v Green, 200 Ariz. 496, 29 P.3d 271, ¶ 10 (2001) (in interpreting Rule 609(b), court noted that, when interpreting evidentiary rule that predominantly echoes its federal counterpart, court often looks to federal court interpretation for guidance).

Orme School v Reeves (College World Services, Inc.), 166 Ariz. 301, 304, 802 P.2d 1000, 1003 (1990) (court adopts federal court interpretation of civil procedure Rule 56(b)).

State v Piatt, 132 Ariz. 145, 149, 644 P.2d 881, 885 (1981) (in interpreting Rule 601, court cited to federal Advisory Committee's Note attending federal Rule 601, which Arizona adopted with little variation).

102.025 Although the Arizona Rules of Evidence were adopted from the Federal Rules of Evidence, the Arizona courts are not bound by the non-constitutional interpretation by the federal courts when construing the Arizona Rules of Evidence, thus uniformity in interpretation of the Federal rules and the Arizona rules is not necessarily desirable if the Arizona courts do not agree with the interpretation given by the federal courts.

Logerquist v McVey (Danforth), 196 Ariz. 470, 1 P.3d 113, ¶ 56 (2000) (in interpreting Rule 702, because role of trial judge is to determine admissibility of evidence and role of jurors is to weigh credibility, Arizona Supreme Court refused to adopt *Daubert/Joiner/Kumho* interpretation of Rule 702 because that interpretation requires trial judge to weigh credibility of expert witness).

State v Terrazas, 189 Ariz. 580, 582, 944 P.2d 1194, 1196 (1997) (in interpreting Rule 404(b) and in determining the level of proof necessary for admission of evidence of other crimes, wrongs, or acts, Arizona Supreme Court rejected United States Supreme Court's adoption of preponderance of evidence standard, and instead adopts clear and convincing evidence standard).

102.030 When the trial court makes a ruling, or in a trial to the court, the appellate court will not reverse for errors in receiving improper matters in evidence provided there is sufficient competent evidence to sustain the ruling, it being presumed, absent affirmative proof to the contrary, that the trial court considered only the competent evidence in arriving at the final judgment.

State v Djerf, 191 Ariz. 583, 959 P.2d 1274, ¶ 41 (1998) (court rejected defendant's contention that, when trial court stated it had considered "all" evidence, it must have considered inadmissible evidence in determining aggravating circumstances).

State v Powers, 200 Ariz. 123, 23 P.3d 668, ¶ 20 (Ct. App. 2001) (defendant contended trial court erred in admitting "emotional testimonials and evidence regarding the deceased" from victim's family and friend; court held that, absent proof to the contrary, trial judge must be presumed to be able to focus on relevant sentencing factors and to set aside irrelevant, inflammatory, and emotional factors), *aprv'd on other grounds,* 200 Ariz. 363, 26 P.3d 1134 (2001).

State v Estrada, 199 Ariz. 454, 18 P.3d 1253, ¶ 11 (Ct. App. 2001) (state and defendant presented aggravating and mitigating evidence, and trial court imposed aggravated sentence; court rejected defendant's contention that trial court was required to articulate mitigating factors even when imposing aggravated sentence, and further rejected defendant's contention that trial court had not considered mitigating evidence, stating it was presumed trial court considered all evidence that was before it).

March 11, 2012

Rule 103. Rulings on Evidence.

(a) **Preserving a Claim of Error.** A party may claim error in a ruling to admit or exclude evidence only if the error affects a substantial right of the party and:

(1) if the ruling admits evidence, a party, on the record:

(A) timely objects or moves to strike; and

(B) states the specific ground, unless it was apparent from the context; or

(2) if the ruling excludes evidence, a party informs the court of its substance by an offer of proof, unless the substance was apparent from the context.

(b) **Not Needing to Renew an Objection or Offer of Proof.** Once the court rules definitively on the record— either before or at trial— a party need not renew an objection or offer of proof to preserve a claim of error for appeal.

(c) **Court's Statement About the Ruling; Directing an Offer of Proof.** The court may make any statement about the character or form of the evidence, the objection made, and the ruling. The court may direct that an offer of proof be made in question-and-answer form.

(d) **Preventing the Jury from Hearing Inadmissible Evidence.** To the extent practicable, the court must conduct a jury trial so that inadmissible evidence is not suggested to the jury by any means.

(e) **Taking Notice of Fundamental Error.** A court may take notice of an error affecting a fundamental right, even if the claim of error was not properly preserved.

Comment to 2012 Amendment

Subsection (b) has been added to conform to Federal Rule of Evidence 103(b).

Additionally, the language of Rule 103 has been amended to conform to the federal restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent in the restyling to change any result in any ruling on evidence admissibility.

The substance of subsection (e) (formerly subsection (d)), which refers to "fundamental error," has not been changed to conform to the federal rule, which refers to "plain error," because Arizona and federal courts have long used different terminology in this regard.

Cases

Paragraph (a) — Effect of erroneous ruling.

103.a.010 If a party is entitled to object to certain evidence during trial, the trial court has discretion to consider the objection by means of a motion in limine made before or during trial, even though the party makes this motion less than 20 days before the trial begins.

State v West, 176 Ariz. 432, 442, 862 P.2d 192, 202 (1993) (because state could have objected during trial to evidence of victim's suicidal tendencies, trial court had discretion to consider evidentiary question by means of motion in limine, even though state made motion less than 20 days prior to trial).

Brown v U.S.F. & G., 194 Ariz. 85, 977 P.2d 807, ¶¶ 9–11 (Ct. App. 1998) (plaintiff did not file motion in limine by cut-off date imposed by trial court, and instead filed motion asking trial court to reconsider cut-off date and rule on plaintiff's motion to preclude polygraph evidence; trial court denied motion to reconsider cut-off date; at trial, plaintiff made tactical decision to admit polygraph evidence first; on appeal, plaintiff contended trial court erred in admitting polygraph evidence; court held that, because trial court had not ruled on merits of polygraph evidence before trial, plaintiff could

have objected at trial if defendant sought to admit that evidence, and because plaintiff did not object, plaintiff could not raise issue on appeal).

State v Vincent, 147 Ariz. 6, 8–10, 708 P.2d 97, 99–101 (Ct. App. 1985) (trial court did not abuse discretion in considering motion to dismiss filed after original 20-day deadline had past, but did abuse discretion in granting motion to dismiss).

State v Zimmerman, 166 Ariz. 325, 328, 802 P.2d 1024, 1027 (Ct. App. 1990) (because state could have objected to admission of expert testimony during trial itself, trial court did not abuse its discretion in resolving that issue prior to start of trial, even though state filed its motion to preclude admission of evidence less than 20 days prior to trial).

103.a.020 To preserve for appeal the question of admission of evidence, a party must make a specific and timely objection; if the party **fails to object,** the party will have waived the issue on appeal.

State v Cruz, 218 Ariz. 149, 181 P.3d 196, ¶¶ 104–105 (2008) (state called witness who was visibly intoxicated; defendant initially objected but then withdrew his objection; court stated that objection that is withdrawn is waived).

State v Ellison, 213 Ariz. 116, 140 P.3d 899, ¶¶ 57–58 (2006) (when detective testified about looking to find "the gun that was described [to police] [by codefendant]" defendant's attorney chose not to object immediately to avoid emphasizing statement to jurors; defendant's attorney later suggested that trial court strike statement; trial court suggested instruction could prevent any improper inferences by jurors; parties agreed statement would not be struck to avoid drawing attention to it, and defendant's attorney did not request any limiting instruction; defendant claimed on appeal that trial court erred in not sua sponte ordering mistrial or giving limiting instruction; court noted that, except for fundamental error, party generally waives objection by either not asking that testimony be struck with limiting instruction, or requesting mistrial; court found any error was not fundamental).

State v Huerstel, 206 Ariz. 93, 75 P.3d 698, ¶¶ 69–70 (2003) (defendant was charged with robbing Pizza Hut; court held that defendant's statement he made a few days prior to that robbery that he intended to rob Auto Zone was statement of plan or intent; defendant contended statement was inadmissible because his intent was not an issue; court held that, because defendant never raised that intent issue with trial court, defendant waived that argument on appeal).

State v Montaño, 204 Ariz. 413, 65 P.3d 61, ¶¶ 59–62 (2003) (when witness testified about defendant's gang affiliation, defendant failed to object, and thus waived that issue on appeal).

State v Fulminante, 193 Ariz. 485, 975 P.2d 75, ¶¶ 64–65 (1999) (because defendant failed to object at trial to evidence of arrangement of victim's clothes, he waived that objection on appeal).

State v Spreitz, 190 Ariz. 129, 945 P.2d 1260 (1997) (by failing to object to habit evidence for victim, defendant waived issue on appeal).

State v Jones, 188 Ariz. 388, 937 P.2d 310 (1997) (prosecutor asked medical examiner to compare exhibit 136, which was admitted in evidence, with exhibit 137, which was not admitted in evidence; because defendant did not object to questions about exhibit that was not admitted in evidence, defendant waived issue on appeal).

Ritchie v Krasner, 221 Ariz. 288, 211 P.3d 1272, ¶¶ 46 (Ct App. 2009) (defendant contended trial court abused discretion in precluding evidence of plaintiff's prior felony conviction; court noted that felony conviction was admissible only to attack plaintiff's credibility as witness, and only time plaintiff testified was at deposition; because defendant failed to raise timely plaintiff's conviction during deposition, trial court did not abuse discretion in excluding evidence of plaintiff's felony conviction at trial).

State v Sucharew, 205 Ariz. 16, 66 P.3d 59, ¶¶ 17 (Ct. App. 2003) (state alleged defendant and Doyle were racing when defendant's vehicle collided with victim's vehicle, killing victim; to obtain his testimony, state granted immunity to Doyle; when cross-examining Doyle, defendant sought to question Doyle about conversations Doyle had with his attorney, and state objected on basis of attorney-client privilege, which trial court sustained; on appeal, defendant contended state lacked standing to assert Doyle's attorney-client privilege; court held defendant waived this issue by not objecting during trial on that basis, noting that both Doyle and his attorney were present when state objected, and if defendant had objected to state's attorney-client privilege objection, Doyle and his attorney could have cured any procedural problem).

State v Sucharew, 205 Ariz. 16, 66 P.3d 59, ¶¶ 27 (Ct. App. 2003) (state alleged defendant and Doyle were racing when defendant's vehicle collided with victim's vehicle, killing victim; two witnesses testified that, as they saw vehicles drive by, one stated, "There goes your *Fast and Furious* movie"; defendant contended on appeal that, because *Fast and Furious* movie purportedly depicted "punks and thugs engaged in highly illegal activity," trial court should have precluded this evidence under Rule 403; court held that, because defendant failed to object at trial on that basis, defendant waived issue on appeal).

Brown v U.S.F. & G., 194 Ariz. 85, 977 P.2d 807, ¶¶ 9–11 (Ct. App. 1998) (plaintiff did not file motion in limine by cut-off date imposed by trial court, and instead filed motion asking trial court to reconsider cut-off date and rule on plaintiff's motion to preclude polygraph evidence; trial court denied motion to reconsider; at trial, plaintiff made tactical decision to admit polygraph evidence first; on appeal, plaintiff contended trial court erred in admitting polygraph evidence; court held that, because trial court had not ruled on merits of polygraph evidence before trial, plaintiff could have objected at trial if defendant sought to admit that evidence, and because plaintiff did not object, plaintiff could not raise issue on appeal).

Sheppard v Crow-Baker-Paul No. 1, 192 Ariz. 539, 968 P.2d 612, ¶ 35 (Ct. App. 1998) (because defendant did not raise claim at trial that prior consistent statement was not made prior to time motive to fabricate arose, defendant waived this claim on appeal).

State v Baldenegro, 188 Ariz. 10, 932 P.2d 275 (Ct. App. 1996) (for assisting and participating in criminal syndicate for benefit of street gang, state had to prove "Carson 13" was criminal street gang, thus evidence of criminal activity by members of "Carson 13" was relevant; because defendant did not object to evidence of misdemeanor activity on basis that A.R.S. § 13–105(7) limits this evidence to felony activity, defendant waived that claim on appeal).

State v Sullivan, 187 Ariz. 599, 931 P.2d 1109 (Ct. App. 1996) (court noted that, if counsel chose not to object to hearsay for tactical reasons, defendant could not raise issue on appeal, but because state did not allege waiver on appeal, court addressed merits of issue).

State v Scott, 187 Ariz. 474, 930 P.2d 551 (Ct. App. 1996) (because defendant did not object to trial court's failure to have bench conferences recorded, defendant waived issue on appeal).

State v Doody, 187 Ariz. 363, 930 P.2d 440 (Ct. App. 1996) (because defendant did not object to redaction of portions of witness's prior testimony, he waived issue for appeal).

State v Paxton, 186 Ariz. 580, 925 P.2d 721 (Ct. App. 1996) (because defendant did not object at trial, he waived any claim on appeal that trial court erred in allowing witness who had been precluded from testifying on direct to testify on rebuttal).

103.a.025 If a party does not object to the admission of certain evidence and the trial court admits that evidence, and on appeal the matter is remanded for new trial, as long as the appellate court has not ruled on that issue, a party is not precluded from objecting at retrial to the admission of that evidence.

Jimenez v Wal-Mart Stores, Inc., 206 Ariz. 424, 79 P.3d 673, ¶¶ 10–15 (Ct. App. 2003) (at first trial, defendant did not object to admission of photographs, but did object to their admission upon retrial; court noted, because there was no objection at first trial, trial court never ruled so there was no decision on merits, and on appeal, appellate court did not address any issue relating to those photographs, thus nothing precluded defendant from objecting at retrial to admission of photographs).

103.a.040 To preserve for appeal the question of admission of evidence, a party must make a specific and timely objection; if the party **fails to make a sufficiently specific objection,** the party will have waived the issue on appeal.

State v Montaño, 204 Ariz. 413, 65 P.3d 61, ¶¶ 55–58 (2003) (defendant contended on appeal that trial court abused discretion under Rule 403 in admitting photographs; state noted defendant only objected generally to admission of photographs; court held that, "Because the appellant's trial counsel did not object on 403 grounds, the argument has been waived.").

State v Fischer, 219 Ariz. 408, 199 P.3d 663, ¶ 32 (Ct. App. 2008) (defendant's continuing general objection to testimony did not preserve on appeal claim that testimony was hearsay).

State v Lopez, 217 Ariz. 433, 175 P.3d 682, ¶¶ 4–6 (Ct. App. 2008) (when state asked nurse to read victim's statements about history of assault, defendant objected "to the history"; court held this objection was not sufficiently specific to preserve issue for appeal).

State v DePiano, 187 Ariz. 41, 926 P.2d 508 (Ct. App. 1995) (objection that evidence was "irrelevant" was not sufficiently specific to support claim on appeal that admission of evidence was not proper under Rule 404(b)), *vacated on other grounds*, 187 Ariz. 27, 926 P.2d 494 (1996).

103.a.050 An objection at trial for one reason or purpose does not preserve for appeal a claim of error based on a different reason or purpose.

State v Womble, 225 Ariz. 91, 235 P.3d 244, ¶¶ 10–13 (2010) (detective testified that jail informant told him about defendant and that he used that information to get court order to listen to telephone calls; although defendant objected on basis of hearsay, because defendant did not object on basis of Confrontation Clause violation, court reviewed for fundamental error only; because detective testified only about defendant's existence and not about substance of what informant said, testimony did not violate Confrontation Clause).

State v Moody, 208 Ariz. 424, 94 P.3d 1119, ¶¶ 38–40 (2004) (defendant's motion at trial to preclude expert's testimony because of untimely disclosure of expert's notes did not preserve for appeal claim that trial court should have precluded testimony because expert relied on tainted information).

State v Rutledge (Sherman), 205 Ariz. 7, 66 P.3d 50, ¶¶ 26–38 (2003) (defendant gave videotaped interview to detective, but did not testify at trial; in closing argument, prosecutor discussed fact that defendant told detective he had been with some girls night of murder, but did not want to give their names; at trial, defendant objected on basis that this argument shifted burden of proof, and on appeal claimed this was comment on defendant's failure to testify; court held defendant failed to make timely objection at trial stating specific ground raised on appeal, and thus waived that objection on appeal).

State v Montaño, 204 Ariz. 413, 65 P.3d 61, ¶¶ 59–63 (2003) (when witness testified at trial about meaning of defendant's EME tattoo, defendant objected on basis of relevance and foundation; on appeal, defendant contended admission of this evidenced violated Rule 403; court held defendant waived any Rule 403 objection).

State v Kinney, 225 Ariz. 550, 241 P.3d 914, ¶ 7 (Ct. App. 2010) (trial objection that probative value of defendant's statement was substantially outweigh by danger of unfair prejudice did not preserve for appeal contention that police obtained statement in violation of defendant's constitutional rights).

State v Damper, 223 Ariz. 572, 225 P.3d 1148, ¶ 8 (Ct. App. 2010) ("hearsay" objection did not preserve for appellate review claim that admission of out-of-court text message violated Sixth Amendment right of confrontation).

State v Lopez, 217 Ariz. 433, 175 P.3d 682, ¶¶ 4–6 (Ct. App. 2008) (when state asked nurse whether victim's injuries were consistent with anal penetration, defendant objected that nurse was not qualified as expert; court held that defendant's objection that nurse was not qualified as expert did not preserve for appeal claim that nurse testified about victim's statements, and those statements were hearsay).

State v Alvarez, 213 Ariz. 467, 143 P.3d 668, ¶ 7 (Ct. App. 2006) (after victim died, officer testified about what victim said to officer; defendant objected on basis that statement was hearsay; court held defendant's hearsay objection did not preserve claim on appeal that admission of statement violated confrontation clause; court reviewed for fundamental error only, and found no error).

State v Tyszkiewicz, 209 Ariz. 457, 104 P.3d 188, ¶¶ 8–9 (Ct. App. 2005) (for BAC testing, one officer observed initial portion of deprivation period, and second officer, who was not present during initial portion, observed latter portion of deprivation period; when second officer testified about deprivation period, defendant objected on basis that state did not lay adequate foundation that first officer had actually conducted initial portion of deprivation period; court noted that, because second officer was not present when first officer began observing deprivation period, anything second officer knew would have had to have been based on hearsay, and that defendant's objection that second officer did not have "personal knowledge" of what happened during initial portion was not sufficient to support hearsay objection).

Hernandez v State, 201 Ariz. 336, 35 P.3d 97, ¶ 21 (Ct. App. 2001) (plaintiff fell off wall at Patagonia Lake Park; defendant offered testimony from park manager of no other accidents at that wall; plaintiff objected on basis of relevance; court held plaintiff should have objected on basis of lack of foundation showing system of obtaining information if there had been accidents, and on basis of Rule 403), *vacated,* 203 Ariz. 196, 52 P.3d 765 (2002).

State v Tovar, 187 Ariz. 391, 930 P.2d 468 (Ct. App. 1996) (objection at trial under Rule 608(b) did not preserve claim of error under Rule 609(d)).

State v DePiano, 187 Ariz. 41, 926 P.2d 508 (Ct. App. 1995) (objection that evidence was "irrelevant" was not sufficiently specific to support claim that admission of evidence was not proper under Rule 404(b)), *vacated on other grounds,* 187 Ariz. 27, 926 P.2d 494 (1996).

103.a.060 Objection of "no foundation" is insufficient to preserve the issue; the objecting party must indicate how the foundation is lacking so that the party offering the evidence can overcome the shortcoming, if possible.

State v Rodriguez, 186 Ariz. 240, 250, 921 P.2d 643, 653 (1996) (defendant objected to improper foundation for admission of earring; because defendant did not identify what foundation was lacking, trial court did not abuse discretion in admitting exhibit).

State v Guerrero, 173 Ariz. 169, 171, 840 P.2d 1034, 1036 (Ct. App. 1992) (defendant contended on appeal state failed to provide specifics about times, dates, places, or quantities of prior acts; court held that claim of insufficient foundation may not be raised on appeal unless appellant specifically points out to trial court alleged defects in foundation so that opponent may cure any defects).

Packard v Reidhead, 22 Ariz. App. 420, 423, 528 P.2d 171, 174 (1974) (court noted that appellee laid tenuous foundation for admission of traffic signal installation report, but held appellant's "no foundation" objection was inadequate to preserve issue for review on appeal; purpose of rule is to enable adversary to obviate objection if possible and to permit trial court to make intelligent ruling).

103.a.080 To preserve for appeal the question of admission of evidence, a party must make a specific and timely objection; if the party **fails to object in a timely manner,** the party will have waived the issue on appeal.

State v Cruz, 218 Ariz. 149, 181 P.3d 196, ¶¶ 99–102 (2008) (officer testified that hammer of gun used to kill victim had been removed and that removal may have been done to facilitate concealment; defendant did not object when testimony given, but next day moved for mistrial claiming that this testimony "implied bad character, bad conduct, a bad act, and that the person that possessed the weapon was engaging in criminal behavior"; court reviewed only for fundamental error, and concluded that, because there was no evidence that defendant had removed hammer from gun, this testimony did not prejudice defendant).

State v Moody, 208 Ariz. 424, 94 P.3d 1119, ¶¶ 38–40 (2004) (although defendant moved for mistrial based on claim that expert relied on tainted information, defendant did not make that motion until day after expert testified, and because defendant did not make contemporaneous objection while expert was testifying, defendant waived issue on appeal).

In re Estate of Reinen, 198 Ariz. 283, 9 P.3d 314, ¶¶ 5–7 (2000) (defendant did not object to defendant's expert witness's lack of expertise until after witness had finished testifying and had left for California; court held that party must make objection at time when trial court can take appropriate action, such as either before or during testimony, thus defendant waived objection and trial court erred in striking witness's testimony).

103.a.090 To preserve for appeal the question of exclusion of evidence, a party must make a **specific and timely objection,** and must make an offer of proof showing that the excluded evidence would be admissible and relevant, unless either the substance of the evidence is apparent from the context of the record, or the trial court excludes the evidence on substantive rather than evidentiary grounds.

* *State v Dixon,* 226 Ariz. 545, 250 P.3d 1174, ¶¶ 40–44 (2011) (defendant contended trial court erred in precluding him from introducing entries from victim's diary; defendant failed to make offer of proof, thus court had no basis for determining precisely what evidence was excluded).

State v Villalobos, 225 Ariz. 74, 235 P.3d 227, ¶¶ 32–36 (2010) (after testimony of state's mental health expert, juror submitted question asking whether it was likely defendant could be significantly reformed with help of medications or therapy; trial court did not submit question stating that "doesn't seem to fall within the realm of what mitigation is about"; court held defendant's potential for rehabilitation was mitigating circumstance, therefore trial court incorrectly concluded it was not, but held no reversible error because expert did not diagnose defendant for treatment nor was his expertise on effects of medication or therapy established, but more importantly, defendant made no offer of proof of what expert would have said if allowed to answer question).

State v Nordstrom, 200 Ariz. 229, 25 P.3d 717, ¶¶ 35–38 (2001) (although trial court denied defendant's motion to order witness to answer certain questions during deposition, trial court said defendant could ask those questions at trial; because defendant never asked those questions at trial, defendant waived that issue).

State v Mott, 187 Ariz. 536, 540, 931 P.2d 1046, 1050 (1997) (although defendant withdrew the battered woman syndrome as a defense, she continued to argue that this evidence was relevant on the issue of her intent, thus defendant preserved for review exclusion of this evidence).

State v Dickens, 187 Ariz. 1, 13–14, 926 P.2d 468, 480–81 (1996) (because defendant did not make offer of proof of what acts he wanted to use to impeach the witness, court was unable to determine whether trial court abused its discretion in precluding those acts under Rule 403).

State v Atwood, 171 Ariz. 576, 641, 832 P.2d 593, 658 (1992) (because defendant did not object to trial court's limitation on cross-examination, and did not make offer of proof of what the testimony would have been, defendant waived that issue on appeal).

State v Bravo, 158 Ariz. 364, 377, 762 P.2d 1318, 1331 (1988) (because defendant never objected to witness's invocation of Fifth Amendment privilege, defendant waived that issue for appeal).

State v Davis, 205 Ariz. 174, 68 P.3d 127, ¶¶ 31–32 (Ct. App. 2003) (victim left with defendant; 3 days later, defendant told girlfriend he had killed victim; defendant then confessed to police and took them to location of victim's body; at trial, defendant sought to introduce following evidence that he contended showed another person committed crime: night of murder, witness had seen M.H. and T.J. acting suspiciously and with injuries on their arms, and said victim had told her she was pregnant with M.H.'s child; another witness said he had overheard M.H. and T.J. making incriminating statements about their role in victim's death; suitcase characterized as portable methamphetamine lab had been found near where victim was killed, and when M.H. was arrested 1 month after murder, he had portable methamphetamine lab in car; court excluded this evidence as not relevant; on appeal, defendant contended this violated his constitutional right to present evidence; court held defendant waived this claim by not raising it at trial).

Taeger v Catholic Fam & Com Serv, 196 Ariz. 285, 995 P.2d 721, ¶ 38 (Ct. App. 1999) (plaintiffs attempted to introduce statements that trial court excluded as hearsay; because plaintiffs made no offer of proof for these statements, plaintiffs waived issue on appeal).

State v Wooten, 193 Ariz. 357, 972 P.2d 993, ¶¶ 29–30 (Ct. App. 1998) (trial court granted state's motion to preclude evidence that someone other than defendant killed victim; defendant conceded much of evidence in question was admitted at trial, and failed to make offer of proof to establish what evidence he was precluded from presenting).

Cervantes v Rijlaarsdam, 190 Ariz. 396, 398–99, 949 P.2d 56, 58–59 (Ct. App. 1997) (plaintiff's doctor testified plaintiff did not have CT scan because he did not have health insurance; because defendants did not make offer of proof of what they expected to elicit from doctor on cross-examination, court could not find that trial court erred in limiting cross-examination).

State v Doody, 187 Ariz. 363, 373, 930 P.2d 440, 450 (Ct. App. 1996) (because trial court allowed defendant to present evidence of circumstances of taking of his statement and statements of Tucson Four, and because he made no offer of proof of what additional evidence he wanted to present, defendant provided no basis for further review by court).

103.a.110 An offer of proof at trial for one reason or purpose does not preserve for appeal a claim of error based on a different reason or purpose.

State v Tankersley, 191 Ariz. 359, 956 P.2d 486, ¶ 48 (1998) (because defendant's claim at trial was hearsay, statement was a statement against interest, and he never claimed hearsay statement was admissible as a public record, defendant waived this argument on appeal).

Salt River Project v Miller Park LLC, 216 Ariz. 161, 164 P.3d 667, ¶ 19 (Ct. App. 2007) (because plaintiff offered evidence of value in owner's tax protest material only to impeach owner's testimony about value of property in condemnation action, court would not consider on appeal claim that evidence should have been admissible as admission by owner); *vac'd in part*, 218 Ariz. 246, 183 P.3d 497 (2008).

103.a.130 Once a party has made a motion in limine or an objection to a certain type of evidence and the trial court has ruled against it, the party need not continually object to the same evidence, even if it is proffered by additional witnesses or additional testimony.

State v Anthony, 218 Ariz. 439, 189 P.3d 366, ¶ 38 (2008) (because defendant filed written pre-trial motion to preclude admission of other act evidence and trial court had oral argument, defendant preserved issue for appeal even though he never objected to admission of other act evidence during trial).

103.a.150 If the trial court's ruling is not definite, or if the trial court's ruling is definite but the evidence exceeds the purpose for which the trial court ruled it would be admissible, the party must object further to preserve the issue on appeal.

State v Connor, 215 Ariz. 553, 161 P.3d 596, ¶¶ 29–35 (Ct. App. 2007) (trial court ruled that evidence that victim's family and friends had told victim they believed defendant had burglarized victim's apartment and victim should stay away from him was admissible to rebut defendant's testimony that he was friends with victim and was welcome in his apartment; to avoid prejudice to defendant, trial court instructed jurors there was no evidence defendant had in fact burglarized apartment; defendant contended issue of burglary improperly expanded with testimony about defendant's whereabouts during burglary; court noted defendant made no objection to this expanded scope of testimony, and thus waived issue on appeal).

103.a.160 Once the trial court has ruled against a party on an objection or offer of proof, the party may change its strategy and question the witness without waiving the right to challenge the ruling on appeal.

State v Rockwell, 161 Ariz. 5, 9–10, 775 P.2d 1069, 1073–74 (1989) (usually stipulation waives right to object to evidence on appeal; however, because counsel offered stipulation only after trial court had overruled defendant's objection and ruled that state could introduce evidence, defendant preserved that issue for appeal).

State v Lindsey, 149 Ariz. 472, 475–77, 720 P.2d 73, 76–78 (1986) (once trial court admitted testimony over defendant's objection, defendant did not waive issue by cross-examining witness).

State v Williams, 133 Ariz. 220, 224, 650 P.2d 1202, 1206 (1982) (defendant filed pretrial motion in limine to preclude tape-recorded statements witness made to police, which trial court denied; at trial, defendant then introduced tapes in evidence; court held that pretrial motion in limine preserved admissibility question for appeal, and that subsequent change in strategy because of trial court's adverse decision on motion in limine did not waive issue on appeal).

State v Hicks, 133 Ariz. 64, 69, 649 P.2d 267, 272 (1982) (defendant objected to evidence of victim's character, but trial court overruled objection; defendant on cross-examination asked another witness about victim's character; state contended defendant waived any objection to evidence of victim's character by cross-examining witness; court held that, after trial court overruled defendant's objection to character evidence, defendant's attempt to minimize effect of erroneous ruling by cross-examining witness did not waive objection).

103.a.163 Once the trial court has ruled that evidence of a prior conviction is admissible, the defendant does not waive this issue by testifying and admitting the prior conviction; however, if the defendant does not testify, the defendant may not question on appeal the trial court's ruling.

State v Smyers, 207 Ariz. 314, 86 P.3d 370, ¶¶ 5–15 (2004) (trial court ruled that defendant could be impeached with his prior conviction for attempted child abuse, and would allow in evidence (1) name of offense, (2) court, (3) date of offense, and (4) whether defendant was assisted by counsel; trial court would not allow in evidence (1) class of offense or (2) facts of offense; because defendant chose not to testify, defendant waived on appeal correctness of trial court's ruling).

103.a.165 Once the trial court has ruled that the state may ask defendant's character witnesses on cross-examination whether they know about defendant's prior conviction, if defendant does not then call those character witnesses to testify, defendant may not question on appeal the trial court's ruling.

State v Romar, 221 Ariz. 342, 212 P.3d 34, ¶¶ 5–10 (Ct. App. 2009) (defendant was charged with sexual offenses against child; defendant had two 22-year-old convictions for sexual abuse; defendant indicated he would call eight to ten character witnesses; trial court ruled that state would be permitted on cross-examination to ask character witnesses if they knew defendant had two prior convictions, but would not allow state to specify name or nature of offenses unless character witnesses gave their opinion that defendant would not commit "such a crime" (opinion does not state whether "such a crime" is offense charged or prior offense); at trial, defendant did not call any character witnesses; court held that, by failing to call character witnesses, defendant failed to preserve his claim of error, and thus court declined to consider correctness of trial court's ruling).

103.a.167 Once the trial court has ruled on a certain issue and a party has adopted a strategy in reliance on that ruling, if the trial court later changes its ruling and if this change prejudices the party, the party may be entitled to a new trial or reversal on appeal.

Henry v Healthpartners of Southern Arizona, 203 Ariz. 393, 55 P.3d 87, ¶¶ 19–20 (Ct. App. 2002) (medical malpractice action resulting from patient's death from cancer was filed against decedent's doctor, radiologist employed by medical center, and medical center (TMC/HSA); plaintiff settled with doctors and went to trial against TMC/HSA; TMC/HSA named doctors as non-parties at fault; TMC/HSA asked to be allowed to read to jurors factual allegations contained in plaintiff's complaint; trial court denied this request, but after plaintiff had presented her case, reversed itself and allowed TMC/HSA to read factual allegations to jurors; after verdict in favor of TMC/HSA, trial court granted new trial; court upheld granting of new trial, holding that reading of allegations was essentially an error in admission of evidence under Civ. R. P. 59(a)(6)).

103.a.170 Before a party is entitled to a new trial, it must first have exhausted all other remedies, such as making timely objections, because a party will not be permitted to take its chances of obtaining a favorable verdict or decision, and then for the first time avail itself of the point on a motion for a new trial.

State v DePiano, 187 Ariz. 41, 926 P.2d 508 (Ct. App. 1995) (because defendant did not make motion to strike and only objected to evidence on ground that it was "irrelevant," defendant waived claim on appeal that admission of evidence was not proper under Rule 404(b)), *vacated on other grounds,* 187 Ariz. 27, 926 P.2d 494 (1996).

103.a.180 A party is not required to present a claim in a motion for new trial before the party may raise that claim on appeal.

Brown v U.S.F. & G., 194 Ariz. 85, 977 P.2d 807, ¶¶ 12–14 (Ct. App. 1998) (during defendant's opening statement, plaintiff objected to statement that plaintiff had "long history of fire loss claims," and trial court overruled objection; during trial, plaintiff attempted to "draw the sting" by introducing that evidence first; plaintiff permitted to raise on appeal trial court's ruling even though plaintiff then introduced evidence himself).

103.a.190 "Invited error" occurs when a party asks a certain question, or asks the trial court to take some action, or specifically does not object to certain evidence, that results in otherwise inadmissible evidence being introduced; in such a case, a party may not object on appeal to an error the party itself created or invited.

State v Pandeli, 215 Ariz. 514, 161 P.3d 557, ¶¶ 49–50 (2007) (defendant contended that trial court improperly allowed former girlfriend to testify that defendant molested her daughter; court noted trial court asked whether defendant's attorney objected to that evidence, and defendant's attorney stated that he did not; court held that defendant invited any error).

State v Anderson, 210 Ariz. 327, 111 P.3d 369, ¶ 44 (2005) (defendant contended evidence of sexual relationship between him (age 48) and 14-year-old female co-defendant was extremely prejudicial and should have been excluded; because defendant's attorney elicited this evidence, any error was invited).

State v Moody, 208 Ariz. 424, 94 P.3d 1119, ¶¶ 111 (2004) (defendant's attorney asked state's expert whether defendant had been "called a malingerer, which is a medical term for liar," to which expert responded, "Yes"; assuming that expert's "Yes" answer meant "Yes, malingerer is a medical term for liar," if that testimony was error, any error was invited by defendant's attorney's question).

State v Mann, 188 Ariz. 220, 934 P.2d 784 (1997) (because defendant invited trial court at sentencing to consider evidence of fatal traffic accident in which defendant was involved, defendant could not complain on appeal that trial court considered that evidence).

State v Herrera, 226 Ariz. 59, 243 P.3d 1041, ¶¶ 24–25 (Ct. App. 2010) (detective testified defendant's computer contained thousands of photographic images; on cross-examination, defendant's attorney asked detective if "around 17,500" photographs of naked women had been found on hard drive; because defendant first introduced pornographic nature of photographs, defendant invited any error).

103.a.200 A party will "open the door" when the party introduces evidence that makes certain otherwise inadmissible evidence admissible; in such a case, the party may not object on appeal because the party itself opened the door to admission of otherwise inadmissible evidence.

State v Andriano, 215 Ariz. 497, 161 P.3d 540, ¶ 29 (2007) (once defendant's expert testified that defendant needed to use personal lubricant when she had sex with her husband, this opened door to prosecutor's asking expert whether defendant needed to use personal lubricant when she had sex with her extramarital affair, because this rebutted expert's suggestion that defendant needed to use personal lubricant with her husband because her husband was abusive spouse).

State v Blakley, 204 Ariz. 429, 65 P.3d 77, ¶¶ 33–39 (2003) (trial court precluding expert from giving opinion on whether interrogation tactics in this case were coercive and giving opinion whether defendant's confession was voluntary; defendant contended that, when state asked expert on cross-examination whether he asked defendant about his mental condition and any counseling he may have had, this "opened the door" to asking expert to relate to jurors statements defendant had made; court noted that state was merely asking about areas and types of questions asked and did not ask about specific answers, so state did not "open the door").

State v Harrod, 200 Ariz. 309, 26 P.3d 492, ¶¶ 27–28 (2001) (in case-in-chief, defendant suggested ex-wife and her family were lying about his involvement in murder because of bitterness over divorce; court held this opened door and allowed state to call ex-wife in rebuttal to ask her why she had divorced defendant; ex-wife testified that she divorced him because he told her he had killed victim).

State v Doerr, 193 Ariz. 56, 969 P.2d 1168, ¶¶ 25–27 (1998) (on cross-examination, defendant elicited testimony from officer that he did not believe defendant was truthful during questioning on day of arrest; on rebuttal, state permitted to ask officer why he did not believe defendant was being truthful).

State v Mann, 188 Ariz. 220, 934 P.2d 784 (1997) (when defendant told psychologist he could not talk about the murders, but then used significant portions of the report for mitigation, defendant opened the door to use of full report).

State v Soto-Fong, 187 Ariz. 186, 928 P.2d 610 (1996) (in September, person gave one statement to police describing what co-defendants told him in August, and this statement tended to exculpate defendant; in November, person gave another statement to police describing what co-defendants told him in August, and this statement tended to inculpate defendant; trial court properly ruled that, if defendant chose to introduce testimony about September statement, state could introduce testimony about November statement).

State v Connor, 215 Ariz. 553, 161 P.3d 596, ¶¶ 29–35 (Ct. App. 2007) (defendant was charged with first-degree murder; evidence that victim's apartment had been burglarized and that family and friends had told victim they believed defendant had done the burglary and victim should stay away from defendant admissible to rebut defendant's testimony that he was friends with victim and was welcome in his apartment; to avoid prejudice to defendant, trial court instructed jurors there was no evidence defendant had in fact burglarized apartment; defendant contended issue of burglary improperly expanded with testimony about defendant's whereabouts during burglary, but acknowledged that his counsel initiated questioning in this area and therefore opened door to this inquiry).

Elia v Pifer, 194 Ariz. 74, 977 P.2d 796, ¶¶ 13–23 (Ct. App. 1998) (defendant was plaintiff's former attorney in dissolution action; plaintiff sued defendant for legal malpractice, claiming defendant did not have authority to agree to terms of proposed settlement agreement, and planned to introduce telephone message slip found in defendant's files purportedly saying not to agree to terms; in deposition testimony, defendant said she did not believe message slip was written in her office, and that plaintiff had come into her office and "rampaged" through his file; prior to trial, attorneys agreed message slip was admissible; in opening statement, plaintiff's attorney predicted that defendant would testify that plaintiff somehow got into file and planted message slip there; defendant's attorney then claimed that statement opened the door to defendant's state of mind and thus he intended to introduce evidence that Dental Board had found that plaintiff had fraudulently altered patient's records; trial court allowed defendant's attorney to say that in opening statement, and allowed defendant to testify that she thought defendant had planted the message slip because Dental Board had found plaintiff "guilty" of altering records; court held that relevance and authenticity of message slip were not at issue at start of case because parties had stipulated to its admissibility, but when plaintiff suggested in opening statement that defendant might accuse plaintiff of fabrication, that made authenticity of message slip relevant, but it did not open the door and make defendant's state of mind relevant, thus trial court erred in allowing admission of character evidence about plaintiff, resulting in reversal).

State v Tour, 187 Ariz. 391, 930 P.2d 468 (Ct. App. 1996) (although state's questioning about handgun was irrelevant, defendant did not object, and when defendant gave false answer, he opened door to evidence that otherwise would have been inadmissible).

State v Paxton, 186 Ariz. 580, 925 P.2d 721 (Ct. App. 1996) (because defendant presented evidence in his case that made witness's testimony relevant, trial court properly allowed witness who had been precluded from testifying on direct to testify on rebuttal).

State v DePiano, 187 Ariz. 41, 926 P.2d 508 (Ct. App. 1995) (because defendant asked witness whether certain portions of note were subject to different types of interpretation, she opened door to testimony of other witnesses about their interpretation of note), *vacated on other grounds,* 187 Ariz. 27, 926 P.2d 494 (1996).

103.a.205 Even when a party "opens the door" by introducing certain evidence, the evidence that the other party then seeks to introduce must still satisfy the Confrontation Clause.

State v Huerstel, 206 Ariz. 93, 75 P.3d 698, ¶¶ 35–36 (2003) (defendant introduced statements from two inmates who claimed codefendant told them he shot all three victims; trial court then allowed state to introduce codefendant's statement to police in which he claimed defendant shot all three victims; state claimed defendant "opened the door" to admission of codefendant's statement; court held accomplice confession implicating defendant was not within firmly rooted exception to hearsay rule, and trial court made no finding codefendant's statement to police bore sufficient indicia of reliability, thus evidence did not satisfy Confrontation Clause, so trial court erred in admitting statement).

103.a.210 A party may not justify admission of inadmissible evidence by claiming it was in response to other inadmissible evidence that the other party was able to have admitted; the proper procedure is for the party to object in the first place when the other party attempts to introduce the inadmissible evidence.

State v Dunlap, 187 Ariz. 441, 930 P.2d 518 (Ct. App. 1996) (even had defendant's evidence been inadmissible hearsay, it would not have justified admission of state's hearsay evidence).

103.a.230 A party is not entitled to a reversal on appeal on the basis of erroneously admitted evidence that did not affect a substantial right of the party, and the prejudice to the substantial rights of the party will not be presumed, it must appear in the record.

State v Anthony, 218 Ariz. 439, 189 P.3d 366, ¶¶ 39–42 (2008) (defendant was convicted of killing wife and step-children; trial court allowed state to present evidence tending to show defendant molested 14-year old step-daughter; state argued that molestation was defendant's motive for killing her; court concluded there was not enough evidence for jurors to conclude by clear and convincing evidence that molestation occurred and thus trial court should not have admitted that evidence; because claim that defendant molested step-daughter was prejudicial to defendant and because molestation was repeated theme of state's closing argument, court was unable to conclude beyond reasonable doubt improperly admitted allegation of molestation did not affect verdict, and thus reversed conviction).

State v Cruz, 218 Ariz. 149, 181 P.3d 196, ¶¶ 99–102 (2008) (officer testified that hammer of gun used to kill victim had been removed and that removal may have been done to facilitate concealment; defendant did not object when testimony given, but next day moved for mistrial claiming that this testimony "implied bad character, bad conduct, a bad act, and that the person that possessed the weapon was engaging in criminal behavior"; court reviewed only for fundamental error, and concluded that, because there was no evidence that defendant had removed hammer from gun, this testimony did not prejudice defendant).

State v Bocharski, 200 Ariz. 50, 22 P.3d 43, ¶¶ 28–34 (2001) (court concluded photographs met bare minimum standard of relevance, but that probative value was substantially outweighed by danger of unfair prejudice, thus trial court should have excluded Exhibits 46–47, but found any error to be harmless in light of other evidence).

State v Bocharski, 200 Ariz. 50, 22 P.3d 43, ¶¶ 35–39 (2001) (while in jail, defendant allegedly assaulted fellow inmate; trial court admitted by stipulation inmate's statement of what defendant said during assault; court held defendant's statement, "If it were up to me, you would be dead right now," had no relevance, thus it was error to admit statement, but any error was harmless).

State v Hoskins, 199 Ariz. 127, 14 P.3d 977, ¶¶ 65–67 (2001) (detective testified about statements witness made to him about defendant's wanting to commit car-jacking and kill victim; although defendant had claimed witness was biased and had motive to fabricate, court concluded that bias and motive to fabricate arose prior to time witness made statements to detective, but held that, even if testimony was improperly admitted, any error was harmless because witness testified and told jurors same things that detective told them).

State v Hoskins, 199 Ariz. 127, 14 P.3d 977, ¶¶ 54–58 (2001) (prosecutor asked witness when he had last seen defendant, and witness said it was when they both were arrested as juveniles while making "beer run"; court noted witness gave this testimony in violation of trial court's order, but held any error was harmless in light of other evidence presented).

State v Jones, 197 Ariz. 290, 4 P.3d 345, ¶¶ 17–18 (2000) (defendant implied witness had motive to lie because witness, rather than defendant, was responsible for killings; because motive to fabricate would have arisen at time of killing, statement was made after motive arose, thus trial court erred in admitting prior statement; because defendant thoroughly impeached witness, any error was harmless).

State v Doerr, 193 Ariz. 56, 969 P.2d 1168, ¶¶ 29, 31–33 (1998) (court held that enlarged photograph of victim when alive was not relevant, and there was danger that such photograph would cause sympathy for victim, but concluded admission of photograph did not materially affect verdict in light of overwhelming physical evidence).

State v Spreitz, 190 Ariz. 129, 945 P.2d 1260 (1997) (photographs of victim after decomposing in desert heat for 3 days and showing insect activity had little if any probative value, thus trial court erred in not finding probative value was substantially outweighed by prejudicial effect; because of evidence against defendant, including his un-coerced confession, no prejudice was found).

State v Lacy, 187 Ariz. 340, 929 P.2d 1288 (1996) (although trial court erred in admitting evidence of subsequent burglary, because jurors already knew defendant committed other burglaries and because trial court gave a proper limiting instruction, error was harmless).

Fuentes v Fuentes, 209 Ariz. 51, 97 P.3d 876, ¶¶ 24–25 (Ct. App. 2004) (exhibit was copy of budget wife prepared for trial; because this budget of average anticipated monthly expenses was out-of-court statement offered to prove truth of matters asserted, it was hearsay, even though wife discussed budget while testifying; court concluded admission of exhibit did not prejudice husband because (1) wife testified and was subject to cross-examination, (2) information in exhibit was similar to affidavit of financial information that was admitted at trial, (3) admission of this type of evidence is fairly routine in dissolution proceedings, and (4) this was bench trial and court assumed trial court considered only competent evidence).

State v Beasley, 205 Ariz. 334, 70 P.3d 463, ¶¶ 16–26 (Ct. App. 2003) (although trial court erred in admitting for impeachment nature of prior convictions without balancing prejudicial effect of nature of prior convictions against probative value of nature of prior convictions, evidence against defendant was so strong that any error was harmless).

Hernandez v State, 201 Ariz. 336, 35 P.3d 97, ¶ 18 (Ct. App. 2001) (plaintiff fell off wall at Patagonia Lake Park; because plaintiff testified there was no trail and that he stepped off retaining wall, notice of claim letter to state from plaintiff's attorney stating plaintiff was walking on trail and stepped off cliff was admissible as prior inconsistent statement; because plaintiff testified he did not write, verify, or even see notice of claim letter before trial, admission of letter did not prejudice plaintiff), *vacated,* 203 Ariz. 196, 52 P.3d 765 (2002).

State v Garcia, 200 Ariz. 471, 28 P.3d 327, ¶¶ 41–42 (Ct. App. 2001) (because victim testified about how defendant molested her and physician specializing in sexual abuse testified that victim's hymen was almost totally destroyed and that destruction would have had to have happened in way consistent with victim's testimony, error in admitting evidence of other acts committed by defendant against victim was harmless).

In re Anthony H., 196 Ariz. 200, 994 P.2d 407, ¶ 13 (Ct. App. 1999) (although trial court erred in admitting evidence of juvenile's juvenile adjudication, evidence that juvenile committed offense was overwhelming, so admission of evidence of juvenile adjudication was not prejudicial).

Brown v U.S.F. & G., 194 Ariz. 85, 977 P.2d 807, ¶¶ 19–22 (Ct. App. 1998) (insurance company defended refusal to pay claim on basis that plaintiff had breached contract by misrepresenting material facts on insurance application and by intentionally setting fire; even if it had been error to admit evidence plaintiff's "long history of fire loss claims," there was sufficient evidence that plaintiff set fire himself, so any error would have been harmless).

Sheppard v Crow-Baker-Paul No. 1, 192 Ariz. 539, 968 P.2d 612, ¶ 36 (Ct. App. 1998) (because parent's testimony about what their son said about how injury happened were general and innocuous when compared to son's testimony, defendant failed to show prejudice).

State v Alatorre, 191 Ariz. 208, 953 P.2d 1261, ¶¶ 18–19 (Ct. App. 1998) (defendant was charged with sexual acts with 8-year-old victim, evidence that defendant struck victim in stomach on an unspecified occasion was not evidence of prior sexual offense and thus not propensity, and did not complete the story, and thus should not have been admitted; in light of other evidence, error was harmless).

State v Lummus, 190 Ariz. 569, 950 P.2d 1190 (Ct. App. 1997) (court was concerned that officer testified that, on an intoxication scale of 1 to 10, defendant was a 10+, but held that error was harmless beyond a reasonable doubt because of other evidence).

State v Jones, 188 Ariz. 534, 937 P.2d 1182 (Ct. App. 1996) (because victim unequivocally identified defendant as one who molested her, and because defendant never claimed that someone else committed acts of molestation, doctor's testimony that victim said defendant molested her was harmless).

State v DePiano, 187 Ariz. 41, 926 P.2d 508 (Ct. App. 1995) (because note was admitted in evidence and thus jurors could draw their own conclusions what it meant, any error in admitting testimony of other witnesses of their interpretation of note was harmless), *vacated on other grounds*, 187 Ariz. 27, 926 P.2d 494 (1996).

103.a.240 Erroneous admission of cumulative evidence does not require reversal.

State v Dunlap, 187 Ariz. 441, 458, 930 P.2d 518, 535 (Ct. App. 1996) (because state's hearsay evidence was cumulative, any error in its admission was harmless).

State v Riggs, 186 Ariz. 573, 925 P.2d 714 (Ct. App. 1996) (*rev granted* 10/21/96) (because defendant admitted he thought there were insufficient funds in his account, and because authenticity of signature card was not an issue, any error in admission of bank records would have been harmless).

State v Riggs, 186 Ariz. 573, 925 P.2d 714 (Ct. App. 1996) (*rev granted* 10/21/96) (because defendant's defense was that he had permission to cash checks in question, any error in admission of handwriting examiner's opinion that signature on checks did not match defendant's signature on signature card would have been harmless).

103.a.250 A party is entitled to a reversal on appeal on the basis of erroneously admitted evidence if it affected a substantial right of the party.

State v Green, 200 Ariz. 496, 29 P.3d 271, ¶¶ 21–23 (2001) (court held trial court erred in admitting 12-year-old felony under Rule 609(b) because it considered only one factor (centrality of credibility issue) and did not consider other factors; court held it could not conclude that error did not affect verdict, and thus reversed conviction).

State v Bass, 198 Ariz. 571, 12 P.3d 796, ¶¶ 39–46 (2000) (hearsay statement did not satisfy requirements for excited utterance, thus trial court erred in admitting statement; because there was no showing beyond a reasonable doubt that statement did not affect jurors' verdict, court reversed conviction).

State v Fulminante, 193 Ariz. 485, 975 P.2d 75, ¶ 10 (1999) (trial court erred in admitting victim's hearsay statements reflecting her belief about defendant's future conduct, and admission prejudiced defendant, requiring a new trial).

State v Bronson, 204 Ariz. 321, 63 P.3d 1058, ¶¶ 29–36 (Ct. App. 2003) (court held admission of transcript of accomplice's interview conducted by defendant's attorney was error; court concluded elements of burglary conviction were based upon interview statements and that jurors relied heavily on those statements, and these statements were critical to refute defendant's mere presence defense, thus state failed to show admission of statement was harmless).

Ogden v J.M. Steel Erecting, Inc., 201 Ariz. 32, 31 P.3d 806, ¶¶ 36–38, 40 (Ct. App. 2001) (in order to prove driving record of truck driver who caused accident, plaintiffs presented truck driver's MVD

record (listing three prior offenses) and police report of investigating officer, which contained supplement by another officer purporting to show truck driver's alleged driving record (listing 10 additional prior offenses); court held trial court erred in admitting supplement, and because it allowed jurors to conclude defendant should never have allowed truck driver to drive defendant's truck, defendant was prejudiced).

State v Garcia, 200 Ariz. 471, 28 P.3d 327, ¶¶ 43–44 (Ct. App. 2001) (because evidence of indecent exposure was weak, error in admitting evidence of other acts committed by defendant against victim was not harmless).

City of Phoenix v Wilson, 197 Ariz. 456, 4 P.3d 999, ¶ 19 (Ct. App. 2000) (court stated "when evidence is improperly admitted, prejudice is presumed"), *vacated,* 200 Ariz. 2, 21 P.3d 388 (2001).

State v Taylor, 196 Ariz. 584, 2 P.3d 674, ¶¶ 15–17 (Ct. App. 1999) (trial court erred in admitting pretrial videotaped statement made by minor victim; because credibility was primary issue and admission of videotaped statement allowed state to present victim's testimony, without opportunity for cross-examination, error in admitting statement was not harmless).

State v Vigil, 195 Ariz. 189, 986 P.2d 222, ¶¶ 17–22 (Ct. App. 1999) (no one disputed fact that defendant was in car, thus identity was not an issue; only issue was whether defendant shot gun from car; because defendant's prior and subsequent acts of throwing objects at victim's house did not make it more likely that defendant fired gun at victim, trial court erred in admitting this evidence; because there was no other evidence corroborating testimony of victim and mother that defendant shot at victim, erroneous admission of this other act evidence was not harmless).

State v Reimer, 189 Ariz. 239, 941 P.2d 912 (Ct. App. 1997) (when victim gave different version when testifying, trial court erred in allowing officer to give opinion that victim was not lying when she gave version at time of assault; because outcome of case depended on credibility of victim's statement to officer at time of assault, court found error was prejudicial).

103.a.260 A party is not entitled to a reversal on appeal on the basis of erroneously excluded evidence that did not affect a substantial right of the party, and the prejudice to the substantial rights of the party will not be presumed, it must appear in the record.

State v Lehr, 201 Ariz. 509, 38 P.3d 1172, ¶¶ 32–35 (2002) (court held trial court erred in precluding defendant from cross-examining witness about laboratory procedure used in DNA analysis; because non-DNA evidence was sufficient to sustain convictions for certain counts, court affirmed convictions on those counts).

State v Nordstrom, 200 Ariz. 229, 25 P.3d 717, ¶¶ 73–75 (2001) (state called supervisor of AzDOC home arrest program to rebut testimony of defendant's brother's parole officer, who testified how electronic bracelet monitoring system could be defeated; court admitted evidence of lawsuit filed against AzDOC by victims of defendant's crimes alleging negligent supervision of defendant, other participant in crimes, and defendant's brother, but precluded defendant from questioning supervisor about lawsuit because, in pre-trial interview, supervisor denied any knowledge of lawsuit; court held trial court should have allowed questioning of supervisor to explore any motive to fabricate, but held any error was harmless because nothing suggested supervisor had any knowledge of lawsuit).

State v Wassenaar, 215 Ariz. 565, 161 P.3d 608, ¶¶ 34–35 (Ct. App. 2007) (defendant claimed trial court erred in striking testimony that he had never previously assaulted correction officer; court held it did not have to address whether trial court erred because other evidence previously admitted showed defendant had no disciplinary actions for assaulting AzDOC personnel).

State v Jeffrey, 203 Ariz. 111, 50 P.3d 861, ¶¶ 13–16 (Ct. App. 2002) (in home invasion, defendant and cohort demanded drugs and money; when police arrived, cohort shot and killed himself; defendant

was charged with four counts of kidnapping, and claimed duress, contending that, because of erratic and violent behavior of cohort, she felt compelled to assist in home invasion; defendant claimed trial court erred in precluding evidence of cohort's earlier suicide attempt, contending this evidence was relevant (material) to whether she acted under duress and was relevant (relevance) because it made it more likely she acted under duress; court held, in light of other evidence, any error in precluding this evidence was harmless).

Taeger v Catholic Fam & Com Serv, 196 Ariz. 285, 995 P.2d 721, ¶ 38 (Ct. App. 1999) (because plaintiffs were able to introduce in other ways evidence that trial court excluded, plaintiffs were not prejudiced).

State v Doody, 187 Ariz. 363, 930 P.2d 440 (Ct. App. 1996) (although precluded evidence would have negated premeditation, it would have shown knowing participation in robbery; because jurors convicted defendant of felony murder, any error in preclusion was harmless).

103.a.270 Erroneous exclusion of cumulative evidence does not require reversal.

State v Wassenaar, 215 Ariz. 565, 161 P.3d 608, ¶¶ 34–35 (Ct. App. 2007) (defendant claimed trial court erred in striking testimony that he had never previously assaulted correction officer; court held it did not have to address whether trial court erred because other evidence previously admitted showed defendant had no disciplinary actions for assaulting AzDOC personnel).

State v Dunlap, 187 Ariz. 441, 930 P.2d 518 (Ct. App. 1996) (because defendant had thoroughly attacked witness's credibility, any error in excluding other impeachment evidence was harmless).

103.a.280 A party is entitled to a reversal on appeal on the basis of erroneously excluded evidence if it affected a substantial right of the party.

State v Prion, 203 Ariz. 157, 52 P.3d 189, ¶¶ 19–27 (2002) (because evidence that another person could have committed charged offense was sufficient to create reasonable doubt about defendant's guilt, that evidence was relevant and thus trial court erred in excluding it; because of relative strength to evidence against defendant and against other person, exclusion was not harmless, thus defendant was entitled to new trial).

State v Lehr, 201 Ariz. 509, 38 P.3d 1172, ¶¶ 32–41 (2002) (court held trial court erred in precluding defendant from cross-examining witness about laboratory procedure used in DNA analysis; because non-DNA evidence was not sufficient to sustain convictions for certain counts, court reversed convictions on those counts).

State v Speers, 209 Ariz. 125, 98 P.3d 560, ¶¶ 34–36 (Ct. App. 2004) (defendant was charged with 18 counts of sexual exploitation of minors based on computer images; trial court admitted as propensity evidence testimony from two second-grade students of alleged misconduct with them; court held that testimony from expert witness about suggestive interview techniques was admissible and that trial court erred in precluding this evidence, and because court could not conclude beyond reasonable doubt that jurors would have reached same verdict if they had heard this evidence, defendant was entitled to new trial).

Paragraph (b) — Record of offer and ruling.

103.b.010 The appellant has the duty to make a record at trial to support the claim of error on appeal, and absent such a record, the appellate court will presume that the evidence presented to the trial court was sufficient to maintain its evidentiary rulings.

Salt River Project v Miller Park LLC, 218 Ariz. 246, 183 P.3d 497, ¶¶ 23–25 (2008) (in condemnation action, defendant sought to preclude statements in defendant's previous tax protest that full cash value of property was certain figure, which was less than amount defendant requested in condemna-

tion action; defendant moved to preclude evidence under both Rule 402 and 403; in granting motion to preclude, trial court did not specify whether its ruling was based on Rule 402, Rule 403, or both; on appeal, plaintiff in effect asked court to presume trial court relied only on Rule 402; court held that to extent trial court's ruling was ambiguous, it was incumbent on plaintiff to seek to clarify record).

Kline v Kline, 221 Ariz. 564, 212 P.3d 902, ¶¶ 7–10, 26–33 (Ct. App. 2009) (in civil case, wife filed third-party complaint against husband, who was properly served; trial court held default hearing, which husband did not attend; trial court approved factual findings and conclusions of law proposed by wife, and ordered that husband pay wife $285,155.56 compensatory damages and $100,000 punitive damages; because husband did not provide to appellate court transcript of default hearing, court presumed record supported trial court's decision).

In re Jaramillo, 217 Ariz. 460, 176 P.3d 28, ¶ 18 (Ct. App. 2008) (in sexually violent persons case, Jaramillo asked trial court to exclude evidence of three prior sexual acts, and cited Rule 403 in his motion; on appeal, Jaramillo claimed trial court failed to conduct Rule 403 analysis; court stated that, although trial court made no express finding under Rule 403, record sufficiently demonstrated that trial court considered and balanced necessary factors in its ruling; to extent Jaramillo claimed trial court erred in not making express findings, Jaramillo waived that issue by failing to request that trial court make such findings).

State v Miles, 211 Ariz. 475, 123 P.3d 669, ¶ 4 n.1 (Ct. App. 2005) (defendant caused collision that injured his passenger (victim); defendant moved to preclude introduction of victim's medical records and testimony about seriousness of victim's injuries; defendant did not make transcript of hearing on his motion part of record on appeal; court presumed that any information about relationship between defendant and victim was discussed at hearing and presumed that missing portions supported trial court's ruling allowing introduction of medical records and testimony about victim).

Romero v Southwest Ambulance Corp., 211 Ariz. 200, 119 P.3d 467, ¶¶ 2–4 (Ct. App. 2005) (in wrongful death action, plaintiff contended trial court erred in admitting evidence of decedent's past illegal drug use, substance abuse treatment, criminal record, and diagnosis of hepatitis C; because plaintiff did not include in record on appeal transcripts of trial, appellate court was unable to determine what evidence was presented at trial, whether plaintiff objected at trial, how evidence was used, and how evidence may have prejudiced plaintiff; court therefore presumed that record supported rulings of trial court).

State v Olcan, 204 Ariz. 181, 61 P.3d 475, ¶¶ 6–13 (Ct. App. 2003) (defendant's attorney read series of stipulated facts into record and submitted written stipulation to trial court; trial court concluded state had failed to provide defendant with opportunity for independent blood draw; on appeal, state contended statement about independent opportunity was only defendant's attorney's argument rather than stipulated fact; court noted parties had not made written stipulation part of record on appeal, thus court would presume missing portion supported trial court's determination).

State v Vasko, 193 Ariz. 142, 971 P.2d 189, ¶ 12 (Ct. App. 1998) (although court reporter was present during hearing, no transcript was provided to appellate court; court presumed whatever transpired at hearing supported trial court's ruling that witness was unavailable).

Clark Equip. v Arizona Prop. & Cas., 189 Ariz. 433, 943 P.2d 793 (Ct. App. 1997) (because record did not contain disclosure statement that was alleged to have in it an admission, appellant waived this issue on appeal).

State v Scott, 187 Ariz. 474, 930 P.2d 551 (Ct. App. 1996) (because defendant did not object to trial court's failure to have bench conferences recorded, defendant waived issue on appeal).

State v Doody, 187 Ariz. 363, 930 P.2d 440 (Ct. App. 1996) (assuming that substantial similarities of circumstances, interrogators, and defendants could render voluntariness of one confession relevant to issue of another confession's voluntariness, defendant made no showing in record that circumstances, interrogators, and defendants were similar).

103.b.020 Both the Arizona Supreme Court and the Arizona Court of Appeals have disapproved of the practice of arguing motions without the court reporter present, such as at bench conferences or in chambers, and then attempting to recreate the arguments later on the record.

State v Paxton, 186 Ariz. 580, 925 P.2d 721 (Ct. App. 1996) (court took opportunity to express its own disapproval of practice of not recording bench conferences).

103.b.025 Although the Arizona Supreme Court has disapproved of the practice of holding unrecorded bench conferences, it has never required the verbatim reporting of all bench conferences, thus it is permissible for the trial court to follow a procedure as long as it makes a sufficient appellate record.

State v Hargrave, 225 Ariz. 1, 234 P.3d 569, ¶¶ 57–61 (2010) (trial court did not have bench conferences recorded, but instead allowed counsel to make record out of presence of jurors and obtained counsel's assent that trial court had accurately described discussions).

103.b.030 If the trial court does not have bench conferences recorded and a party does not object, that party will have waived on appeal the failure to have the bench conferences recorded.

State v Scott, 187 Ariz. 474, 930 P.2d 551 (Ct. App. 1996) (trial court did not have bench conferences recorded and then attempted to reconstruct them later if it deemed them important; because defendant did not object, defendant waived issue on appeal).

March 11, 2012

Rule 104. Preliminary Questions.

(a) **In General.** The court must decide any preliminary question about whether a witness is qualified, a privilege exists, or evidence is admissible. In so deciding, the court is not bound by evidence rules, except those on privilege.

(b) **Relevance That Depends on a Fact.** When the relevance of evidence depends on whether a fact exists, proof must be introduced sufficient to support a finding that the fact does exist. The court may admit the proposed evidence on the condition that the proof be introduced later.

(c) **Conducting a Hearing So That the Jury Cannot Hear It.** The court must conduct any hearing on a preliminary question so that the jury cannot hear it if:

(1) the hearing involves the admissibility of a confession;

(2) a defendant in a criminal case is a witness and so requests; or

(3) justice so requires.

(d) **Cross-Examining a Defendant in a Criminal Case.** By testifying on a preliminary question, a defendant in a criminal case does not become subject to cross-examination on other issues in the case.

(e) **Evidence Relevant to Weight and Credibility.** This rule does not limit a party's right to introduce before the jury evidence that is relevant to the weight or credibility of other evidence.

Comment to 2012 Amendment

The language of Rule 104 has been amended to conform to the federal restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Cases

Paragraph (a) — Questions of admissibility generally.

104.a.015 In determining preliminary questions on the admissibility of evidence, the trial court must use the preponderance of the evidence standard.

State v. Harrod, 200 Ariz. 309, 26 P.3d 492, ¶¶ 22–26 (2001) (trial court found by preponderance of evidence that witness had not been successfully hypnotized, but stated that, if standard were clear and convincing evidence, it would not have so found; court held trial court used proper standard).

104.a.060 The trial court is not bound by the Rules of Evidence in determining admissibility of evidence.

State v. Medina, 178 Ariz. 570, 575, 875 P.2d 803, 808 (1994) (in determining whether witness was "unavailable," trial court properly considered prosecutor's avowals; information presented was not, however, sufficient for court to conclude that witness was "unavailable").

State v. Hutchinson, 141 Ariz. 583, 588, 688 P.2d 209, 214 (Ct. App. 1984) (even though trial court may consider otherwise inadmissible evidence in determining admissibility of evidence, this does not mean trial court should admit this inadmissible evidence for jurors to consider).

* *State v. Rivera*, 226 Ariz. 325, 247 P.3d 560, ¶ 17 (Ct. App. 2011) (in hearing to determine whether witness was "unavailable," trial court was not bound Rules of Evidence).

State v. Silva, 137 Ariz. 339, 342, 670 P.2d 737, 740 (Ct. App.1983) (in determining admission of laboratory report, trial court may consider hearsay to determine whether chain of custody requirement for narcotics has been satisfied).

State v Simmons, 131 Ariz. 482, 484, 642 P.2d 479481 (Ct. App. 1982) (trial court may consider reliable hearsay in determining authentication of documents).

State v Hadd, 127 Ariz. 270, 275, 619 P.2d 1047, 1052 (Ct. App. 1980) (at suppression hearing, trial court could consider tape recording not yet admitted in evidence).

State v Spratt, 126 Ariz. 184, 186, 613 P.2d 848, 850 (Ct. App. 1980) (trial court could consider hearsay in determining availability of witness).

104.a.070 Abuse of discretion is an exercise of discretion that is manifestly unreasonable, or exercised on untenable grounds or for untenable reasons.

State v Wagner, 194 Ariz. 1, 976 P.2d 250, ¶ 39 (Ct. App. 1998) (trial court did not abuse discretion in admitting autopsy photographs), *approv'd in part & vac'd in part on other grounds,* 194 Ariz. 310, 982 P.2d 270 (1999).

State v Dunlap, 187 Ariz. 441, 458, 930 P.2d 518, 535 (Ct. App. 1996) (trial court did not abuse discretion in admitting diary entries as statements of a co-conspirator).

Bledsoe v Salt River Valley Water Users, 179 Ariz. 469, 473, 880 P.2d 689, 693 (Ct. App. 1994) (trial court's decision to allow plaintiff's counsel to show a videotape, not admitted in evidence, during closing argument, and to allow plaintiff's counsel to conduct an experiment during rebuttal argument, was abuse of discretion and required reversal).

State v Woody, 173 Ariz. 561, 845 P.2d 487 (Ct. App. 1992) (because facts of defendant's prior DUI convictions were sufficiently similar to present offense that jurors could conclude defendant was aware of risks he posed to others in driving under influence, trial court did not abuse discretion in ruling that evidence was relevant to whether defendant showed reckless indifference to human life).

Paragraph (e) — Weight and credibility.

104.e.010 Once the trial court has determined that a party has presented sufficient admissible evidence upon which the jurors could conclude that certain facts exist, the parties are permitted to introduce additional evidence going to the weight and credibility of the initial evidence.

State v Montaño, 204 Ariz. 413, 65 P.3d 61, ¶ 69 (2003) (defendant's claims on appeal that DNA is "magic" and "bogus," that one witness had judgment against him, that *USA Today* ran article calling British DNA database "flawed," and that DNA evidence was not overwhelming in this case, were merely attacks on weight of evidence, which was matter within province of jurors).

State v Lehr, 201 Ariz. 509, 38 P.3d 1172, ¶¶ 16–31 (2002) (in consolidated action, judge holding consolidated hearing took judicial notice of fact that principles and theories underlying DNA analysis in forensic labs are generally accepted in scientific community and that RFLP method in particular met general acceptance test, and then held claimed deficiencies in laboratory procedure did not preclude admission of evidence; at trial, trial judge precluded defendant from cross-examining witness about laboratory procedure, ruling this would be re-litigating issues resolved at consolidated hearing; court held jurors must assess weight of evidence of laboratory procedure, and thus held trial judge erred in precluding this evidence).

March 11, 2012

Rule 105. Limiting Evidence That Is Not Admissible Against Other Parties or for Other Purposes.

If the court admits evidence that is admissible against a party or for a purpose— but not against another party or for another purpose— the court, on timely request, must restrict the evidence to its proper scope and instruct the jury accordingly.

Comment to 2012 Amendment

The language of Rule 105 has been amended to conform to the federal restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Cases

105.010 Evidence that is admissible for one purpose or against one party is not to be excluded merely because it is not admissible for some other purpose or against another party.

State v Sanchez, 191 Ariz. 418, 956 P.2d 1240 (Ct. App. 1997) (because implied consent form was admissible to provide foundation for defendant's breath test results, it was not inadmissible merely because it contained information about possible punishment if defendant did not take test).

105.030 The language of Rule 105 is mandatory, not discretionary; if the trial court admits evidence for one purpose but not for another, it may not refuse to give a limiting instruction.

State v Gomez, 226 Ariz. 165, 244 P.3d 1163, ¶¶ 25–27 (2010) (court held defendant's submission of inadequate instruction did not waive defendant's right to limiting instruction, but because evidence was not admitted simply to support expert's opinion, limiting instruction was not required).

105.060 Failure to request a limiting instruction, and failure to object to a limiting instruction that is given, waives the issue on appeal.

State v Boggs, 218 Ariz. 325, 185 P.3d 111, ¶ 36 (2008) (detective testified at trial that, during interrogation, defendant asked about statements codefendant had made; defendant contended this violated his Sixth Amendment right of confrontation; court held, because codefendant's statements were admitted not to prove truth of matters asserted, but were instead introduced to show context of interrogation, admission did not violate right of confrontation; court noted defendant neither objected to testimony nor requested limiting instruction, thus no error in not giving limiting instruction).

State v Boggs, 218 Ariz. 325, 185 P.3d 111, ¶ 42 (2008) (during videotaped interrogation of defendant, detective accused defendant of lying; defendant claimed playing videotape to jurors violated his right to fair trial; court held that detective's accusations were part of interrogation technique and not for purpose of giving opinion testimony at trial, thus no error; court noted that, if defendant had requested limiting instruction, one would have been appropriate, but that defendant neither objected to testimony nor requested limiting instruction, thus no error in not giving limiting instruction).

State v Prince, 204 Ariz. 156, 61 P.3d 450, ¶¶ 7–10 (2003) (defendant was charged with murder of daughter and attempted murder of mother; trial court admitted evidence of other violent acts and threats made by defendant against mother; trial court gave instruction limiting application of that evidence to count of attempted murder of mother; defendant claimed instruction was not adequate for count of murder of daughter; court noted defendant did not object to that instruction and held instructions were adequate and there was no error and certainly no fundamental error).

State v Nordstrom, 200 Ariz. 229, 25 P.3d 717, ¶ 51 (2001) (although letter from defendant to third person was admitted for limited purpose and thus defendant would have been entitled to limiting instruction, because defendant did not provide limiting instruction, defendant waived any error).

March 11, 2012

Rule 106. Remainder of or Related Writings or Recorded Statements.

If a party introduces all or part of a writing or recorded statement, an adverse party may require the introduction, at that time, of any other part— or any other writing or recorded statement— that in fairness ought to be considered at the same time.

Comment to 2012 Amendment

The language of Rule 106 has been amended to conform to the federal restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Cases

106.010 When a party introduces a portion of a writing or recorded statement, the other party may require the introduction of any other portion or any other writing or recorded statement that in fairness ought to be considered with the portion admitted, which means a portion of a statement that is necessary to qualify, explain, or place in context the portion of the statement that is already admitted.

State v Ellison, 213 Ariz. 116, 140 P.3d 899, ¶¶ 45–47 (2006) (court held that, if defendant introduced those parts of codefendant's statement that implicated codefendant and tended to exculpate defendant, state could inquire on cross-examination about those portions of codefendant's statement that implicated defendant).

State v Prasertphong, 210 Ariz. 496, 114 P.3d 828, ¶¶ 24–29 (2005) (defendant sought to introduce portion of codefendant's statement as statement against penal interest; court held state was then entitled to introduce those remaining portions of codefendant's statement that were necessary to keep jurors from being misled).

State v Prasertphong, 206 Ariz. 70, 75 P.3d 675, ¶¶ 30–33 (2003) (defendant sought to admit portions of codefendant's statement that were self-incriminating; state agreed that self-incriminating portions of statement were admissible, but contended that entire statement must be admitted, which included portions wherein codefendant shifted some responsibility for crimes to defendant; court agreed with trial court that admitting only portions of statement offered by defendant would have been misleading, thus entire statement would have to be admitted), *vac'd*, 541 U.S. 1039 (2004).

State v Soto-Fong, 187 Ariz. 186, 928 P.2d 610 (1996) (in September, person gave one statement to police describing what co-defendants told him in August, and this statement tended to exculpate defendant; in November, person gave another statement to police describing what co-defendants told him in August, and this statement tended to inculpate defendant; trial court properly ruled that, if defendant chose to introduce testimony about September statement, state could introduce testimony about November statement).

State v Clark, 196 Ariz. 530, 2 P.3d 89, ¶ 42 (Ct. App. 1999) (defendant claimed trial court erred in admitting only portion of tape of defendant's conversation with officer; trial court heard entire tape during motion for new trial and concluded other portion of tape did not warrant new trial; further, other testimony duplicated what was on other portion of tape).

State v Wooten, 193 Ariz. 357, 972 P.2d 993, ¶ 59 (Ct. App. 1998) (evidence presented was that all jail telephone conversations were recorded on master microcomputer tape, and then must be transferred to cassette tape; state presented excerpts of defendant's telephone calls; defendant claimed excerpted version of tapes precluded him from introducing his complete statements; court noted that defendant was able to place excerpted portions in context, and thus failure to play statements in entirety did not violate defendant's rights).

106.015 If the portion of the statement that the party wants admitted does not qualify, explain, or place in context the portion of the statement that is already admitted, the trial court should not admit the requested portion.

State v Cruz, 218 Ariz. 149, 181 P.3d 196, ¶¶ 57–58 (2008) (as officer drew his gun, defendant said, "Just do it. . . . Just go ahead and kill me now. Kill me now. Just get it over with"; approximately 1 hour later as paramedic was taking defendant to hospital, defendant told paramedic that "Arturo Sandoval" had shot police officer; court held "Arturo Sandoval" statement did not qualify, explain, or place in context "just shoot me" statement, thus "Arturo Sandoval" statement was not admissible under rule of completeness).

State v Huerstel, 206 Ariz. 93, 75 P.3d 698, ¶¶ 37–39 (2003) (defendant introduced statements from two inmates, who claimed codefendant told them he shot all three victims; trial court then allowed state to introduce codefendant's statement to police in which he claimed defendant shot all three victims; state claimed codefendant's statement to police was admissible under "rule of completeness"; court noted these were two separate conversations rather than separate parts of same conversation, thus "rule of completeness" did not apply).

106.020 Once a party introduces a portion of a statement and the adverse party wants to introduce excluded portions of the statement, the adverse party is not required to have the excluded portions admitted immediately, but may instead have them admitted at a later time.

State v Dunlap, 187 Ariz. 441, 930 P.2d 518 (Ct. App. 1996) (on redirect examination, state attempted to rehabilitate witness by reading portions of letter he wrote, and on recross-examination, defendant sought to have remainder of letter admitted; court held trial court erred in ruling that request was untimely).

106.030 Once a party introduces a portion of a written or recorded statement, this rule requires the admission of the remaining portions of the statement that ought in fairness to be considered contemporaneously with it; the remainder of the statement need not itself be admissible, under the reasoning that a party who introduces a portion of the statement forfeits any evidentiary or constitutional protections for the remainder of the statement.

State v Ellison, 213 Ariz. 116, 140 P.3d 899, ¶¶ 45–47 (2006) (court held that, if defendant introduced those parts of codefendant's statement that implicated codefendant and tended to exculpate defendant, state could inquire on cross-examination about those portions of codefendant's statement that implicated defendant, and introduction of those other portions would not implicate confrontation clause).

State v Prasertphong, 210 Ariz. 496, 114 P.3d 828, ¶¶ 10–29 (2005) (defendant sought to introduce portion of codefendant's statement as statement against penal interest; court held state was then entitled to introduce those remaining portions of codefendant's statement under Rule 106 that were necessary to keep jurors from being misled, and that by introducing portions of codefendant's statement, defendant forfeited Confrontation Clause protection for remaining portions; court stated that "legal scholars have reasoned that admission under the rule of completeness should not depend upon whether the portion sought to be introduced to complete the statement necessarily complies with some other rule of evidence").

State v Prasertphong, 206 Ariz. 70, 75 P.3d 675, ¶¶ 34–39 (2003) (defendant sought to introduce portion of codefendant's statement that were self-incriminating; state contended entire statement must be admitted, which included portions wherein codefendant shifted some responsibility for crimes to defendant; court agreed with trial court that admitting only portions of statement offered by defendant would have been misleading, thus entire statement would have to be admitted, but portion state wanted admitted would not be admissible if it violated Confrontation Clause; court held, however,

that portion state wanted admitted sufficiently inculpated codefendant to make it admissible under Rule 804(b)(3), and fact that it was somewhat inculpatory of defendant did not make it any less inculpatory, reliable, or admissible), *vac'd,* 541 U.S. 1039 (2004).

State v Hughes, 189 Ariz. 62, 938 P.2d 457 (1997) (issue was whether victim had rejected defendant, not whether a "serious" relationship existed between them, thus portions of letters defendant wanted admitted were irrelevant and not subject to admission under this rule). (**Note:** To the extent this opinion holds that the remainder of the letter must also be admissible, it appears no longer to be good law.)

March 11, 2012

ARTICLE 2. JUDICIAL NOTICE

Rule 201. Judicial Notice of Adjudicative Facts.

(a) **Scope.** This rule governs judicial notice of an adjudicative fact only, not a legislative fact.

(b) **Kinds of Facts That May Be Judicially Noticed.** The court may judicially notice a fact that is not subject to reasonable dispute because it:

(1) is generally known within the trial court's territorial jurisdiction; or

(2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.

(c) **Taking Notice.** The court:

(1) may take judicial notice on its own; or

(2) must take judicial notice if a party requests it and the court is supplied with the necessary information.

(d) **Timing.** The court may take judicial notice at any stage of the proceeding.

(e) **Opportunity to Be Heard.** On timely request, a party is entitled to be heard on the propriety of taking judicial notice and the nature of the fact to be noticed. If the court takes judicial notice before notifying a party, the party, on request, is still entitled to be heard.

(f) **Instructing the Jury.** In a civil case, the court must instruct the jury to accept the noticed fact as conclusive. In a criminal case, the court must instruct the jury that it may or may not accept the noticed fact as conclusive.

Comment to 2012 Amendment

The last sentence of subsection (f) (formerly subsection (g)) has been added to conform to Federal Rule of Evidence 201(f), as restyled.

Additionally, the language of Rule 201 has been amended to conform to the federal restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent in the restyling to change any result in any ruling on evidence admissibility.

Cases

Paragraph (b) — Kinds of facts.

201.b.005 In order for a court to take judicial notice of a fact, the fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

State v Wadsworth, 109 Ariz. 59, 63, 505 P.2d 230, 234 (1973) (appellate court took judicial notice of fact that marijuana is one of most widely used drugs among our young).

Simon v Maricopa Medical Center, 225 Ariz. 55, 234 P.3d 623, ¶ 14 (Ct. App. 2010) (issue was whether City of Phoenix received service of complaint and where complaint was served; court took judicial notice that 200 W. Washington is Phoenix City Hall and the 15th floor is office of Clerk of City of Phoenix).

State v Damper, 223 Ariz. 572, 225 P.3d 1148, ¶ 12 & n.3 (Ct. App. 2010) (defendant was charged with killing girlfriend (C.); shortly before shooting, C's friend B. received text message from C's cell phone that said, "Can you come over; me and Marcus [defendant] are fighting and I have no gas"; defendant

contended text message was "testimonial"; court stated text message could be testimonial or non-testimonial, depending on circumstances and purpose for which it was made; defendant contended creating text message is necessarily slow and deliberate act; court took judicial notice of "common experience" that some persons are able to "text" at rapid fire pace).

201.b.050 A trial court may take judicial notice of geographical matters.

In re Roy L., 197 Ariz. 441, 4 P.3d 984, ¶ 20 (Ct. App. 2000) (court noted that the "members of this court work in Maricopa County, not on Mount Olympus," and thus they could take judicial notice that Maricopa County has population in excess of 500,000 persons).

In re Anthony H., 196 Ariz. 200, 994 P.2d 407, ¶¶ 6–7 (Ct. App. 1999) (trial court could take judicial notice that Maricopa County has population in excess of 500,000 persons, and this fact was so well known that trial court did not need documentation for that fact).

201.b.063 A trial court may take judicial notice of the age of a person.

In re Sabino R., 198 Ariz. 424, 10 P.3d 1211, ¶¶ 1–7 (Ct. App. 2000) (for charge of underage consumption; juvenile claimed insufficient evidence he was under age; on appeal, state asked court to take judicial notice of juvenile's age, noting (1) juvenile was on juvenile probation at time of offense, (2) proceedings were in juvenile court, and (3) other court files had juvenile's date of birth; court held trial court could have taken judicial notice of other court files, thus so could appellate court).

201.b.067 A trial court may take judicial notice of matters that have gained general acceptance in the scientific community.

State v Lehr, 201 Ariz. 509, 38 P.3d 1172, ¶¶ 16–19 (2002) (trial court took judicial notice of fact that principles and theories of DNA analysis in forensic labs are generally accepted in scientific community and that RFLP method in particular met general acceptance test).

201.b.110 A trial court may not take judicial notice of matters not generally known within the territorial jurisdiction of the court or not capable of accurate and ready determination.

In re Cesar R., 197 Ariz. 437, 4 P.3d 980, ¶ 7 (Ct. App. 1999) (A.R.S. § 13–3111 prohibited juveniles from possession firearms, but applied only to counties with populations over 500,000 persons, which included only Maricopa and Pima Counties; juvenile contended that statute was void as special or local legislation; court could not accept state's invitation to take judicial notice that juvenile street gangs are more likely to exist in Maricopa and Pima Counties and thus those counties have higher rates of juvenile gun-related crimes).

Higgins v Higgins, 194 Ariz. 266, 981 P.2d 134, ¶¶ 20–21 (Ct. App. 1999) (whether child is being harmed by custodial parent's adulterous relationship depends on facts of specific case, and thus is not subject to judicial notice).

201.b.120 An appellate court may take judicial notice of any fact of which a trial court could have taken judicial notice, even if the trial court was not requested to take judicial notice.

State v Wadsworth, 109 Ariz. 59, 63, 505 P.2d 230, 234 (1973) (appellate court took judicial notice of fact that marijuana is one of most widely used drugs among our young).

State v Rojers, 216 Ariz. 555, 169 P.3d 651, ¶¶ 25–33 & n.2(Ct. App. 2007) (court held search of defendant's vehicle was not valid incident to arrest; defendant contended there was no evidence in record of standardized procedure for police inventory search, thus trial court erred in denying motion to suppress based in inevitable discovery; court took judicial notice of Phoenix Police Department Order for inventory searches available on website, and based on that information, concluded police would have conducted inventory search and inevitably discovered inculpatory items).

In re Sabino R., 198 Ariz. 424, 10 P.3d 1211, ¶¶ 1–7 (Ct. App. 2000) (juvenile was adjudicated delinquent for underage consumption of alcohol; juvenile claimed there was insufficient evidence that he was under age; on appeal, state asked court to take judicial notice of juvenile's age, noting that juvenile was on juvenile probation at time of offense and that proceedings were taking place in juvenile court, and further noting that other court files contained juvenile's date of birth; court held trial court could have taken judicial notice of other court files, thus so could appellate court).

In re Roy L., 197 Ariz. 441, 4 P.3d 984, ¶ 20 (Ct. App. 2000) (although trial court did not take judicial notice of population of Maricopa County, appellate court could take judicial notice that Maricopa County has population in excess of 500,000 persons).

201.b.130 An appellate court may take judicial notice of its own records and the records of other courts.

In re Sabino R., 198 Ariz. 424, 10 P.3d 1211, ¶¶ 1–7 (Ct. App. 2000) (juvenile was adjudicated delinquent for underage consumption of alcohol; juvenile claimed there was insufficient evidence that he was under age; on appeal, state asked court to take judicial notice of juvenile's age, noting that juvenile was on juvenile probation at time of offense and that proceedings were taking place in juvenile court, and further noting that other court files contained juvenile's date of birth; court held trial court could have taken judicial notice of other court files, thus so could appellate court).

Stubblefield v Trombino, 197 Ariz. 382, 4 P.3d 437, ¶ 2 (Ct. App. 2000) (court took judicial notice of fact that trial court judges were ruling in different ways on whether crime of attempted possession of drugs was subject to Proposition 200).

201.b.140 A trial court or an appellate court may take judicial notice of the contents and disposition of a file, and may take notice that the case exists and that allegations were made, but may not take notice of the truth or falsity of specific allegations except as established by final judgment.

Mack v Cruikshank, 196 Ariz. 541, 2 P.3d 100, ¶¶ 18–19 (Ct. App. 1999) (defendant contended state knew Intoximeter RBT–IV was unreliable; defendants presented trial court with transcript from hearings before another judge in other cases; court noted that other judge had not made any findings of fact or conclusions of law concerning state's knowledge of reliability of that machine, thus court could not take judicial notice of truth of any testimony given).

Paragraph (f) — Time of taking notice.

201.f.010 The appellate court may take judicial notice of its own files, and may take judicial notice of any fact of which a trial court could have taken judicial notice, even if the trial court was not requested to take judicial notice.

State v Wadsworth, 109 Ariz. 59, 63, 505 P.2d 230, 234 (1973) (appellate court took judicial notice of fact that marijuana is one of most widely used drugs among our young).

State v Rojers, 216 Ariz. 555, 169 P.3d 651, ¶¶ 25–33 & n.2(Ct. App. 2007) (court held search of defendant's vehicle was not valid search incident to arrest; defendant contended there was no evidence in record of standardized procedure police would have followed for inventory search, thus trial court erred in denying motion to suppress based in inevitable discovery; court took judicial notice of Phoenix Police Department Order for inventory searches that was available on website, and based on that information, concluded police would have conducted inventory search and inevitably discovered inculpatory items).

In re Sabino R., 198 Ariz. 424, 10 P.3d 1211, ¶¶ 1–7 (Ct. App. 2000) (juvenile was adjudicated delinquent for underage consumption of alcohol; juvenile claimed there was insufficient evidence that he was under age; on appeal, state asked court to take judicial notice of juvenile's age, noting that juvenile

was on juvenile probation at time of offense and that proceedings were taking place in juvenile court, and further noting that other court files contained juvenile's date of birth; court held trial court could have taken judicial notice of other court files, thus so could appellate court).

In re Roy L., 197 Ariz. 441, 4 P.3d 984, ¶ 20 (Ct. App. 2000) (although trial court did not take judicial notice of population of Maricopa County, appellate court could take judicial notice that Maricopa County has population in excess of 500,000 persons).

March 11, 2012

ARTICLE 3. PRESUMPTIONS IN CIVIL ACTIONS AND PROCEEDINGS

Rule 301. Presumptions in Civil Cases Generally.

In a civil case, unless a statute or these rules provide otherwise, the party against whom a presumption is directed has the burden of producing evidence to rebut the presumption. But this rule does not shift the burden of persuasion, which remains on the party who had it originally.

Comment to 2012 Amendment

The language of this rule has been added to conform to Federal Rule of Evidence 301, as restyled.

Rule 302. Applying State Law to Presumptions in Civil Cases.

< Rule not adopted >

Comment to 2012 Amendment

Federal Rule of Evidence 302 has not been adopted because it is inapplicable to state court proceedings.

Comment to Original 1977 Rule

Federal Rule of Evidence 302 was not adopted because of the non-adoption of Rule 301. No other purpose was intended.

Cases

301. In general.

301.010 The general rule is that a presumption serves to shift the burden of producing evidence, unless the substantive common law or legislative enactment giving rise to the presumption compels the conclusion that the presumption shifts the burden of persuasion to the party opposing the presumed fact.

Golonka v General Motors Corp., 204 Ariz. 575, 65 P.3d 956, ¶¶ 4, 36–44, 50–51 (Ct. App. 2003) (plaintiff was killed when her idling truck shifted into reverse and struck her as she stood behind truck; plaintiff sued defendant on basis of strict product liability (information defect) and negligence (failure to warn); jurors found for plaintiff; court held heeding presumption is viable in Arizona, and that heeding presumption shifted burden of production rather than burden of persuasion).

301.020 A rebuttable presumption vanishes when the opposing party provides contradictory evidence.

State v Grilz, 136 Ariz. 450, 455, 666 P.2d 1059, 1064 (1983) (court stated that presumption of sanity placed on defendant burden of producing evidence sufficient to raise reasonable doubt about sanity; once defendant presented evidence contradicting presumption, presumption disappeared entirely, and jurors are bound to follow usual rules of evidence in reaching their ultimate conclusion of fact).

Englehart v Jeep Corp., 122 Ariz. 256, 259, 594 P.2d 510, 513 (1979) (court held presumption of due care disappeared when rebutted by any competent evidence, and that evidence of decedent's intoxication was sufficient to destroy presumption of due care).

Englehart v Jeep Corp., 122 Ariz. 256, 259, 594 P.2d 510, 513 (1979) (court held statutory presumption of intoxication arises from and gives meaning to substantive evidence of blood-alcohol, and while it can be rebutted, this statutory presumption does not vanish with presentation of contrary evidence).

Golonka v General Motors Corp., 204 Ariz. 575, 65 P.3d 956, ¶¶ 53–54 (Ct. App. 2003) (plaintiff was killed when her idling truck shifted into reverse and struck her as she stood behind truck; plaintiff sued defendant on basis of strict product liability (information defect) and negligence (failure to warn); jurors found for plaintiff; court held that defendant introduced competent evidence to rebut heeding presumption).

State v Martinez, 202 Ariz. 507, 47 P.3d 1145, ¶ 17 (Ct. App. 2002) (presumption under A.R.S. § 13–411(C) that person is presumed to act reasonably in using force in crime prevention).

Glodo v Industrial Comm'n, 191 Ariz. 259, 264, 955 P.2d 15, 20 (Ct. App. 1997) (presumption that claimant does not intend to injure himself or herself).

Evans v Liston, 116 Ariz. 218, 220, 568 P.2d 1116, 1118 (Ct. App. 1977) (presumption of undue influence in context of wills).

301.030 Whether the presumption has been rebutted is a preliminary question of the sufficiency of the evidence, which is for the trial court to decide.

State v Grilz, 136 Ariz. 450, 455–56, 666 P.2d 1059, 1064–65 (1983) (court overruled prior authority that held it was for jurors to determine whether presumption had been rebutted).

Golonka v General Motors Corp., 204 Ariz. 575, 65 P.3d 956, ¶¶ 52–54 (Ct. App. 2003) (plaintiff was killed when her idling truck shifted into reverse and struck her as she stood behind truck; plaintiff sued defendant on basis of strict product liability (information defect) and negligence (failure to warn); jurors found for plaintiff; court held that trial court should have determined whether defendant introduced sufficient evidence to rebut heeding presumption; court concluded defendant had introduced competent evidence to rebut presumption and thus trial court should not have given jurors instruction about presumption).

301.040 If the trial court determines the party opposing the presumption has presented sufficient evidence to rebut the presumption, the presumption vanishes and is of no further force and effect, so the trial court should not instruct the jurors about the presumption and should merely let the jurors determine the issues on the basis of the evidence presented.

State v Grilz, 136 Ariz. 450, 454–56, 666 P.2d 1059, 1063–65 (1983) (court instructed jurors that defendant was presumed to be sane, but once evidence has been presented to raise question of defendant's sanity, state has burden of proving beyond reasonable doubt defendant was sane; court held giving of that instruction was not fundamental error).

Golonka v General Motors Corp., 204 Ariz. 575, 65 P.3d 956, ¶¶ 52–55 (Ct. App. 2003) (plaintiff was killed when her idling truck shifted into reverse and struck her as she stood behind truck; plaintiff sued defendant on basis of strict product liability (information defect) and negligence (failure to warn); jurors found for plaintiff; court concluded defendant had introduced competent evidence to rebut presumption, thus trial court erred by instructing jurors about presumption rather than finding that presumption had spent its force; court held that instruction improperly placed upon defendant burden of proof).

308. Causation — Heeding presumption in information defect strict products liability cases and failure-to-warn negligence cases.

308.010 The "heeding presumption" is a rebuttable presumption that allows the finder-of-fact to presume that the person injured by a product would have heeded an adequate warning if given.

Gosewisch v American Honda Motor Co., 153 Ariz. 400, 404, 737 P.2d 376, 380 (1987) (plaintiff was thrown from ATC when it hit mound of sand; plaintiff's complaint alleged defendant was negligent for failing to warn, but at trial characterized case as strict products liability, in either case contending

defendant was liable for not giving adequate warnings about dangers of ATC; jurors found for defendant; court noted some states have adopted heeding presumption; court does not decide whether or under what circumstances Arizona should adopt this approach, but held undisputed evidence that plaintiff did not heed any warnings would have rebutted presumption as matter of law).

Golonka v General Motors Corp., 204 Ariz. 575, 65 P.3d 956, ¶¶ 4, 36–44 (Ct. App. 2003) (plaintiff was killed when her idling truck shifted into reverse and struck her as she stood behind truck; plaintiff sued defendant on basis of strict product liability (information defect) and negligence (failure to warn); jurors found for plaintiff; court held heeding presumption is viable in Arizona, but reversed because trial court gave incorrect instruction on presumption).

Dole Food Co. v North Carolina Foam Ind., Inc., 188 Ariz. 298, 305–06, 935 P.2d 876, 883–84 (Ct. App. 1996) (plaintiff sued under strict liability and negligence for failure to warn adequately of product hazards; trial court granted defendant's motion for summary judgment; court reversed and held (1) heeding presumption does not dissipate in the face of contrary evidence and (2) presumption shifts burden of proof to defendant, thus it is jury question whether burden has been satisfied).

Sheehan v Pima County, 135 Ariz. 235, 237–39, 660 P.2d 486, 488–90 (Ct. App. 1982) (plaintiff contracted polio after receiving Sabin Oral Polio Vaccine from defendant; plaintiff sued based upon strict liability in tort contending failure to warn rendered product defective; jurors found for defendant; plaintiff contended trial court erred in refusing to give heeding presumption; court held presumption disappears entirely upon introduction of any contradicting evidence, and because of contradicting evidence presented, plaintiff was not entitled to instruction based on presumption).

310. Causation — Workers' compensation cases.

310.010 For workers' compensation, the claimant has the burden of establishing that the injury arose out of the employment and occurred in the course of the employment; when an employee is found dead in a place where the employee's duties required the employee to be, or where the employee might properly have been in the performance of those duties during the hours of work, in the absence of evidence to the contrary, there is a presumption that the injury arose out of and in the course of the employment.

Hypl v Industrial Comm'n, 210 Ariz. 381, 111 P.3d 423, ¶¶ 6–13 (Ct. App. 2005) (general discussion of presumption when injury resulted in claimant's death).

310.020 For workers' compensation, when the injury renders the claimant unable to testify about how the injury happened, and the claimant proves by a preponderance of the evidence that he or she is unable to remember or communicate the circumstances and cause of the injury due to the injury, and proves by a preponderance of the evidence that the injury occurred during the time and space limitations of employment, the presumption will be that the injury arose out of and in the course of the employment.

Hypl v Industrial Comm'n, 210 Ariz. 381, 111 P.3d 423, ¶¶ 14–22 (Ct. App. 2005) (claimant was truck driver; officer observed claimant driving erratically away from his intended destination; medical examination showed claimant had skull fracture and blood on surface of brain; claimant was in coma for 8 hours after surgery; claimant had no memory how injury happened; court held that, if claimant could provide sufficient factual basis to allow inference that he was injured in time and space limitations of employment, he would be entitled to presumption that injury occurred in course of, and arose out of, his employment).

318. Civil proceedings.

318.010 The trial court has discretion to determine whether an inmate has the right to attend civil court proceedings, but there is a rebuttable presumption that an inmate is entitled to attend "critical proceedings," such as the trial itself.

Arpaio v Steinle (Stewart), 201 Ariz. 353, 35 P.3d 114, ¶ 4 (Ct. App. 2001) (in civil proceeding, trial court had ordered sheriff to transport three AzDOC inmates to civil trial; court rejected sheriff's claim that statute only required sheriff to transport AzDOC inmates to criminal proceedings and that AzDOC was required to transport AzDOC inmates to civil proceedings).

332. Intent to injure.

332.010 A conclusive presumption of intent to injure arises when the insured commits an act virtually certain to cause injury, but does not apply when the insured lacks the mental capacity to act rationally.

Western Ag. Ins. v Brown, 195 Ariz. 45, 985 P.2d 530, ¶¶ 7–8, 11 (Ct. App. 1998) (insured fired nine shots into his wife and her companion, and said to the dying companion, "This is the last marriage you'll ever break up"; insured was subsequently convicted of two counts of premeditated first-degree murder).

K.B. v State Farm F. & C. Co., 189 Ariz. 263, 941 P.2d 1288 (Ct. App. 1997) (victim contended that defendant was so intoxicated he could not act intentionally; because defendant pled guilty to attempted child molestation, and because an attempted crime requires an intent to commit the crime, defendant was estopped from denying he acted intentionally; defendant allowed judgment to be entered against him and assigned his cause of action against insurance company in exchange for covenant not to execute; because victim obtained only those rights defendant had, and because defendant was precluded from denying he acted intentionally, victim was precluded from denying intentional acts under intentional acts exclusion of insurance policy).

340. Judgments.

340.025 Final judgments are presumed to be valid, and that includes the presumption that the defendant was represented by an attorney, thus if the state proves the existence of a prior conviction, it is presumed that the defendant was represented by an attorney; if, however, the defendant presents some evidence to overcome that presumption, the burden shifts to the state to prove that the prior conviction was constitutionally obtained.

State v McCann, 200 Ariz. 27, 21 P.3d 845, ¶¶ 6–18 (2001) (in prosecution for aggravated DUI, state offered in evidence copies of defendant's two prior DUI convictions, but records did not disclose whether defendant was represented by attorney).

344. Judicial officers.

344.020 A trial judge is presumed to know the law and to apply it in making decisions.

State v Moody, 208 Ariz. 424, 94 P.3d 1119, ¶¶ 49–53 (2004) (court presumed trial court was aware of law and procedure for competency determination and followed that law).

State v Moody, 208 Ariz. 424, 94 P.3d 1119, ¶ 81 (2004) (court presumed trial court was aware of law for attorney-client privilege and applied it correctly when denying defendant's motion to dismiss).

State v Williams, 220 Ariz.331, 206 P.3d 780, ¶ 9 (Ct. App. 2008) (defendant committed first-degree murder; at resentencing, trial court imposed natural life sentence, but did not make special verdict; court stated defendant presented nothing to rebut presumption that judge is presumed to know law and to apply it in making decisions, nor did record suggest trial court did not consider proper factors in imposing sentence).

PRESUMPTIONS

344.030 A trial judge is presumed to be free of bias or prejudice, thus a party moving for a change of judge for cause based on bias or prejudice has the burden of proving alleged facts by a preponderance of the evidence; bare allegations of bias and prejudice, unsupported by factual evidence, are insufficient to overcome the presumption and do not require recusal.

State v Ellison, 213 Ariz. 116, 140 P.3d 899, ¶¶ 37–40 (2006) (defendant contended trial judge was biased based on statements he made during trial of codefendant and evidentiary ruling he made; court held defendant failed to show bias or prejudice that would require disqualification).

State v Smith, 203 Ariz. 75, 50 P.3d 825, ¶ 13 (2002) (defendant filed motion based on fact that victim's son was superior court juvenile probation officer, and victim's daughter-in-law had been judicial assistant to two judges and was presently superior court's case flow manager; defendant never alleged, and in fact disavowed, that trial judge had any actual bias, and nothing presented at hearing showed any bias, thus court held defendant failed to meet his burden of proof).

* *Costa v MacKey*, 227 Ariz. 565, 261 P.3d 449, ¶¶ 11–13 (Ct. App. 2011) (defendant was charged with two counts of continuous sexual abuse of child; court held mere fact that trial court set bond at $75 million in cash was insufficient to meet defendant's burden).

State v Ramsey, 211 Ariz. 529, 124 P.3d 756, ¶¶ 37–38 (Ct. App. 2005) (defendant was charged with continuous sexual abuse of child, his 12-year-old daughter; defendant contended judge was biased against him because judge referred to daughter as "victim"; court noted that same judge had presided over separate trial wherein defendant was convicted of furnishing obscene or harmful materials to daughter, thus daughter was, in fact, a victim).

State v Hurley, 197 Ariz. 400, 4 P.3d 455, ¶¶ 18–25 (Ct. App. 2000) (trial judge was assigned to courtroom that was adequate for only 8 jurors, so trial court asked parties about number of jurors; when prosecutor opined that conviction of charge and alleged priors would require 12-person jury, trial court stated that, if prosecutor dismissed one or more priors, defendant would be entitled only to 8-person jury, which might make it easier to convict defendant; defendant filed motion for change of judge, alleging judge's legal advice to prosecutor showed judge was biased against defendant; court held defendant failed to rebut presumption that judge is presumed to be free of bias and prejudice).

State v Medina, 193 Ariz. 504, 975 P.2d 94, ¶¶ 9–13 (1999) (defendant contended judge should have recused himself because he had presided over earlier trial for aggravated assault and robbery, which were used as aggravating circumstances for present murder conviction; defendant filed neither Rule 10.1 motion nor motion for new trial, and thus presented no reason to question judge's impartiality).

Pardik v Chinle Unif. Sch. Dist., 195 Ariz. 148, 985 P.2d 633, ¶ 11 (Ct. App. 1999) (applies this presumption to school board considering whether to dismiss teacher).

344.035 A trial judge is presumed to be free of bias or prejudice; the bias and prejudice necessary for disqualification must arise from an extra-judicial source and not from what the judge has done in participating in the case.

Simon v Maricopa Medical Center, 225 Ariz. 55, 234 P.3d 623, ¶¶ 29–30 (Ct. App. 2010) (*pro se* plaintiff contended trial judge's consistent pattern of adverse rulings showed bias and justified reversal; because plaintiff alleged no facts other than judge's rulings, plaintiff failed to demonstrate judicial bias).

344.040 When the trial court makes a ruling, or in a trial to the court, it is presumed the trial court considered any relevant evidence.

State v Cazarez, 205 Ariz. 425, 72 P.3d 355, ¶ 7 (Ct. App. 2003) (defendant was 18 years old, and contended trial court erred because it did not find age was mitigating circumstance; court concluded trial court had considered age, and that was all that was required).

344.050 When the trial court makes a ruling, or in a trial to the court, the appellate court will not reverse for errors in receiving improper matters in evidence provided there is sufficient competent evidence to sustain the ruling, it being presumed, absent affirmative proof to the contrary, that the trial court considered only the competent evidence in arriving at the final judgment.

State v Djerf, 191 Ariz. 583, 959 P.2d 1274, ¶ 41 (1998) (court rejected defendant's contention that, when trial court stated it had considered "all" evidence, it must have considered inadmissible evidence in determining aggravating circumstances).

In re Estate of Newman, 219 Ariz. 260, 196 P.3d 863, ¶ 66 (Ct. App. 2008) (in probate proceeding, appellant contended report prepared by appellee's expert witness was "replete with highly prejudicial, inflammatory, and inadmissible evidence," but failed to identify any particular statement in 14-page report to support his allegations; court held that, because trial was to court and not to jurors, it would presume trial court ignored any improper evidence).

State v Powers, 200 Ariz. 123, 23 P.3d 668, ¶ 20 (Ct. App. 2001) (defendant contended trial court erred in admitting "emotional testimonials and evidence regarding the deceased" from victim's family and friend; court held that, absent proof to the contrary, trial judge must be presumed to be able to focus on relevant sentencing factors and to set aside irrelevant, inflammatory and emotional factors), *apprv'd on other grounds,* 200 Ariz. 363, 26 P.3d 1134 (2001).

State v Estrada, 199 Ariz. 454, 18 P.3d 1253, ¶ 11 (Ct. App. 2001) (state and defendant presented aggravating and mitigating evidence, and trial court imposed aggravated sentence; court rejected defendant's contention that trial court was required to articulate mitigating factors even when imposing aggravated sentence, and further rejected defendant's contention that trial court had not considered mitigating evidence, stating it was presumed trial court considered all evidence that was before it).

State v Warren, 124 Ariz. 396, 402, 604 P.2d 660, 666 (Ct. App. 1979) (although trial court improperly admitted hearsay evidence and business records without proper foundation, there was other sufficient properly-admitted evidence showing defendant breached plea agreement, thus court assumed trial court did not consider evidence not properly admitted).

348. Jurors.

348.010 Jurors are presumed to follow the trial court's instructions.

State v Kuhs, 223 Ariz. 376, 224 P.3d 192, ¶¶ 51–55 (2010) (during guilt and aggravation phases, trial court instructed jurors not to be influenced by sympathy; during penalty phase, trial court instructed jurors not to be swayed by sympathy not related to evidence presented during penalty phase; on appeal, defendant contended trial court erred because jurors may have relied on guilt and aggravation phase instruction during penalty phase; because defendant did not object at trial, court reviewed for fundamental error only, and because jurors were presumed to follow instructions, found no error).

State v Newell, 212 Ariz. 389, 132 P.3d 833, ¶¶ 68–69 (2006) (prosecutor made improper arguments to jurors; trial court sustained objection and instructed jurors that arguments were not evidence and to disregard anything for which trial court sustained an objection; court held in part that improper comments did not require reversal because jurors are presumed to follow trial court's instructions).

State v Dann, 205 Ariz. 557, 74 P.3d 231, ¶¶ 46, 48 (2003) (witness testified that, after defendant told her he killed three people, she encouraged him to turn himself in, to which he replied, "That's not an option; I can't go back to jail"; defendant contended this was inadmissible other act evidence and requested mistrial; as curative instruction, trial court told jurors that witness had "misspoke" and stated, "That's not appropriate; it's not what happened"; defendant contended that instruction "highlighted the testimony rather than curing it"; court stated that was risk inherent in curative instructions, but presumed jurors followed instruction and stated it would not reverse on that ground).

State v Miles, 211 Ariz. 475, 123 P.3d 669, ¶¶ 19–22 (Ct. App. 2005) (defendant caused collision that injured victim; state charged defendant with DUI, aggravated assault, endangerment, and criminal damage; court granted motion for judgment of acquittal for DUI and instructed jurors to disregard any evidence presented to support DUI counts and any evidence about alcohol; defendant argued that jurors would have used this evidence in determining whether he acted recklessly for other counts; court noted that jurors are presumed to follow instructions, and then considered whether there was enough other evidence to support charge for which the jurors found defendant guilty).

State v Jeffrey, 203 Ariz. 111, 50 P.3d 861, ¶¶ 17–18 (Ct. App. 2002) (during trial, evidence bag containing defendant's purse had been admitted in evidence; during deliberations, jurors found in that evidence bag bullet that had not been admitted in evidence; trial court instructed jurors that no bullet had been found in defendant's purse and they were not to consider bullet in any way; court stated jurors were presumed to follow trial court's instruction, and that defendant had failed to establish that jurors did not follow instruction).

State v Blackman, 201 Ariz. 529, 38 P.3d 1192, ¶ 65 (Ct. App. 2002) (trial court gave instruction that jurors were not to consider punishment).

State v Blackman, 201 Ariz. 529, 38 P.3d 1192, ¶ 54 (Ct. App. 2002) (trial court gave instruction that jurors were to consider codefendant's statement only against codefendant).

360. Legislation.

360.015 Court presumes the Arizona Legislature intended to act with a constitutional purpose.

McMann v City of Tucson, 202 Ariz. 468, 47 P.3d 672, ¶ 8 (Ct. App. 2002) (because charter city is sovereign in all municipal affairs when power to be exercised has been granted in charter, and because that includes sale, disposition, or use of its property, city could require party using convention center for gun show and sale to require background checks prior to any sales, thus if A.R.S. § 13–3108(A), which precludes political subdivision of state from enacting any ordinance, rule, or tax relating to transportation, possession, carrying, sale, or use of firearms, ammunition, or components, were construed to prohibit city from imposing such use condition, statute would be unconstitutional).

360.020 All legislative enactments are presumed to be constitutional, and any doubts will be resolved in favor of constitutionality; the burden of establishing that a statute is unconstitutional therefore rests upon the party challenging its validity.

State v Mutschler, 204 Ariz. 520, 65 P.3d 469, ¶¶ 4, 16, 21 (Ct. App. 2003) (defendants were convicted of violating city code prohibiting person from operating "live sex act business," which is defined as "any business in which one or more persons may view, or may participate in, a live sex act for a consideration"; "live sex act" is defined as "any act whereby one or more persons engage in a live performance or live conduct which contains sexual contact, oral sexual contact, or sexual intercourse"; court presumed statute was constitutional and concluded it was not vague or over broad).

State v Kaiser, 204 Ariz. 514, 65 P.3d 436, ¶¶ 17–18 (Ct. App. 2003) (officers stopped vehicle driven by defendant's wife with defendant as passenger; while investigating defendant's wife for DUI, officers told defendant to remain in vehicle; defendant refused, remained out of vehicle, and was angry, disruptive, aggressive, and profane, and made comments officers interpreted as threats; defendant was convicted of violating city code that provided that "[n]o person shall refuse to obey a peace officer engaged in the discharge of his duties"; defendant contended provision was vague and over broad; court stated that, when ordinance is challenged as being either vague or over broad, there is strong presumption provision is constitutional).

State v Jeffrey, 203 Ariz. 111, 50 P.3d 861, ¶ 5 (Ct. App. 2002) (court presumed statute requiring defendant to prove affirmative defense (in this case duress) was constitutional and held defendant had burden of overcoming presumption).

State v McMahon, 201 Ariz. 550, 38 P.3d 1213, ¶ 5 (Ct. App. 2002) (defendant had burden of proving statute prohibiting exhibition of speed or acceleration was vague).

State v Navarro, 201 Ariz. 292, 34 P.3d 971, ¶ 24 (Ct. App. 2001) (defendant shot victim six times, permanently disfiguring and disabling him, and was convicted of attempted second-degree murder, which is punished the same as attempted first-degree murder; because there is reasonable basis for providing same range of punishment for both attempted first-degree murder and attempted second-degree murder and because trial court may take into consideration aggravating and mitigating circumstances to the extent there are differences in conduct, providing same sentencing range for these two offenses does not violate due process).

State v Ochoa, 189 Ariz. 454, 943 P.2d 814 (Ct. App. 1997) (court rejected defendant's claim that A.R.S. § 13–105(8), which defines "criminal street gang member," was unconstitutional).

360.025 While generally a statute is presumed to be constitutional, when a statute impinges on core constitutional rights, the burden is shifted to the proponent of the statute to show that the statute is constitutional.

State v Hazlett, 205 Ariz. 523, 73 P.3d 1258, ¶ 8 (Ct. App. 2003) (defendant was charged with violating A.R.S. § 13–3553, which prohibits production or use of images of "a minor" involved in sexually exploitive acts; trial court dismissed charges because it concluded statute failed to require, as element of offense, depiction of actual human being; court disagreed with trial court's interpretation of statute and held that statute did require that subject be actual living human being, and thus held statute did not violate protections of First Amendment).

360.050 The legislature is presumed to know the law when it enacts statutes.

State v Box, 205 Ariz. 492, 73 P.3d 623, ¶ 10 (Ct. App. 2003) (court presumed that, when legislature enacted A.R.S. § 28–1594, which was enacted in 1995 and permits officer to stop vehicle and detain driver for violation and has no limitation about violation being committed in officer's presence, legislature was aware of A.R.S. § 13–3883(B), which was enacted in 1990 and provides that peace officer may stop and detain person who commits violation in officer's presence).

State ex rel. Romley v Superior Ct. (Clements), 198 Ariz. 164, 7 P.3d 970, ¶ 7 (Ct. App. 2000) (court held that, when legislature enacted Sexually Violent Persons Act and made actions under that act civil actions, legislature was presumed to know that unanimous juries were not required in civil actions).

360.060 When the legislature amends an existing statute, it is presumed to be aware of prior judicial construction of the statute by the Arizona Supreme Court.

State v Thompson, 201 Ariz. 273, 34 P.3d 382, ¶ 24 (Ct. App. 2001) (Arizona Supreme Court had previously held "any length of time to permit reflection" language of first-degree murder statute could be as instantaneous as time it takes to make successive thoughts; court presumed legislature was aware of that construction), *vacated*, 204 Ariz. 471, 65 P.3d 420 (2003).

360.070 When the legislature amends an existing statute and retains a term previously construed by the Arizona Supreme Court, it is presumed the legislature intended that the term would continue to have the same meaning.

State v Thompson, 201 Ariz. 273, 34 P.3d 382, ¶ 24 (Ct. App. 2001) (Arizona Supreme Court had previously held "any length of time to permit reflection" language of first-degree murder statute could be as instantaneous as time it takes to make successive thoughts; court presumed legislature intended

to keep that construction when it amended statute to provide that proof of actual reflection was not required), *vacated*, 204 Ariz. 471, 65 P.3d 420 (2003).

360.080 When the legislature modifies the language of a statute, it is presumed the legislature intended to change the existing law.

In re Kyle M., 200 Ariz. 447, 27 P.3d 804, ¶ 14 (Ct. App. 2001) (court noted previous versions of A.R.S. § 13–1202(A)(1), which prohibits threatening or intimidating, contained an intent to cause physical injury and an intent to terrify, while present version contains no culpable mental state, and held it was precluded from adding any culpable mental state to the statute).

360.090 A statute is unconstitutional if it contains a presumption that establishes an element of a criminal offense, and then requires the defendant to disprove that element.

State v Seyrafi, 201 Ariz. 147, 32 P.3d 430, ¶¶ 8, 12 (Ct. App. 2001) (court held provision of Scottsdale City Code contained mandatory presumption and thus was unconstitutional).

362. Mailing.

362.040 If a person has a claim against a governmental entity, the person must file that claim with the appropriate person authorized to accept service, which means that person must actually receive that claim; the presumption that something that is mailed is received does, however, apply, and if plaintiff presents evidence that the claim was properly mailed, then the fact finder must then determine whether the claim was in fact received within the statutory deadline.

Lee v State, 218 Ariz. 235, 182 P.3d 1169, ¶¶ 6–22 (2008) (plaintiffs submitted certificate of mailing stating that plaintiff's counsel's secretary sent notice of claim via regular United States mail in sealed postage-paid envelope addressed to Arizona Attorney General's Office; state submitted affidavit of Arizona Attorney General's Office employee whose job duties included maintaining log of received notices of claim stating she had searched records of Arizona Attorney General's Office and found no notice of claim submitted by plaintiffs; court held proof of mailing created material issue of fact).

368. Mental capacity.

368.040 To rebut the presumption of testamentary capacity, the burden is on the contestant to show by a preponderance of the evidence that the decedent lacked at least one of these three elements: (1) the ability to know the nature and extent of the property; (2) the ability to know his or her relation to the persons who are the natural objects of his or her bounty and whose interests are affected by the terms of the instrument; or (3) the ability to understand the nature of the testamentary act.

M.I. Marshall & Ilsley Trust v McCannon, 188 Ariz. 562, 937 P.2d 1368 (Ct. App. 1996) (even though decedent had testamentary capacity under three-part test, she was suffering from delusional paranoid disorder that affected her perception of her nephews and niece, and this paranoid delusion was sufficient to invalidate will).

368.050 Even if the decedent had testamentary capacity under the three-part test, the will would be invalid if the decedent had an insane delusion that affected the terms of the will related to one of the three requirements.

M.I. Marshall & Ilsley Trust v McCannon, 188 Ariz. 562, 937 P.2d 1368 (Ct. App. 1996) (even though decedent had testamentary capacity under three-part test, she was suffering from a delusional paranoid disorder that affected her perception of her nephews and niece, and this paranoid delusion was sufficient to invalidate will).

380. Property — Community.

380.030 When one spouse pays for real property from separate funds but takes title in the names of both spouses, or when a spouse places separate property in joint tenancy with the other spouse, the law presumes that the paying spouse intended to make a gift to the marital community, and the presumption can be overcome only by clear and convincing evidence.

In re Marriage of Inboden, 223 Ariz. 542, 225 P.3d 599, ¶¶ 2–10 (Ct. App. 2010) (husband and wife executed deed transferring property from themselves as separate persons to themselves as married persons as joint tenants with rights of survivorship; court acknowledged property was community property, but stated gifts merely represented equitable rights to jointly held property and did not constitute irrevocable gifts of one-half interest, and that property was subject to equitable division).

In re Marriage of Flower, 223 Ariz. 531, 225 P.3d 588, ¶¶ 15–18 (Ct. App. 2010) (husband deeded separate property to himself and wife as community property with right of survivorship; court acknowledged property was community property, but stated gifts merely represented equitable rights to jointly held property and did not constitute irrevocable gifts of one-half interest, and that property was subject to equitable division).

380.060 The presumption that all property acquired during marriage is community property (and thus that all expenditures made during marriage were for community obligations) does not apply when one spouse has made a prima facie showing of abnormal or excessive expenditures; the spouse alleging abnormal or excessive expenditures had the burden of making a prima facie showing of waste; if the spouse makes such a prima facie showing, the burden shifts to the other spouse to rebut showing of waste.

Gutierrez v Gutierrez, 193 Ariz. 343, 972 P.2d 676, ¶¶ 6–7 (Ct. App. 1998) (husband withdrew $62,000 from community retirement account; trial court concluded husband had wasted these funds).

380.070 Parties may enter into a premarital agreement prospectively abrogating their respective rights to community property and obligations for community debts as long as the agreement is voluntary and not unconscionable when executed.

Schlaefer v Financial Mgmt. Serv, 196 Ariz. 336, 996 P.2d 746, ¶¶ 10–13 (Ct. App. 2000) (husband and wife had valid premarital agreement keeping assets and obligations separate; because husband never signed authorization for wife's medical treatment, he was not obligated for those expenses).

Elia v Pifer, 194 Ariz. 74, 977 P.2d 796, ¶¶ 43–46 (Ct. App. 1998) (court held prenuptial agreement was valid and insulated defendant's husband from liability that could arise from wife's conduct before marriage, thus trial court properly granted husband's motion for summary judgment)

382. Property — Real.

382.030 When the claimant has shown an open, visible, continuous, and unmolested use of the land of another for the period of time sufficient to acquire title by adverse possession, the use will be presumed to be under a claim of right, and not by license of the owner; in order to overcome this presumption, the burden is upon the owner to show that the use was permissive.

Spaulding v Pouliot, 218 Ariz. 196, 181 P.3d 243, ¶¶ 7–27 (Ct. App. 2008) (trial court erred in using incorrect presumption that use of another's land is presumed to be with landowner's permission).

382.040 Glendale zoning ordinance Section 7(d) created a rebuttable presumption of abandonment.

City of Glendale v Aldabbagh, 187 Ariz. 235, 928 P.2d 659 (Ct. App. 1996) *(rev granted*, 12/17/96) (because owner's reason for not operating non-conforming use (a topless dance club) was that county attorney had seized it pending litigation, defendant was able to rebut presumption he intended to abandon non-conforming use of property).

384. Receipt of notice.

384.010 Service of notice of suspension, revocation, cancellation, disqualification, or ignition interlock device limitation is complete upon mailing to the address provided by the defendant on his application for a license, so if the state is able to prove that notice was mailed to the defendant, it is presumed that the defendant received it and had knowledge of the suspension, revocation, cancellation, disqualification, or ignition interlock device limitation notification, but the defendant may rebut this presumption.

State v. Gonzales, 206 Ariz. 469, 80 P.3d 276 (Ct. App. 2003) (court rejected defendant's contention that, because former version of statute listed only suspension and revocation, presumption did not apply to cancellation).

March 11, 2012

Rule 401. Test for Relevant Evidence.

Evidence is relevant if:

(a) it has any tendency to make a fact more or less probable than it would be without the evidence; and

(b) the fact is of consequence in determining the action.

Comment to 2012 Amendment

The language of Rule 401 has been amended to conform to the federal restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Civil Cases

401.civ.010 For evidence to be relevant, it must satisfy two requirements: **First,** the fact to which the evidence relates must be of consequence to the determination of the action (materiality).

Salt River Project v Miller Park LLC, 218 Ariz. 246, 183 P.3d 497, ¶¶ 10–12, 20–22 (2008) (because tax valuation is based on current use, and condemnation valuation is based on highest and best use, and because current use may or may not be highest and best use, tax valuation is generally inadmissible in determining condemnation valuation, but may be relevant in certain situations; thus whether to admit such evidence is within trial court's discretion).

Shotwell v Dohahoe, 207 Ariz. 287, 85 P.3d 1045, ¶¶ 4–36 (2004) (court rejected position that EEOC determination letter is automatically admissible as evidence in Title VII employment discrimination lawsuit, and held instead that admissibility of letter is controlled by Arizona Rules of Evidence; court stated "contents of Determination is certainly probative of matters at issue in the case").

* *Oliver v Henry*, 227 Ariz. 514, 260 P.3d 314, ¶¶ 2–17 (Ct. App. 2011) (plaintiff purchased vehicle new in October 2008 for $23,296; in December 2008, vehicle was involved in collision; court noted measure of damages to personal property that is not destroyed is difference in value immediately before and immediately after injury; for vehicle that was repaired, measure of damages was cost of repair ($15,535) plus difference in value of vehicle before and after collision ($8,975)).

* *Lennar Corp. v Transamerica Ins. Co.*, 227 Ariz. 238, 256 P.3d 635, ¶¶ 1, 14, 23–31 (Ct. App. 2011) (Lennar built homes; homeowners sued for construction defects; Lennar tendered claims to insurance companies; insurance companies brought declaratory judgment action; trial court granted summary judgment in favor of insurance companies concluding construction defects would not be considered "occurrence" within meaning of policies; court of appeals reversed, holding allegations of construction defects were sufficient to allege "occurrence" under policies; insurance companies then moved for summary judgment on Lennar's bad faith claim, contending trial court's ruling in their favor on "occurrence" issue established insurance companies had reasonable basis for denying coverage; court held insurer that seeks judicial interpretation of disputed policy term may not ignore claims-handling responsibilities while declaratory judgment action proceeds, and it was jury question whether insurance companies acted in good faith).

* *Lennar Corp. v Transamerica Ins. Co.*, 227 Ariz. 238, 256 P.3d 635, ¶¶ 18–22 (Ct. App. 2011) (Lennar built homes; homeowners sued for construction defects; Lennar tendered claims to insurance companies; insurance companies brought declaratory judgment action; trial court granted summary judgment in favor of insurance companies concluding construction defects would not be considered

"occurrence" within meaning of policies; court of appeals reversed, holding allegations of construction defects were sufficient to allege "occurrence" under policies; insurance companies then moved for summary judgment on Lennar's bad faith claim, contending trial court's ruling in their favor on "occurrence" issue established insurance companies had reasonable basis for denying coverage; court noted insured suing for bad faith based on denial of coverage must prove not only that insurer lacked objectively reasonable basis for denying claim, but also insured knew or was conscious of fact it lacked reasonable basis for claim; court held trial court's initial determination that damages Lennar sought did not relate to "occurrence" within meaning of policy was relevant, as was court of appeals' contrary conclusion, and evidence of how these insurance companies, other insurance companies, and other courts have interpreted this policy language would be relevant, and this was question for jurors to resolve).

Wendland v Adobeair, Inc, 223 Ariz. 199, 221 P.3d 390, ¶¶ 12–26 (Ct. App. 2009) (Partners leased property containing three buildings to Adobeair (defendant); defendant relocated its manufacturing business and removed press machines from building 2, leaving 12 foot deep pits that had been under press machines; defendant agreed to fill pits to return floor to flat surface before returning building to Partners; Partners hired general contractor to remodel building, but told general contractor not to work in building 2 until pits were filled in; general contractor asked plaintiff to give bid for part of remodeling project; plaintiff entered building 2, and because of poor lighting conditions, fell into pit; defendant moved *in limine* to preclude plaintiff's expert from giving testimony on standard of care because that opinion was based on OSHA standards; court agreed that defendant was not bound by OSHA regulations, but held jurors could consider OSHA standards along with other relevant evidence to determine whether defendant had notice of unreasonably dangerous condition and whether it failed to use reasonable care to provide warnings or adequate safeguards, thus trial court did not abuse discretion in allowing defendant's expert to testify about OSHA standards).

Bogard v Cannon & Wendt Elec. Co., 221 Ariz. 325, 212 P.3d 17, ¶¶ 32–37 (Ct. App. 2009) (court followed rule that EEOC determination letter is not automatically admissible as evidence in Title VII employment discrimination lawsuit, but instead trial court has discretion to admit letter under Arizona Rules of Evidence; court held trial court did not abuse discretion in determining EEOC letter was relevant and that its probative value was not substantially outweighed by danger of unfair prejudice).

Ritchie v Krasner, 221 Ariz. 288, 211 P.3d 1272, ¶¶ 12–22 (Ct App. 2009) (plaintiff injured back at work; worker's compensation carrier retained defendant to perform independent medical examination; prior to examination, plaintiff signed agreement stating that no doctor-patient relationship existed between plaintiff and defendant; defendant opined that plaintiff's condition was stable and that he could go back to work; plaintiff's condition continued to deteriorate; he was later examined by AHCCCS doctor, who diagnosed cervical spinal cord compression and recommended surgery; surgery halted further deterioration of plaintiff's spinal cord, but condition prior to surgery caused part of plaintiff's spinal cord to die; plaintiff developed condition called "central pain syndrome," which caused constant pain, so AHCCCS doctor prescribed Oxycontin and Oxycodone; plaintiff subsequently died of accidental overdose, characterized as "synergistic effects of the various medications he was taking for his cervical spinal cord injury"; prior to his death, plaintiff filed medical malpractice complaint against various doctors; after trial, jurors returned verdict of $5 million and found defendant 28.5% at fault; court concluded that, because defendant was hired to determine extent of plaintiff's work-related injuries and make treatment recommendations, he assumed duty to conform to legal standards of reasonable conduct in light of apparent risk, thus trial court correctly held that defendant owed duty of reasonable care to plaintiff; defendant contended that trial court erred in precluding admission of limited liability agreement; court held that, because defendant's duty to plaintiff did not depend on doctor-patient relationship, agreement that there was no doctor-patient relationship was not relevant, thus trial court was correct in precluding its admission).

Brethauer v General Motors Corp., 221 Ariz. 192, 211 P.3d 1176, ¶¶ 15–16 (Ct. App. 2009) (plaintiff's 1998 pick-up truck went off road and bounced through ditch; side and rear windows shattered and plaintiff was ejected out rear window; plaintiff asserted he was wearing seat belt; plaintiff contended seat belt buckle was defective and unlatched improperly; plaintiff contended trial court erred by granting GM's motion in limine to preclude evidence that GM recalled certain 1994–95 C/K extended cab pick-up trucks ("C/K trucks") because, if both lap and shoulder belt energy management loops in those vehicles released at same time in frontal collision, resulting inertial forces and loading of belts could cause buckle to unlatch; although plaintiff drove different 1998-model pick-up truck, both models used identical "JDC buckle"; plaintiff claimed recall evidence was relevant to show both that JDC buckle had potential to release due to inertial forces and that GM knew about this defect; court held that fact "of consequence" in this case was whether inertial forces acting on plaintiff's truck as it bounced through rough terrain caused JDC buckle to unlatch prior to any impact; court noted that plaintiff's truck did not have same fabric belt system that GM replaced in C/K trucks, that plaintiff was not involved in frontal collision, and no evidence showed that, absent defective fabric belts in C/K trucks, JDC buckles could have unlatched prior to collision, thus recall of C/K trucks to replace belting system in order to avoid unlatching in frontal collisions did not have tendency to make it more probable that JDC buckle unlatched during plaintiff's accident).

Warner v Southwest Desert Images, 218 Ariz. 121, 180 P.3d 986, ¶¶ 33–37 (Ct. App. 2008) (plaintiff sued defendant weed control company after its herbicide spray entered building through air conditioning system; trial court granted defendant's motion to preclude plaintiff from introducing evidence of workers' compensation benefits she had received; court held evidence of workers' compensation benefits is generally inadmissible because it is irrelevant to issue of plaintiff's damages, and thus affirmed trial court's ruling).

Belliard v Becker, 216 Ariz. 356, 166 P.3d 911, ¶¶ 13–17 (Ct. App. 2007) (even though defendant conceded negligence and liability, because plaintiff was seeking punitive damages, evidence of defendant's alcohol consumption prior to collision was of consequence to determination whether defendant consciously pursued course conduct knowing it created substantial risk of significant harm to another, and thus was material).

Miller v Kelly (Barrera), 212 Ariz. 283, 130 P.3d 982, ¶¶ 3–9 (Ct. App. 2006) (in wrongful death action based on medical malpractice, trial court granted plaintiff's motion to have defendant doctor disclose amounts paid in settlement of previous medical malpractice actions brought against him; court concluded that amount of settlement did not relate to fact that was of consequence to determination of the action (whether defendant was negligent in present action), thus held trial court erred in ordering disclosure of settlement amounts).

Acuna v Kroack, 212 Ariz. 104, 128 P.3d 221, ¶¶ 14–20 (Ct. App. 2006) (vehicle collided with plaintiff's vehicle; after collision, defendant-husband appeared to be intoxicated, and left scene before police arrived; defendant-wife told police she was driving vehicle, and made same statement several days after collision and in deposition; defendant-husband later acknowledged he was driving vehicle; plaintiff brought action against both defendants for negligence and against defendant-wife for negligently entrusting vehicle to husband; court held that evidence of defendant-husband's possible intoxication and leaving scene of collision, and defendant-wife's initially claiming she was driving vehicle, related to fact that was of consequence to determination of action, i.e., whether defendant-husband was negligent in driving and whether defendant-wife negligently entrusted vehicle to husband).

Crackel v Allstate Ins. Co., 208 Ariz. 252, 92 P.3d 882, ¶¶ 46–53 (Ct. App. 2004) (plaintiffs sued Allstate for abuse of process based on how Allstate handled their minor impact soft tissue (MIST) claims, and sought to introduce evidence of how Allstate handled other MIST claims; trial court precluded evidence under Rule 403; court agreed with plaintiffs that other act evidence was both "relevant and pro-

bative" of issues in the case, and although it stated that reasonable minds might disagree with trial court's assessment that probative value of other act evidence was limited, it stated it could not conclude that trial court abused its discretion in light of argument given on both sides of question).

Jimenez v Wal-Mart Stores, Inc., 206 Ariz. 424, 79 P.3d 673, ¶ 15 (Ct. App. 2003) (plaintiff offered photographs showing various hazards near entrance to defendant's store, contending these refuted defendant's claim of "meticulously well-kept entrance"; because photographs were taken some time after injury and did not depict condition of entrance at time of injury, relevance was questionable).

Henry v Healthpartners of Southern Arizona, 203 Ariz. 393, 55 P.3d 87, ¶¶ 15–17 (Ct. App. 2002) (medical malpractice action resulting from patient's death from cancer was filed against decedent's doctor, radiologist employed by medical center, and medical center (TMC/HSA); plaintiff settled with doctors and went to trial against TMC/HSA; TMC/HSA named doctors as non-parties at fault; court held radiologist's negligence was of consequence to the determination of the action and thus was relevant (materiality)).

Hernandez v State, 201 Ariz. 336, 35 P.3d 97, ¶¶ 6–7 (Ct. App. 2001) (plaintiff fell off wall at Patagonia Lake Park, which was not scalable and was cordoned off; because ADOT memorandum related to warning signs at Painted Cliffs rest area and expressed no statewide policy, and because Painted Cliffs wall consisted of blocks forming steps that enable people to scale it, memorandum was not of consequence to determination whether state was negligent in maintaining Patagonia Lake area), *vacated*, 203 Ariz. 196, 52 P.3d 765 (2002).

S. Dev Co. v Pima Capital Mgmt Co., 201 Ariz. 10, 31 P.3d 123, ¶¶ 32–35 (Ct. App. 2001) (plaintiff bought apartment building from defendant, and later discovered apartment had been built with polybutylene pipe, which was defective; plaintiff sued defendant in tort for fraud; trial court granted plaintiff's motion *in limine* to preclude evidence that plaintiff had received settlement proceeds from class-action lawsuit against manufacturer of pipe; court held measure of damages was difference between what plaintiff paid for building and what building was worth at time of sale, thus amount of money subsequently received was not of consequence to determination of action and thus was not relevant (materiality)).

Yauch v Southern Pac. Transp., 198 Ariz. 394, 10 P.3d 1181, ¶¶ 19–24 (Ct. App. 2000) (plaintiff injured his back while working, and brought Federal Employer's Liability Act claim against defendant railroad; court held evidence of defendant's Disability Management and Internal Placement Program and plaintiff's failure to take advantage of that program was relevant to issue of mitigation of damages, and further held that Arizona's "sheltered employment" doctrine did not apply in FELA cases).

Yauch v Southern Pac. Transp., 198 Ariz. 394, 10 P.3d 1181, ¶¶ 31–37 (Ct. App. 2000) (plaintiff injured his back while working, and brought Federal Employer's Liability Act claim against defendant railroad; because trial court did not allow mitigation of damages defense, plaintiff's emotional distress 2 years after accident did not relate to any issue being litigated, thus evidence of defendant's conduct 2 years after accident and whether that conduct caused plaintiff's emotional distress did not relate to any issue being litigated).

Elia v Pifer, 194 Ariz. 74, 977 P.2d 796, ¶¶ 35–36 (Ct. App. 1998) (defendant was plaintiff's former attorney in dissolution action; after dissolution, plaintiff filed for bankruptcy; plaintiff sued defendant for legal malpractice, claiming defendant did not have authority to agree to terms of proposed settlement agreement; court held that plaintiff's claim of malpractice placed in issue communications with bankruptcy attorneys because, if plaintiff never told them defendant settled dissolution without his approval, it would give rise to inference that defendant had not committed malpractice, and if plaintiff had told them and they failed to follow his instructions to attack dissolution decree in bankruptcy proceedings, they might be negligent, which would reduce defendant's share of the liability).

State v Wells Fargo Bank, 194 Ariz. 126, 978 P.2d 103, ¶¶ 35–37 (Ct. App. 1998) (in severance damages action resulting from state's building freeway next to defendant's property, expert testimony about noise levels produced by persons driving related to issue that was of consequence to determination of action).

Conant v Whitney, 190 Ariz. 290, 947 P.2d 864 (Ct. App. 1997) (plaintiffs were injured when they ran into bull owned by defendant; evidence that Forest Service land on which defendant had grazing permit did not permit bulls was relevant to plaintiffs' claim that duty to keep bulls out of area imposed no more of burden than Forest Service already imposed, that defendant knew keeping bull out of area was necessary for public safety, to rebut inference that Forest Service was at fault for not prohibiting bulls in this area, and to define defendant's contractual undertakings and responsibilities in relation to that of the Forest Service).

Hutcherson v City of Phoenix, 188 Ariz. 183, 933 P.2d 1251 (Ct. App. 1996) (victim in wrongful death action was player for Phoenix Cardinals; because evidence showed that victim intended to support mother, his future income was relevant to mother's damages).

401.civ.020 For evidence to be relevant, it must satisfy two requirements: **Second,** the evidence must make the fact that is of consequence more or less probable (relevance).

Salt River Project v Miller Park LLC, 218 Ariz. 246, 183 P.3d 497, ¶¶ 10–12, 20–22 (2008) (because tax valuation is based on current use, and condemnation valuation is based on highest and best use, and because current use may or may not be highest and best use, tax valuation is generally inadmissible in determining condemnation valuation, but may be relevant in certain situations; thus whether to admit such evidence is within discretion of trial court).

Shotwell v Dohahoe, 207 Ariz. 287, 85 P.3d 1045, ¶¶ 4–36 (2004) (court rejected position that EEOC determination letter is automatically admissible as evidence in Title VII employment discrimination lawsuit, and held instead that admissibility of letter is controlled by Arizona Rules of Evidence; court stated "contents of Determination is certainly probative of matters at issue in the case").

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In re MH 2008–002596, 223 Ariz. 32, 219 P.3d 242, ¶¶ 12–16 (Ct. App. 2009) (appellant sought relief from order of commitment for involuntary mental health treatment; statute required testimony of two or more witnesses acquainted with patient; appellant contended one witness did not qualify as acquaintance witness because her contact with him was limited to one 15 minute telephone conversation; court held that this telephone conversation gave witness personal knowledge; court noted that appellant had told witness that he had overdosed on medications and that he would refuse help by lying to first responders; court held this information was relevant).

Hudgins v Southwest Airlines, Co., 221 Ariz. 472, 212 P.3d 810, ¶¶ 19–21 (Ct. App. 2009) (plaintiffs were bail enforcement agents (bounty hunters); on 9/11/99, they flew from Baltimore to Phoenix; before trip, they called Southwest Airlines (SWA) to obtain instructions on how to transport handguns lawfully on airplane; plaintiffs followed those instructions, but were arrested in Phoenix because they were not law enforcement officers; plaintiffs sued SWA claiming that SWA was negligent in actions that led to plaintiffs' arrest; jurors returned verdicts of $500,000 each in compensatory damages and $4 million each in punitive damages; SWA contended that evidence that plaintiffs (1) failed to obtain Maryland-issued concealed weapons permits and (2) failed to work with local bail agent in apprehending fugitive in Tucson after they were released from custody was relevant on issue of plaintiffs' comparative fault for failing to investigate adequately how to transport weapons legally on airplane; court held that neither (1) whether plaintiffs violated Maryland law while going to Baltimore airport nor (2) whether plaintiffs failed to comply with local laws while apprehending fugitive in Tucson made it more or less probable that plaintiffs exercised reasonable care in investigating how to travel legally on airplane with weapons, thus trial court correctly precluded this evidence).

Bogard v Cannon & Wendt Elec. Co., 221 Ariz. 325, 212 P.3d 17, ¶¶ 32–37 (Ct. App. 2009) (court followed rule that EEOC determination letter is not automatically admissible as evidence in Title VII employment discrimination lawsuit, but instead trial court has discretion to admit letter under Arizona Rules of Evidence; court held trial court did not abuse discretion in determining EEOC letter was relevant and that its probative value was not substantially outweighed by danger of unfair prejudice).

Ritchie v Krasner, 221 Ariz. 288, 211 P.3d 1272, ¶¶ 12–22 (Ct App. 2009) (plaintiff injured back at work; worker's compensation carrier retained defendant to perform independent medical examination; prior to examination, plaintiff signed agreement stating that no doctor-patient relationship existed between plaintiff and defendant; defendant opined that plaintiff's condition was stable and that he could go back to work; plaintiff's condition continued to deteriorate; he was later examined by AHCCCS doctor, who diagnosed cervical spinal cord compression and recommended surgery; surgery halted further deterioration of plaintiff's spinal cord, but condition prior to surgery caused part of plaintiff's spinal cord to die; plaintiff developed condition called "central pain syndrome," which caused constant pain, so AHCCCS doctor prescribed Oxycontin and Oxycodone; plaintiff subse-

quently died of accidental overdose, characterized as "synergistic effects of the various medications he was taking for his cervical spinal cord injury"; prior to his death, plaintiff filed medical malpractice complaint against various doctors; after trial, jurors returned verdict of $5 million and found defendant 28.5% at fault; court concluded that, because defendant was hired to determine extent of plaintiff's work-related injuries and make treatment recommendations, he assumed duty to conform to legal standards of reasonable conduct in light of apparent risk, thus trial court correctly held that defendant owed duty of reasonable care to plaintiff; defendant contended that trial court erred in precluding admission of limited liability agreement; court held that, because defendant's duty to plaintiff did not depend on doctor-patient relationship, agreement that there was no doctor-patient relationship was not relevant, thus trial court was correct in precluding its admission).

Brethauer v General Motors Corp., 221 Ariz. 192, 211 P.3d 1176, ¶¶ 15–16 (Ct. App. 2009) (plaintiff's 1998 pick-up truck went off road and bounced through ditch; side and rear windows shattered and plaintiff was ejected out rear window; plaintiff asserted he was wearing seat belt; plaintiff contended seat belt buckle was defective and unlatched improperly; plaintiff contended trial court erred by granting GM's motion in limine to preclude evidence that GM recalled certain 1994–95 C/K extended cab pick-up trucks ("C/K trucks") because, if both lap and shoulder belt energy management loops in those vehicles released at same time in frontal collision, resulting inertial forces and loading of belts could cause buckle to unlatch; although plaintiff drove different 1998-model pick-up truck, both models used identical "JDC buckle"; plaintiff claimed recall evidence was relevant to show both that JDC buckle had potential to release due to inertial forces and that GM knew about this defect; court held that fact "of consequence" in this case was whether inertial forces acting on plaintiff's truck as it bounced through rough terrain caused JDC buckle to unlatch prior to any impact; court noted that plaintiff's truck did not have same fabric belt system that GM replaced in C/K trucks, that plaintiff was not involved in frontal collision, and no evidence showed that, absent defective fabric belts in C/K trucks, JDC buckles could have unlatched prior to collision, thus recall of C/K trucks to replace belting system in order to avoid unlatching in frontal collisions did not have tendency to make it more probable that JDC buckle unlatched during plaintiff's accident).

Belliard v Becker, 216 Ariz. 356, 166 P.3d 911, ¶¶ 13–17 (Ct. App. 2007) (even though defendant conceded negligence and liability, because plaintiff was seeking punitive damages, evidence of defendant's alcohol consumption prior to collision showed it was more probable that defendant consciously pursued course conduct knowing it created substantial risk of significant harm to another, and thus was relevant).

Felder v Physiotherapy Assoc, 215 Ariz. 154, 158 P.3d 877, ¶¶ 56–62 (Ct. App. 2007) (plaintiff was baseball player who had been on major team's 40-man roster repeatedly from 1994 until March 1997, when he was removed from 40-man roster to have elbow surgery; in spring 1998, he injured his eye, which ended his baseball career; plaintiff sued for lost earnings and introduced opinion testimony based on what he could have earned as major league player; defendant sought to introduce data showing that, of the players removed from 40-man roster, only 21.3% advanced to major leagues, and only 3.4% remained in major leagues for more than 3 years; because 63% of players in data were pitchers and plaintiff was outfielder, trial court did not abuse discretion in precluding data as not relevant).

Miller v Kelly (Barrera), 212 Ariz. 283, 130 P.3d 982, ¶¶ 3–9 (Ct. App. 2006) (in wrongful death action based on medical malpractice, trial court granted plaintiff's motion to have defendant doctor disclose amounts paid in settlement of previous medical malpractice actions brought against him; court concluded that amount of settlement did not make fact that was of consequence to determination of the action (whether defendant was negligent in present action) any more probable, thus held trial court erred in ordering disclosure of settlement amounts).

Acuna v Kroack, 212 Ariz. 104, 128 P.3d 221, ¶¶ 21–35 (Ct. App. 2006) (vehicle collided with plaintiff's vehicle; after collision, defendant-husband appeared to be intoxicated, and left scene before police arrived; defendant-husband later acknowledged he was driving vehicle; plaintiff brought action against both defendants for negligence and against defendant-wife for negligently entrusting vehicle to husband; court held that, because there was no evidence defendant-wife knew or should have known of husband's alleged incompetence to drive when she permitted him to do so, there was not sufficient evidence to support jurors' verdict that defendant-wife was liable for 30 percent of damages).

Crackel v Allstate Ins. Co., 208 Ariz. 252, 92 P.3d 882, ¶¶ 46–53 (Ct. App. 2004) (plaintiffs sued Allstate for abuse of process based on how Allstate handled their minor impact soft tissue (MIST) claims, and sought to introduce evidence of how Allstate handled other MIST claims; trial court precluded evidence under Rule 403; court agreed with plaintiffs that other act evidence was both "relevant and probative" of issues in the case, and although it stated that reasonable minds might disagree with trial court's assessment that probative value of other act evidence was limited, it stated it could not conclude that trial court abused its discretion in light of argument given on both sides of question).

Jimenez v Wal-Mart Stores, Inc., 206 Ariz. 424, 79 P.3d 673, ¶ 15 (Ct. App. 2003) (plaintiff offered photographs showing various hazards near entrance to defendant's store, contending these refuted defendant's claim of "meticulously well-kept entrance"; because photographs were taken some time after injury and did not depict condition of entrance at time of injury, relevance was questionable).

Henry v Healthpartners of Southern Arizona, 203 Ariz. 393, 55 P.3d 87, ¶¶ ¶¶ 15–17 (Ct. App. 2002) (medical malpractice action resulting from patient's death from cancer was filed against decedent's doctor, radiologist employed by medical center, and medical center (TMC/HSA); plaintiff settled with doctors and went to trial against TMC/HSA; TMC/HSA named doctors as non-parties at fault; because plaintiff's trial strategy was to minimize radiologist's fault in order to place more blame on TMC/HSA, plaintiff's factual allegations contained in complaint delineating radiologist's negligence made this fact of consequence more or less probable and thus were relevant (relevance)).

Hernandez v State, 201 Ariz. 336, 35 P.3d 97, ¶¶ 6–7 (Ct. App. 2001) (plaintiff fell off wall at Patagonia Lake Park, which was not scalable and was cordoned off; because ADOT memorandum related to warning signs at Painted Cliffs rest area and expressed no statewide policy, and because Painted Cliffs wall consisted of blocks forming steps that enable people to scale it, memorandum did not make state's negligence more or less probable), *vacated*, 203 Ariz. 196, 52 P.3d 765 (2002).

S. Dev. Co. v Pima Capital Mgmt. Co., 201 Ariz. 10, 31 P.3d 123, ¶¶ 32–35 (Ct. App. 2001) (plaintiff bought apartment building from defendant, and later discovered apartment had been built with polybutylene pipe, which was defective; plaintiff sued defendant in tort for fraud; trial court granted plaintiff's motion *in limine* to preclude evidence that plaintiff had received settlement proceeds from class-action lawsuit against manufacturer of pipe; court held measure of damages was difference between what plaintiff paid for building and what building was worth at time of sale, thus amount of money subsequently received did not make any fact of consequence more or less probable and thus was not relevant (relevance)).

Yauch v Southern Pac. Transp., 198 Ariz. 394, 10 P.3d 1181, ¶¶ 12–18 (Ct. App. 2000) (plaintiff worked as engineer and injured his back while working, and brought Federal Employer's Liability Act claim against defendant railroad; court held evidence of defendant's Disability Management and Internal Placement Program and plaintiff's failure to take advantage of that program was relevant to issue of mitigation of damages and thus amount of damages, held that Arizona's "sheltered employment" doctrine did not apply in FELA cases, and further held that, even if "sheltered employment" doctrine did apply, defendant's program was not "sheltered employment").

Brown v U.S.F. & G., 194 Ariz. 85, 977 P.2d 807, ¶¶ 23–27 (Ct. App. 1998) (fire that destroyed plaintiff's house was accelerated with acetone; evidence that neighbor had acetone on his property more than year after fire was too remote to be relevant).

Elia v Pifer, 194 Ariz. 74, 977 P.2d 796, ¶¶ 35–36 (Ct. App. 1998) (defendant was plaintiff's former attorney in dissolution action; after dissolution, plaintiff filed for bankruptcy; plaintiff sued defendant for legal malpractice, claiming defendant did not have authority to agree to terms of proposed settlement agreement; court held that plaintiff's claim of malpractice placed in issue communications with bankruptcy attorneys because, if plaintiff never told them defendant settled dissolution without his approval, it would give rise to inference that defendant had not committed malpractice, and if plaintiff had told them and they failed to follow his instructions to attack dissolution decree in bankruptcy proceedings, they might be negligent, which would reduce defendant's share of the liability).

State v Wells Fargo Bank, 194 Ariz. 126, 978 P.2d 103, ¶¶ 35–37 (Ct. App. 1998) (in severance damages action resulting from state's building freeway next to defendant's property, expert testimony about noise levels produced by persons driving 10 mph over speed limit made issue that was of consequence to determination of action (noise level) more or less probable, and question whether people actually drove 10 mph over speed limit went to weight rather than admissibility of evidence).

Conant v Whitney, 190 Ariz. 290, 947 P.2d 864 (Ct. App. 1997) (plaintiffs were injured when they ran into bull owned by defendant; evidence that Forest Service land on which defendant had grazing permit did not permit bulls was relevant to plaintiffs' claim that duty to keep bulls out of area imposed no greater burden than Forest Service already imposed, that defendant knew keeping bull out of area was necessary for public safety, to rebut inference that Forest Service was at fault for not prohibiting bulls in this area, and to define defendant's contractual undertakings and responsibilities in relation to that of Forest Service).

Hutcherson v City of Phoenix, 188 Ariz. 183, 933 P.2d 1251 (Ct. App. 1996) (plaintiff claimed "911" operator was negligent because, when victim called to report person was threatening her, operator did not ask about other threats and assign call higher priority; evidence of prior threats and reports of these threats to police was therefore relevant).

401.civ.030 If evidence does not tend to make the existence of any fact of consequence more or less probable, it is not relevant and therefore is not admissible.

Kimu P. v Arizona D.E.S., 218 Ariz. 39, 178 P.3d 511, ¶¶ 9–12 (Ct. App. 2008) (in proceeding to terminate parental rights to children C.P. and Z.P., court held that evidence of how parents treated I.P., who was born after commencement of termination proceedings for C.P. and Z.P., was not relevant to question whether termination of parental rights to C.P. and Z.P. would be in their best interests).

Moran v Moran, 188 Ariz. 139, 933 P.2d 1207 (Ct. App. 1996) (parties entered into "marriage contract" that provided it was irrevocable and based on "the Divine Law of Yahweh, as revealed in Holy Scripture" and stated it was "not subject to any statute, rule, regulation, or policy of man, in any jurisdiction whatsoever, if said statute, rule, regulation, or policy is contrary to the Principles of Divine Law"; because issue was whether parties' failure to obtain marriage license invalidated their purported marriage, videotape of what happened at their ceremony was not relevant).

401.civ.050 Arizona law makes no distinction between direct and circumstantial evidence.

Thompson v Better-Built Alum. Prods., 171 Ariz. 550, 557–59, 832 P.2d 203, 210–12 (1992) (because plaintiff presented sufficient circumstantial evidence to establish that defendant was motivated by evil mind, trial court erred in granting defendant's motion for directed verdict).

State ex rel. Fox v New Phoenix Auto Auc., 185 Ariz. 302, 306, 916 P.2d 492, 496 (Ct. App. 1996) (although defendant did not have any official records showing that vehicles had been inspected for emissions, defendant presented affidavits, internal records, and monthly fleet inspection summaries, and although this was only circumstantial evidence of inspections, the fact that it was circumstantial evidence did not diminish its probative value, so trial court should not have granted summary judgment for plaintiff).

McElhanon v Hing, 151 Ariz. 386, 396, 728 P.2d 256, 266 (Ct. App. 1985) (court noted that Arizona Supreme Court overruled prior opinions regarding weight of circumstantial evidence, and held probative value of direct evidence and circumstantial evidence was intrinsically similar).

401.civ.056 Although a factual stipulation is binding on the parties, it is not binding on the jurors, thus a party may not be required by the trial court to accept a stipulation, the effect of which may not have the same effect on the jurors as the evidence that establishes the fact.

Arizona DOR v Superior Ct., 189 Ariz. 49, 54, 938 P.2d 98, 103 (Ct. App. 1997) (fact that one party was willing to stipulate to witness's evaluation of the property did not preclude other party from calling that witness to give live testimony).

401.civ.057 Although a factual stipulation is not binding on the jurors, a stipulation of liability is binding on the jurors, thus if the jurors do not follow the stipulation about liability, the aggrieved party will be entitled to a new trial.

Ogden v J.M. Steel Erecting, Inc., 201 Ariz. 32, 31 P.3d 806, ¶¶ 15–20 (Ct. App. 2001) (truck driver turned in front of motorcycle causing death of motorcycle driver and serious injuries to motorcycle passenger; motorcycle passenger and family of motorcycle driver sued truck driver's employer; parties stipulated that truck driver was intoxicated and intoxication was proximate cause of accident; jurors returned verdict for plaintiffs and apportioned 100% of fault to defendant; because of stipulation, jurors were required to apportion some percentage of fault to truck driver, thus defendant was entitled to new trial).

401.civ.090 Evidence that an event did not happen is relevant, but only if the proponent makes an adequate showing that the witness was in such a situation, including position and attitude, or had access to such information, so that the witness would have been aware if the event had happened.

Isbell v State, 198 Ariz. 291, 9 P.3d 322, ¶ 9 (2000) (because defendant failed to make required foundational showing, including how many near accidents and how many fortuitous escapes from injury may have occurred, trial court did not abuse discretion in precluding evidence of absence of prior accidents at railroad crossing in question).

Hernandez v State, 201 Ariz. 336, 35 P.3d 97, ¶¶ 19–22 (Ct. App. 2001) (plaintiff fell off wall at Patagonia Lake Park; because park manager had served there for 8 years and lived there year-round, and because any fall off that wall would have resulted in serious injuries, park manager was permitted to testify that he knew of no other accidents at that wall), *vacated*, 203 Ariz. 196, 52 P.3d 765 (2002).

401.civ.100 Evidence that a party did not call a certain person as a witness is relevant if (1) the person was under the exclusive control of that party, (2) the party would be expected to produce the person if that person's testimony would be favorable to that party, and (3) the person had exclusive knowledge of the existence or nonexistence of certain facts.

Gordon v Liguori, 182 Ariz. 232, 895 P.2d 523 (Ct. App. 1995) (although defendants' uncalled expert witnesses arguably met first two factors, they did not meet third because their testimony was opinion, not fact, and opinion about defendants' negligence would not be within exclusive knowledge of these witnesses).

401.civ.120 In a negligence action or strict liability action based on design defect (but not in an action based upon manufacturing defect), evidence of nonexistence of prior accidents is relevant, but only if proponent makes an adequate showing that proponent was in such a situation or had access to information that would have made proponent aware of any accidents if they had happened.

Isbell v State, 198 Ariz. 291, 9 P.3d 322, ¶ 9 (2000) (because defendant failed to make required foundational showing, including how many near accidents and how many fortuitous escapes from injury may have occurred, trial court did not abuse discretion in precluding evidence of absence of prior accidents at railroad crossing in question).

Hernandez v State, 201 Ariz. 336, 35 P.3d 97, ¶¶ 19–22 (Ct. App. 2001) (plaintiff fell off wall at Patagonia Lake Park; because park manager had served there for 8 years and lived there year-round, and because any fall off that wall would have resulted in serious injuries, park manager was permitted to testify that he knew of no other accidents at that wall), *vacated,* 203 Ariz. 196, 52 P.3d 765 (2002).

401.civ.195 Comparative fault principles apply in product strict liability actions, thus all evidence having a bearing on the fault of any of the participants is admissible.

Zuern v Ford Motor Co., 188 Ariz. 486, 937 P.2d 676 (Ct. App. 1996) (plaintiff claimed evidence of nonparty's intoxication was not relevant in claim of strict liability in automobile accident case; court held such evidence was admissible).

401.civ.245 In a wrongful death action, evidence of the manner of the decedent's death is admissible, but only to the extent that it caused the survivor to suffer mental anguish because of the death, and not to the extent that it showed the decedent suffered prior to death.

Girouard v Skyline Steel, Inc., 215 Ariz. 126, 158 P.3d 255, ¶¶ 9–23 (Ct. App. 2007) (defendant's employee caused automobile collision that caused decedent's vehicle to burst into flames; decedent died of thermal and inhalation injuries, although there was conflict in evidence showing whether decedent was conscious at time of death; father sought to introduce evidence that fire was so intense that there was nothing of decedent's remains to identify and that decedent had been burned alive, and this caused father great pains; court noted wrongful death statute allows recovery for injury to surviving party caused by death, and that injury includes anguish, sorrow, stress, mental suffering, pain, and shock, thus trial court erred in excluding evidence of manner of decedent's death to extent knowledge of manner of death caused anguish, sorrow, stress, mental suffering, pain, or shock to father).

401.civ.275 In an action to recover punitive damages, the plaintiff must prove the defendant consciously pursued a course conduct knowing that it created a substantial risk of significant harm to other, thus evidence tending to prove or disprove this issue is relevant.

Belliard v Becker, 216 Ariz. 356, 166 P.3d 911, ¶¶ 13–17 (Ct. App. 2007) (defendant was driving north on Highway 101 in right lane, crossed three lanes of traffic, ran into steel cables separating lanes, and stopped on southbound side of road facing north; defendant saw that cable was attached to his bumper, but he turned car around and drove south; as he drove away, he "felt a jerk on the front end" and eventually "lost control" and his car came to stop; he then noticed cable was wrapped around axle; it was later determined he dragged 1200 feet of cable down highway; while defendant was moving south, plaintiff's vehicle became entangled in cable and spun into embankment, injuring plaintiff; DPS officer could smell moderate odor of alcohol on defendant's breath; defendant admitted having "a couple of drinks earlier in the evening," and portable breath test showed .031 BAC; trial court granted defendant's motion in limine and precluded any evidence of defendant's alcohol consumption or bars he visited prior to collision; because defendant conceded negligence and liability, court agreed that evidence of alcohol consumption was not relevant to negligence and liability, but held it was relevant to issue of punitive damages, thus trial court erred in precluding it; court remanded for retrial on issue of punitive damages).

401.civ.340 If a party offers an experiment or model as an attempted replication of the litigated event, the conditions in the experiment or the model must substantially match the circumstances surrounding that event; if the experiment or model is not a purported replication but is more in the nature of a demonstration, it is appropriately admitted if it fairly illustrates a disputed trait or characteristic.

Standard Chartered PLC v Price Waterhouse, 190 Ariz. 6, 945 P.2d 317 (Ct. App. 1996) (because videotape comparing conduct of defendant-seller with captain of Titanic contained information that was not admitted in evidence and was highly inflammatory, trial court should not have allowed plaintiff-buyer to play it during closing argument).

Criminal Cases

401.cr.010 For evidence to be relevant, it must satisfy two requirements: **First,** the fact to which the evidence relates must be of consequence to the determination of the action (materiality).

* *State v Machado*, 226 Ariz. 281, 246 P.3d 632, ¶ 24 (2011) (only issue in case was whether defendant or someone else committed murder; telephone call wherein caller admitted committing crime related to fact that was of consequence to determination of action, thus evidence of call was material).

State v Armstrong, 218 Ariz. 451, 189 P.3d 378, ¶¶ 25–27 (2008) (court concluded that details of crime were of consequence to determination whether killing was for pecuniary gain and whether defendant committed multiple murders; details of defendant's flight from scene were of consequence to determination whether killing was for pecuniary gain, and evidence about blood-stained furniture corroborated testimony about location of murders, which was of consequence to determination whether defendant committed multiple murders).

State v Boggs, 218 Ariz. 325, 185 P.3d 111, ¶¶ 63–66 (2008) (in mitigation, defendant claimed he suffered from mental health issues, including bipolar disorder, which caused him to have delusional involvement in militia; defendant's letters threatening harm to those who mistreated leader of militia were relevant because they rebutted suggestion that defendant's involvement in militia was benign).

State v Tucker, 215 Ariz. 298, 160 P.3d 177, ¶¶ 45–49 (2007) (defendant contended montage of 44 photographs showing corpses and autopsies was not relevant; state contended montage related to issue whether defendant's killing of victim was cruel; court concluded photographs had some minimal relevancy to cruelty prong).

State v Arellano (Apelt), 213 Ariz. 474, 143 P.3d 1015, ¶¶ 14–22 (2006) (court held that trial court erred as matter of law in ruling that evidence of defendant's adaptive behavior after age 18 years was not relevant and in ruling that state could not present testimony of AzDOC personnel).

State v Ellison, 213 Ariz. 116, 140 P.3d 899, ¶¶ 57–58 (2006) (in search of defendant's girlfriend's house, officers found .22 caliber handgun in car parked in garage; girlfriend told officers defendant possessed that gun at some point; defendant's daughter told police defendant had been in their house after date of murders; print examiner matched defendant's print to one of eight prints on gun; court held evidence of gun was relevant because it established defendant possessed gun before and after killings, and combined with evidence that codefendant did not possess gun, made less likely defendant's story that he participated only because codefendant threatened him with gun).

State v Ellison, 213 Ariz. 116, 140 P.3d 899, ¶¶ 50–51 (2006) (defendant sought to introduce statements codefendant made to fellow jail inmate; court noted that statements might be marginally relevant to support defendant's claim that codefendant, as ringleader, forced defendant to participate in murders, but held that, because duress is not defense to murder, any error in excluding statements would have been harmless).

State v Davolt, 207 Ariz. 191, 84 P.3d 456, ¶¶ 65–66 (2004) (defendant contended trial court's preclusion of evidence that detective had improperly recorded and then erased portion of defendant's coerced inculpatory statements (which were subsequently suppressed) "gutted his defense" because this was probative of police sloppiness; trial court found this evidence was not relevant to any disputed issue; court agreed and found no abuse of discretion).

State v Finch, 202 Ariz. 410, 46 P.3d 421, ¶¶ 19–20 (2002) (defendant shot victim in back as victim was fleeing; defendant claimed that, because police did not find victim in time to save his life, time it took police to find victim constituted superseding event that proximately caused victim's death; court noted that, although victim might have survived had he received prompt medical attention, he would not have died if defendant had not shot him, thus causation was not an issue and trial court did not err in not giving proximate cause instruction).

State v Nordstrom, 200 Ariz. 229, 25 P.3d 717, ¶ 49 (2001) (because defendant questioned witnesses about relationship between defendant's brother and third person in attempt to show defendant's brother was person who did killings, relationship between defendant and that person was of consequence and letter from defendant to that person related to that issue, thus letter was material).

State v Bass, 198 Ariz. 571, 12 P.3d 796, ¶¶ 10–14 (2000) (defendant drove above speed limit in right lane when vehicle in left lane moved partially into right lane, whereupon defendant swerved right and vehicle's right wheels rode curb for moment, until passenger grabbed steering wheel and jerked it to left, causing defendant to lose control of vehicle, which then spun across center line and into incoming traffic, causing multi-car collision and death and injuries to others; court rejected defendant's argument that jurors should be instructed that, for actions to be superseding causes, passenger's action in grabbing steering wheel would have to be both unforeseeable and abnormal/extraordinary because that action was in response to defendant's actions, while other driver's action in moving into lane would have to be merely unforeseeable because that action was coincidental; court held instead both types of acts must be both unforeseeable and either abnormal or extraordinary).

State v Fulminante, 193 Ariz. 485, 975 P.2d 75, ¶¶ 56–57 (1999) (evidence comparing lead fragments from victim's head to lead ammunition from defendant's home was relevant because it showed defendants possessed ammunition consistent with that used to kill victim).

State v Greene, 192 Ariz. 431, 967 P.2d 106, ¶¶ 24–25 (1998) (because one issue at sentencing was whether defendant acted in an especially heinous or depraved manner, letter showing defendant's state of mind was material).

State ex rel. Thomas v Duncan (Reagan), 216 Ariz. 260, 165 P.3d 238, ¶¶ 11–15 (Ct. App. 2007) (defendant's claim that he was fleeing from road rage situation when he ran red light and killed victim was of consequence to determination of defendant's mental state (whether defendant was aware of and consciously disregarded substantial and unjustifiable risk), and thus evidence was material).

State v Wassenaar, 215 Ariz. 565, 161 P.3d 608, ¶¶ 36–39 (Ct. App. 2007) (trial court allowed defendant to introduce evidence that he smuggled handcuff key into prison facility not to escape but to defend himself from beating he feared was imminent; court held trial court did not abuse discretion in precluding evidence why defendant thought he would be beaten).

State v Miller, 215 Ariz. 40, 156 P.3d 1145, ¶¶ 2–6 (Ct. App. 2007) (defendant was charged with robbery at commercial store; after reviewing suspect descriptions and *modus operandi* of two other robberies at commercial stores, detective concluded that same person had committed those robberies; trial court permitted detective to testify that, after date that defendant was arrested, there had been no other similar robberies in the area; court held this evidence was relevant).

State v Gay, 214 Ariz. 214, 150 P.3d 787, ¶¶ 37–40 (Ct. App. 2007) (defendant contended trial court erred in precluding expert testimony on effect withdrawal from cocaine would have had on defendant during police interviews; court noted trial court found no evidence of police coercion, and without that predicate, expert proffered testimony was not relevant).

State v Ramsey, 211 Ariz. 529, 124 P.3d 756, ¶¶ 31–34 (Ct. App. 2005) (defendant was charged with continuous sexual abuse of child, which requires proof of three or more acts of sexual conduct with minor, sexual assault, or molestation of child under 14 years of age over period of 3 months or more; evidence showed defendant touched daughter's breasts, vagina, and buttocks numerous times over 22-month period; defendant contended evidence of incestuous pornographic material was not relevant; court noted that, although expert testified that interest in pornography does not establish causal relationship with propensity to commit child molestation, expert testified that "it is a link," thus evidence was relevant).

State v Jeffrey, 203 Ariz. 111, 50 P.3d 861, ¶¶ 13–16 (Ct. App. 2002) (in home invasion, defendant and cohort demanded drugs and money; when police arrived, cohort shot and killed himself; defendant was charged with four counts of kidnapping, and claimed duress, contending that, because of erratic and violent behavior of cohort, she felt compelled to assist cohort in home invasion; defendant claimed trial court erred in precluding evidence of cohort's earlier suicide attempt, contending this evidence was relevant (material) to whether she acted under duress; court held that, in light of other evidence, any error in precluding this evidence was harmless).

State v Paxson, 203 Ariz. 38, 49 P.3d 310, ¶¶ 13–15 (Ct. App. 2002) (in manslaughter prosecution, because spontaneous deployment of passenger-side air bag with its accompanying noise could be considered both unforeseeable and either abnormal or extraordinary and thus qualify as superseding cause, it was relevant (material) to whether defendant acted recklessly).

State v Paxson, 203 Ariz. 38, 49 P.3d 310, ¶¶ 13–15 (Ct. App. 2002) (defendant intended to testify that he consumed same amount of alcohol as victim while they were bar-hopping, and sought to introduce evidence of victim's blood alcohol content; because parties stipulated that defendant's blood alcohol content was 0.16, that evidence was not relevant (material)).

Guthrie v Jones (State of Arizona), 202 Ariz. 273, 43 P.3d 601, ¶¶ 12–18 (Ct. App. 2002) (because it is alcohol in blood that causes impairment, if state presents only evidence of percentage of alcohol in defendant's breath to establish presumptively that defendant was under influence of alcohol, testimony about breath-to-blood partition ratios is relevant (material) to charge under § 28–1381(A)(1)).

Guthrie v Jones (State of Arizona), 202 Ariz. 273, 43 P.3d 601, ¶¶ 10–11 (Ct. App. 2002) (although it is alcohol in blood that causes impairment, because A.R.S. § 28–1381(A)(2) makes it unlawful to drive when having an alcohol concentration of 0.08 or more, which means either blood or breath, testimony about breath-to-blood partition ratios is not relevant (material) to charge under § 28–1381(A)(2)).

Beijer v Adams, 196 Ariz. 79, 993 P.2d 1043, ¶¶ 23, 25 (Ct. App. 1999) (when defendant is charged with transportation of drugs, such evidence as smell of hair spray, presence of snack wrappers, and dirty clothes admissible so long as not tied to what other drug couriers do).

State v Wooten, 193 Ariz. 357, 972 P.2d 993, ¶¶ 45 (Ct. App. 1998) (murder victim telephoned friend and told her "Vonnie" was at her apartment "so if anything happens to me you know who was here"; this statement related to identity of person who murdered victim, and thus was relevant in the materiality sense).

State v Wooten, 193 Ariz. 357, 972 P.2d 993, ¶¶ 49, 61 (Ct. App. 1998) (defendant was charged with killing Mustaf's pregnant ex-girlfriend; jail tapes of defendant talking with Mustaf about obtaining attorney were relevant to overall theory of cooperation between defendant and Mustaf).

State v Acinelli, 191 Ariz. 66, 952 P.2d 304 (Ct. App. 1997) (although impeachment material is always relevant, defendant made no showing officers' files might contain such information, thus failed to show materiality; trial court therefore properly refused to order search of files).

State v Baldenegro, 188 Ariz. 10, 932 P.2d 275 (Ct. App. 1996) (for assisting and participating in criminal syndicate for benefit of street gang, state had to prove "Carson 13" was criminal street gang, thus evidence of criminal activity by members of "Carson 13" was relevant).

401.cr.020 For evidence to be relevant, it must satisfy two requirements: **Second,** the evidence must make the fact that is of consequence more or less probable (relevance).

* *State v Dixon*, 226 Ariz. 545, 250 P.3d 1174, ¶¶ 40–45 (2011) (defendant contended trial court erred in precluding him from introducing entries from victim's diary, which he claimed contained victim's statement she had been sexually assaulted in Europe and would fight back if sexually assaulted again; court held statements had little probative value, thus trial court did not abuse discretion in precluding them).

* *State v Machado*, 226 Ariz. 281, 246 P.3d 632, ¶ 24 (2011) (only issue in case was whether defendant or someone else committed murder; telephone caller admitted committing crime and there were strong indications defendant was not caller, thus evidence of telephone call made facts of defendant's guilt less probable and was therefore relevant).

State v Armstrong, 218 Ariz. 451, 189 P.3d 378, ¶¶ 25–27 (2008) (court concluded that details of crime made it more probable that defendant killed for pecuniary gain and that defendant committed multiple murders; details of defendant's flight from scene made it more probable that defendant killed for pecuniary gain, and evidence about blood-stained furniture corroborated testimony about location of murders, which made it more probable that defendant committed multiple murders

State v Boggs, 218 Ariz. 325, 185 P.3d 111, ¶¶ 63–66 (2008) (in mitigation, defendant claimed he suffered from mental health issues, including bipolar disorder, which caused him to have delusional involvement in militia; defendant's letters threatening harm to those who mistreated leader of militia were relevant because they rebutted suggestion that defendant's involvement in militia was benign).

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State v Greene, 192 Ariz. 431, 967 P.2d 106, ¶¶ 24–25 (1998) (because letter showed defendant's callous fascination with being convicted murderer apparently headed for death row, it was relevant in showing defendant's especially heinous or depraved state of mind).

State ex rel. Thomas v Duncan (Reagan), 216 Ariz. 260, 165 P.3d 238, ¶¶ 11–15 (Ct. App. 2007) (defendant's claim that he was fleeing from road rage situation when he ran red light and killed victim could make it more or less probable that he was not aware of and did not consciously disregarded substantial and unjustifiable risk, thus evidence was relevant).

State v Miller, 215 Ariz. 40, 156 P.3d 1145, ¶¶ 2–6 (Ct. App. 2007) (defendant was charged with robbery at commercial store; after reviewing suspect descriptions and *modus operandi* of two other robberies at commercial stores, detective concluded that same person had committed those robberies; trial court permitted detective to testify that, after date that defendant was arrested, there had been no other similar robberies in the area; court held this evidence was relevant).

State v Ramsey, 211 Ariz. 529, 124 P.3d 756, ¶¶ 31–34 (Ct. App. 2005) (defendant charged with continuous sexual abuse of child, which requires proof of three or more acts of sexual conduct with minor, sexual assault, or molestation of child under 14 years of age over period of 3 months or more; evidence showed that defendant touched daughter's breasts, vagina, and buttocks numerous times over 22-month period; defendant contended evidence of incestuous pornographic material was not relevant; court noted that, although expert testified that interest in pornography does not establish causal relationship with propensity to commit child molestation, expert testified that "it is a link," thus evidence was relevant).

State v Vandever, 211 Ariz. 206, 119 P.3d 473, ¶ 15 (Ct. App. 2005) (defendant made illegal left turn from right lane; oncoming car collided and passenger died; defendant proffered evidence that he had close and caring relationship with victim; trial court precluded that evidence; court held that issue was whether defendant acted recklessly on night in question, and that evidence of how he acted toward victim in past did not make it any more or less likely that he acted recklessly on night in question).

State v Jeffrey, 203 Ariz. 111, 50 P.3d 861, ¶¶ 13–16 (Ct. App. 2002) (in home invasion, defendant and cohort demanded drugs and money; when police arrived, cohort shot and killed himself; defendant was charged with four counts of kidnapping, and claimed duress, contending that, because of erratic and violent behavior of cohort, she felt compelled to assist cohort in home invasion; defendant claimed trial court erred in precluding evidence of cohort's earlier suicide attempt, contending this evidence was relevant (relevance) because it made it more likely she acted under duress; court held that, in light of other evidence, any error in precluding this evidence was harmless).

State v Paxson, 203 Ariz. 38, 49 P.3d 310, ¶¶ 13–18 (Ct. App. 2002) (because it was equally possible that injuries could have been caused if (1) air bag had deployed properly but unbelted passenger eluded air bag's protection or (2) air bag had deployed without warning or apparent reason, startling defendant and causing him to veer off roadway, evidence was relevant (relevance) to whether defendant acted recklessly).

Guthrie v Jones (State of Arizona), 202 Ariz. 273, 43 P.3d 601, ¶¶ 12–18 (Ct. App. 2002) (because amount of alcohol in blood causes impairment, and because such factors as gender, blood consistency, breathing patterns, body temperature, phase of alcohol metabolism, ventilation-perfusion abnormalities, ethanol in the mouth, regurgitation of alcoholic stomach contents, barometric pressure, and elevation above sea level affect breath-to-blood partition ratios, if state presents only evidence of percentage of alcohol in defendant's breath to establish presumptively defendant was under influence of alcohol, testimony about breath-to-blood partition ratios is relevant (relevance) to charge under 1381(A)(1)).

Beijer v Adams, 196 Ariz. 79, 993 P.2d 1043, ¶¶ 23, 25 (Ct. App. 1999) (when defendant is charged with transportation of drugs, such evidence as smell of hair spray, presence of snack wrappers, and dirty clothes admissible so long as not tied to what other drug couriers do).

State v Wooten, 193 Ariz. 357, 972 P.2d 993, ¶¶ 45 (Ct. App. 1998) (murder victim telephoned friend and told her "Vonnie" was at her apartment "so if anything happens to me you know who was here"; this statement made it more likely that defendant was person who murdered victim, and thus was relevant in the relevancy sense).

State v Wooten, 193 Ariz. 357, 972 P.2d 993, ¶¶ 49, 61 (Ct. App. 1998) (defendant was charged with killing Mustaf's pregnant ex-girlfriend; jail tapes of defendant talking with Mustaf about obtaining attorney were relevant to overall theory of cooperation between defendant and Mustaf).

State v Acinelli, 191 Ariz. 66, 952 P.2d 304 (Ct. App. 1997) (although impeachment material is always relevant, defendant made no showing that officers' files might contain such information, thus failed to show materiality; trial court therefore properly refused to order search of files).

State v Fillmore, 187 Ariz. 174, 927 P.2d 1303 (Ct. App. 1996) (although defendant denied being part of chop-shop operation, his statements tended to prove familiarity with enterprise and consciousness of guilt, thus they were relevant).

State v Paxton, 186 Ariz. 580, 925 P.2d 721 (Ct. App. 1996) (testimony that seat cover was off car 3 months prior to murder was relevant because it made it more likely seat cover was off when victim was shot, and remoteness went to weight and not admissibility).

401.cr.025 The standard of relevance is not particularly high.

State v Taylor, 169 Ariz. 121, 122, 124 & n.3, 817 P.2d 488, 489, 490 & n.3 (1991) (defendant, his girlfriend, and their children lived together in girlfriend's apartment; victim (girlfriend's brother) argued with defendant and told him he had 30 days to get out, which started fight; before he left, victim told defendant he would be back and would "kick his butt"; victim returned next day and threatened defendant, which again started fight; when fighting stopped, victim went to his truck, where defendant believed victim carried gun, and defendant went into apartment and came out with gun; as victim was moving toward apartment, defendant shot at him, hitting him three times, two in the back; defendant was charged with first-degree murder and convicted of second-degree murder; before trial, state moved to preclude evidence of victim's child abuse conviction for immersing child in bathtub with scalding water; trial court found 4-year-old conviction did not "shed much light" on issue of who was aggressor; court held victim's prior conviction was crime of violence, and that, because defendant knew of victim's prior conviction before shooting, that evidence was relevant because (1) it related to whether defendant was justifiably apprehensive for his own safety, and (2) it related to whether defendant was justifiably apprehensive for safety of his two children in apartment at time of shooting).

State v Oliver, 158 Ariz. 22, 28, 760 P.2d 1071, 1077 (1988) (court held that, if accused raises defense of fabrication, and if minor victim was of such tender years that jurors might infer that only way victim could testify in detail about alleged molestation was because defendant had in fact sexually abused victim, then evidence of victim's prior sexual history would be relevant to rebut such inference).

State v Miller, 215 Ariz. 40, 156 P.3d 1145, ¶¶ 2–6 (Ct. App. 2007) (defendant was charged with robbery at commercial store; after reviewing suspect descriptions and *modus operandi* of two other robberies at commercial stores, detective concluded that same person had committed those robberies; trial court permitted detective to testify that, after date that defendant was arrested, there had been no other similar robberies in the area; defendant contended this evidence lacked sufficient probative value to clear relevance threshold; court noted standard for relevance was not particularly high and held this evidence was relevant).

State v Speers, 209 Ariz. 125, 98 P.3d 560, ¶¶ 2–9, 26–31 (Ct. App. 2004) (on April 28, 2000, two children made accusations against defendant that led to his being charged with child molestation; on May 4, 2000, officers searched defendant's parents home and seized his computer, passport, and printout of airline travel information from Expedia.com. for trip to Lisbon, Portugal, May 7, 2000, and return to Phoenix August 6, 2000; based on images found in defendant's computer, he was charged with 18 counts of sexual exploitation of minor; at sexual exploitation trial, trial court admitted evidence of passport and travel information and gave flight instruction; court held that trial court did not abuse discretion in admitting "flight" evidence, but strength of this evidence was not sufficient to justify flight instruction).

State v Paxson, 203 Ariz. 38, 49 P.3d 310, ¶¶ 3–5, 13–18 (Ct. App. 2002) (defendant lost control of vehicle while leaving s-shaped switchback going 70 to 75 m.p.h. in 45 m.p.h. zone; vehicle left road and hit tree, killing passenger; defendant's BAC was .16; trial court precluded defendant from presenting expert testimony from which jurors could have inferred passenger-side air bag deployed prematurely, thus distracting defendant and causing him to veer off road; court held desired inference, although arguably tenuous, was not unreasonable, thus trial court erred in precluding this evidence).

State v Kiper, 181 Ariz. 62, 64–65, 887 P.2d 592, 594–95 (Ct. App. 1994) (defendant was charged with embezzling money from his employers; defendant alleged charges against him were false and brought by employers in retaliation for public accusations he made against them; defense witness testified on direct examination that, shortly before defendant was terminated, employer said he did not want defendant working books because, among other things, "[h]e had some things in his background that they found out about"; trial court then allowed state to introduce evidence that defendant's "background" involved criminal record; court held evidence of criminal record was relevant to rebut defendant's retaliation theory).

401.cr.030 If evidence does not tend to make the existence of any fact of consequence more or less probable, it is not relevant and therefore is not admissible.

State v Huerstel, 206 Ariz. 93, 75 P.3d 698, ¶¶ 71–73 (2003) (at trial, defendant contended he confessed because he feared reprisals from codefendant; trial court allowed state to impeach that testimony with fact that, at suppression hearing, defendant contended only that officers' actions made his statements involuntary and never mentioned anything about codefendant; court held that, because codefendant was not in any way connected with state, what codefendant did to defendant was irrelevant to issue of voluntariness, so trial court erred in allowing state to impeach defendant's trial testimony with his testimony given at suppression hearing).

State v Dann, 205 Ariz. 557, 74 P.3d 231, ¶¶ 37–39 (2003) (defendant sough to introduce evidence of drugs in victims' systems in order to discredit medical examiner's testimony about how quickly victims died; because medical examiner testified drugs in system probably did not make substantial difference in time it took victims to die, evidence of drugs in victims' systems was not relevant, thus trial court did not abuse discretion in excluding this evidence).

State v Fulminante, 193 Ariz. 485, 975 P.2d 75, ¶¶ 66–68 (1999) (because defendant was not charged with sexual assault, and there was no evidence that defendant had ever made any sexual advances

toward victim or had sexual relationship with her, evidence about swab tests taken from victim's mouth, vagina, and rectum did not relate to an issue in controversy (materiality), and thus was not relevant).

State v Fulminante, 193 Ariz. 485, 975 P.2d 75, ¶¶ 66–68 (1999) (because evidence about swab tests taken from victim's mouth, vagina, and rectum was "moderately positive" but inconclusive, it did not make any fact that is of consequence more or less probable (relevance), and thus was not relevant).

State v Doody, 187 Ariz. 363, 930 P.2d 440 (Ct. App. 1996) (Arizona has never held that substantial similarities of circumstances, interrogators, and defendants could render voluntariness of one confession relevant to issue of another confession's voluntariness).

401.cr.045 Although results of field sobriety tests (FSTs) are not admissible to quantify an accused's blood alcohol concentration, they are relevant evidence of an accused's impairment, thus an officer may testify about the manner in which defendant performed the FSTs, and may testify they administered FSTs in an attempt to determine whether defendant was in fact intoxicated and was intoxicated while driving.

State v Campoy (Cordova), 214 Ariz. 132, 149 P.3d 756, ¶¶ 6–12 (Ct. App. 2006) (defendant was charged with DUI; court held trial court abused discretion in ruling that state's witnesses, when testifying about FSTs, could not use such terms as "impairment," "sobriety," "tests," "pass/fail," "marginal," or "field sobriety test").

401.cr.050 Arizona law makes no distinction between direct and circumstantial evidence.

State v Bible, 175 Ariz. 549, 560 & n.1, 858 P.2d 1152, 1163 & n.1 (1993) (court stated guilty verdicts were primarily based on circumstantial evidence, bout noted there was no distinction between probative value of direct and circumstantial evidence).

State v Harvill, 106 Ariz. 386, 391, 476 P.2d 841, 846 (1970) (opinion of court was that probative value of direct and circumstantial evidence was intrinsically similar; therefore, there was no logically sound reason for drawing distinction in weight to be assigned each).

State v Musgrove, 223 Ariz. 164, 221 P.3d 43, ¶¶ 5–7 (Ct. App. 2009) (defendant's requested instruction drew distinction between weight assigned to circumstantial versus direct evidence by implying that greater degree of proof was required for jurors to rely on circumstantial evidence; because direct and circumstantial evidence are of intrinsically similar probative value, there is no logically sound reason for drawing distinction in weight to be assigned to each, thus trial court properly refused to give defendant's requested instruction).

401.cr.055 Although a factual stipulation is binding on the parties, it is not binding on the jurors.

State v Allen, 223 Ariz. 125, 220 P.3d 245, ¶¶ 1, 11 (2009) (defendant was charged with possession of marijuana; trial court read to jurors stipulation between defendant and state that defendant was in possession of usable amount of marijuana; court held that, when defendant stipulates to elements of an offense, unless defendant pleads guilty to the offense, trial court does not have to go through guilty plea litany).

State v Carreon, 210 Ariz. 54, 107 P.3d 900, ¶¶ 44–47 (2005) (trial court should not have instructed jurors that stipulation satisfied element of offense; defendant did not object, and court found any error was not fundamental).

State v Virgo, 190 Ariz. 349, 353, 947 P.2d 923, 927 (Ct. App. 1997) (although parties stipulated that marijuana involved weighed 35 pounds, jurors were not bound by that stipulation; because jurors did not determine weight of marijuana, trial court erred in sentencing defendant for Class 4 felony; court remanded for sentencing for Class 6 felony).

401.cr.056 Although a factual stipulation is binding on the parties, it is not binding on the jurors, thus a party may not be required by the trial court to accept a stipulation, the effect of which may not have the same effect on the jurors as the evidence that establishes the fact.

State v Lopez, 209 Ariz. 58, 97 P.3d 883, ¶¶ 4–8 (Ct. App. 2004) (state charged defendant with misconduct involving weapons for possession of firearm by prohibited possessor, which is person who has been convicted of felony and whose civil right to carry gun or firearm has not been restored; defendant offered to stipulate to fact he was prohibited possessor to prevent state from presenting to jurors evidence of his prior conviction and evidence his right to possess firearm had not been restored; state rejected offer and trial court refused to force state to accept stipulation; court held that, because prior conviction and non-restoration of civil right were elements of offense, defendant had no right to preclude jurors from receiving evidence of those matters).

State v Newnom, 208 Ariz. 507, 95 P.3d 950, ¶¶ 2–5 (Ct. App. 2004) (defendant was charged with aggravated domestic violence; defendant offered to stipulate to existence of prior convictions to avoid having jurors receive that information; state rejected offer and trial court refused to force state to accept stipulation; court held that prior convictions are elements of aggravated domestic violence under A.R.S. § 13–3601.02, thus defendant was not entitled to bifurcated trial on issue of prior convictions and had no right to preclude jurors from receiving evidence of prior convictions).

401.cr.060 Exclusion of irrelevant evidence does not deny a defendant the Sixth Amendment right to present evidence.

State v Davis, 205 Ariz. 174, 68 P.3d 127, ¶ 33 (Ct. App. 2003) (victim left with defendant; 3 days later, defendant told girlfriend he had killed victim; defendant then confessed to police and took them to location of victim's body; at trial, defendant sought to introduce following evidence that he contended showed another person committed crime: night of murder, witness had seen M.H. and T.J. acting suspiciously and with injuries on their arms, and said victim had told her she was pregnant with M.H.'s child; another witness said he had overheard M.H. and T.J. making incriminating statements about their role in victim's death; suitcase characterized as portable methamphetamine lab had been found near where victim was killed, and when M.H. was arrested 1 month after murder, he had portable methamphetamine lab in car; court excluded this evidence as not relevant; on appeal, defendant contended this violated his constitutional right to present evidence; court held exclusion of irrelevant evidence does not violate defendant's constitutional rights).

State v Wooten, 193 Ariz. 357, 972 P.2d 993, ¶¶ 31–32 (Ct. App. 1998) (trial court granted state's motion to preclude evidence that someone other than defendant killed victim; court held this rule was essentially application of rule excluding evidence that is not relevant, and did not violate defendant's constitutional right to present evidence).

401.cr.070 Negative evidence is not *per se* inadmissible, but is admissible only if there is a showing that evidence of the event would have been apparent if it had happened.

State v Miller, 215 Ariz. 40, 156 P.3d 1145, ¶¶ 2–6 (Ct. App. 2007) (defendant was charged with robbery at commercial store; after reviewing suspect descriptions and *modus operandi* of two other robberies at commercial stores, detective concluded that same person had committed those robberies; trial court permitted detective to testify that, after date that defendant was arrested, there had been no other similar robberies in the area; court held this evidence was relevant).

401.cr.100 Evidence that a party did not call a certain person as a witness (negative evidence) is relevant if (1) the person was under the exclusive control of that party, (2) the party would be expected to produce the person if that person's testimony would be favorable to that party, and (3) the person had exclusive knowledge of the existence or nonexistence of certain facts.

State v Conroy, 114 Ariz. 499, 500–01, 562 P.2d 379, 380–81 (1977) (because witness was available only to defendant, prosecutor could comment on defendant's failure to call that witness).

State v Cozad, 113 Ariz. 437, 439, 556 P.2d 312, 314 (1976) (because person was within defendant's control and presumably would have given testimony favorable to defendant, state was permitted to comment on defendant's failure to call that person as witness).

* *State v Abdi*, 226 Ariz. 361, 248 P.3d 209, ¶¶ 19–20 (Ct. App. 2011) (court held that, for jury instruction that neither side is required to call as witnesses all persons who may have been present at the time of the events in question or who may have some knowledge of those events or to produce all objects or documents mentioned or suggested by the evidence, jurors would take that instruction to mean state need not produce every scrap of evidence available).

State v Herrera, 203 Ariz. 131, 51 P.3d 353, ¶¶ 22–24 (Ct. App. 2002) (trial court instructed jurors: "Neither side is required to call as witnesses all persons who may have been present at an event disclosed by the evidence or who may appear to have some knowledge of these events or to produce all documents or evidence suggested by the evidence"; court quoted other instructions informing jurors that state had burden of proof, defendant was not required to prove innocence, and defendant was not required to present any evidence; court held trial court's instruction did not shift burden of proof to defendant, and that it was not error to give instruction).

State v Corona, 188 Ariz. 85, 89–90, 932 P.2d 1356, 1360–61 (Ct. App. 1997) (because there was no evidence presented that defendant had retained an expert, prosecutor should not have commented on defendant's failure to call an expert).

State v Jerdee, 154 Ariz. 414, 417–18, 743 P.2d 10, 13–14 (Ct. App. 1987) (because officer was equally available to both sides, once defendant's attorney argued jurors should construe state's failure to call that officer against state, prosecutor was permitted to argue that officer was equally available to both sides, and thus jurors could assume his testimony would not have added anything to either side).

State v Filipov, 118 Ariz. 319, 324, 576 P.2d 507, 512 (Ct. App. 1977) (because state failed to show that person who took property to defendant would have given testimony favorable to defendant, state erred in arguing inferences from defendant's failure to call that person as witness).

401.cr.115 In determining whether to admit evidence that another person may have committed the crime, the court must assess the effect this evidence would have on the defendant's culpability; if the evidence merely casts suspicion or speculation about a class of persons and does not show that another person had the motive and opportunity to commit the crime, this would not tend to create a reasonable doubt about the defendant's guilt, so that evidence would not be relevant and thus not admissible.

State v Davolt, 207 Ariz. 191, 84 P.3d 456, ¶¶ 81–83 (2004) (court held that evidence that victim was unpopular did not tend to create reasonable doubt about defendant's guilt).

State v Dann, 205 Ariz. 557, 74 P.3d 231, ¶¶ 30–36 (2003) (defendant sought to introduce evidence that, because victim took and sold drugs, some person involved in notoriously violent drug scene might have killed victim; trial court stated that any connection between drug trade and murders was "reach"; court stated its review would have been easier if trial court had stated its conclusion in terms of applicable legal standard, but because trial court discussion showed it understood need to determine relevance of evidence and thus was guided by applicable legal standard, court held that, whether trial court concluded evidence was not relevant under Rule 401 or tenuous and speculative nature of evidence caused it to fail Rule 403 test, trial court did not abuse discretion in precluding this evidence).

State v Tucker, 205 Ariz. 157, 68 P.3d 110, ¶¶ 28–32 (2003) (defendant wanted to introduce following evidence to show P.K. might be the killer: P.K. new all three victims; he did not like victim R.M.; he did not like blacks (defendant was black; victims R.M. and Am.M. were black-white bi-racial); he had

spoken derogatorily about R.M. in particular and blacks in general; he had access to guns; he gave defendant one of his three sets of handcuffs; and he pled guilty to another murder that occurred 2 months before present murders; court stated this evidence only minimally indicated P.K. had motive, but there was no evidence showing P.K. had opportunity to kill the victims; court stated, "Without some evidence tending to connect P.K. to the crime scene, Tucker's speculation that P.K. might have been the killer is arguably irrelevant, and therefore would likely have been found inadmissible").

State v Blakley, 204 Ariz. 429, 65 P.3d 77, ¶¶ 63–67 (2003) (defendant charged with first-degree murder and sexual assault in the death of his girl-friend's 16-month-old daughter, Shelby; defendant wanted to introduce following evidence about his cousin Fred: (1) when Fred was 13 to 15 years old, he repeatedly molested Keri, his 6- or 7-year-old female cousin, for which he was adjudicated delinquent in juvenile court; (2) Fred had telephoned Keri in 1999 and yelled at her; (3) Fred had fight with Keri's brother; (4) Fred had history of cruelty to animals; (5) after newspaper article indicated that cousin of defendant may have caused Shelby's death, Keri began receiving hang-up phone calls; (6) when Fred was young, he had been molested; (7) Fred was beaten by his father; (8) Fred's father died of AIDS; and (9) Fred had engaged in self-mutilation; court noted defendant never attempted to show Fred was at scene of crime on day of murder and noted that molestation committed by Fred was not similar to sexual assault committed on Shelby, thus evidence was not relevant and thus not admissible).

State v Phillips, 202 Ariz. 427, 46 P.3d 1048, ¶¶ 25–28 (2002) (African-American man and white or Hispanic man with bandana on face robbed bar while armed with handgun and sawed-off rifle; 11 days later, defendant and African-American man robbed another bar while armed with handgun and sawed-off rifle; 5 days later, defendant and African-American man robbed another bar while armed with handgun and sawed-off rifle; defendant and codefendant (who was African-American) were charged with all three robberies; defendant sought to introduce evidence that (1) African-American man other than codefendant confessed to committing first robbery, (2) that person had history of robbery and criminal behavior and carried gun, (3) witness identified this other person with white man at bar night before robbery, and (4) police searched this person's apartment after first robbery and found empty .38 caliber handgun box; court noted that, even if this evidence showed other person rather than codefendant committed robberies, this would not exculpate defendant, thus trial court properly precluded this evidence).

State v Ring, 200 Ariz. 267, 25 P.3d 1139, ¶¶ 27–32 (2001) (although evidence was relevant to show another person was involved in planning crimes and thus implicated that other person, evidence did not exculpate defendant in planning and commission of crimes, thus trial court did not err in precluding evidence).

State v Tankersley, 191 Ariz. 359, 956 P.2d 486, ¶¶ 38–40 (1998) (only similarities were both victims were about same age and were strangled, and because victim in crime charged showed bite marks, had been sexually assaulted, and strangled with ligature, but other crime did not have these features, other crime was not sufficiently similar to be admissible).

State v Jones, 188 Ariz. 388, 937 P.2d 310 (1997) (evidence that, 90 days before the murder of the 4-year-old victim, victim's mother had given victim's older sister "hard" spanking did not have any tendency to connect victim's mother with sexual abuse and murder of victim).

State v Soto-Fong, 187 Ariz. 186, 928 P.2d 610 (1996) (because evidence that another person threatened victim prior to murder did not identify that person, and even if it did implicate particular person, there was no showing that person was connected to crime, trial court properly precluded this evidence).

State v Davis, 205 Ariz. 174, 68 P.3d 127, ¶¶ 17–31 (Ct. App. 2003) (victim left with defendant; 3 days later, defendant told girlfriend he had killed victim; defendant then confessed to police and took them to location of victim's body; at trial, defendant sought to introduce following evidence that he

contended showed another person committed crime: night of murder, witness said victim had told her she was pregnant with M.H.'s child, had seen M.H. and T.J. acting suspiciously and with injuries on their arms; another witness said he had overheard M.H. and T.J. making incriminating statements about their role in victim's death; suitcase characterized as portable methamphetamine lab had been found near where victim was killed, and when M.H. was arrested 1 month after murder, he had portable methamphetamine lab in car; court held this evidence was not relevant because it did not have tendency to create reasonable doubt about defendant's guilt for following reasons: many transients frequented murder site and defendant himself told police methamphetamine lab was there night of murder; state had obtained victim's medical records, which showed she tested negative for pregnancy; there was no evidence either M.H. or T.J. had been near murder site on night of murder; and there was no evidence victim had struggled prior to death).

State v Wooten, 193 Ariz. 357, 972 P.2d 993, ¶¶ 29–30 (Ct. App. 1998) (trial court granted state's motion to preclude evidence that someone other than defendant killed victim; defendant conceded much of evidence in question was admitted at trial, and failed to establish what evidence he was precluded from presenting).

401.cr.120 In determining whether to admit evidence that another person may have committed the crime, the trial court must assess the effect this evidence would have on the defendant's culpability; if evidence shows that another person had the motive and opportunity to commit the crime, this would tend to create a reasonable doubt about the defendant's guilt, which would make the evidence relevant and the trial court should admit it.

* *State v Machado*, 226 Ariz. 281, 246 P.3d 632, ¶ 16 (2011) (court held trial court erred in excluding evidence indicating someone other than defendant killed victim).

State v Prion, 203 Ariz. 157, 52 P.3d 189, ¶¶ 19–27 (2002) (trial court erred in not admitting following evidence about another person: That person and victim were co-workers at restaurant; person had been disciplined for sexually harassing female co-workers at work, but tried to hide that fact from police; he had attempted to rape female co-worker at his apartment after work; he had violent temper and bit woman's nose during fight; he was also working in nightclub where victim was last seen on night victim disappeared, but he denied that fact when police questioned him; when doorman let victim into nightclub night she disappeared, she had specifically asked to see that person; he rented new apartment day victim disappeared, and that apartment was near both nightclub where victim was last seen and where victim's car was found; and when person appeared for work at restaurant morning after victim disappeared, he was so disheveled and disoriented that he was fired).

State v Gibson, 202 Ariz. 321, 44 P.3d 1001, ¶¶ 9–16 (2002) (evidence showed defendant, victim, and two other individuals were from same small Arizona town; these two individuals had been with victim shortly before murder, both gave alibis that could not be corroborated, both knew substantial information about crime that had not been made known to public; one of them had mental problems, and there was alleged sexual relationship between his wife and victim; trial court used "inherent tendency" test and excluded this evidence; court rejected "inherent tendency" test, held this type of evidence should be analyzed under Rules 401, 402, and 403, and reversed conviction).

* *State v Bigger*, 227 Ariz. 196, 254 P.3d 1142, ¶¶ 40–43 (Ct. App. 2011) (defendant contended trial court abused discretion in excluding evidence that victim's wife murdered victim: (1) victim had recently increased amount of life insurance for which wife was sole beneficiary; (2) wife was not excluded as contributor to DNA found in victim's vehicle; and (3) wife had acted suspiciously when officers came to her home night victim was murdered; court stated proposed evidence constituted no more than vague grounds of suspicion and was trivial once placed in context, and thus held evidence did not create reasonable doubt about defendant's guilt, so trial court did not abuse discretion in precluding that evidence).

* *State v Bigger*, 227 Ariz. 196, 254 P.3d 1142, ¶¶ 40–46 (Ct. App. 2011) (defendant contended trial court abused discretion in excluding evidence that co-defendant dentist's friend's husband, D.H., murdered victim: (1) co-workers saw D.H. cleaning and discarding "bloody knife," (2) D.H.'s whereabouts were unknown night of murder, and (3) D.H. asked co-worker if she would ever kill for money; court noted that, after initial uncertainty, co-worker K.E. was certain D.H. cleaned and discarded "bloody knife" months before murder, and question about killing for money was hearsay and did not come under any hearsay exception, and was not more than hypothetical question, and thus held trial court did not abuse discretion in precluding that evidence).

State v Machado, 224 Ariz. 343, 230 P.3d 1158, ¶¶ 25–56 (Ct. App. 2010) (court concluded **trial court erred in excluding** following evidence: (1) some time within 9 months prior to victim's murder, J. kidnapped his girlfriend and her sister by pointing older looking revolver at them; (2) 1 year after victim's murder J. was charged with aggravated assault for "road rage" incident when he pointed revolver at another driver and passenger; (3) 5 years after victim's murder J. was convicted of assault for pointing gun a woman, threatening to kill her with it, and telling her he had killed before; (4) almost 1 month after victim's murder, victim's mother received anonymous telephone call from person saying he did not mean to kill victim; (5) J's general access to weapons; (6) letter J. sent to girlfriend referring to victim and expressing desire to avenge her death; (7) girlfriend's testimony that J. talked about victim and referred to her as his "angel"; (8) that police investigated and obtained search warrant for J.; court concluded **trial court did not err in excluding** following evidence: (1) several other incidents reported by succession of J's girlfriends that J. had been threatening, violent, and abusive within several years of victim's murder, including holding knife to one girlfriend's neck; (2) J's school assignment wherein J. described the "perfect murder"; (3) J's drug and alcohol use; (4) J's parents' concerns about J's mental health; (5) contents and accompanying affidavit for search warrant for J.), *aff'd*, 226 Ariz. 281, 246 P.3d 632 (2011).

401.cr.123 In determining whether to admit evidence that another person may have committed the crime, the trial court should not analyze the admissibility of the evidence under Rule 404(b).

State v Machado, 226 Ariz. 281, 246 P.3d 632, ¶¶ 10–16 (2011) (court followed reasoning from federal courts and other state courts).

401.cr.125 Even if evidence that another person may have committed the crime tends to create a reasonable doubt about the defendant's guilt and thus is relevant, the trial court may still exclude such evidence under Rule 403.

State v Dann, 205 Ariz. 557, 74 P.3d 231, ¶¶ 30–36 (2003) (defendant sought to introduce evidence that, because victim took and sold drugs, some person involved in notoriously violent drug scene might have killed victim; trial court stated that any connection between drug trade and murders was "reach"; court stated its review would have been easier if trial court had stated its conclusion in terms of applicable legal standard, but because trial court discussion showed it understood need to determine relevance of evidence and thus was guided by applicable legal standard, court held that, whether trial court concluded evidence was not relevant under Rule 401 or tenuous and speculative nature of evidence caused it to fail Rule 403 test, trial court did not abuse discretion in precluding this evidence).

State v Gibson, 202 Ariz. 321, 44 P.3d 1001, ¶¶ 12, 17 (2002) (court held admission of evidence that some other person committed crime is governed by Rules 401, 402, and 403, and included general discussion of Rule 403).

State v Tankersley, 191 Ariz. 359, 956 P.2d 486, ¶ 41 (1998) (because no charges were ever brought against the other person for the murder defendant claimed was similar to the charged murder, interdiction of that evidence would have resulted in trial within trial, thus trial court did not abuse discretion in excluding it).

State v Tankersley, 191 Ariz. 359, 956 P.2d 486, ¶ 42 (1998) (because the sexual assault that defendant claimed was similar was 10 years old, trial court did not abuse discretion in concluding it was too remote in time and not sufficiently similar).

401.cr.205 Evidence that a person tried to influence a witness or had some ulterior motive may be relevant.

State v Styers, 177 Ariz. 104, 112–13, 865 P.2d 765, 773–74 (1993) (evidence supported instruction, and therefore trial court properly instructed jurors that, if they found that defendant attempted to persuade witness to testify falsely or tried to fabricate evidence, they may consider that as circumstance tending to show consciousness of guilt).

State v Allen, 140 Ariz. 412, 413–14, 682 P.2d 417, 418–19 (1984) (court admitted in evidence letter defendant wrote to girlfriend in which he asked whether girlfriend and another would testify falsely for him; court held evidence was relevant and admissible, and it did not matter whether testimony was sought to be used for impeachment or substantive purposes).

State v Robles, 135 Ariz. 92, 93–94, 659 P.2d 645, 646–47 (1983) (in opening statement, prosecutor told jurors that victim would testify that defendant told him to stab another witness, who was going to testify that defendant confessed to murder; court held evidence of defendant's threats against witness was admissible).

State v Uriarte, 194 Ariz. 275, 981 P.2d 575, ¶¶ 20–23 (Ct. App. 1998) (victim's mother testified that defendant's wife said to her, "If my husband spends one day in jail because of you guys, you're going to be dead"; court held threat was probative of wife's bias, and was properly admitted; court further held "Rule 608(b) neither blocks an inquiry about conduct which is probative of bias nor precludes introduction of extrinsic evidence to prove such conduct").

State v Gertz, 186 Ariz. 38, 41–42, 918 P.2d 1056, 1059–60 (Ct. App. 1995) (defendant asked victim whether he was filing civil lawsuit against defendant, and victim said "we haven't talked about filing a lawsuit or anything"; after closing arguments but before jurors began deliberating and outside of presence of jurors, process server delivered summons and complaint naming defendant as defendant in civil damages suit brought by victim; defendant sought to reopen for limited purpose of informing that victim had in fact brought suit against defendant, but trial court denied request; court held evidence was relevant to show motive and bias and show have been admitted, and was not impeachment on collateral matter and thus was not precluded by Rule 608(b)).

State v Updike, 151 Ariz. 433, 433–34, 728 P.2d 303, 303–04 (Ct. App. 1986) (defendant's statement to co-participant to "keep your mouth shut and nobody will get in trouble" was effort to get co-participant to assert his privilege against self-incrimination in order to protect defendant, and as such was obstruction of justice and admission that defendant was conscious of guilt).

401.cr.270 Evidence of prior sexual conduct between the victim and persons other than the defendant is generally not admissible.

State v Herrera, 226 Ariz. 59, 243 P.3d 1041, ¶¶ 29–33 (Ct. App. 2010) (defendant was charged with committing sexual acts on 14-year-old step-daughter; court held trial court did not abuse discretion in precluding evidence that victim had consensual sexual relationship with female friend and had sexual intercourse with boyfriend).

401.cr.285 If the defendant raises a defense of mis-perception, and the victim is of such a young age or has been subjected to events that may have caused the victim to mis-perceive what happened, evidence of these other events is relevant.

State v Lujan, 192 Ariz. 448, 967 P.2d 123, ¶¶ 8–9, 11–13, 16, 20–21 (1998) (because defendant admitted playing with victim in swimming pool but denied ever touching victim's private parts, defendant was entitled to show that victim was hypersensitive to interaction with adult males and thus may have mis-perceived her physical contact with defendant, and thus should have been allowed to introduce expert testimony about how victim's nearly contemporaneous sexual abuse by others may have caused victim to mis-perceive defendant's actions).

401.cr.290 Expert testimony about "child sexual abuse accommodation syndrome" (CSAAS) is relevant and admissible in a child molestation case.

State v Curry, 187 Ariz. 623, 931 P.2d 1133 (Ct. App. 1996) (expert witness testified about generally shared characteristics of child sexual abuse victims, explaining such phenomena as secrecy, helplessness, coping mechanisms, response to abuse, and "script memory," described familiar patterns of disclosure by victims to others, and described common techniques used by perpetrators to keep victims from disclosing abuse to others).

401.cr.310 Expert testimony about "battered woman syndrome" is not admissible to show that defendant could not form the necessary intent to commit the crime charged.

State v Mott, 187 Ariz. 536, 931 P.2d 1046 (1997) (defendant charged with child abuse for failure to seek treatment after her child was injured while in care of boyfriend; defendant wanted to introduce evidence that her condition as battered woman caused her to form "traumatic bond" with boyfriend, caused her to feel hopeless and depressed and that she could not escape, interfered with her ability to sense danger and protect others, and caused her to believe what her boyfriend told her and to lie to protect him, all of which would preclude her from forming necessary intent; court held this was merely another form of diminished capacity, which legislature has refused to adopt, thus evidence was not admissible).

401.cr.340 If a party offers an experiment or model as an attempted replication of the litigated event, the conditions in the experiment or the model must substantially match the circumstances surrounding that event; if the experiment or model is not a purported replication but is more in the nature of a demonstration, it is appropriately admitted if it fairly illustrates a disputed trait or characteristic.

State v Nordstrom, 200 Ariz. 229, 25 P.3d 717, ¶¶ 69–70 (2001) (defendant contended his brother committed murders and could have defeated electronic bracelet monitoring system; over weekend before trial, state conducted tests to see if it was possible to defeat electronic bracelet monitoring system used by defendant's brother; because state conducted tests under conditions similar to those of defendant's brother, and because defendant had opportunity to question methodology of tests and meaning of results, evidence of testing was admissible).

* *State v King*, 226 Ariz. 253, 245 P.3d 938, ¶¶ 6–7 (Ct. App. 2011) (during videotaped police interview and during trial testimony, witness was asked how hard defendant had kicked victim and then was asked to use chair to demonstrate how hard kick was; court held kicking of chairs was not purported replication and was instead more in nature of demonstration, thus conditions did not have to be similar and instead only had to illustrate fairly disputed trait or characteristic).

401.cr.350 A photograph is admissible if relevant to an expressly or impliedly contested issue.

State v Snelling, 225 Ariz. 182, 236 P.3d 409, ¶¶ 15–17 (2010) (although autopsy photographs of victim dead for 4 days showed skin slippage and discoloration, each photograph conveyed highly relevant evidence about crime: cause and manner of victim's death and her body's state of decomposition, and medical examiner used them to explain injuries and assist jurors in understanding his testimony; court held trial court did not abuse discretion in admitting photographs after expressly finding their probative value was not substantially outweighed by any prejudicial effect).

State v Villalobos, 225 Ariz. 74, 235 P.3d 227, ¶¶ 21–22 (2010) (defendant was charged with first-degree murder and child abuse as result of death of his girlfriend's daughter; defendant contended trial court erred in admitting autopsy photographs showing various internal injuries; court held photographs were relevant to prove cause of death and extent of abuse and to rebut defendant's argument that victim seemed fine after he beat her and his suggestion she died because of lack of prompt medical care).

State v Lynch, 225 Ariz. 27, 234 P.3d 595, ¶¶ 29–31 (2010) (photographs depicted blood spatter and blood pools in relation to victim's body, and thus corroborated opinion of state's expert that person who slit victim's throat stood behind him).

State v Lynch, 225 Ariz. 27, 234 P.3d 595, ¶¶ 51–53 (2010) (during aggravation phase, trial court admitted three autopsy photographs depicting close-ups of victim's neck wounds (cut jugular vein; completely severed carotid artery; victim's torso covered in dried blood and head tilted back exposing severed larynx); court held these were properly admitted to illustrate testimony of medical examiner).

State v Kiles, 222 Ariz. 25, 213 P.3d 174, ¶¶ 34–38 (2009) (defendant contended trial court erred in admitting various photographs; because defendant in his opening brief specified his objection to only two photographs, court held defendant waived any argument for the other photographs; court noted that photograph of adult victim showed her broken arm, which medical testimony explained was defensive wound, and thus held photograph was relevant to issue of whether defendant committed first-degree murder; because jurors did not choose death sentence for killing of child victim, court held defendant was not prejudiced by admission of photograph showing body of child victim).

State v Dann, 220 Ariz. 351, 207 P.3d 604, ¶¶ 44–47 (2009) (defendant contended trial court denied him right to fair trial when it admitted autopsy photographs, which he claimed were gruesome; court held photographs were relevant because they gave jurors clear picture of temporal, spatial, and motivational relationship of three killings, thus trial court did not abuse discretion in admitting photographs).

State v Cruz, 218 Ariz. 149, 181 P.3d 196, ¶¶ 123–127 (2008) (defendant challenged admission of autopsy photograph; court held photograph was relevant to assist jurors because fact and cause of death are always relevant in murder prosecution).

State v Pandeli, 215 Ariz. 514, 161 P.3d 557, ¶ 24 (2007) (state introduced photographs to establish that killing was heinous and depraved).

State v Pandeli, 215 Ariz. 514, 161 P.3d 557, ¶¶ 27–29 (2007) (photograph of Confederate flag used as window covering on van was relevant because victim's blood was on flag; photograph of van showing Confederate flag was relevant because killing took place in van; photograph of defendant, in which he was shirtless and showed tattoos, was relevant because it showed defendant's physical condition at time of murder and showed no visible injuries or defensive wounds; court noted probative value was minimal because defendant stipulated to existence of blood on flag, that murder took place in van, and that defendant had no injuries; court also noted prejudicial effect was minimal because defendant stipulated to blood on "Confederate flag taken from the rear side window" of defendant's van, and that it was not possible to read what tattoos said).

State v Morris, 215 Ariz. 324, 160 P.3d 203, ¶¶ 68–71 (2007) (because photographs provided information about time and manner of death or otherwise corroborated state's case, they were relevant).

State v Hampton, 213 Ariz. 167, 140 P.3d 950, ¶¶ 16–20 (2006) (court stated that photographs of victim are relevant in murder case because fact and cause of death are always relevant in murder prosecution, and may also be relevant to show *corpus delicti,* to identify victim, to show fatal injury, to determine atrociousness of crime, to corroborate other witnesses, to illustrate other testimony, or to corroborate state's theory of crime).

State v Hampton, 213 Ariz. 167, 140 P.3d 950, ¶¶ 3, 16–20 (2006) (defendant was upset at victim because victim had identified him to police; state's theory of case was that defendant went to victim's room, turned up volume on CD player, then shot victim in forehead, killing him, then as defendant was about to leave house, he went back into bedroom where victim's girlfriend was sleeping, and when she told him to get out, he shot her in head, killing her and her unborn child; defendant contended that, because he did not deny that murder took place, only that he was not the killer, photographs of victims were not relevant; court stated photographs of adults showed placement of victim's injuries and thus were relevant to corroborate testimony of state's witnesses, and although photograph of fetus was unsettling, it was relevant to fetal manslaughter offense and multiple homicides aggravating circumstance, thus trial court did not abuse discretion in admitting photographs).

State v Anderson, 210 Ariz. 327, 111 P.3d 369, ¶ 40 (2005) (court stated that "any photograph of the deceased in any murder case is relevant because the fact and cause of death are always relevant in a murder prosecution").

State v Anderson, 210 Ariz. 327, 111 P.3d 369, ¶¶ 37–42 (2005) (photograph of victim with knife inserted through ear and emerging through nose showed an attacker would have had great difficulty acting alone, and thus was relevant to rebut defendant's claim that he did not participate in killing).

State v Phillips, 202 Ariz. 427, 46 P.3d 1048, ¶¶ 29–31 (2002) (African-American man and white or Hispanic man with bandana on face robbed bar while armed with handgun and sawed-off rifle; trial court admitted photograph of defendant holding two handguns and wearing bandana; because one gun in photograph matched description of gun used in robbery, photograph was relevant).

State v Cañez, 202 Ariz. 133, 42 P.3d 564, ¶¶ 67 (2002) (photograph (ex. 19) depicted what witness saw upon entering house; court found photographs were not gruesome or inflammatory, and stated photograph had little probative value and little prejudicial effect, so trial court did not abuse discretion in admitting photograph).

State v Cañez, 202 Ariz. 133, 42 P.3d 564, ¶¶ 68 (2002) (photograph (ex. 75) depicted what officer saw upon entering house; court found photographs were not inflammatory or gruesome, and held that, to extent officer testified he did not remember body being in position depicted in photograph, that went to weight of photograph and not its admissibility).

State v Cañez, 202 Ariz. 133, 42 P.3d 564, ¶¶ 69 (2002) (photographs (ex. 32–34) were of victim during autopsy; defendant conceded photographs were relevant, but claimed they were unduly inflammatory; court found photographs were not gruesome or inflammatory).

State v Bocharski, 200 Ariz. 50, 22 P.3d 43, ¶¶ 21–25 (2001) (court stated photographs of victim's body were relevant, although noting that, when defendant does not contest certain issues, probative value may be minimal, but held trial court did not err in admitting Exhibits 42–45).

State v Bocharski, 200 Ariz. 50, 22 P.3d 43, ¶¶ 25–27 (2001) (court noted prosecutor argued photographs were relevant because they showed angles and depths of penetrating wounds, but prosecutor never questioned any witness about angles and depths of wounds; court concluded that photographs met bare minimum standard of relevance, but that probative value was substantially outweighed by danger of unfair prejudice, thus trial court should have excluded Exhibits 46–47, but found any error to be harmless).

State v Doerr, 193 Ariz. 56, 969 P.2d 1168, ¶¶ 43–44 (1998) (photographs of crime scene corroborated, explained, and illustrated testimony about crime scene; autopsy photographs corroborated, explained, and illustrated testimony of medical examiner).

State v Trostle, 191 Ariz. 4, 951 P.2d 869 (1997) (photograph of body was relevant because it corroborated defendant's detailed account of how he murdered victim).

State v Rienhardt, 190 Ariz. 579, 951 P.2d 454 (1997) (photographs of victim's injuries corroborated testimony of state's key witness).

State v Lee(II), 189 Ariz. 608, 944 P.2d 1222 (1997) (four autopsy photographs and three blood-spatter photographs were relevant to show location, size, and shape of wounds, and sequence of shots, and were not unfairly prejudicial).

State v Hughes, 189 Ariz. 62, 938 P.2d 457 (1997) (photograph was relevant because it showed placement of stick within noose, as well as length of the rope, and one issue was whether victim had been bound at hands or feet and whether stick was used as torture device).

State v Thornton, 187 Ariz. 325, 929 P.2d 676 (1996) (videotape showed walk-through of victim's entire house and illustrated testimony of officer, thus it was relevant).

State v Wagner, 194 Ariz. 1, 976 P.2d 250, ¶¶ 40–41 (Ct. App. 1998), *vac'd in part & aff'd in part,* 194 Ariz. 310, 982 P.2d 270 (1999) (court agreed with trial court that three photographs showing victim's (1) face with traces of blood and assorted injuries, (2) chest wound with gunpowder residue, and (3) shoulder and ear with powder burn marks were relevant because they corroborated witness's testimony that defendant struck victim before shooting her and helped explain medical examiner's testimony about powder burn marks).

401.cr.360 The fact that there is no dispute about certain elements or that the defendant is willing to stipulate to them, such as the identity of the victim, or the time, mode, manner, and cause of the injury, does not make a photograph inadmissible.

State v Pandeli, 215 Ariz. 514, 161 P.3d 557, ¶¶ 24–25 (2007) (defendant contended trial court should not have admitted photographs because he was willing to stipulate to facts of murder; court noted state was still required to prove every element of crime, and this burden of proof was not relieved by defendant's tactical decision not to contest certain elements; moreover, although defendant was willing to admit to having killed victim, he did not offer to stipulate killing was heinous and depraved).

State v Hampton, 213 Ariz. 167, 140 P.3d 950, ¶¶ 16–20 (2006) (court stated, even if defendant does not contest certain issues, photographs are still admissible if relevant because burden to prove every element of offense is not relieved by defendant's tactical decision not to contest element of offense).

State v Dawlt, 207 Ariz. 191, 84 P.3d 456, ¶¶ 60–62 (2004) (defendant contended trial court abused discretion in admitting autopsy photographs because identity and extent of victims' injuries were not contested; court stated that fact and cause of death is always relevant in murder case; court held photographs were relevant to time and manner of victims' death, thus trial court did not abuse discretion in admitting photographs).

State v Cañez, 202 Ariz. 133, 42 P.3d 564, ¶¶ 65–66 (2002) (court stated that, because state must carry its burden of proof on uncontested issues as well as contested one, fact that photographs were probative only of matters not in dispute did not make them irrelevant).

State v Rienhardt, 190 Ariz. 579, 951 P.2d 454 (1997) (photographs of victim's injuries corroborated testimony of state's key witness; fact that defendant did not dispute cause of death did not make them any less relevant).

State v Thornton, 187 Ariz. 325, 929 P.2d 676 (1996) (defendant's willingness to stipulate to identification of victim did not make autopsy photograph irrelevant because it showed how victim was killed and that shot was fired from approximately 5 inches away).

401.cr.365 If a photograph has little bearing on any expressly or impliedly contested issue, or if a photograph is merely duplicative to other photographs, its relevance may be limited, and thus if that photograph is prejudicial, its probative value may be substantially outweighed by the danger of unfair prejudice.

State v Hampton, 213 Ariz. 167, 140 P.3d 950, ¶¶ 16–20 (2006) (court stated that photographs must not be introduced for sole purpose of inflaming jurors).

State v Davolt, 207 Ariz. 191, 84 P.3d 456, ¶¶ 63–64 (2004) (defendant contended trial court abused discretion in admitting photographs and videotape of crime scene because he did not contest identity of victims and fact that murders had occurred; court held probative value was minimal and photographs and videotape were highly inflammatory, thus trial court abused discretion in admitting them, but any error was harmless in light of other evidence).

State v Jones, 203 Ariz. 1, 49 P.3d 273, ¶¶ 28–33 (2002) (in trial for murder of 12-year-old victim, trial court admitted following photographs of victim: close-up of buttocks showing injuries to anus and hemorrhaging; lower half of face and torso showing lacerations, puncture wounds, and training bra pushed over chest; close-up of torso showing lacerations and puncture wounds to middle chest and throat; torso with ruler showing scale of wounds; close-up of pelvic region showing vaginal injury and hemorrhaging; shaved head showing multiple deep wounds to frontal lobe; skull with skin removed showing large frontal impact hole and bone fragments; because defendant did not challenge manner of death or injuries and only defense was identity of perpetrator, court stated that, although photographs might be technically relevant, there was nothing in them that could not have been made clear through testimony and diagrams, thus photographs were cumulative; because of other evidence of guilt and jurors' acquittal on one count, court held that any error would be harmless, but stated that cumulative, non-essential, and gruesome photographs should not be admitted in evidence).

State v Bocharski, 200 Ariz. 50, 22 P.3d 43, ¶¶ 21–25 (2001) (court stated photographs of body were relevant; court noted that, when defendant does not contest certain issues, probative value may be minimal, but held trial court did not err in admitting Exhibits 42–45).

State v Bocharski, 200 Ariz. 50, 22 P.3d 43, ¶¶ 25–27 (2001) (court noted prosecutor argued photographs were relevant because they showed angles and depths of penetrating wounds, but prosecutor never questioned any witness about angles and depths of wounds; court concluded that photographs met bare minimum standard of relevance, but that probative value was substantially outweighed by danger of unfair prejudice, thus trial court should have excluded Exhibits 46–47, but found any error to be harmless).

State v Anderson, 197 Ariz. 314, 4 P.3d 369, ¶ 30 (2000) (court concluded several photographs were cumulative to other less inflammatory photographs).

State v Doerr, 193 Ariz. 56, 969 P.2d 1168, ¶¶ 29, 31–32 (1998) (court held that enlarged photograph of victim when alive was not relevant, and there was danger such photograph would cause sympathy for victim, but concluded admission of photograph did not materially affect verdict in light of overwhelming physical evidence).

State v Spreitz, 190 Ariz. 129, 945 P.2d 1260 (1997) (photographs of victim after decomposing for 3 days and showing insect activity had little if any probative value, thus trial court erred in not finding that probative value was substantially outweighed by prejudicial effect).

401.cr.380 All references to polygraph tests are inadmissible for any purpose in Arizona, absent a stipulation of the parties.

State v Hoskins, 199 Ariz. 127, 14 P.3d 977, ¶¶ 68–69 (2001) (witness had been willing to take polygraph test, and defendant sought to question officers about their decision not to give witness poly-

graph test, contending this showed officers did not consider witness to be reliable; court held any testimony about polygraph tests was inadmissible, and declined invitation to revisit what it considered was settled area of law).

401.cr.390 Although certain evidence may initially be inadmissible, if a party through questioning "opens the door" to this area and introduces testimony upon which the evidence has a bearing, the evidence becomes relevant and therefore becomes admissible.

State v Tour, 187 Ariz. 391, 930 P.2d 468 (Ct. App. 1996) (although state's questioning about handgun was irrelevant, defendant did not object, and when defendant gave false answer, he opened the door to evidence that otherwise would have been inadmissible).

State v Paxton, 186 Ariz. 580, 925 P.2d 721 (Ct. App. 1996) (because defendant presented evidence in his case that made witness's testimony relevant, trial court properly allowed witness who had been precluded from testifying on direct to testify on rebuttal).

State v DePiano, 187 Ariz. 41, 926 P.2d 508 (Ct. App. 1995) (when defendant asked officer whether he would agree that certain portions of note were subject to different interpretations, it opened the door to admission of opinions by several lay witnesses of their interpretations of note), *vacated on other grounds,* 187 Ariz. 27, 926 P.2d 494 (1996).

401.cr.400 The "relevance" discussed in *Booth v Maryland* is different from that in the rules of evidence, and is instead a constitutional concept that considers whether information that may bear upon a capital sentencing decision creates a constitutionally unacceptable risk that jurors may impose a death sentence based upon impermissible arbitrary and emotional factors.

Lynn v Reinstein (Glassel), 205 Ariz. 186, 68 P.3d 412, ¶ 13, n.5 (2003) (husband of murder victim sought to tell jurors he thought defendant should receive life in prison; court held that victim in capital case had right to tell jurors how defendant's crime affected victim's life, but did not have right to tell jurors what sentence victim thought should be imposed).

401.cr.410 Although the preferred method of proving a prior conviction for sentence enhancement purposes is a certified document bearing the defendant's fingerprints, courts may consider other kinds of evidence as well, such as a certified copy of a record abstract ("pen pack") from the Arizona Department of Corrections.

State v [Van] Adams, 194 Ariz. 408, 984 P.2d 16, ¶¶ 35–37 (1999) (state presented certified copy of California Disposition of Arrest and Court Action that showed "Adams, James Van," "dob 1/30/64," had been convicted of assault with intent to commit rape; even though California material did not include photograph and fingerprints, because name, date of birth, physical description, and social security number in California material matched those items for defendant, state presented sufficient evidence for trial court to conclude that defendant had prior conviction).

State v Miller, 215 Ariz. 40, 156 P.3d 1145, ¶¶ 4, 10–13 (Ct. App. 2007) (at aggravation phase of trial, state called prosecutor who testified that she had previously prosecuted defendant and he was convicted for four separate felony offenses; because defendant did not object, court reviewed for fundamental error only; court held some form of documentary evidence was still required, thus agreed that trial court erred in permitting jurors to find conviction based only on witness's testimony, but defendant failed to prove prejudice).

State v Robles, 213 Ariz. 268, 141 P.3d 748, ¶¶ 3, 11–17 (Ct. App. 2006) (state relied upon certified copy of record abstract ("pen pack") from Arizona Department of Corrections to prove defendant's prior convictions).

Impeachment Cases

401.imp.010 Evidence that tests, sustains, or impeaches a witness's credibility or character is admissible for impeachment or rehabilitation purposes.

Salt River Project v Miller Park LLC, 218 Ariz. 246, 183 P.3d 497, ¶¶ 23–25 (2008) (in condemnation action, defendant's managing member testified about fair market value of property; plaintiff sought to impeach that testimony with statements in defendant's tax protest that full cash value of property was certain figure, which was less than figure given in condemnation action; court held that land owner's prior statements of value for tax purposes may be, but are not always, admissible in condemnation action; court noted that persons from company that prepared tax protest did not testify at condemnation trial, and person who testified at condemnation trial did not participate in preparing tax protest, thus trial court did not abuse discretion in precluding statements from tax protest).

State v Johnson, 212 Ariz. 425, 133 P.3d 735, ¶¶ 36–40 (2006) (although parts of videotape of defendant's statement did not reflect well on defendant because of his use of profanity and references to unrelated criminal conduct, it was relevant because state's expert based opinion of personality disorder in part on videotape, and was helpful to jurors because it showed defendant's histrionic traits, and served to rebut defendant's expert's testimony that defendant was not faking his symptoms, thus trial court did not abuse discretion in admitting this evidence).

Hernandez v State, 203 Ariz. 196, 52 P.3d 765, ¶¶ 5, 13–17 (2002) (in notice of claim letter required by statute, plaintiff's description of physical characteristics of area was incorrect; prior to trial, parties stipulated to actual physical characteristics of area, and plaintiff testified at trial, giving accurate description of physical characteristics of area; court held trial court properly permitted defendant to impeach plaintiff's accurate trial testimony with his incorrect description of physical characteristics of area contained in claim letter).

State v Cañez, 202 Ariz. 133, 42 P.3d 564, ¶¶ 50–51 (2002) (because hearing defendant's actual words and his demeanor would assist jurors in determining his credibility, audiotape had probative value).

State v Nordstrom, 200 Ariz. 229, 25 P.3d 717, ¶¶ 73–75 (2001) (state called supervisor of AzDOC home arrest program to rebut testimony of defendant's brother's parole officer, who testified how electronic bracelet monitoring system could be defeated; court admitted evidence of lawsuit filed against AzDOC by victims of defendant's crimes alleging negligent supervision of defendant, other participant in crimes, and defendant's brother, but precluded defendant from questioning supervisor about lawsuit because, in pre-trial interview, supervisor denied any knowledge of lawsuit; court held trial court should have allowed questioning of supervisor to explore any motive to fabricate, but held any error was harmless because nothing suggested supervisor had any knowledge of lawsuit).

State v Ramsey, 211 Ariz. 529, 124 P.3d 756, ¶¶ 31–34 (Ct. App. 2005) (defendant was charged with continuous sexual abuse of child, which requires proof of three or more acts of sexual conduct with minor, sexual assault, or molestation of child under 14 years of age over period of 3 months or more; evidence showed defendant touched 12-year-old daughter's breasts, vagina, and buttocks numerous times over 22-month period; defendant contended evidence that he took daughter to adult store and bought her vibrator and bottle of lubricant was not relevant; court held this evidence was probative of daughter's credibility and supported her testimony, thus evidence was relevant).

State v Rienhardt, 190 Ariz. 579, 951 P.2d 454 (1997) (defendant elicited inconsistent statement from state's witness on cross-examination; on re-direct trial court allowed state to introduce prior consistent statements; court held such statements were relevant by definition).

State v Livingston, 206 Ariz. 145, 75 P.3d 1103, ¶ 13 (Ct. App. 2003) (while driving on curved road, defendant allowed right side tires to cross white shoulder line on one occasion and then corrected, bringing vehicle back within lane; trial court held this action did not violate statute that requires person to drive vehicle as nearly as practicable entirely within single lane; state contended trial court erred when it allowed inquiry into, and commented upon, officer's subjective motive in making stop; court agreed that officer's subjective motive was not relevant to whether officer had legally justifiable grounds to stop defendant's vehicle, but held officer's ulterior motive for stop would be relevant to officer's credibility on threshold question of whether officer actually had witnessed traffic violation).

Henry v Healthpartners of Southern Arizona, 203 Ariz. 393, 55 P.3d 87, ¶¶ 15–17 (Ct. App. 2002) (medical malpractice action resulting from patient's death from cancer was filed against decedent's doctor, radiologist employed by medical center, and medical center (TMC/HSA); plaintiff settled with doctors and went to trial against TMC/HSA; TMC/HSA named doctors as non-parties at fault; because plaintiff's trial strategy was to minimize radiologist's fault in order to place more blame on TMC/HSA, plaintiff's factual allegations contained in complaint delineating radiologist's negligence were relevant and admissible against plaintiff).

Hernandez v State, 201 Ariz. 336, 35 P.3d 97, ¶¶ 8–9 (Ct. App. 2001) (plaintiff fell off wall at Patagonia Lake Park; because plaintiff testified there was no trail and that he stepped off retaining wall, notice of claim letter to state from plaintiff's attorney stating plaintiff was walking on trail and stepped off cliff was admissible as prior inconsistent statement), *vacated*, 203 Ariz. 196, 52 P.3d 765 (2002).

401.imp.013 If evidence does not test, sustain, or impeach a witness's credibility or character, it is not admissible for impeachment or rehabilitation purposes.

Salt River Project v Miller Park LLC, 218 Ariz. 246, 183 P.3d 497, ¶¶ 23–25 (2008) (in condemnation action, defendant's managing member testified about fair market value of property; plaintiff sought to impeach that testimony with statements in defendant's tax protest that full cash value of property was certain figure, which was less than figure given in condemnation action; court held that land owner's prior statements of value for tax purposes may be, but are not always, admissible in condemnation action; court noted that persons from company that prepared tax protest did not testify at condemnation trial, and person who testified at condemnation trial did not participate in preparing tax protest, thus trial court did not abuse discretion in precluding statements from tax protest).

State v Nordstrom, 200 Ariz. 229, 25 P.3d 717, ¶ 61 (2001) (witness was arrested for drug dealing 2 days after testifying; arrest could not have affected witness's testimony or given him motive to fabricate, thus trial court did not abuse discretion in precluding this evidence).

* *State v Abdi*, 226 Ariz. 361, 248 P.3d 209, ¶¶ 21–25 (Ct. App. 2011) (defendant claimed victim's immigration status would be in jeopardy if he had been aggressor, thus evidence of victim's immigration was relevant; court held defendant made no showing victim's immigration status would be in jeopardy; thus evidence was not relevant).

401.imp.015 A prior inconsistent statement may be used for substantive as well as for impeachment purposes.

State v Huerstel, 206 Ariz. 93, 75 P.3d 698, ¶ 42 n.9 (2003) (defendant introduced statements from two inmates, who claimed codefendant told them he shot all three victims; trial court then allowed state to introduce codefendant's statement to police in which he claimed defendant shot all three victims; court held admission of codefendant's statement to police violated Confrontation Clause, thus trial court erred in admitting it; court noted that use of prior inconsistent statement as substantive evidence is predicated on fact that witness who made statement testifies at trial and thus is subject to cross-examination, but when prior inconsistent statement is admitted under Rule 806, declarant has not

testified at trial and thus is not subject to cross-examination, so only way statement could be used is for impeachment and not as substantive evidence).

State v Acree, 121 Ariz. 94, 97, 588 P.2d 836, 839 (1978) (when police interviewed victim 2 days after assault, she said defendant pointed gun at her and had tried to shoot her; at trial, victim testified that defendant never pointed gun at her, that she did not believe defendant would have shot or harmed her, and that she could have blown entire matter out of proportion; state was then allowed to impeach victim's trial testimony with statement she made during police interview; defendant contended that trial court erred in allowing use of prior inconsistent statements for substantive purposes; court held evidence was admissible for substantive purposes).

401.imp.017 The trial court has the discretion to preclude cross-examination about a document that has not been admitted in evidence.

State v Ellison, 213 Ariz. 116, 140 P.3d 899, ¶¶ 52–53 (2006) (in February 1999, victims were killed; victims' daughter testified she saw defendant working at her parents' house in July or August 1998; defendant sought to impeach her with defendant's Arizona Department of Corrections records that showed he was in prison from May 1998 through January 1999; court noted that AzDOC records had not been admitted in evidence, and held that trial court did not abuse discretion in ruling that defendant could not use records during witness's cross-examination absent their admission in evidence).

401.imp.020 Evidence showing that the witness's mental condition may have had an effect on the witness's ability to perceive, remember, or relate is admissible for impeachment and rehabilitation purposes.

* *State v Delahanty*, 226 Ariz. 502, 250 P.3d 1131, ¶¶ 13–21 (2011) (defendant contended trial court abused discretion in precluding evidence that witness suffered from Schizophrenia; although past records noted witness had been diagnosed with Schizophrenia, defendant's expert was unable to make diagnosis of Schizophrenia, thus trial court did not abuse discretion in precluding this evidence).

State v Orantez, 183 Ariz. 218, 222–23, 902 P.2d 824, 828–29 (1995) (because evidence of intoxication at time of observation is admissible to attack witness's ability to perceive, remember, and relate, trial court erred in denying defendant's motion for new trial based on newly-discovered evidence that victim was using drugs at time of assault).

State v Zuck, 134 Ariz. 509, 513–14, 658 P.2d 162, 166–67 (1982) (evidence of insanity admissible if it affected witness's ability to perceive at time of event, relate at time of testimony, or remember in meantime).

401.imp.030 Before a party may introduce evidence about the witness's mental condition or drug use in an attempt to impeach the witness's ability to perceive, remember, or relate, the party must make an offer of proof of evidence sufficient for the jurors to find that the witness's mental condition or drug use did have an effect on the witness's ability to perceive, remember, or relate.

* *State v Delahanty*, 226 Ariz. 502, 250 P.3d 1131, ¶¶ 13–21 (2011) (defendant contended trial court abused discretion in precluding evidence that witness suffered from Schizophrenia; although past records noted witness had been diagnosed with Schizophrenia, defendant's expert was unable to make diagnosis of Schizophrenia, thus trial court did not abuse discretion in precluding this evidence).

State v Soto-Fong, 187 Ariz. 186, 197–98, 928 P.2d 610, 621–22 (1996) (because defendant's offer of proof failed to show how officer's terminal illness, use of prescription medicine, or mood in any way affected his testimony, trial court properly precluded this evidence).

State v Dumaine, 162 Ariz. 392, 397–98, 406, 783 P.2d 1184, 1189–90, 1198 (1989) (defendant presented insufficient evidence to show mental condition affected witness's ability to perceive, remember,

and relate, thus prosecutor did not commit discovery violation by failing to disclose witness's mental condition).

State v Walton, 159 Ariz. 571, 581–82, 769 P.2d 1017, 1027–28 (1989) (state's witness testified about admission defendant had made; defendant sought to introduce evidence of witness's history of drug use, but made no offer of proof beyond bare speculation; state sought to exclude evidence of witness's drug use beyond use at time he heard defendant's admission; court stated trial court does not abuse discretion when proponent fails to make offer of proof that witness's perception or memory was affected by condition; court held that, because defendant's offer of proof failed to show drug use did impair witness's memory or perception, trial court did not abuse discretion in excluding evidence).

State v Zuck, 134 Ariz. 509, 513, 658 P.2d 162, 662 (1982) (evidence of insanity admissible if it affected witness's ability to perceive at time of event, relate at time of testimony, or remember in meantime; court stated, "We hold that before psychiatric history of a witness may be admitted to discredit him on cross-examination, the proponent of the evidence must make an offer of proof showing how it affects the witness's ability to observe and relate the matters to which he testifies.").

Mulhern v City of Scottsdale, 165 Ariz. 395, 397–98, 799 P.2d 15, 17–18 (Ct. App. 1990) (trial court granted defendant's motion to preclude evidence of officer's drug and alcohol use; because plaintiff did not offer any evidence that officer was under influence of alcohol or drugs at time of shooting, trial court properly precluded evidence of officer's use of alcohol and drugs).

401.imp.070 Specific instances of the witness's conduct or a party's conduct are admissible if they show bias, prejudice, interest, or corruption on the part of the witness, or how they may have affected the witness's testimony.

American Fam. Mut. Ins. v Grant, 222 Ariz. 507, 217 P.3d 1212, ¶¶ 2–30 (Ct. App. 2009) (respondent made claim with petitioner for injuries from automobile collision; petitioner retained orthopedic surgeon (Dr. Zoltan), who opined that respondent's injury was result of preexisting degenerative joint disease, so petitioner denied claim; respondent sued petitioner and sought discovery involving financial arrangements between petitioner and Zoltan; trial court ordered Zoltan to provide various items of information covering last 8 years; petitioner conceded that respondent may take Zoltan's deposition to demonstrate any bias, including general inquiry into his involvement in case, who hired him, his credentials, compensation received for this case, approximate number of examinations and record reviews he performed in last year, his dealings generally with petitioner and their law firm, approximate amount received for expert services in last year, approximate percentage of practice devoted to litigation-based examinations and record reviews, and his knowledge of other cases where he testified at depositions or trials during last 4 years; court vacated challenged portions of trial court's discovery order and remanded so that trial court could assess whether respondent had explored less intrusive discovery, and if so, whether respondent could demonstrate good cause for any more expanded inquires).

State v Uriarte, 194 Ariz. 275, 981 P.2d 575, ¶¶ 20–21 (Ct. App. 1998) (defendant was charged with child molestation, sexual conduct with minor, and public sexual indecency involving his 12-year-old sister-in-law; defendant's wife testified; trial court did not abuse discretion in admitting evidence that defendant's wife threatened victim and victim's mother with death if defendant was convicted).

Sheppard v Crow-Baker-Paul No. 1, 192 Ariz. 539, 968 P.2d 612, ¶¶ 42, 44 (Ct. App. 1998) (party is entitled to introduce evidence that expert witness has done certain amount of work for insurance companies).

State v Dunlap, 187 Ariz. 441, 930 P.2d 518 (Ct. App. 1996) (because letter could have shown witness's bias and desire to alter testimony, trial court erred in limiting cross-examination).

401.imp.075 A party may question the other party's expert witness about the extent of compensation the witness has received testifying as an expert witness.

* *State v Manuel*, ___ Ariz. ___, ___ P.3d ___, ¶¶ 28–29 (Dec. 21, 2011) (on cross-examination, defense mitigation expert testified he and wife earned about $200–300,000 annually from work on capital cases, that total income was about $400,000, and gross income was about $650,000 from both capital and non-capital cases, and acknowledged prosecution had never asked him to testify for state in capital case).

401.imp.080 Specific instances of a witness's conduct are admissible if they are inconsistent with the witness's testimony.

Standard Chartered PLC v Price Waterhouse, 190 Ariz. 6, 945 P.2d 317 (Ct. App. 1996) (because defendant paid $2 million to expert witness's firm and thus expert witness had stake in litigation, plaintiff was properly allowed to refer to expert witness as defendant's "$2 million man").

401.imp.085 Evidence is relevant and thus admissible if it is inconsistent with the witness's testimony or prior statements, and for a statement to be inconsistent, it must directly, substantially, and materially contradict the testimony in issue.

State v Lacy, 187 Ariz. 340, 929 P.2d 1288 (1996) (evidence about shoe prints was relevant because it tended to show defendant may have been in woman's bedroom and thus showed that defendant may have lied about extent of his involvement in the murder and burglary).

401.imp.087 If the testimony of two witnesses is contradictory and that could be the result of poor ability or opportunity to perceive, faulty memory, mistake, or poor ability to relate what happened, asking one witness in those situations whether the other witness is lying is improper, but when the only possible explanation for the inconsistent testimony is deceit or lying, or when one witness has opened the door by testifying about the veracity of the other witness, asking one witness whether the other witness is lying may be proper.

State v Canion, 199 Ariz. 227, 16 P.3d 788, ¶¶ 40–44 (Ct. App. 2000) (defendant claimed prosecutor acted improperly by asking him on cross-examination about differences between his testimony and officer's testimony and asking him to comment on officer's credibility; court held that, even if it assumed prosecutor's questions constituted misconduct, it was not so pervasive or pronounced that trial lacked fundamental fairness).

State v Morales, 198 Ariz. 372, 10 P.3d 630, ¶¶ 8–15 (Ct. App. 2000) (defendant's testimony directly contradicted officers' testimony, prosecutor asked defendant whether officers were lying, and defendant did not object; court held that, even assuming prosecutor's question was improper, error was not fundamental).

401.imp.090 Evidence that impeaches on a collateral matter is irrelevant and inadmissible.

State v Nordstrom, 200 Ariz. 229, 25 P.3d 717, ¶¶ 58–59 (2001) (because it appeared witness's allegedly threatening statements to sister-in-law related to alimony dispute with witness's brother and not to her testifying at defendant's trial, trial court did not abuse discretion in precluding these statements).

State v Nordstrom, 200 Ariz. 229, 25 P.3d 717, ¶ 60 (2001) (because witness's arrest for drug dealing 2 days after testifying was not inconsistent with witness's testimony that he had not dealt drugs while in prison, this evidence was collateral, thus trial court did not abuse discretion in precluding this evidence).

401.imp.110 A party may not impeach a witness by implication, with facts that are not true, with facts that the party would not be able to prove, or by vague or speculative matters.

State v Hoskins, 199 Ariz. 127, 14 P.3d 977, ¶¶70–71 (2001) (defendant sought to cross-examine state's witness about another state's witness's reputation as "braggart" and "boaster"; court held proposed testimony was vague, speculative, and immaterial, thus trial court did not err in precluding that testimony).

March 11, 2012

Rule 402. General Admissibility of Relevant Evidence.

Relevant evidence is admissible unless any of the following provides otherwise:

. the United States or Arizona Constitution;

. an applicable statute;

. these rules; or

. other rules prescribed by the Supreme Court.

Irrelevant evidence is not admissible.

Comment to 2012 Amendment

The language of Rule 402 has been amended to conform to the federal restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Cases

402.010 All relevant evidence is admissible unless a constitutional provision, statute, or rule precludes its admission.

Hayes v Gama (Hayes), 205 Ariz. 99, 67 P.3d 695, ¶¶ 21–23 (2003) (in child custody dispute, mother violated trial court's order and had daughter seen by therapeutic counselor other than one ordered by trial court; as sanction, trial court excluded testimony and notes of therapeutic counselor; court noted that A.R.S. § 25–403(A) provided that "court shall consider all relevant factors," held that notes and testimony were relevant evidence, and thus held that trial court erred in imposing sanction that would preclude the consideration of relevant evidence).

402.015 Evidence that is not relevant is not admissible.

State v Huerstel, 206 Ariz. 93, 75 P.3d 698, ¶¶ 71–73 (2003) (at trial, defendant contended he confessed because he feared reprisals from his codefendant; trial court allowed state to impeach that testimony with fact that, at suppression hearing, defendant contended only that officers' actions made his statements involuntary and never mentioned anything about codefendant; court held that, because codefendant was not in any way connected with state, what codefendant did to defendant was irrelevant to issue of voluntariness, so trial court erred in allowing state to impeach defendant's trial testimony with his testimony given at suppression hearing).

State v Dann, 205 Ariz. 557, 74 P.3d 231, ¶¶ 37–39 (2003) (defendant sought to introduce evidence of drugs in victims' systems in order to discredit medical examiner's testimony about how quickly victims died; because medical examiner testified that drugs in system probably did not make substantial difference in time it took victims to die, evidence of drugs in victims' systems was not relevant, thus trial court did not abuse discretion in excluding this evidence).

402.017 If a contract contains a written expression of the parties' intent that the contract represents a complete and final agreement between them (integration clause), then parol evidence rule renders inadmissible any evidence of any prior or contemporaneous oral understandings and any prior written understandings that would contradict, vary, or add to the written contract.

Aztar Corp. v U.S. Fire Ins. Co, 223 Ariz. 463, 224 P.3d 960, ¶¶ 49–52 (Ct. App. 2010) (in 2002, plaintiff began construction on building expansion; on October 30, 2003, six floors of expansion collapsed, causing 7-month delay in utilizing expansion; contract provided expansion would be endorsed onto insurance policy effective April 1, 2004; plaintiff contended expansion was covered property through-

out construction and that April 1, 2004, date referred to date when estimated value of expansion would be added to policy; plaintiff argued extrinsic evidence showed it purchased coverage for loss caused by expansion, specifically deposition testimony that risk manager and insurance broker intended expansion to be covered under policy; court held language of policy was clear: The expansion would be endorsed onto the policy (and consequently become covered property) on April 1, 2004, which meant it was not covered property before April 1, 2004, thus parol evidence rule barred admission of extrinsic evidence that would vary or contradict terms of written contract).

402.065 Arizona Supreme Court does not have the authority to delegate to the Administrative Director the authority to make rules on the admissibility of evidence.

In re Jonah T., 196 Ariz. 204, 994 P.2d 1019, ¶¶ 9–21(Ct. App. 1999) (Arizona Supreme Court adopted Administrative Order 95–20, which authorized the Administrative Director of the Court to distribute certain policies and procedures for drug testing; the procedure adopted provided that if an immunoassay test showed that a juvenile tested positive for drugs but the juvenile denied using drugs, those test results were not admissible unless the positive result was confirmed by a subsequent gas chromatography/ mass spectrometry test; court held the administrative procedure conflicted with the Rules of Evidence, and that the administrative procedure could not negate the applicable Rule of Evidence).

402.070 The Arizona Legislature is permitted to enact statutory procedural rules that are reasonable and workable and that supplement the rules promulgated by the Arizona Supreme Court.

David G. v Pollard, 207 Ariz. 308, 86 P.3d 364, ¶¶ 15–17 (2004) (court held that A.R.S. § 8–323, which sets forth procedure for adjudicating certain offenses listed in A.R.S. § 8–323(B), supplements and does not conflict with Arizona Rules of Juvenile Procedure).

State v Vincent, 159 Ariz. 418, 768 P.2d 150 (1989) (A.R.S. § 13–4253, which allows for the presentation of videotaped testimony, is constitutional and admission of such testimony is permissible as long as the trial court makes the necessary findings).

Jilly v Rayes (Carter), 221 Ariz. 40, 209 P.3d 176, ¶¶ 1–8 (Ct. App. 2009) (court held that A.R.S. § 12–2603, which provides that plaintiff suing health care professional must certify whether or not expert opinion testimony is necessary to prove health care professional's standard of care or liability, and if expert opinion testimony is necessary, requires service of "preliminary expert opinion affidavit" with initial disclosures, did not conflict with any court rule, and thus was constitutional).

Bertleson v Tierney, 204 Ariz. 124, 60 P.3d 703, ¶¶ 20–22 (Ct. App. 2002) (A.R.S. § 12–2602, which deals with notice whether expert testimony will be necessary in claim against licensed professional supplements existing procedural rules and is reasonable and workable, and therefore constitutional).

State v Gilfillan, 196 Ariz. 396, 998 P.2d 1069, ¶¶ 17–28 (Ct. App. 2000) (court held A.R.S. § 13–1421, which prescribes when sexual assault victim's prior sexual conduct may be admitted in evidence, was reasonable and workable supplement to court's procedural rules and thus was permissible statutory rule of procedure).

Martin v Reinstein, 195 Ariz. 293, 987 P.2d 779, ¶¶ 104–07 (Ct. App. 1999) (Arizona's Sexually Violent Persons Act provides that Arizona Rules of Evidence apply to proceedings; court held this was reasonable and workable and supplemented rules promulgated by Arizona Supreme Court, and thus was permissible).

In re Maricopa Cty. Juv. No. JD–6123, 191 Ariz. 384, 956 P.2d 511 (Ct. App. 1997) (Juvenile Rule 16.1(f) is a reasonable and workable supplement to the Arizona Rules of Evidence).

State v Nihiser, 191 Ariz. 199, 953 P.2d 1252 (Ct. App. 1997) (A.R.S. § 28–692(F), which provides method for establishing foundation for breath test results, is a reasonable and workable supplement to the rules).

402.075 Although the Arizona Legislature is permitted to enact statutory rules that are reasonable and workable and that supplement the rules promulgated by the Arizona Supreme Court, when a conflict arises, or a statutory rule tends to engulf a rule that the court has promulgated, the court rule will prevail.

* *Lear v Fields,* 226 Ariz. 226, 245 P.3d 911, ¶¶ 14–22 (Ct. App. 2011) (A.R.S. § 12–2203 (Arizona *Daubert*) does not alter any substantive law, but instead is attempt to control admissibility of expert witness testimony in all cases and such controls procedural matters; because it conflicts with existing rules of evidence, it is unconstitutional).

State v Taylor, 196 Ariz. 584, 2 P.3d 674, ¶¶ 4–11(Ct. App. 1999) (A.R.S. § 13–4254 allows for admission of pretrial videotaped statement made by minor, this statute is both more restrictive and less restrictive than existing hearsay exceptions, and so it engulfs Rules of Evidence and is therefore unconstitutional).

402.077 Although a statute may have the effect of precluding certain evidence and may appear to be in conflict with a court rule, if the statute in question controls a matter of substantive law, then the statute will prevail over the court rule.

Seisinger v Siebel, 220 Ariz. 85, 203 P.3d 483, ¶¶ 22–44 (2009) (defendant moved to preclude testimony of plaintiff's expert witness; trial court ruled that plaintiff's expert witness did not meet requirements of A.R.S. § 12–2604, which provides additional qualifications for expert witness in medical malpractice actions, and granted defendant's motion; court held that A.R.S. § 12–2604 set forth what was required for plaintiff to meet burden of proof in medical malpractice case and thus was matter of substantive law, which meant statute would prevail over contrary court rule).

March 11, 2012

Rule 403. Excluding Relevant Evidence for Prejudice, Confusion, Waste of Time, or Other Reasons.

The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.

Comment to 2012 Amendment

The language of Rule 403 has been amended to conform to the federal restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Civil Cases

403.civ.010 If evidence is relevant and therefore admissible, a trial court may not exclude that evidence unless the opposing party establishes that the evidence poses the danger of *unfair* prejudice, and establishes that the *unfair* prejudice *substantially* outweighs the probative value.

Shotwell v Dohahoe, 207 Ariz. 287, 85 P.3d 1045, ¶¶ 4–36 (2004) (court held that admissibility of determination letter issued by EEOC in Title VII employment discrimination lawsuit is controlled by Arizona Rules of Evidence; court stated "contents of Determination is certainly probative of matters at issue in the case," and remanded case to trial court for determination whether probative value was substantially outweighed by dangers of unfair prejudice, confusion of issues, misleading jurors, undue delay, waste of time, or needless presentation of cumulative evidence).

Bogard v Cannon & Wendt Elec. Co., 221 Ariz. 325, 212 P.3d 17, ¶¶ 32–37 (Ct. App. 2009) (court followed rule that EEOC determination letter is not automatically admissible as evidence in Title VII employment discrimination lawsuit, but instead trial court has discretion to admit such letter under Arizona Rules of Evidence; court held trial court did not abuse discretion in determining EEOC letter was relevant and that its probative value was not substantially outweighed by danger of unfair prejudice).

Ritchie v Krasner, 221 Ariz. 288, 211 P.3d 1272, ¶¶ 40–44 (Ct App. 2009) (plaintiff injured back at work; defendant opined that plaintiff's condition was stable and that he could go back to work; AHCCCS doctor later diagnosed cervical spinal cord compression and recommended surgery; condition prior to surgery caused part of plaintiff's spinal cord to die, which caused constant pain, so AHCCCS doctor prescribed Oxycontin and Oxycodone; plaintiff subsequently died of accidental overdose, characterized as "synergistic effects of the various medications he was taking for his cervical spinal cord injury"; defendant contended trial court abused discretion in precluding evidence of plaintiff's alcoholism; court held that, because trial court allowed evidence of plaintiff's predisposition to abusing pain drugs, it did not abuse its discretion in precluding evidence of specifics of alcoholism and drug use based on its determination that evidence was "too unclear," "too remote," and "too prejudicial").

Girouard v Skyline Steel, Inc., 215 Ariz. 126, 158 P.3d 255, ¶¶ 9–23 (Ct. App. 2007) (defendant's employee caused automobile collision that caused decedent's vehicle to burst into flames; decedent died of thermal and inhalation injuries, although there was conflict in evidence showing whether decedent was conscious at time of death; father sought to introduce evidence that fire was so intense that there was nothing of decedent's remains to identify and that decedent had been burned alive, and this caused father great pains; court noted that evidence of manner of death may have tended to suggest damage award based on emotion, sympathy, or horror, but that possibility did not require exclusion of all evidence of how father was affected by decedent's death).

Harvest v Craig, 202 Ariz. 529, 48 P.3d 479, ¶¶ 18–22 (Ct. App. 2002) (because evidence showed plaintiff's schizophrenia and bipolar disorder affected her ability to perceive, remember, and relate, plaintiff failed to show any prejudicial effect substantially outweighed probative value, trial court did not abuse discretion in admitting evidence).

Yauch v Southern Pac. Transp., 198 Ariz. 394, 10 P.3d 1181, ¶¶ 27–28 (Ct. App. 2000) (plaintiff worked as engineer and injured his back while working, and brought Federal Employer's Liability Act claim against defendant railroad; trial court excluded evidence of defendant's Disability Management and Internal Placement Program and plaintiff's failure to take advantage of that program; court held that evidence was relevant to issue of mitigation of damages and thus amount of damages, thus trial court erred in excluding that evidence, and rejected plaintiff's request that it hold that evidence could have been excluded under Rule 403, concluding that evidence was not unfairly prejudicial).

Conant v Whitney, 190 Ariz. 290, 947 P.2d 864 (Ct. App. 1997) (plaintiffs injured when they ran into bull owned by defendant; evidence that Forest Service land on which defendant had grazing permit did not permit bulls was not unfairly prejudicial).

403.civ.020 If evidence is relevant and therefore admissible, a trial court may exclude that evidence if the opposing party establishes that the evidence poses the danger of *unfair* prejudice, and establishes that the *unfair* prejudice *substantially* outweighs the probative value.

Higgins v Assmann Elec. Inc., 217 Ariz. 289, 173 P.3d 453, ¶¶ 35–39 (Ct. App. 2007) (Assmann Electronics was German company; Meyer was Assmann's highest ranking officer in United States and was plaintiff's supervisor; Meyer and plaintiff had consensual sexual relationship that had terminated prior to time of relevant events; over Labor Day, Meyer called plaintiff, and getting no response, went to her apartment, and upon entering, found plaintiff and male companion dressed only in bath towels; Meyer became enraged and attacked plaintiff's companion; Meyer assaulted plaintiff, threw her out front door where her towel came off when she hit wall, punched plaintiff, and then told her she was fired; 3½ weeks later, Assmann's chief financial officer sent letter to plaintiff stating her employment was terminated and her work visa had therefore expired; parties went to trial on assault claim against Meyer and wrongful termination claim against Meyer and Assmann; jurors returned verdict in favor of plaintiff on both counts; Meyer contended trial court erred in admitting evidence of prior altercation he had with co-workers at Z-Tejas restaurant; court noted there was evidence that people at Assmann were aware of Meyer's conduct and took no action; court held this evidence had some probative value in showing Meyer was fully in charge in Arizona and that people at Assmann did not challenge his conduct or decisions; court held that, although evidence did not portray Meyer in favorable light, it did not find that evidence was so prejudicial that it would prejudice jurors; court further noted Meyer did not ask for limiting instruction, which could have reduced prejudicial effect of evidence)

403.civ.030 Because evidence that is relevant will generally be adverse to the opposing party, use of the word "prejudicial" to describe this type of evidence is incorrect and cannot be the basis for excluding evidence under this rule; evidence is "unfairly prejudicial" only if it has an undue tendency to suggest a decision on an improper basis, such as emotion, sympathy, or horror.

Shotwell v Dohahoe, 207 Ariz. 287, 85 P.3d 1045, ¶ 34 (2004) (court stated prejudice under Rule 403 is decision based on improper basis, such as emotion, sympathy, or horror).

Hudgins v Southwest Airlines, Co., 221 Ariz. 472, 212 P.3d 810, ¶¶ 15–18 (Ct. App. 2009) (plaintiffs were bail enforcement agents (bounty hunters); on 9/11/99, they flew from Baltimore to Phoenix; before trip, they called Southwest Airlines (SWA) to obtain instructions on how to transport handguns lawfully on airplane; plaintiffs followed those instructions, but were arrested in Phoenix because they were not law enforcement officers; plaintiffs sued SWA claiming that SWA was negligent in actions that led to plaintiffs' arrest; jurors returned verdicts of $500,000 each in compensatory damages and

$4 million each in punitive damages; SWA contended trial court erred in admitting letter from FAA to SWA concerning 1998 incident in which SWA permitted other bounty hunters who had presented false information to board SWA flight; letter stated SWA failed to ask basic questions that would have prevented deception, and further advised SWA that there appeared to be prevalent problem in Arizona where individuals calling themselves bail recovery agents or bounty hunters have been able to present themselves as being authorized to travel armed when they were not so authorized; court held letter was admissible to show SWA had notice of problem of bounty hunters attempting to fly while armed and what steps SWA should take to prevent this from happening; court further held that letter would not have caused jurors to punish SWA for repeated lapses in checking identifications because (1) letter did not say SWA had "prevalent problem" and was instead only warning about single event, (2) trial court gave limiting instruction, and (3) SWA's attorney testified he was unaware of this "prevalent problem," explicitly dispelling any notion that SWA had experienced such problem).

Higgins v Assmann Elec. Inc., 217 Ariz. 289, 173 P.3d 453, ¶¶ 35–39 (Ct. App. 2007) (Assmann Electronics was German company; Meyer was Assmann's highest ranking officer in United States and was plaintiff's supervisor; Meyer and plaintiff had consensual sexual relationship that had terminated prior to time of relevant events; over Labor Day, Meyer called plaintiff, and getting no response, went to her apartment, and upon entering, found plaintiff and male companion dressed only in bath towels; Meyer became enraged and attacked plaintiff's companion; Meyer assaulted plaintiff, threw her out front door where her towel came off when she hit wall, punched plaintiff, and then told her she was fired; 3½ weeks later, Assmann's chief financial officer sent letter to plaintiff stating her employment was terminated and her work visa had therefore expired; parties went to trial on assault claim against Meyer and wrongful termination claim against Meyer and Assmann; jurors returned verdict in favor of plaintiff on both counts; Meyer contended trial court erred in admitting evidence of prior altercation he had with co-workers at Z-Tejas restaurant; court noted there was evidence that people at Assmann were aware of Meyer's conduct and took no action; court held this evidence had some probative value in showing Meyer was fully in charge in Arizona and that people at Assmann did not challenge his conduct or decisions; court held that, although evidence did not portray Meyer in favorable light, it did not find that evidence was so prejudicial that it would prejudice jurors; court further noted Meyer did not ask for limiting instruction, which could have reduced prejudicial effect of evidence).

Girouard v Skyline Steel, Inc., 215 Ariz. 126, 158 P.3d 255, ¶¶ 9–23 (Ct. App. 2007) (defendant's employee caused automobile collision that caused decedent's vehicle to burst into flames; decedent died of thermal and inhalation injuries, although there was conflict in evidence showing whether decedent was conscious at time of death; father sought to introduce evidence that fire was so intense that there was nothing of decedent's remains to identify and that decedent had been burned alive, and this caused father great pains; court noted that evidence of manner of death may have tended to suggest damage award based on emotion, sympathy, or horror, but that possibility did not require exclusion of all evidence of how father was affected by decedent's death).

Henry v Healthpartners of Southern Arizona, 203 Ariz. 393, 55 P.3d 87, ¶¶ 15, 18 (Ct. App. 2002) (medical malpractice action resulting from patient's death from cancer was filed against decedent's doctor, radiologist employed by medical center, and medical center (TMC/HSA); plaintiff settled with doctors and went to trial against TMC/HSA; TMC/HSA named doctors as non-parties at fault; because plaintiff's trial strategy was to minimize radiologist's fault in order to place more of blame on TMC/HSA, plaintiff's factual allegations contained in complaint delineating radiologist's negligence were relevant; court noted plaintiff was undoubtedly prejudiced by admission of factual allegations, but because they would not cause jurors to decide case based on emotion, sympathy, or horror, they were not subject to exclusion under Rule 403).

403.civ.040 If evidence is relevant and therefore admissible, a trial court may exclude that evidence if the opposing party establishes that the evidence poses the danger of confusing the issues or misleading the jurors, and establishes that this danger of confusing the issues substantially outweighs the probative value.

Brethauer v General Motors Corp., 221 Ariz. 192, 211 P.3d 1176, ¶¶ 15–17 (Ct. App. 2009) (plaintiff's 1998 pick-up truck went off road and bounced through ditch; side and rear windows shattered and plaintiff was ejected out rear window; plaintiff asserted he was wearing seat belt; plaintiff contended seat belt buckle was defective and unlatched improperly; trial court precluded evidence that GM recalled certain 1994–95 pick-up trucks because seat belt buckle could become improperly unlatched in frontal collision; trial court precluded this evidence because, although plaintiff's truck had same buckle, plaintiff's truck did not have same fabric belt system as in 1994–95 trucks, plaintiff was not involved in frontal collision, and no evidence showed that, absent defective fabric belts in 1994–95 trucks, buckles could have unlatched prior to collision; court held that, even if this evidence were considered relevant, trial court did not abuse discretion in precluding it because it could have misled jurors because of differences in design of two systems and type of accident).

Brethauer v General Motors Corp., 221 Ariz. 192, 211 P.3d 1176, ¶¶ 18–20 (Ct. App. 2009) (plaintiff contended trial court erred by precluding 3-minute videotaped collage of 10 GM-conducted tests on seat belt systems containing same buckle as involved in subject litigation; because seven tests were of seat belt systems containing different fabric belts than one involved in subject litigation, one involved torn belt webbing at latch plate of buckle prototype due to sewing problem, one involved buckle that unlatched when test dummy struck release button after impact, and one involved buckle release that occurred on rebound of dummy after crash, trial court precluded videotape because it could have confused jurors, wasted time, and caused unfair prejudice to GM; court held that trial court did not abuse discretion in precluding videotape).

Elia v Pifer, 194 Ariz. 74, 977 P.2d 796, ¶¶ 41–42 (Ct. App. 1998) (defendant was plaintiff's former attorney in dissolution action; plaintiff sued defendant for legal malpractice, claiming defendant did not have authority to agree to terms of proposed settlement agreement, and also included a claim for emotional distress from being jailed for failing to pay child support and spousal maintenance required by the decree; plaintiff wanted to present hearsay testimony from wife that plaintiff called her from jail and told her that another inmate had tried to kill him because he thought plaintiff was child molester; court held that trial court properly excluded this evidence because it was cumulative and could cause jurors to be confused on how to use that evidence).

403.civ.050 If evidence is relevant and therefore admissible, a trial court may exclude that evidence if the opposing party establishes that the evidence poses the danger of undue delay or waste of time, and establishes that this danger of undue delay or waste of time substantially outweighs the probative value.

Yauch v Southern Pac. Transp., 198 Ariz. 394, 10 P.3d 1181, ¶¶27–28 (Ct. App. 2000) (plaintiff injured his back while working, and brought Federal Employer's Liability Act claim against defendant railroad; trial court excluded evidence of defendant's Disability Management and Internal Placement Program and plaintiff's failure to take advantage of that program; court held evidence was relevant to issue of mitigation of damages and thus amount of damages, thus trial court erred in excluding that evidence, and rejected plaintiff's request that it hold that evidence could have been excluded under Rule 403, concluding that amount of time needed to present evidence would not substantially outweigh probative value).

403.civ.080 The trial court may exclude evidence of absence of prior accidents if its probative value is substantially outweighed by the danger of unfair prejudice, if it would confuse the issues or mislead the jurors, if it would cause undue delay or waste of time, or if it would be cumulative.

Isbell v State, 198 Ariz. 291, 9 P.3d 322, ¶ 9 (2000) (because defendant failed to make required foundational showing, including how many near accidents and how many fortuitous escapes from injury may have occurred, trial court did not abuse discretion in precluding evidence of absence of prior accidents at railroad crossing in question).

Hernandez v State, 201 Ariz. 336, 35 P.3d 97, ¶¶ 19–22 (Ct. App. 2001) (plaintiff fell off wall at Patagonia Lake Park; because park manager had served there for 8 years and lived there year-round, and because any fall off that wall would have resulted in serious injuries, park manager was permitted to testify that he knew of no other accidents at that wall), *vacated*, 203 Ariz. 196, 52 P.3d 765 (2002).

403.civ.125 If a party makes a motion for an evidentiary ruling based in part on Rule 403 and the trial court does not cite Rule 403 in its ruling, the appellate court will presume that the trial court also relied on Rule 403 in its ruling.

Salt River Project v Miller Park LLC, 218 Ariz. 246, 183 P.3d 497, ¶¶ 23–25 (2008) (in condemnation action, defendant sought to preclude statements in defendant's previous tax protest that full cash value of property was certain figure, which was less than amount defendant requested in condemnation action; defendant moved to preclude evidence under both Rule 402 and 403; in granting motion to preclude, trial court did not specify whether its ruling was based on Rule 402, Rule 403, or both; on appeal, plaintiff in effect asked court to presume trial court relied only on Rule 402; court held it would instead presume that trial court relied on both rules in making its ruling).

In re Jaramillo, 217 Ariz. 460, 176 P.3d 28, ¶ 18 (Ct. App. 2008) (in sexually violent persons case, Jaramillo asked trial court to exclude evidence of three prior sexual acts, and cited Rule 403 in his motion; on appeal, Jaramillo claimed trial court failed to conduct Rule 403 analysis; court stated that, although trial court made no express finding under Rule 403, record sufficiently demonstrated that trial court considered and balanced necessary factors in its ruling).

403.civ.140 When evidence has both probative value and prejudicial effect, the trial court need not require wholesale proscription; it should determine (1) whether probative value of the evidence is sufficient that it should be admitted in some form, (2) what restrictions should be placed by jury instructions on the use of the evidence, and (3) whether the evidence can be narrowed or limited to reduce its potential for unfair prejudice while preserving probative value.

Girouard v Skyline Steel, Inc., 215 Ariz. 126, 158 P.3d 255, ¶¶ 22–23 (Ct. App. 2007) (defendant's employee caused automobile collision that caused decedent's vehicle to burst into flames; decedent died of thermal and inhalation injuries, although there was conflict in evidence showing whether decedent was conscious at time of death; father sought to introduce evidence that fire was so intense that there was nothing of decedent's remains to identify and that decedent had been burned alive, and this caused father great pain; court noted that evidence of manner of death may have tended to suggest damage award based on emotion, sympathy, or horror, but that possibility did not require exclusion of all evidence of how father was affected by decedent's death; court left it to trial court on remand to determine what evidence to admit and what to exclude).

403.civ.180 Because the determination under this rule involves a weighing and balancing of competing evidentiary factors, it is a determination the trial court is in the best position to make, thus an appellate court should leave this determination to discretion of the trial court and not substitute its determination of how it would have ruled if it had been sitting as the trial court.

Crackel v Allstate Ins. Co., 208 Ariz. 252, 92 P.3d 882, ¶¶ 46–53 (Ct. App. 2004) (plaintiffs sued Allstate for abuse of process based on how Allstate handled their minor impact soft tissue (MIST) claims, and sought to introduce evidence of how Allstate handled other MIST claims; trial court precluded evidence under Rule 403; court agreed with plaintiffs that other act evidence was both relevant and probative of issues in the case, and although it stated that reasonable minds might disagree with trial

court's assessment that probative value of other act evidence was limited, it stated it could not conclude that trial court abused its discretion in light of argument given on both sides of question).

Crackel v Allstate Ins. Co., 208 Ariz. 252, 92 P.3d 882, ¶¶ 65–67 (Ct. App. 2004) (trial court ordered parties to participate in settlement conference before Judge O'Neil; based on their conduct, Judge O'Neil found Allstate's employees had not participated in settlement conference in good faith, and ordered case to be tried on issue of damages only, at which point Allstate settled plaintiffs' claims; plaintiffs then sued Allstate for abuse of process, and sought to introduce Judge O'Neil's order sanctioning Allstate; court held sanction order was not hearsay because it was not offered to prove truth of matters asserted, but was instead offered to show effect it had on Allstate and its employees in settling plaintiffs' claims, and that evidence was relevant on issue of punitive damages; although court concluded sanction order was relevant and admissible, it stated it could not conclude trial court abused discretion in precluding sanction order in light of argument given on both sides of question).

Harvest v Craig, 202 Ariz. 529, 48 P.3d 479, ¶¶ 19 (Ct. App. 2002) (court stated only "manifest abuse of discretion justifies reversal of the trial court's weighing of probative value and prejudicial effect under Rule 403").

Yauch v Southern Pac. Transp., 198 Ariz. 394, 10 P.3d 1181, ¶¶ 25–26 (Ct. App. 2000) (plaintiff worked as engineer and injured his back while working, and brought Federal Employer's Liability Act claim against defendant railroad; trial court excluded evidence of defendant's Disability Management and Internal Placement Program and plaintiff's failure to take advantage of that program; court held evidence was relevant to issue of mitigation of damages (amount of damages), thus trial court erred in excluding that evidence, and rejected plaintiff's request that it hold that evidence could have been excluded under Rule 403, noting that balancing under Rule 403 is peculiarly a trial court function).

Criminal Cases

403.cr.005 In order to raise on appeal a claim that the evidence should have been excluded under Rule 403, the party must make a specific objection stating Rule 403 as the grounds for the objection.

State v Montaño, 204 Ariz. 413, 65 P.3d 61, ¶¶ 55–58 (2003) (defendant contended on appeal that trial court abused discretion under Rule 403 in admitting photographs; state noted defendant only objected generally to admission of photographs; court held that, "Because the appellant's trial counsel did not object on 403 grounds, the argument has been waived.").

State v Montaño, 204 Ariz. 413, 65 P.3d 61, ¶¶ 59–63 (2003) (defendant objected to testimony about meaning of his EME tattoo on basis of relevance and foundation; on appeal, defendant contended admission of this evidence violated Rule 403; court held defendant waived any Rule 403 objection).

State v Miller, 215 Ariz. 40, 156 P.3d 1145, ¶ 9 (Ct. App. 2007) (defendant was charged with robbery at store; after reviewing suspect descriptions and *modus operandi* of two other robberies at stores, detective concluded same person had committed those robberies; trial court permitted detective to testify that, after date that defendant was arrested, there had been no other similar robberies in the area; court held this evidence was relevant; court stated evidence may have been subject to exclusion under Rule 403, but would not address that issue because defendant did not make Rule 403 objection).

403.cr.010 If evidence is relevant and therefore admissible, a trial court may not exclude that evidence unless the opposing party establishes that the evidence poses the danger of *unfair* prejudice, and establishes that the *unfair* prejudice *substantially* outweighs the probative value.

* *State v Machado*, 226 Ariz. 281, 246 P.3d 632, ¶ 25 (2011) (only issue in case was whether defendant or someone else committed murder; evidence of telephone call wherein caller admitted committing crime was relevant, and because it did not have potential of distracting jurors from central issue of case, probative value was not outweighed by prejudicial effect).

State v Villalobos, 225 Ariz. 74, 235 P.3d 227, ¶ 20 (2010) (defendant was charged with first-degree murder and child abuse as result of death of his girlfriend's daughter; defendant contended trial court erred in admitting following evidence: (1) 3 months prior, he had violently shaken victim; (2) 2 months prior, he had bruised victim's face and buttocks; (3) 1 month prior, he had bruised victim's face; (4) weeks prior, he had bruised victim's arms; court held evidence was relevant to rebut defendant's claim that he did not intend to hurt victim and hit her as "reflex" as well as his contention that girlfriend could have caused injuries, and held that, in light of defendant's defenses, probative value was not substantially outweighed by prejudicial effect because these other acts occurred shortly before fatal attack, and trial court gave appropriate limiting instruction).

State v Roque, 213 Ariz. 193, 141 P.3d 368, ¶¶ 53–59 (2006) (after 9/11/01, defendant said he wanted to shoot some "rag heads," referring to people defendant perceived to be of Arab descent; after drinking 75 ounces of beer, defendant shot and killed Sikh of Indian descent who wore turban, and shot at several other people at other locations; state's theory of case was that shootings were intentional acts of racism while intoxicated; defendant pursued insanity defense; in assessing defendant's mental health, state's expert testified that he considered defendant's 1983 conviction for attempted robbery; court noted that evidence of prior conviction is generally admissible when insanity is issue, but this evidence had only minimal probative value because there was no showing that robbery was alcohol induced or product of racism; however, although probative value was minimal, so was any prejudicial effect because (1) jurors heard about prior conviction from two other experts who testified that, because of age of conviction and lack of violence, it did not affect their assessment of defendant's mental health, (2) defendant admitted doing acts that were basis of current charges, so jurors did not rely on fact of prior conviction to prove defendant committed current acts, and (3) trial court offered to give limiting instruction, but defendant declined offer; thus defendant failed to prove probative value was substantially outweighed by danger of unfair prejudice).

State v Johnson, 212 Ariz. 425, 133 P.3d 735, ¶ 28 (2006) (although evidence that defendant was member of gang could have highly inflammatory impact, because evidence of defendant's gang-related activities was relevant to show motive for killing, which was to eliminate witness, trial court did not abuse discretion in admitting this evidence).

State v Johnson, 212 Ariz. 425, 133 P.3d 735, ¶¶ 36–40 (2006) (although parts of videotape of defendant's statement did not reflect well on defendant because of his use of profanity and references to unrelated criminal conduct, it was relevant because state's expert based opinion of personality disorder in part on videotape, and was helpful to jurors because it showed defendant's histrionic traits, thus trial court did not abuse discretion in admitting this evidence).

State v Cañez, 202 Ariz. 133, 42 P.3d 564, ¶¶ 50–51 (2002) (because hearing defendant's actual words and his demeanor would assist jurors in determining defendant's credibility, audiotape had probative value; court held it would be rare case when defendant's own statement would be considered prejudicial to extent it should be excluded under Rule 403).

State v Nordstrom, 200 Ariz. 229, 25 P.3d 717, ¶ 50 (2001) (because letter from defendant to third person had significant probative value, and because prejudicial effect of defendant's anger at third person for "not taking care of things the way we talked about" was minimal, trial court did not abuse discretion in admitting letter).

State v Martinez, 196 Ariz. 451, 999 P.2d 795, ¶¶ 29–33 (2000) (ballistic evidence showed shell casing found at subsequent robbery was consistent with ammunition used in officer's gun; evidence that defendant committed subsequent robbery was relevant to determination of defendant's identity as person who killed officer; defendant failed to establish evidence was unfairly prejudicial, or that danger of unfair prejudice substantially outweighed probative value).

State v Fulminante, 193 Ariz. 485, 975 P.2d 75, ¶¶ 56–57 (1999) (evidence comparing lead fragments from victim's head to lead ammunition from defendant's home was relevant because it showed defendant possessed ammunition consistent with that used to kill victim; defendant failed to show this evidence was unfairly prejudicial).

State v Fulminante, 193 Ariz. 485, 975 P.2d 75, ¶ 60 (1999) (evidence that defendant spanked victim and later said, "I'll kill your fucking ass," was relevant to show defendant's motive; defendant failed to show this evidence was unfairly prejudicial).

State v Sharp, 193 Ariz. 414, 973 P.2d 1171, ¶¶ 22–23 (1999) (in trial for kidnapping, sexual assault, and murder, pornographic magazine was relevant to show premeditation because it tended to show defendant's motive in calling victim to room was sexual; danger of unfair prejudice was limited because magazine was cumulative to other evidence of sexual motive and premeditation, and because prosecutor did not emphasize evidence at trial).

State v Rienhardt, 190 Ariz. 579, 951 P.2d 454 (1997) (on cross-examination, defendant elicited inconsistent statement from state's key witness; trial court allowed state to introduce prior consistent statements on re-direct; defendant claimed this put defense counsel in unfair light; court held that any unfair prejudice did not substantially outweigh probative value).

State v Lee(I), 189 Ariz. 590, 944 P.2d 1204 (1997) (although evidence of other murders was harmful to defense, not all harmful evidence is unfairly prejudicial; no showing that jurors were improperly influenced by emotion or horror).

State v Ramsey, 211 Ariz. 529, 124 P.3d 756, ¶ 37 (Ct. App. 2005) (defendant charged with continuous sexual abuse of child, which requires proof of three or more acts of sexual conduct with a minor, sexual assault, or molestation of a child under 14 years of age over a period of 3 months or more; evidence showed defendant touched 12-year-old daughter's breasts, vagina, and buttocks numerous times over 22-month period; court held evidence of incestuous pornographic material and evidence that defendant took daughter to adult store and bought vibrator and bottle of lubricant for her was relevant, and that trial court did not abuse discretion in overruling defendant's Rule 403 objection).

State v Mills, 196 Ariz. 269, 995 P.2d 705, ¶ 28 (Ct. App. 1999) (defendant had been involved in dissolution action with wife, and was charged with killing his wife by paying someone to shoot her; trial court properly admitted evidence that, 2 months prior to shooting, defendant had cut brake lines on wife's truck; although this evidence was prejudicial, defendant failed to show it was *unduly* prejudicial).

State v Klausner (Alger), 194 Ariz. 169, 978 P.2d 654, ¶¶ 19–20 (Ct. App. 1998) (trial court erred in finding that presumptions provided in A.R.S. § 28–692(E) [§ 28–1381(G)] were unfairly prejudicial and in refusing to present them to jurors).

State v Uriarte, 194 Ariz. 275, 981 P.2d 575, ¶¶ 20, 23 (Ct. App. 1998) (defendant was charged with child molestation, sexual conduct with minor, and public sexual indecency involving his 12-year-old sister-in-law; defendant's wife testified; evidence showed defendant's wife threatened victim and victim's mother with death if defendant was convicted; trial court did not abuse discretion in determining that this evidence had probative value, and that probative value was not substantially outweighed by danger of unfair prejudice).

State v Baldenegro, 188 Ariz. 10, 932 P.2d 275 (Ct. App. 1996) (in charge of assisting and participating in criminal syndicate for benefit of street gang, state had to prove "Carson 13" was a criminal street gang, thus evidence of criminal activity by members of "Carson 13" was relevant and had substantial probative value; trial court limited prejudicial effect by excluding specific names and instances of criminal conduct by "Carson 13" members; trial court therefore did not abuse discretion by admitting this evidence).

403.cr.020 If evidence is relevant and therefore admissible, a trial court may exclude that evidence if the opposing party establishes that the evidence poses the danger of *unfair* prejudice, and establishes that the *unfair* prejudice *substantially* outweighs the probative value.

State v Hughes, 189 Ariz. 62, 938 P.2d 457 (1997) (in a jailhouse statement, defendant said he gave juveniles cocaine as payment for committing murder, and evidence that certain juvenile had committed fire bombings would show defendant's control over that juvenile, but because most of witnesses discussed arson in context of defendant's retaliatory character, there was substantial risk jurors considered this evidence for improper purpose).

State v Coghill, 216 Ariz. 578, 169 P.3d 942, ¶¶ 12–22 (Ct. App. 2007) (defendant was charged with sexual exploitation of minor based on having child pornography on his computer; defendant contended trial court abused discretion in admitting evidence that he had downloaded adult pornography on his computer; court held that evidence showing defendant's ability, willingness, and superior opportunity to download and copy other material from Internet was both relevant and admissible, but nature and content of other downloaded material was either not relevant, or else its probative value was substantially outweighed by danger of unfair prejudice).

State v Vigil, 195 Ariz. 189, 986 P.2d 222, ¶¶ 26–27 (Ct. App. 1999) (court held trial court erred in not conducting any Rule 403 inquiry).

403.cr.025 If the trial court determines that evidence that another person may have committed the crime is relevant in that it tends to create a reasonable doubt about the defendant's guilt, the trial court may exclude that evidence if it determines that the evidence poses the danger of unfair prejudice, and that the unfair prejudice substantially outweighs the probative value.

State v Dann, 205 Ariz. 557, 74 P.3d 231, ¶¶ 30–36 (2003) (defendant sought to introduce evidence that, because victim took and sold drugs, some person involved in notoriously violent drug scene might have killed victim; trial court stated any connection between drug trade and murders was a "reach"; court stated its review would have been easier if trial court had stated its conclusion in terms of applicable legal standard, but because trial court discussion showed it understood need to determine relevance of evidence and thus was guided by applicable legal standard, court held that, whether trial court concluded evidence was not relevant under Rule 401 or tenuous and speculative nature of evidence caused it to fail Rule 403 test, trial court did not abuse discretion in precluding this evidence).

State v Gibson, 202 Ariz. 321, 44 P.3d 1001, ¶¶ 17–18 (2002) (evidence showed defendant, victim, and two other individuals were from same small Arizona town; these two individuals had been with victim shortly before murder, both gave alibis that could not be corroborated, both knew substantial information about crime that had not been made known to public; one of them had mental problems, and there was alleged sexual relationship between his wife and victim; trial court used "inherent tendency" test and excluded this evidence; court rejected "inherent tendency" test, held this type of evidence should be analyzed under Rules 401, 402, and 403, and reversed conviction).

403.cr.030 Because evidence that is relevant will generally be adverse to the opposing party, use of the word "prejudicial" to describe this type of evidence is incorrect and cannot be the basis for excluding evidence under this rule; evidence is "*unfairly* prejudicial" only if it has an undue tendency to suggest a decision on an improper basis, such as emotion, sympathy, or horror.

State v Boggs, 218 Ariz. 325, 185 P.3d 111, ¶¶ 67 (2008) (in mitigation, defendant claimed he suffered from mental health issues, including bipolar disorder, which caused him to have delusional involvement in a militia; defendant's letters threatening harm to those who mistreated leader of militia were relevant because they rebutted suggestion that defendant's involvement in militia was benign; because letters were not offered to show defendant's bad character, trial court did not abuse discretion in admitting them).

State v Lee(I), 189 Ariz. 590, 599–600, 944 P.2d 1204, 1213–14 (1997) (although evidence of other murders was harmful to defense, not all harmful evidence is unfairly prejudicial; no showing that jurors were improperly influenced by emotion or horror).

State v Dickens, 187 Ariz. 1, 926 P.2d 468 (1996) (once state had rested, one of its witnesses who previously refused to testify now agreed to testify; trial court did not abuse discretion in allowing state to reopen when testimony did not come as surprise to defendant; court noted that testimony certainly hurt defendant's case, but that did not equate to bad faith).

State v Herrera, 226 Ariz. 59, 243 P.3d 1041, ¶ 23 (Ct. App. 2010) (defendant was charged with four counts of committing sexual acts on step-daughter in Tucson between her 14th and 15th birthdays; trial court admitted evidence that defendant had committed sexual acts on victim in Yuma when she was 13; because jurors acquitted defendant of two of six counts, that indicated guilty verdicts were not result of emotion, sympathy, or horror.).

State v Damper, 223 Ariz. 572, 225 P.3d 1148, ¶¶ 20–22 (Ct. App. 2010) (defendant was charged with killing girlfriend (C.); defendant claimed shooting was accidental; shortly before shooting, C's friend B. received text message from C's cell phone that said, "Can you come over; me and Marcus [defendant] are fighting and I have no gas"; defendant contended prejudicial effect outweighed probative value; court held no show message would have caused jurors to decide case based on emotion, sympathy, or horror, and that message had significant probative value, thus trial court properly admitted text message).

State v Connor, 215 Ariz. 553, 161 P.3d 596, ¶¶ 37–39 (Ct. App. 2007) (defendant was charged with first-degree murder; evidence was presented that victim had been victim of check-cashing scheme and that victim's mother told him to stay away from anyone asking him to cash checks for them; evidence that defendant had asked victim to cash checks admissible to rebut defendant's testimony that he was friends with victim and was welcome in his apartment; court noted that evidence is "unfairly prejudicial" only if it has an undue tendency to suggest a decision on an improper basis, such as emotion, sympathy, or horror, and stated trial court was in best position to make this determination, and that trial court had given limiting instruction, which would mitigate any potential for unfair prejudice).

State v Mills, 196 Ariz. 269, 995 P.2d 705, ¶ 28 (Ct. App. 1999) (defendant had been involved in dissolution action with wife, and was charged with killing his wife by paying someone to shoot her; trial court properly admitted evidence that, 2 months prior to shooting, defendant had cut brake lines on wife's truck; although this evidence was prejudicial, defendant failed to show it was *unduly* prejudicial).

State v Fillmore, 187 Ariz. 174, 927 P.2d 1303 (Ct. App. 1996) (noted that any evidence that is probative of defendant's guilt is prejudicial, but "unfair prejudice" is something different; because defendant argued to trial court only that his statements were highly prejudicial and of questionable relevance and did not argue they were unfairly prejudicial and made no effort on appeal to show how they would have been unfairly prejudicial, court concluded that trial court properly admitted them).

403.cr.040 If evidence is relevant and therefore admissible, a trial court may exclude that evidence if the opposing party establishes that the evidence poses the danger of confusing the issues or misleading the jurors, and establishes that this danger of confusing the issues substantially outweighs the probative value.

State v Dann, 205 Ariz. 557, 74 P.3d 231, ¶¶ 37–39 (2003) (defendant sought to introduce evidence of drugs in victims' systems in order to discredit medical examiner's testimony about how quickly victims died; because medical examiner testified that drugs in system probably did not make substantial difference in time it took victims to die, this evidence may well have confused issues at trial, thus trial court did not abuse discretion in excluding this evidence).

403.cr.045 If the trial court determines that evidence that another person may have committed the crime is relevant in that it tends to create a reasonable doubt about the defendant's guilt, the trial court may exclude that evidence if it determines that the evidence poses the danger of confusing the issues or misleading the jurors, and establishes that this danger of confusing the issues substantially outweighs the probative value.

State v Dann, 205 Ariz. 557, 74 P.3d 231, ¶¶ 30–36 (2003) (defendant sought to introduce evidence that, because victim took and sold drugs, some person involved in notoriously violent drug scene might have killed victim; trial court stated any connection between drug trade and murders was a "reach"; court stated its review would have been easier if trial court had stated its conclusion in terms of applicable legal standard, but because trial court discussion showed it understood need to determine relevance of evidence and thus was guided by applicable legal standard, court held that, whether trial court concluded evidence was not relevant under Rule 401 or tenuous and speculative nature of evidence caused it to fail Rule 403 test, trial court did not abuse discretion in precluding this evidence).

State v Gibson, 202 Ariz. 321, 44 P.3d 1001, ¶¶ 17–18 (2002) (evidence showed defendant, victim, and two other individuals were from same small Arizona town; these two individuals had been with victim shortly before murder, both gave alibis that could not be corroborated, both knew substantial information about crime that had not been made known to public; one of them had mental problems, and there was alleged sexual relationship between his wife and victim; trial court used "inherent tendency" test and excluded this evidence; court rejected "inherent tendency" test, held this type of evidence should be analyzed under Rules 401, 402, and 403, and reversed conviction).

403.cr.050 If evidence is relevant and therefore admissible, a trial court may exclude that evidence if the opposing party establishes that the evidence poses the danger of undue delay or waste of time, and establishes that this danger of undue delay or waste of time substantially outweighs the probative value.

State v Dann, 205 Ariz. 557, 74 P.3d 231, ¶¶ 37–39 (2003) (defendant sought to introduce evidence of drugs in victims' systems in order to discredit medical examiner's testimony about how quickly victims died; because medical examiner testified that drugs in system probably did not make substantial difference in time it took victims to die, this evidence may well have wasted time at trial, thus trial court did not abuse discretion in excluding this evidence).

State v Nordstrom, 200 Ariz. 229, 25 P.3d 717, ¶ 39 (2001) (because trial court admitted evidence of defendant's brother's conduct during his recent period of probation, trial court did not abuse discretion in precluding evidence of defendant's brother's conduct during 1992–93 period of probation).

* *State v Abdi*, 226 Ariz. 361, 248 P.3d 209, ¶¶ 28–30 (Ct. App. 2011) (defendant testified he had been in refugee camp in Kenya at age 13 and that police in refugee camp had been corrupt and had beaten him; because that evidence would have supported defendant's explanation of why he ran from scene of stabbing and why he initially denied involvement when questioned by police, trial court did not abuse discretion in precluding as being cumulative defendant's testimony about being tortured as child in Somalia).

403.cr.055 If the trial court determines evidence that another person may have committed the crime is relevant in that it tends to create a reasonable doubt about defendant's guilt, the trial court may exclude that evidence if it determines the evidence poses the danger of undue delay or waste of time, and establishes that this danger of undue delay or waste of time substantially outweighs the probative value.

State v Dann, 205 Ariz. 557, 74 P.3d 231, ¶¶ 30–36 (2003) (defendant sought to introduce evidence that, because victim took and sold drugs, some person involved in notoriously violent drug scene might have killed victim; trial court stated any connection between drug trade and murders was a "reach"; court stated its review would have been easier if trial court had stated its conclusion in terms of applicable legal standard, but because trial court discussion showed it understood need to deter-

mine relevance of evidence and thus was guided by applicable legal standard, court held that, whether trial court concluded evidence was not relevant under Rule 401 or tenuous and speculative nature of evidence caused it to fail Rule 403 test, trial court did not abuse discretion in precluding this evidence).

State v Gilson, 202 Ariz. 321, 44 P.3d 1001, ¶¶ 17–18 (2002) (evidence showed defendant, victim, and two other individuals were from same small Arizona town; these two individuals had been with victim shortly before murder, both gave alibis that could not be corroborated, both knew substantial information about crime that had not been made known to public; one of them had mental problems, and there was alleged sexual relationship between his wife and victim; trial court used "inherent tendency" test and excluded this evidence; court rejected "inherent tendency" test, held this type of evidence should be analyzed under Rules 401, 402, and 403, and reversed conviction).

403.cr.080 If the crime, wrong, or act is an element of the charged crime, the trial court may not exclude that evidence or require its presentation in a bifurcated proceeding, even when the trial court concludes that the evidence is unfairly prejudicial.

State v Geschwind, 136 Ariz. 360, 363, 666 P.2d 460, 463 (1983) (because prior DUI offense was element of offense, defendant was not entitled to bifurcated trials on issues whether he drove while intoxicated without license and whether this was second time he did so).

State v Talamante (Murray), 214 Ariz. 106, 149 P.3d 484, ¶¶ 6–12 (Ct. App. 2006) (grand jury indicted defendant for violent sexual assault; state alleged defendant had prior conviction for sexual assault; court held that fact of prior conviction was element of offense and rejected defendant's contention that fact of prior conviction was sentencing enhancement factor, and thus concluded trial court erred in ruling that state could not introduce evidence of prior conviction in its case-in-chief).

403.cr.100 Once the trial court determines that a photograph has probative value, the trial court, if requested, must determine whether the photograph has any danger of unfair prejudice, and if so, whether the danger of unfair prejudice substantially outweighs the probative value.

State v Snelling, 225 Ariz. 182, 236 P.3d 409, ¶¶ 15–17 (2010) (trial court admitted autopsy photographs of victim who had been dead for 4 days; although photographs showed skin slippage and discoloration, each photograph conveyed highly relevant evidence about crime: cause and manner of victim's death and her body's state of decomposition, and medical examiner used them to explain injuries and assist jurors in understanding his testimony; court held trial court did not abuse discretion in admitting photographs after expressly finding their probative value was not substantially outweighed by any prejudicial effect).

State v Villalobos, 225 Ariz. 74, 235 P.3d 227, ¶ 23 (2010) (defendant was charged with first-degree murder and child abuse as result of death of his girlfriend's daughter; defendant contended trial court erred in admitting autopsy photographs showing various internal injuries; court held photographs were relevant to prove cause of death and extent of abuse and to rebut defendant's argument that victim seemed fine after he beat her and his suggestion she died because of lack of prompt medical care; court noted photographs showed only internal injuries and were unlikely to cause undue prejudice when charges involved beating death of young child, and further stated, "There is nothing sanitary about murder, and there is nothing in Rule 403 that requires a trial judge to make it so").

State v Lynch, 225 Ariz. 27, 234 P.3d 595, ¶¶ 29–31 (2010) (photographs depicted blood spatter and blood pools in relation to victim's body, and thus corroborated opinion of state's expert that person who slit victim's throat stood behind him; court stated that, although photographs were disturbing, none was overly gruesome, and further noted, "There is nothing sanitary about murder" and nothing "requires a trial judge to make it so").

State v Lynch, 225 Ariz. 27, 234 P.3d 595, ¶¶ 51–53 (2010) (during aggravation phase, trial court admitted three autopsy photographs depicting close-ups of victim's neck wounds (cut jugular vein; completely severed carotid artery; victim's torso covered in dried blood and head tilted back exposing severed larynx); court held these were properly admitted to illustrate testimony of medical examiner; court noted that, before jurors saw these photographs, they heard expert testimony about neck injuries without objection).

State v Kiles, 222 Ariz. 25, 213 P.3d 174, ¶ 37 (2009) (because photograph of adult victim showed her broken arm, which medical testimony explained was defensive wound, court held photograph was relevant to issue of whether defendant committed first-degree murder; court noted defendant identified nothing about photograph that was particularly inflammatory, especially given that "[t]here is nothing sanitary about murder").

State v Dann, 220 Ariz. 351, 207 P.3d 604, ¶¶ 44–47 (2009) (defendant contended trial court denied him his right to fair trial when it admitted autopsy photographs, which he contended were gruesome; court held photographs were relevant because they gave jurors clear picture of temporal, spatial, and motivational relationship of three killings; court stated "there is nothing sanitary about murder" and that "nothing requires a trial judge to make it so"; court noted trial court carefully examined all crime scene and autopsy photographs and excluded most gruesome ones, thus trial court did not abuse discretion in admitting photographs).

State v Cruz, 218 Ariz. 149, 181 P.3d 196, ¶¶ 123–127 (2008) (defendant challenged admission of autopsy photograph; court held photograph was relevant to assist jurors because fact and cause of death are always relevant in murder prosecution; court noted photograph was not particularly inflammatory, and that there is nothing sanitary about murder, and there is nothing in Rule 403 that requires trial court to make it so).

State v Pandeli, 215 Ariz. 514, 161 P.3d 557, ¶ 26 (2007) (court concluded only one photograph was gruesome, but noted trial court did not admit other photographs that were more gruesome; court held trial court did not abuse discretion in concluding probative value was not substantially outweighed by danger of unfair prejudice).

State v Pandeli, 215 Ariz. 514, 161 P.3d 557, ¶¶ 27–29 (2007) (photograph of Confederate flag used as window covering on van was relevant because victim's blood was on flag; photograph of van showing Confederate flag was relevant because killing took place in van; photograph of defendant, in which he was shirtless and showed tattoos, was relevant because it showed defendant's physical condition at time of murder and showed no visible injuries or defensive wounds; court noted probative value was minimal because defendant stipulated to existence of blood on flag, that murder took place in van, and that defendant had no injuries; court also noted prejudicial effect was minimal because defendant stipulated to blood on "Confederate flag taken from the rear side window" of defendant's van, and that it was not possible to read what tattoos said).

State v Morris, 215 Ariz. 324, 160 P.3d 203, ¶¶ 68–71 (2007) (court concluded photographs that showed victim's hands and feet and victim's nude body from a distance were not gruesome).

State v Hampton, 213 Ariz. 167, 140 P.3d 950, ¶¶ 3, 16–20 (2006) (defendant was upset at victim because victim had identified him to police; state's theory of case was that defendant went to victim's room, turned up volume on CD player, then shot victim in forehead, killing him, then as defendant was about to leave house, he went back into bedroom where victim's girlfriend was sleeping, and when she told him to get out, he shot her in head, killing her and her unborn child; defendant contended that, because he did not deny that murder took place, only that he was not the killer, photographs of victims were not relevant; court stated photographs of adults showed placement of victim's injuries and thus were relevant to corroborate testimony of state's witnesses, and although

photograph of fetus was unsettling, it was relevant to fetal manslaughter offense and multiple homicides aggravating circumstance; court again stated that "[t]here is nothing sanitary about murder, and there is nothing in Rule 403 that requires a trial judge to make it so"; court concluded trial court did not abuse discretion in admitting photographs).

State v Anderson, 210 Ariz. 327, 111 P.3d 369, ¶ 40 (2005) ("There is nothing sanitary about murder, and there is nothing in Rule 403 that requires a trial judge to make it so.").

State v Phillips, 202 Ariz. 427, 46 P.3d 1048, ¶¶ 29–31 (2002) (African-American man and white or Hispanic man with bandana on face robbed bar while armed with handgun and sawed-off rifle; trial court admitted photograph of defendant holding two handguns and wearing bandana; because one gun in photograph matched description of gun used in robbery, photograph was relevant; court noted defendant failed to explain how photograph's prejudicial effect outweighed its probative value).

State v Cañez, 202 Ariz. 133, 42 P.3d 564, ¶¶ 67 (2002) (photograph (ex. 19) depicted what witness saw upon entering house; court found photographs were not gruesome or inflammatory, and stated photograph had little probative value and little prejudicial effect, so trial court did not abuse discretion in admitting photograph).

State v Cañez, 202 Ariz. 133, 42 P.3d 564, ¶¶ 68 (2002) (photograph (ex. 75) depicted what officer saw upon entering house; court found photographs were not inflammatory or gruesome, and held that, to extent officer testified he did not remember body being in position depicted in photograph, that went to weight of photograph and not its admissibility).

State v Cañez, 202 Ariz. 133, 42 P.3d 564, ¶¶ 69 (2002) (photographs (ex. 32–34) were of victim's head during autopsy; defendant conceded photographs were relevant, but claimed they were unduly inflammatory; court found photographs were not gruesome or inflammatory).

State v Bocharski, 200 Ariz. 50, 22 P.3d 43, ¶¶ 21–25 (2001) (court stated photographs of victim's body were relevant, although noting that, when defendant does not contest certain issues, probative value may be minimal, but held trial court did not err in admitting Exhibits 42–45).

State v Bocharski, 200 Ariz. 50, 22 P.3d 43, ¶¶ 25–27 (2001) (court noted prosecutor argued photographs were relevant because they showed angles and depths of penetrating wounds, but prosecutor never questioned any witness about angles and depths of wounds; court concluded that photographs met bare minimum standard of relevance, but that probative value was substantially outweighed by danger of unfair prejudice, thus trial court should have excluded Exhibits 46–47, but found any error to be harmless).

State v Doerr, 193 Ariz. 56, 969 P.2d 1168, ¶¶ 29, 31–32 (1998) (court held that enlarged photograph of victim when alive was not relevant, and there was danger that such photograph would cause sympathy for victim, but concluded admission of photograph did not materially affect verdict in light of overwhelming physical evidence).

State v Trostle, 191 Ariz. 4, 951 P.2d 869 (1997) (although photograph of victim was arguably gruesome because body had been in desert for several days, it showed neither face nor fatal head wound, and therefore was not unfairly prejudicial).

State v Rienhardt, 190 Ariz. 579, 951 P.2d 454 (1997) (photographs of victim's injuries corroborated testimony of state's key witness; because they were fair representation of what happened, they were not unfairly prejudicial).

State v Spreitz, 190 Ariz. 129, 945 P.2d 1260 (1997) (photographs of victim after decomposing in desert heat for 3 days and showing insect activity had little if any probative value, thus trial court erred in not finding that probative value was substantially outweighed by prejudicial effect).

State v Lee(II), 189 Ariz. 608, 944 P.2d 1222 (1997) (four autopsy photographs and three blood-spatter photographs were relevant to show location, size, and shape of wounds, and sequence of shots, and were not unfairly prejudicial).

State v Hughes, 189 Ariz. 62, 938 P.2d 457 (1997) (photograph of victim in morgue showed her clothing and discoloration of her face; although it was gruesome, it was not unduly prejudicial).

State v Thornton, 187 Ariz. 325, 929 P.2d 676 (1996) (trial court found autopsy photograph was not unduly gory, and did not abuse discretion in finding that probative value was not outweighed by danger of unfair prejudice; because videotape of walk-through of victim's house showed victim's body only twice and did not show blood oozing from head, it was not unduly prejudicial).

State v Wagner, 194 Ariz. 1, 976 P.2d 250, ¶¶ 43–45 (Ct. App. 1998) (court agreed that photographs showing victim's (1) face with traces of blood and assorted injuries, (2) chest wound with gunpowder residue, and (3) shoulder and ear with powder burn marks were relevant because they corroborated witness's testimony that defendant struck victim before shooting her and helped explain medical examiner's testimony about powder burn marks; because these were only marginally inflammatory, trial court did not abuse discretion in admitting them), *vac'd in part & aff'd in part,* 194 Ariz. 310, 982 P.2d 270 (1999).

403.cr.115 If a photograph has little bearing on any expressly or impliedly contested issue, or if a photograph is merely duplicative to other photographs, its relevance may be limited, and thus if that photograph is prejudicial, its probative value may be substantially outweighed by the danger of unfair prejudice.

State v Dawlt, 207 Ariz. 191, 84 P.3d 456, ¶¶ 63–64 (2004) (defendant contended trial court abused discretion in admitting photographs and videotape of crime scene because he did not contest identity of victims and fact that murders had occurred; court held probative value was minimal and photographs and videotape were highly inflammatory, thus trial court abused discretion in admitting them, but any error was harmless in light of other evidence).

State v Bocharski, 200 Ariz. 50, 22 P.3d 43, ¶¶ 21–25 (2001) (court stated photographs of victim's body were relevant, although noting that, when defendant does not contest certain issues, probative value may be minimal, but held trial court did not err in admitting Exhibits 42–45).

State v Bocharski, 200 Ariz. 50, 22 P.3d 43, ¶¶ 25–27 (2001) (court noted prosecutor argued photographs were relevant because they showed angles and depths of penetrating wounds, but prosecutor never questioned any witness about angles and depths of wounds; court concluded that photographs met bare minimum standard of relevance, but that probative value was substantially outweighed by danger of unfair prejudice, thus trial court should have excluded Exhibits 46–47, but found any error to be harmless).

State v Anderson, 197 Ariz. 314, 4 P.3d 369, ¶ 30 (2000) (court concluded several photographs were cumulative to other less inflammatory photographs, and thus were arguably prejudicial in light of slight probative value).

403.cr.120 The trial court is not required *sua sponte* to weigh the danger of unfair prejudice against probative value unless the party against whom the evidence is offered objects on that basis.

State v Montaño, 204 Ariz. 413, 65 P.3d 61, ¶¶ 55–58 (2003) (defendant contended on appeal that trial court abused discretion under Rule 403 in admitting photographs; state noted defendant only objected generally to admission of photographs; court held that, "Because the appellant's trial counsel did not object on 403 grounds, the argument has been waived.").

State v Montaño, 204 Ariz. 413, 65 P.3d 61, ¶¶ 59–63 (2003) (when witness testified at trial about meaning of defendant's EME tattoo, defendant objected on basis of relevance and foundation; on appeal, defendant contended admission of this evidence violated Rule 403; court held defendant waived any Rule 403 objection).

State v Miller, 215 Ariz. 40, 156 P.3d 1145, ¶ 9 (Ct. App. 2007) (defendant was charged with robbery at commercial store; after reviewing suspect descriptions and *modus operandi* of two other robberies at commercial stores, detective concluded that same person had committed those robberies; trial court permitted detective to testify that, after date that defendant was arrested, there had been no other similar robberies in the area; court held this evidence was relevant; court stated evidence may have been subject to exclusion under Rule 403, but would not address that issue because defendant did not make Rule 403 objection).

403.cr.140 When evidence has both probative value and prejudicial effect, the trial court need not require wholesale proscription; it should determine (1) whether probative value of the evidence is sufficient that it should be admitted in some form, (2) what restrictions should be placed by jury instructions on the use of the evidence, and (3) whether the evidence can be narrowed or limited to reduce its potential for unfair prejudice while preserving probative value.

State v Martinez, 196 Ariz. 451, 999 P.2d 795, ¶¶ 29–33 (2000) (because ballistic evidence showed shell casing found at subsequent robbery was consistent with ammunition used in officer's gun, evidence that defendant committed subsequent robbery was relevant to determination of identity of defendant as person who killed officer; because trial court allowed admission only of evidence of robbery and use of weapon, and precluded evidence that defendant shot and killed store clerk during robbery, trial court adequately protected defendant against unfair prejudice).

State v Hughes, 189 Ariz. 62, 938 P.2d 457 (1997) (evidence of defendant's drug involvement with victim was relevant to motive, but trial court erred in admitting cumulative evidence because it went far beyond that necessary to establish motive, thus trial court should have limited this evidence to its probative essence by excluding irrelevant or inflammatory detail).

State v Coghill, 216 Ariz. 578, 169 P.3d 942, ¶¶ 12–22 (Ct. App. 2007) (defendant was charged with sexual exploitation of minor based on having child pornography on his computer; defendant contended trial court abused discretion in admitting evidence that he had downloaded adult pornography on his computer; court held that evidence showing defendant's ability, willingness, and superior opportunity to download and copy other material from Internet was both relevant and admissible, but nature and content of other downloaded material was either not relevant, or else its probative value was substantially outweighed by danger of unfair prejudice; court stated witnesses could have referred to other material in general terms without disclosing its pornographic nature).

State v Connor, 215 Ariz. 553, 161 P.3d 596, ¶¶ 29–34 (Ct. App. 2007) (defendant was charged with first-degree murder; evidence that victim's apartment had been burglarized and that family and friends had told victim they believed defendant had done the burglary and victim should stay away from defendant admissible to rebut defendant's testimony that he was friends with victim and was welcome in his apartment; to avoid prejudice to defendant, trial court instructed jurors there was no evidence defendant had in fact burglarized apartment).

State v Baldenegro, 188 Ariz. 10, 932 P.2d 275 (Ct. App. 1996) (in charge of assisting and participating in criminal syndicate for benefit of street gang, state had to prove "Carson 13" was criminal street gang, thus evidence of criminal activity by members of "Carson 13" was relevant and had substantial probative value; trial court limited prejudicial effect by excluding specific names and instances of criminal conduct by "Carson 13" members; trial court therefore did not abuse discretion by admitting this evidence).

403.cr.180 The appellate court must look at the evidence in a light most favorable to its proponent, maximizing its probative value and minimizing its prejudicial effect.

State v Harrison, 195 Ariz. 28, 985 P.2d 513, ¶¶ 20–21 (Ct. App. 1998) (in charge of aggravated assault against police officers, because defendant claimed he acted in self-defense, his statement while being transported to police station that, if he had possessed a gun, both he and officer would have been shot, was admissible to show desire to harm officer and to refute claim that he acted in self-defense, thus evidence had probative value; because numerous witnesses testified about defendant's aggressive, assaultive behavior, this evidence added little to prejudice already presented), *aff'd*, 195 Ariz. 1, 985 P.2d 486 (1999).

403.cr.190 Because the trial court is best situated to conduct a Rule 403 balancing, an appellate court will reverse a trial court's ruling only for an abuse of discretion.

State v Cañez, 202 Ariz. 133, 42 P.3d 564, ¶¶ 60–61 (2002) (court rejected defendant's claim that, even though defendant's statement was admissible, playing audiotape to jurors was prejudicial because of defendant's thick accent, poor grammar, limited education, and cocky, nonchalant attitude).

March 11, 2012

Rule 404. Character Evidence not Admissible to Prove Conduct; Exceptions; Other Crimes.

(a) Character evidence generally. Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:

(1) *Character of accused or civil defendant.* Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same, or evidence of the aberrant sexual propensity of the accused or a civil defendant pursuant to Rule 404(c);

(2) *Character of victim.* Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor;

(3) *Character of witness.* Evidence of the character of a witness, as provided in Rules 607, 608, and 609.

(b) Other crimes, wrongs, or acts. Except as provided in Rule 404(c) evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

(c) Character evidence in sexual misconduct cases. In a criminal case in which a defendant is charged with having committed a sexual offense, or a civil case in which a claim is predicated on a party's alleged commission of a sexual offense, evidence of other crimes, wrongs, or acts may be admitted by the court if relevant to show that the defendant had a character trait giving rise to an aberrant sexual propensity to commit the offense charged. In such a case, evidence to rebut the proof of other crimes, wrongs, or acts, or an inference therefrom, may also be admitted.

(1) In all such cases, the court shall admit evidence of the other act only if it first finds each of the following:

(A) The evidence is sufficient to permit the trier of fact to find that the defendant committed the other act.

(B) The commission of the other act provides a reasonable basis to infer that the defendant had a character trait giving rise to an aberrant sexual propensity to commit the crime charged.

(C) The evidentiary value of proof of the other act is not substantially outweighed by danger of unfair prejudice, confusion of issues, or other factors mentioned in Rule 403. In making that determination under Rule 403 the court shall also take into consideration the following factors, among others:

(i) remoteness of the other act;

(ii) similarity or dissimilarity of the other act;

(iii) the strength of the evidence that defendant committed the other act;

(iv) frequency of the other acts;

(v) surrounding circumstances;

(vi) relevant intervening events;

(vii) other similarities or differences;

(viii) other relevant factors.

(D) The court shall make specific findings with respect to each of (A), (B), and (C) of Rule 404(c)(1).

(2) In all cases in which evidence of another act is admitted pursuant to this subsection, the court shall instruct the jury as to the proper use of such evidence.

(3) In all criminal cases in which the state intends to offer evidence of other acts pursuant to this subdivision of Rule 404, the state shall make disclosure to the defendant as to such acts as required by Rule 15.1, Rules of Criminal Procedure, no later than 45 days prior to the final trial setting or at such later time as the court may allow for good cause. The defendant shall make disclosure as to rebuttal evidence pertaining to such acts as required by Rule 15.2, no later than 20 days after receipt of the state's disclosure or at such other time as the court may allow for good cause. In all civil cases in which a party intends to offer evidence of other acts pursuant to this subdivision of Rule 404, the parties shall make disclosure as required by Rule 26.1, Rules of Civil Procedure, no later than 60 days prior to trial, or at such later time as the court may allow for good cause shown.

(4) As used in this subsection of Rule 404, the term "sexual offense" is as defined in A.R.S. § 13-1420(C) and, in addition, includes any offense of first-degree murder pursuant to A.R.S. § 13-1105(A)(2) of which the predicate felony is sexual conduct with a minor under § 13-1405, sexual assault under § 13-1406, or molestation of a child under § 13-1410.

Comment to 2012 Amendment

The language of Rule 404 has not been changed in any manner.

Comment to 1997 Amendment

Subsection (c) of Rule 404 is intended to codify and supply an analytical framework for the application of the rule created by case law in State v. Treadaway, 116 Ariz. 163, 568 P.2d 1061 (1977), and State v. McFarlin, 110 Ariz. 225, 517 P.2d 87 (1973). The rule announced in *Treadaway* and *McFarlin* and here codified is an exception to the common-law rule forbidding the use of evidence of other acts for the purpose of showing character or propensity.

Subsection (1)(B) of Rule 404(c) is intended to modify the *Treadaway* rule by permitting the court to admit evidence of remote or dissimilar other acts providing there is a "reasonable" basis, by way of expert testimony or otherwise, to support relevancy, i.e., that the commission of the other act permits an inference that defendant had an aberrant sexual propensity that makes it more probable that he or she committed the sexual offense charged. The *Treadaway* requirement that there be expert testimony in all cases of remote or dissimilar acts is hereby eliminated.

The present codification of the rule permits admission of evidence of the other act either on the basis of similarity or closeness in time, supporting expert testimony, or other reasonable basis that will support such an inference. To be admissible in a criminal case, the relevant prior bad act must be shown to have been committed by the defendant by clear and convincing evidence. State v. Terrazas, 189 Ariz. 580, 944 P.2d 1194 (1997).

Notwithstanding the language in *Treadaway*, the rule does not contemplate any bright line test of remoteness or similarity, which are solely factors to be considered under subsection (1)(c) of Rule 404(c). A medical or other expert who is testifying pursuant to Rule 404(c) is not required to state a diagnostic conclusion concerning any aberrant sexual propensity of the defendant so long as his or her testimony assists the trier of fact and there is other evidence which satisfies the requirements of subsection (1)(B).

Subsection (1)(C) of the rule requires the court to make a Rule 403 analysis in all cases. The rule also requires the court in all cases to instruct the jury on the proper use of any other act evidence that is admitted. At a minimum, the court should instruct the jury that the admission of other acts does not lessen

the prosecution's burden to prove the defendant's guilt beyond a reasonable doubt, and that the jury may not convict the defendant simply because it finds that he committed the other act or had a character trait that predisposed him to commit the crime charged.

Comment to Original 1977 Rule

State v. Superior Court, 113 Ariz. 22, 545 P.2d 946 (1976), is consistent with and interpretative of Rule 404(a)(2).

Paragraph (a)(1) — Character evidence generally — Character of the accused.

Criminal Cases

404.a.1.cr.010 The defendant in a criminal case is permitted to offer evidence of a trait of the defendant's character provided that trait of character is pertinent to the litigation.

State v Lopez, 174 Ariz. 131, 139, 847 P.2d 1078, 1086 (1992) (defendant's character of being nonviolent individual who was caring when dealing with children was relevant to murder charge resulting from beating death of 1-year-old victim, thus trial court erred in not admitting that evidence; because state would then have had right to introduce evidence that defendant had been convicted of child molestation 1 month before trial, exclusion of evidence did not prejudice defendant).

State v Rhodes, 219 Ariz. 476, 200 P.3d 973, ¶¶ 10–12 (Ct. App. 2008) (court held that, when defendant is charged with sexual conduct with child, evidence of defendant's sexual normalcy, or appropriateness in interacting with children, is character trait and one that pertains to charges of sexual conduct with child).

State v Vandever, 211 Ariz. 206, 119 P.3d 473, ¶¶ 9–13 (Ct. App. 2005) (defendant made illegal left turn from right lane; oncoming car collided and passenger died; defendant proffered evidence that he acted prudently and carefully in conducting his life; trial court precluded that evidence; court held evidence of defendant's general reputation for prudence and care in daily life was not relevant and not "pertinent," thus trial court properly precluded this evidence).

404.a.1.cr.030 Once a defendant presents evidence of the defendant's character, the state is permitted to present evidence of prior acts to rebut that character evidence.

State v Lopez, 174 Ariz. 131, 139, 847 P.2d 1078, 1086 (1992) (defendant's character of being nonviolent individual who was caring when dealing with children was relevant to murder charge resulting from beating death of 1-year-old victim, thus trial court erred in not admitting that evidence; because state would then have had right to introduce evidence that defendant had been convicted of child molestation 1 month before trial, exclusion of evidence did not prejudice defendant).

Paragraph (a)(2) — Character evidence generally — Character of the victim.

Criminal Cases

404.a.2.cr.010 The defendant in a criminal case is permitted to offer evidence of a trait of the victim's character provided that trait of character is pertinent to the litigation.

State v Fish, 222 Ariz. 109, 213 P.3d 258, ¶ 25 (Ct. App. 2009) (defendant killed victim, and claimed he acted in self-defense; defendant was permitted to offer evidence of victim's character for violence, but could do so only through evidence of opinion or reputation).

State v Connor, 215 Ariz. 553, 161 P.3d 596, ¶¶ 18–25 (Ct. App. 2007) (defendant was charged with first-degree murder; defendant contended he was entitled to discovery of victim's medical records to support his claim of self-defense; defendant was able to present testimony that victim had character

trait that caused him to become more easily agitated and aggressive when not on medication, and to present evidence that victim was not taking his medication; because defendant gave no indication that victim's medical records could have contained any additional information that would have been admissible, defendant failed to establish that he was entitled to disclosure of victim's medical records).

404.a.2.cr.015 If the defendant offers evidence of a trait of the victim's character that is pertinent to the litigation, the state is then permitted to offer evidence to rebut that character evidence.

State v Greene, 192 Ariz. 431, 967 P.2d 106, ¶¶ 9–11 (1998) (once defendant made claim that he killed victim in response to victim's homosexual advance, state was permitted to offer evidence of victim's heterosexual character; because accusing married person of making non-spousal sexual advance places other aspects of person's character in evidence, such as fidelity, integrity, honesty, trustworthiness, and loyalty, state properly obtained testimony from victim's widow that he was "a man of great honor and integrity, of great moral principle, of deep, abiding faith . . . [and] devoted to [his wife]").

404.a.2.cr.030 Evidence of specific acts of violence by a victim are admissible only when the defendant personally observed those acts or when the defendant knew of those acts prior to the charged offense.

State v Taylor, 169 Ariz. 121, 817 P.2d 488 (1991) (evidence of victim's prior conviction for child abuse was admissible because defendant knew of this conviction, and it was relevant to determine whether defendant was justifiably apprehensive about his own safety and safety of two children in apartment).

State v Santarma, 153 Ariz. 147, 735 P.2d 757 (1987) (specific acts of violence by victim would be admissible if known to defendant in order to prove defendant's state of mind, but only if defendant's state of mind is relevant; because defendant did not rely on self-defense, and evidence did not show that victim was initial aggressor, violent character of victim was not relevant, thus evidence of victim's character was not admissible).

State v Fish, 222 Ariz. 109, 213 P.3d 258, ¶¶ 25, 35–40 (Ct. App. 2009) (defendant killed victim, and claimed he acted in self-defense; because defendant did not know of victim's specific acts of violence at time confrontation occurred, defendant was not permitted to introduce evidence of those specific acts of violence).

State v Connor, 215 Ariz. 553, 161 P.3d 596, ¶¶ 12–16 (Ct. App. 2007) (defendant was charged with first-degree murder; defendant contended he was entitled to discover victim's medical records to support claim of self-defense; because defendant made no claim that medical records contained instances of violence about which defendant already knew, defendant would not be permitted to use any instances of violence contained in medical records, assuming there were any, thus defendant was not entitled to disclosure of victim's medical records).

State v Roscoe, 182 Ariz. 332, 897 P.2d 634 (Ct. App. 1994) (because defendant had no prior knowledge of officers' alleged tendencies for aggressiveness or violence, trial court properly precluded any evidence of officers' specific acts of alleged aggressiveness or violence), *vacated on other grounds,* 185 Ariz. 68, 912 P.2d 1297 (1996).

State v Cano, 154 Ariz. 447, 743 P.2d 956 (Ct. App. 1987) (because defendant made no showing he was personally aware of any specific acts of assaultive behavior by guard, he was not entitled to discovery of guard's records for purpose of learning whether they contained information showing that guard was predisposed to provoking altercations).

State v Williams, 141 Ariz. 127, 685 P.2d 764 (Ct. App. 1984) (proper to exclude evidence of victim's violent character when defendant had no knowledge of victim's conduct).

State v Zamora, 140 Ariz. 338, 681 P.2d 921 (Ct. App. 1984) (in prosecution for aggravated assault, proper to exclude testimony that victim belonged to gang called the "Eastsiders" when defendant did not know of this gang, did not know victim was member of such gang, and did not know gang to be violent).

Paragraph (b) — Other crimes, wrongs, or acts.

Civil Cases

404.b.civ.050 If the conduct in committing the other crime, wrong, or act was a **necessary preliminary** to, or an **inevitable result** of, the conduct that is the subject of the litigation, evidence of the other act or acts will **complete the story** and will be **intrinsic** evidence, and thus admissible without a Rule 404(b) analysis.

Hudgins v Southwest Airlines, Co, 221 Ariz. 472, 212 P.3d 810, ¶ 22 (Ct. App. 2009) (plaintiffs were bail enforcement agents (bounty hunters); on 9/11/99, they flew from Baltimore to Phoenix; before trip, they called Southwest Airlines (SWA) to obtain instructions on how to transport handguns lawfully on airplane; plaintiffs followed those instructions, but were arrested in Phoenix because they were not law enforcement officers; plaintiffs sued SWA claiming that SWA was negligent in actions that led to plaintiffs' arrest; jurors returned verdicts of $500,000 each in compensatory damages and $4 million each in punitive damages; SWA contended that evidence that plaintiffs (1) failed to obtain Maryland-issued concealed weapons permits and (2) failed to work with local bail agent in apprehending fugitive in Tucson after they were released from custody was relevant on issue of plaintiffs' comparative fault for failing to investigate adequately how to transport weapons legally on airplane; court held that neither (1) whether plaintiffs violated Maryland law while going to Baltimore airport nor (2) whether plaintiffs failed to comply with local laws while apprehending fugitive in Tucson made it more or less probable that plaintiffs exercised reasonable care in investigating how to travel legally on airplane with weapons, thus evidence was not relevant, and conduct in Maryland was not "necessary preliminary" to crimes charged for transporting weapons on airplane, thus this was not intrinsic evidence).

404.b.civ.060 If the conduct in committing the other crime, wrong, or act is so connected with the conduct that is the subject of the litigation that proof of one **incidentally involves** proof of another or **explains the circumstances** of the conduct that is the subject of the litigation, evidence of the other act or acts will **complete the story** and will be **intrinsic** evidence, and thus admissible without a Rule 404(b)

Hudgins v Southwest Airlines, Co, 221 Ariz. 472, 212 P.3d 810, ¶ 23 (Ct. App. 2009) (plaintiffs were bail enforcement agents (bounty hunters); on 9/11/99, they flew from Baltimore to Phoenix; before trip, they called Southwest Airlines (SWA) to obtain instructions on how to transport handguns lawfully on airplane; plaintiffs followed those instructions, but were arrested in Phoenix because they were not law enforcement officers; plaintiffs sued SWA claiming that SWA was negligent in actions that led to plaintiffs' arrest; jurors returned verdicts of $500,000 each in compensatory damages and $4 million each in punitive damages; SWA contended that evidence that plaintiffs (1) failed to obtain Maryland-issued concealed weapons permits and (2) failed to work with local bail agent in apprehending fugitive in Tucson after they were released from custody was relevant on issue of plaintiffs' comparative fault for failing to investigate adequately how to transport weapons legally on airplane; court held that neither (1) whether plaintiffs violated Maryland law while going to Baltimore airport nor (2) whether plaintiffs failed to comply with local laws while apprehending fugitive in Tucson made it more or less probable that plaintiffs exercised reasonable care in investigating how to travel legally on airplane with weapons, thus evidence was not relevant; and that conduct that was the subject of litigation was manner that plaintiffs were able to fly with weapons, plaintiffs' arrest, incarceration, and eventual prosecution, and SWA's role in post-arrest investigation, and that plaintiffs' purported violations of other laws did not explain these events, thus this other act evidence did complete the story, so it was not intrinsic evidence).

404.b.civ.080 If the evidence of other crimes, wrongs, or acts is **extrinsic** evidence, four factors protect a party from unfair prejudice that could result from the admission of this evidence: (1) the evidence must be admitted for a proper purpose, that is, it must be legally or logically relevant; (2) the evidence must be factually or conditionally relevant; (3) the trial court, if requested, may exclude this evidence if its probative value is substantially outweighed by the danger of unfair prejudice; and (4) the trial court, if requested, must give a limiting instruction on the limited purpose for which this evidence was admitted.

Lee v Hodge, 180 Ariz. 97, 100–01, 882 P.2d 408, 411–12 (1994) (court employed four-part test as used in *State v Atwood*, 171 Ariz. 576, 638, 832 P.2d 593, 655 (1992)).

404.b.civ.090 **Extrinsic** evidence of another crime, wrong, or act is admissible if it is legally or logically relevant, which means it tends to prove or disprove any issue in the case, and thus is admitted for some purpose other than to show a person's criminal character.

Higgins v Assmann Elec. Inc., 217 Ariz. 289, 173 P.3d 453, ¶¶ 35–38 (Ct. App. 2007) (Assmann Electronics was German company; Meyer was Assmann's highest ranking officer in United States and was plaintiff's supervisor; Meyer and plaintiff had consensual sexual relationship that had terminated prior to time of relevant events; over Labor Day, Meyer called plaintiff, and getting no response, went to her apartment, and upon entering, found plaintiff and male companion dressed only in bath towels; Meyer became enraged and attacked plaintiff's companion; Meyer assaulted plaintiff, threw her out front door where her towel came off when she hit wall, punched plaintiff, and then told her she was fired; 3½ weeks later, Assmann's chief financial officer sent letter to plaintiff stating her employment was terminated and her work visa had therefore expired; parties went to trial on assault claim against Meyer and wrongful termination claim against Meyer and Assmann; jurors returned verdict in favor of plaintiff on both counts; Meyer contended trial court erred in admitting evidence of prior altercation he had with co-workers at Z-Tejas restaurant; court noted there was evidence that people at Assmann were aware of Meyer's conduct and took no action; court held this evidence had some probative value in showing Meyer was fully in charge in Arizona and that people at Assmann did not challenge his conduct or decisions).

Brown v U.S.F. & G., 194 Ariz. 85, 977 P.2d 807, ¶¶ 15–18 (Ct. App. 1998) (defended insurance company refusal to pay claim on basis that plaintiff had breached contract by misrepresenting material facts on insurance application; because plaintiff's "long history of fire loss claims" was admissible to show that plaintiff had misrepresented fire loss history on insurance application, it was admissible even though it also tended to show plaintiff's character).

Thompson v Better-Bilt Alu. Prod. Co., 187 Ariz. 121, 927 P.2d 781 (Ct. App. 1996) (after-acquired evidence that plaintiff committee fraud in the employment application admissible on issue of extent of plaintiff's damages for wrongful termination).

404.b.civ.100 If the **extrinsic** evidence of the other crime, wrong, or act is not relevant to any issue being litigated, then the only effect of that evidence is to show that the person has a bad character, and thus it would be error to admit the evidence.

Hudgins v Southwest Airlines, Co., 221 Ariz. 472, 212 P.3d 810, ¶ 21 (Ct. App. 2009) (plaintiffs were bail enforcement agents (bounty hunters); on 9/11/99, they flew from Baltimore to Phoenix; before trip, they called Southwest Airlines (SWA) to obtain instructions on how to transport handguns lawfully on airplane; plaintiffs followed those instructions, but were arrested in Phoenix because they were not law enforcement officers; plaintiffs sued SWA claiming that SWA was negligent in actions that led to plaintiffs' arrest; jurors returned verdicts of $500,000 each in compensatory damages and $4 million each in punitive damages; SWA contended that evidence that plaintiffs (1) failed to obtain Maryland-issued concealed weapons permits and (2) failed to work with local bail agent in apprehending fugitive in Tucson after they were released from custody was relevant on issue of plaintiffs' comparative fault

for failing to investigate adequately how to transport weapons legally on airplane; court held that neither (1) whether plaintiffs violated Maryland law while going to Baltimore airport nor (2) whether plaintiffs failed to comply with local laws while apprehending fugitive in Tucson made it more or less probable that plaintiffs exercised reasonable care in investigating how to travel legally on airplane with weapons, thus evidence was not relevant, and only purpose would be to show character to prove actions in conformity with character during event in question, which Rule 404(b) specifically excludes).

Elia v Pifer, 194 Ariz. 74, 977 P.2d 796, ¶¶ 13–23 (Ct. App. 1998) (defendant was plaintiff's former attorney in dissolution action; plaintiff sued defendant for legal malpractice, claiming defendant did not have authority to agree to terms of proposed settlement agreement, and planned to introduce telephone message slip found in defendant's files purportedly saying not to agree to terms; in deposition testimony, defendant said she did not believe message slip was written in her office, and that plaintiff had come into her office and "rampaged" through his file; prior to trial, attorneys agreed message slip was admissible; in opening statement, plaintiff's attorney predicted that defendant would testify that plaintiff somehow planted message slip in file; defendant's attorney then claimed that statement opened door to defendant's state of mind and thus he intended to introduce evidence that Dental Board had found plaintiff had fraudulently altered patient's records; trial court allowed defendant's attorney to say that in opening statement, and allowed defendant to testify she thought defendant had planted the message slip because Dental Board had found plaintiff "guilty" of altering records; court held relevance and authenticity of message slip were not at issue at start of case because parties had stipulated to its admissibility, but when plaintiff suggested in opening statement that defendant might accuse plaintiff of fabrication, that made authenticity of message slip relevant, but it did not open door and make defendant's state of mind relevant, thus trial court erred in allowing admission of character evidence about plaintiff, resulting in reversal).

404.b.civ.120 Evidence of other similar accidents at or near the place is admissible provided the conditions under which the previous accident were the same or substantially similar to the one in question, and there must be evidence tending to prove the existence of a dangerous or defective condition, knowledge of or notice of the dangerous condition, or negligence in permitting it to continue.

Wiggs v City of Phx., 197 Ariz. 358, 4 P.3d 413, ¶¶ 47–52 (Ct. App. 1999) (plaintiff's daughter killed while in crosswalk at 8:05 p.m. August 3; testimony was that streetlight was not on; plaintiff offered evidence of two prior accidents in March 1 and May 6; because there was no testimony indicating whether streetlight was on during these prior accidents, trial court did not abuse discretion in excluding that evidence), *vac'd,* 198 Ariz. 367, 10 P.3d 625 (2000).

404.b.civ.240 **Extrinsic** evidence of another crime, wrong, or act is relevant to show **knowledge**.

Hudgins v Southwest Airlines, Co, 221 Ariz. 472, 212 P.3d 810, ¶¶ 11–14 (Ct. App. 2009) (plaintiffs were bail enforcement agents (bounty hunters); on 9/11/99, they flew from Baltimore to Phoenix; before trip, they called Southwest Airlines (SWA) to obtain instructions on how to transport handguns lawfully on airplane; plaintiffs followed those instructions, but were arrested in Phoenix because they were not law enforcement officers; plaintiffs sued SWA claiming that SWA was negligent in actions that led to plaintiffs' arrest; jurors returned verdicts of $500,000 each in compensatory damages and $4 million each in punitive damages; SWA contended trial court erred in admitting letter from FAA to SWA concerning 1998 incident in which SWA permitted other bounty hunters who had presented false information to board SWA flight; letter stated SWA failed to ask basic questions that would have prevented deception, and further advised SWA that there appeared to be prevalent problem in Arizona where individuals calling themselves bail recovery agents or bounty hunters have been able to present themselves as being authorized to travel armed when they were not so authorized; court held letter was admissible to show SWA had notice of problem of bounty hunters attempting to fly while armed and what steps SWA should take to prevent this from happening).

Higgins v Assmann Elec. Inc., 217 Ariz. 289, 173 P.3d 453, ¶¶ 35–38 (Ct. App. 2007) (Assmann Electronics was German company; Meyer was Assmann's highest ranking officer in United States and was plaintiff's supervisor; Meyer and plaintiff had consensual sexual relationship that had terminated prior to time of relevant events; over Labor Day, Meyer called plaintiff, and getting no response, went to her apartment, and upon entering, found plaintiff and male companion dressed only in bath towels; Meyer became enraged and attacked plaintiff's companion; Meyer assaulted plaintiff, threw her out front door where her towel came off when she hit wall, punched plaintiff, and then told her she was fired; 3½ weeks later, Assmann's chief financial officer sent letter to plaintiff stating her employment was terminated and her work visa had therefore expired; parties went to trial on assault claim against Meyer and wrongful termination claim against Meyer and Assmann; jurors returned verdict in favor of plaintiff on both counts; Meyer contended trial court erred in admitting evidence of prior altercation he had with co-workers at Z-Tejas restaurant; court noted there was evidence that people at Assmann were aware of Meyer's conduct and took no action; court held this evidence had some probative value in showing that people at Assmann knew of Meyer's conduct and did not challenge his conduct or decisions).

404.b.civ.250 **Extrinsic** evidence of another crime, wrong, or act is relevant to show **motive**.

State v Martinez, 196 Ariz. 451, 999 P.2d 795, ¶¶ 29–33 (2000) (evidence of arrest warrant and defendant's knowledge of warrant was admissible to show motive for killing).

404.b.civ.305 **Extrinsic** evidence of another crime, wrong, or act may be relevant to determine **amount of damages**.

Wiggs v City of Phx., 197 Ariz. 358, 4 P.3d 413, ¶¶ 53–58 (Ct. App. 1999) (plaintiff's daughter was struck and killed while in crosswalk; evidence that plaintiff gave birth to another daughter admissible to show grief might be less, and evidence that plaintiff's boyfriend died of AIDS admissible to show plaintiff's grief may have come in part from another source), *vac'd*, 198 Ariz. 367, 10 P.3d 625 (2000).

Criminal Cases

404.b.cr.010 Rule 404(b) governs only other act evidence that is "**extrinsic**," and thus does not apply to other act evidence that is "**intrinsic**"; other act evidence is **intrinsic** when (1) the other act or acts and the conduct that is the subject of the crime charged are inextricably intertwined, or (2) all acts are part of a single criminal episode, or (3) the other act or acts are necessary preliminaries to the crime charged.

State v Andriano, 215 Ariz. 497, 161 P.3d 540, ¶¶ 17–23 (2007) (defendant was charged with first-degree murder of her husband; trial court admitted as intrinsic evidence testimony that defendant attempted to purchase insurance on husband's life; court held that, because defendant was not able to buy that insurance, attempts to buy insurance were not inextricably intertwined with husband's murder, were not part of single criminal episode, and were not necessary preliminaries to murder, thus this was not intrinsic evidence; court held, however, this extrinsic evidence was admissible as other act evidence under Rule 404(b)).

State v Andriano, 215 Ariz. 497, 161 P.3d 540, ¶¶ 24–27 (2007) (defendant was charged with first-degree murder of her husband; trial court admitted as intrinsic evidence testimony that defendant had extramarital sex with other men; court held that extramarital sex was not inextricably intertwined with husband's murder, was not part of single criminal episode, and was not necessary preliminary to murder, thus this was not intrinsic evidence; court held, however, this extrinsic evidence was admissible as other act evidence under Rule 404(b)).

State v Nordstrom, 200 Ariz. 229, 25 P.3d 717, ¶ 56 (2001) (because defendant's discussion with third person about committing robbery took place 2 years before crime in question and third person was

not one with whom defendant committed crime in question, and because robbery was to take place at time of day and week different from crime in question, this other act evidence was not intrinsic).

State v Greene, 192 Ariz. 431, 967 P.2d 106, ¶¶ 20–23 (1998) (because letters were about offense in question, they were not evidence of another crime, wrong, or act; and even if the were, they were admissible to show consciousness of guilt and to rebut claim of remorse).

State v Dickens, 187 Ariz. 1, 18 n.7, 926 P.2d 468, 485 n.7 (1996) (defendant charged with murder claimed trial court should not have admitted evidence that he had stolen murder weapon from coworker; court analyzed issue under Rule 404(b) because both trial court and parties did so; court stated evidence was admissible absent Rule 404(b) analysis because it was intrinsic evidence).

State v Herrera, 226 Ariz. 59, 243 P.3d 1041, ¶¶ 5–16 (Ct. App. 2010) (although defendant committed other acts on victim in Yuma and committed charged acts in Tucson, trial court did not abuse discretion in concluding defendant's conduct in Yuma was inextricably intertwined with, and was necessary preliminary to, acts in Tucson because it explained defendant's sexual conduct with victim began by time she was 13 and helped establish time frame within which defendant's committed charged acts).

State v Coghill, 216 Ariz. 578, 169 P.3d 942, ¶¶ 25–26 (Ct. App. 2007) (defendant was charged with sexual exploitation of minor based on having child pornography on his computer; defendant contended trial court abused discretion in admitting evidence that he had downloaded adult pornography on his computer; court held (1) evidence of adult pornography was not inextricably intertwined with evidence of child pornography, (2) possessing adult pornography and possessing child pornography were not part of a single criminal episode, and (3) possessing adult pornography was not necessary preliminary to possessing child pornography, thus evidence of possessing adult pornography was not intrinsic evidence).

State v Baldenegro, 188 Ariz. 10, 15–16, 932 P.2d 275, 280–81 (Ct. App. 1996) (defendant charged with participating in criminal syndicate for benefit of street gang claimed trial court erred in admitting evidence of gang activity by other members of street gang; court held this was intrinsic evidence because it was inextricably intertwined with charged offense).

404.b.cr.015 The phrase **common scheme or plan** as used in both Rule 404(b) and Rule 13.3(a)(3) of the Arizona Rules of Criminal Procedure should be read in a similar fashion, and that phrase is defined in such a way that, in order for the various acts to be part of a **common scheme or plan**, the acts must either be sufficiently related to be considered a single criminal offense, or must be parts of particular plan (overarching plan) of which charged crime is part; under this definition, it appears that another crime, wrong, or act that is part of a common scheme or plan would be either a necessary preliminary to the crime charged or part of a single criminal episode, and thus would be considered **intrinsic** evidence and therefore admissible without a Rule 404(b) analysis.

State v Lee(I), 189 Ariz. 590, 598–99, 944 P.2d 1204, 1212–13 (1997) (both victims were killed during robberies; although (1) murders were 9 days apart; (2) both victims were (a) killed with .22 caliber weapon, (b) shot in head, (c) found in same area, (d) required to carry cash, (e) called to scene, and (f) worked out of automobiles, which were vandalized; (3) similar shoe prints were found at both crime scenes; and (4) defendant admitted firing gun in both murders, there was no testimony or evidence suggesting two robberies were part of a single plan, thus crimes charged in counts for two victims were not part of a common scheme or plan).

State v Hughes, 189 Ariz. 62, 68–69, 938 P.2d 457, 463–64 (1997) (because fire bombings were merely similar and not shown to be part of a particular plan (overarching criminal scheme), trial court erred in admitting other act evidence).

State v Ives, 187 Ariz. 102, 106–08, 927 P.2d 762, 766–68 (1996) (court stated that phrase "common scheme or plan" as used in both Rule 404(b) and Rule 13.3(a)(3) of the Arizona Rules of Criminal Procedure should be read in a similar fashion, and rejected those cases requiring only "visual connection" for there to be a common scheme or plan).

State v Ives, 187 Ariz. 102, 106–09, 927 P.2d 762, 766–69 (1996) (court stated that phrase "common scheme or plan" as used in both Rule 404(b) and Rule 13.3(a)(3) of the Arizona Rules of Criminal Procedure should be read in a similar fashion and noted comment to Rule 13.3(a)(3) indicated that component acts of common scheme or plan must be sufficiently related to be considered single criminal offense; court adopted narrower definition of phrase "common scheme or plan" and held that other act is part of common scheme or plan only if it is part of particular plan (overarching plan) of which charged crime is part; court concluded that other child molestations were merely similar conduct and not part of particular plan, thus trial court erred in joining counts).

State v Dickens, 187 Ariz. 1, 18 n.7, 926 P.2d 468, 485 n.7 (1996) (held other act evidence is intrinsic when evidence of other act and evidence of crime charged are inextricably intertwined, both acts are part of single criminal episode, or other act is necessary preliminary to crime charged; evidence that defendant had stolen murder weapon from co-worker was admissible absent Rule 404(b) analysis because it was intrinsic evidence).

State v Derello, 199 Ariz. 435, 18 P.3d 1234, ¶¶ 9–16 (Ct. App. 2001) (on prior occasion, defendant robbed convenience store, shot clerk, and sought to evade pursuing officers; defendant was convicted of attempted murder, robbery, unlawful flight, and prohibited possession charges; when defendant was subsequently convicted of other offenses, state alleged unlawful flight and prohibited possession as prior offenses; court concluded these offenses occurred on same occasion because they were closely related both by time and distance, and were directed to the accomplishment of a single criminal objective, thus they could be counted only as one prior offense for enhancement purposes; it therefore appears this evidence would be considered intrinsic evidence).

State v Vigil, 195 Ariz. 189, 986 P.2d 222, ¶¶ 23–25 (Ct. App. 1999) (no showing defendant had particular plan to injure victim, thus defendant's prior and subsequent acts of throwing objects at victim's house and charged act of firing gun at victim were not part of common scheme or plan).

State v Garland, 191 Ariz. 213, 953 P.2d 1266, ¶ 16 (Ct. App. 1998) (although two robberies occurred on same night in same general area and were committed by black man named "Mike" wearing cap with "CR" logo and with gun tucked in front of pants, court noted trial court did not find overarching criminal plan to steal items of value and buy drugs, thus trial court should not have joined counts).

404.b.cr.020 If the conduct in committing the other crime, wrong, or act is an **element of the crime charged**, either (1) the conduct in committing the other act or acts and the conduct in committing the crime charged will be inextricably intertwined, or (2) all acts will be part of a single criminal episode, or (3) the other acts will be necessary preliminaries to the crime charged, thus evidence of the other act or acts will be **intrinsic** evidence and admissible without a Rule 404(b) analysis.

State ex rel. Romley v Galati (Petersen), 195 Ariz. 9, 985 P.2d 494, ¶¶ 2–5, 10, 15 (1999) (because defendant's commission of DUI on suspended or invalid license is element of offense of aggravated DUI, defendant is not entitled to bifurcated trial on issue of suspended or invalid license).

State v Talamante (Murray), 214 Ariz. 106, 149 P.3d 484, ¶¶ 6–12 (Ct. App. 2006) (grand jury indicted defendant for violent sexual assault; state alleged defendant had prior conviction for sexual assault; court held that fact of prior conviction was element of offense and rejected defendant's contention that fact of prior conviction was sentencing enhancement factor, and thus concluded trial court erred in ruling that state could not introduce evidence of prior conviction in its case-in-chief).

State v Lopez, 209 Ariz. 58, 97 P.3d 883, ¶¶ 4–8 (Ct. App. 2004) (state charged defendant with misconduct involving weapons for possession of firearm by prohibited possessor, which is person who has been convicted of felony and whose civil right to carry a gun or firearm has not been restored; defendant offered to stipulate to fact he was prohibited possessor to prevent state from presenting to jurors evidence of his prior conviction and evidence his right to possess firearm had not been restored; state rejected offer and trial court refused to force state to accept stipulation; court held that, because prior conviction and non-restoration of civil right were elements of offense, defendant had no right to preclude jurors from receiving evidence of those matters).

State v Newnom, 208 Ariz. 507, 95 P.3d 950, ¶¶ 2–5 (Ct. App. 2004) (defendant was charged with aggravated domestic violence; defendant offered to stipulate to existence of prior convictions to avoid having jurors receive that information; state rejected offer and trial court refused to force state to accept stipulation; court held that prior convictions are elements of aggravated domestic violence under A.R.S. § 13–3601.02, thus defendant was not entitled to bifurcated trial on issue of prior convictions and had no right to preclude jurors from receiving evidence of prior convictions).

404.b.cr.030 If the conduct in committing the other crime, wrong, or act is **inextricably intertwined** with the conduct in committing the crime charged, the evidence of the other act or acts will be **intrinsic** evidence and thus admissible without a Rule 404(b) analysis.

State v Prion, 203 Ariz. 157, 52 P.3d 189, ¶¶ 31–36 (2002) (court noted offenses may be joined under Rule 13.3(a)(2) of the Arizona Rules of Criminal Procedure if they are based on the same conduct or are otherwise connected in their commission; court held Rule 13.3(a)(2) should be interpreted narrowly; court held that killing of 19-year-old college student and kidnapping and assault of 35-year-old street prostitute were not provable by same evidence and did not arise out of series of connected acts, thus trial court erred in not severing counts involving two different victims).

State v Dickens, 187 Ariz. 1, 18 n.7, 926 P.2d 468, 485 n.7 (1996) (held other act evidence is intrinsic when evidence of other act and evidence of crime charged are inextricably intertwined, both acts are part of single criminal episode, or other act is necessary preliminary to crime charged; evidence that defendant had stolen murder weapon from co-worker was admissible absent Rule 404(b) analysis because it was intrinsic evidence).

State v Derello, 199 Ariz. 435, 18 P.3d 1234, ¶¶ 9–16 (Ct. App. 2001) (on prior occasion, defendant robbed convenience store, shot clerk, and sought to evade pursuing officers; defendant was convicted of attempted murder, robbery, unlawful flight, and prohibited possession charges; when defendant was subsequently convicted of other offenses, state alleged unlawful flight and prohibited possession as prior offenses; court concluded these offenses occurred on same occasion because they were closely related both by time and distance, and were directed to the accomplishment of a single criminal objective, thus they could be counted only as one prior offense for enhancement purposes; it therefore appears this evidence would be considered intrinsic evidence).

State v Marshall, 197 Ariz. 496, 4 P.3d 1039, ¶¶ 8–13 (Ct. App. 2000) (defendant was charged with performing oral sex on 9-year-old victim; during victim's testimony about that act, she also said defendant penetrated her vagina with his fingers and penis on that occasion; court held evidence of vaginal penetration was intrinsic to charge of oral sex, thus that evidence would have been admissible absent Rule 404(b) analysis).

State v Garland, 191 Ariz. 213, 953 P.2d 1266, ¶¶ 14–15 (Ct. App. 1998) (although two robberies occurred on same night in same general area and were committed by black man named "Mike" wearing baseball cap with "CR" logo and with gun tucked in front of pants, court held crimes and elements of proof were independent of each other, thus trial court should not have joined counts).

State v Baldenegro, 188 Ariz. 10, 15–16, 932 P.2d 275, 280–81 (Ct. App. 1996) (defendant was charged with participating in criminal syndicate for benefit of criminal street gang and claimed trial court erred in admitting evidence of gang activity by other members of street gang in question; court held that this was intrinsic evidence because it was inextricably intertwined with charged offense).

404.b.cr.040 If the conduct in committing the other crime, wrong, or act and the conduct in committing the crime charged are all **part of a single criminal episode,** the evidence of the other act or acts will be **intrinsic** evidence and thus admissible without a Rule 404(b) analysis.

State v Garland, 191 Ariz. 213, 953 P.2d 1266, ¶¶ 14–15 (Ct. App. 1998) (although two robberies occurred on same night in same general area and were committed by black man named "Mike" wearing baseball cap with "CR" logo and with gun tucked in front of pants, court held crimes and elements of proof were independent of each other, thus trial court should not have joined counts).

404.b.cr.050 If the conduct in committing the other crime, wrong, or act was a **necessary preliminary** to, or an **inevitable result** of, the crime charged, evidence of the other act or acts will **complete the story** and will be **intrinsic** evidence, and thus admissible without a Rule 404(b) analysis.

State v Dickens, 187 Ariz. 1, 18 n.7, 926 P.2d 468, 485 n.7 (1996) (held that other act evidence is intrinsic when evidence of other act and evidence of crime charged are inextricably intertwined, both acts are part of single criminal episode, or other act is necessary preliminary to crime charged; evidence that defendant had stolen murder weapon from co-worker was admissible absent Rule 404(b) analysis because it was intrinsic evidence).

404.b.cr.060 If the conduct in committing the other crime, wrong, or act is so connected with the crime charged that proof of one **incidentally involves** proof of another or **explains the circumstances** of the crime charged, evidence of the other act or acts will **complete the story** and will be **intrinsic** evidence, and thus admissible without a Rule 404(b) analysis.

State v Johnson, 116 Ariz. 399, 400, 569 P.2d 829, 830 (1977) (defendant was charged with receiving earnings of prostitute; witness testified that she worked as prostitute and turned over to defendant her earnings as prostitute; because evidence that, 1 month before defendant was arrested on instant charges, he pulled witness from truck, spat in her face, forced her into her own car, and beat her did not incidentally involve proof crime charged or explain circumstances of crime charged, evidence of other acts did not complete story of crime charged).

State v Herrera, 226 Ariz. 59, 243 P.3d 1041, ¶¶ 5–16 (Ct. App. 2010) (although defendant committed other acts on victim in Yuma and committed charged acts in Tucson, trial court did not abuse discretion in concluding defendant's conduct in Yuma completed story of crime because it helped establish time frame within which defendant's committed charged acts).

404.b.cr.070 Evidence that the defendant has committed similar **sexual acts against the same victim** may indicate that the other acts were part of a system, plan, or scheme and therefore **intrinsic** evidence, thus there will be no need to conduct a Rule 404(b) analysis.

State v Herrera, 226 Ariz. 59, 243 P.3d 1041, ¶¶ 5–16 (Ct. App. 2010) (although defendant committed other acts on victim in Yuma and committed charged acts in Tucson, trial court did not abuse discretion in concluding defendant's conduct in Yuma was inextricably intertwined with, and was necessary preliminary to, acts in Tucson because it explained defendant's sexual conduct with victim began by time she was 13 and helped establish time frame within which defendant's committed charged acts).

State v Garcia, 200 Ariz. 471, 28 P.3d 327, ¶ 33 (Ct. App. 2001) (opinion stated "our courts have never held that discrete offenses, identical to but occurring at different times than the one charged, are intrinsic"; court was apparently unaware of *State v Marshall*, 197 Ariz. 496, 4 P.3d 1039 (Ct. App. 2000), and *State v Jones*, 188 Ariz. 534, 937 P.2d 1182 (Ct. App. 1996)).

State v Marshall, 197 Ariz. 496, 4 P.3d 1039, ¶¶ 2–7 (Ct. App. 2000) (trial court denied defendant's motion to sever two counts alleging sexual conduct with minor in March 1995 with 16 counts alleging sexual conduct with same minor over 4-day period in October 1996; court concluded evidence of 16 counts would have been admissible at separate trial on other two counts, thus trial court did not err in denying motion to sever).

State v Marshall, 197 Ariz. 496, 4 P.3d 1039, ¶¶ 8–13 (Ct. App. 2000) (defendant was charged with performing oral sex on 9-year-old victim; during victim's testimony about that act, she also said defendant penetrated her vagina with his fingers and penis on that occasion; court held evidence of vaginal penetration was intrinsic to charge of oral sex, thus that evidence would have been admissible absent Rule 404(b) analysis).

State v Alatorre, 191 Ariz. 208, 953 P.2d 1261, ¶ 16 (Ct. App. 1998) (defendant's statement that he rubbed his penis against 8-year-old victim's vagina admissible to show defendant's lewd disposition or unnatural attitude toward the particular victim).

State v Jones, 188 Ariz. 534, 937 P.2d 1182 (Ct. App. 1996) (state charged defendant with eight counts of sexual assault against victim when she was 14 years old; at trial, state asked trial court to be allowed to introduce evidence that defendant had been sexually assaulting victim over 9 year period prior to charged offenses; trial court admitted evidence to complete story, show absence of mistake or accident, and to show motive or opportunity; court noted Arizona Supreme Court had held evidence of prior similar sexual offenses by defendant against same victim was admissible to show defendant's lewd disposition toward that particular victim, thus trial court did not need to rely on Rule 404(b) for admission of that evidence), *rev denied as improv granted,* 191 Ariz. 522, 958 P.2d 1120 (1998).

404.b.cr.075 If the defendant has committed other acts, including **acts of violence against the same victim** for a particular purpose, the other acts may be part of a system, plan, or scheme, and therefore **intrinsic** evidence, and, if so, there is no need to conduct a Rule 404(b) analysis.

State v Hughes, 189 Ariz. 62, 938 P.2d 457 (1997) (evidence of defendant's drug involvement with victim relevant to motive, but trial court erred in admitting cumulative evidence because it went far beyond that necessary to establish motive).

State v Mills, 196 Ariz. 269, 995 P.2d 705, ¶¶ 23–26 (Ct. App. 1999) (defendant and wife were seeking dissolution; defendant was charged with killing his wife by paying someone to shoot her; because this was evidence of violent acts against same victim, trial court properly admitted evidence that, 2 months prior to shooting, defendant had cut brake lines on wife's truck).

404.b.cr.078 If trial court concludes evidence that the defendant has committed other acts is admissible as **intrinsic** evidence, the trial court is not required to conduct a Rule 403 analysis.

State v Herrera, 226 Ariz. 59, 243 P.3d 1041, ¶¶ 21–22 (Ct. App. 2010) (court notes requirement of specific determination under Rule 404(c)(1)(D) does not apply to intrinsic evidence; further, record showed trial court did consider prejudicial effect and probative value; and that defendant never requested that trial court make express findings).

404.b.cr.080 If the evidence of other crimes, wrongs, or acts is **extrinsic** evidence, four factors protect a party from unfair prejudice that could result from the admission of this evidence: (1) the evidence must be admitted for a proper purpose, that is, it must be legally or logically relevant; (2) the evidence must be factually or conditionally relevant; (3) the trial court, if requested, may exclude this evidence if its probative value is substantially outweighed by the danger of unfair prejudice; and (4) the trial court, if requested, must give a limiting instruction on the limited purpose for which this evidence was admitted.

Huddleston v United States, 485 U.S. 681, 685–92, 108 S. Ct. 1496, 99 L. Ed. 2d 771 (1988) (defendant was charged with possessing and selling stolen goods (Memorex videocassette); in order to prove de-

fendant knew video cassettes were stolen, government introduced evidence that defendant had previously sold stolen television sets and had previously sold stolen appliances; Court rejected defendant's contention that, before admitting other act evidence, trial court must make preliminary finding that other act happened and that defendant committed that other act, and held instead that trial court should admit such evidence if it concludes there is sufficient evidence from which jurors could conclude that other act happened and that defendant committed that other act).

State v Gulbrandson, 184 Ariz. 46, 60, 906 P.2d 579, 593 (1995) (court adopted reasoning of *Huddleston v United States*).

State v Atwood, 171 Ariz. 576, 638, 832 P.2d 593, 655 (1992) (court adopted reasoning of *Huddleston v United States*).

404.b.cr.090 **Extrinsic** evidence of another crime, wrong, or act is admissible if it is legally or logically relevant, which means it tends to prove or disprove any issue in the case, and thus is admitted for some purpose other than to show the defendant's criminal character.

State v Herrera, 226 Ariz. 59, 243 P.3d 1041, ¶¶ 16–17 (Ct. App. 2010) (defendant was charged with committing sexual conduct with minor in year between victim's 14th and 15th birthday; victim turned 14 shortly after victim and family relocated from Yuma to Tucson; evidence that defendant committed sex acts of victim while they were in Yuma explained defendant's sexual conduct with victim began by time she was 13 and helped establish time frame within which defendant's committed charged acts, helped explain that victim's young age may have been factor in her delayed disclosure of abuse, and rebutted defendant's defense that victim reported acts only when she was having difficulties in school or with mother and that they were fabricated).

State v Smyers, 205 Ariz. 479, 73 P.3d 610, ¶¶ 6–8 (Ct. App. 2003) (defendant was charged with furnishing harmful items to 11-year-old minor as result of showing her pictures on computer screen of man and woman engaged in sexual intercourse; trial court ruled state could admit evidence that defendant had kissed victim on lips, tried to "French kiss" her by sticking his tongue in her mouth, and hugging her by placing his hands on her "butt" and pulling her against his body; court held trial court did not abuse discretion in finding this other act evidence relevant and admitting it, but did not state theory under which trial court found this evidence was relevant); *other grounds vac'd*, 207 Ariz. 314, 86 P.3d 370, ¶ 16 (2004).

State v Corona, 188 Ariz. 85, 932 P.2d 1356 (Ct. App. 1997) (evidence of defendant's other arrests was admissible to rebut suggestion that officers improperly recorded defendant's admission of gang membership).

404.b.cr.100 If the **extrinsic** evidence of the other crime, wrong, or act is not relevant to any issue being litigated, then the only effect of that evidence is to show that the person has a bad character, and thus it would be error to admit the evidence.

State v Prion, 203 Ariz. 157, 52 P.3d 189, ¶¶ 37–44 (2002) (only similarity between two crimes was that both occurred in Tucson at end of 1992, each involved female victim, and knife or knives were used at some point; differences were one victim was 19-year-old college student and other was 35-year-old street prostitute; court held evidence was not sufficient to establish identity, and to extent this might be considered sexual propensity evidence, state failed to make necessary showing under Rule 404(c), thus evidence would not have been admissible in other trial if both charges were tried separately).

State v Nordstrom, 200 Ariz. 229, 25 P.3d 717, ¶ 32 (2001) (trial court allowed expert to testify about effects of methamphetamine usage on perception and memory, but precluded testimony about tendency of methamphetamine users to be violent, paranoid, or aggressive, and precluded testimony that defendant's brother had used methamphetamine around time of crime; because this was charac-

ter evidence for purpose of showing action in conformance with character, trial court properly precluded this testimony).

State v Bocharski, 200 Ariz. 50, 22 P.3d 43, ¶¶ 35–39 (2001) (defendant allegedly assaulted fellow jail inmate; trial court admitted by stipulation inmate's statement of what defendant said during assault; court held defendant's statement, "If it were up to me, you would be dead right now," had no relevance, thus it was error to admit statement, but any error was harmless in light of other evidence).

State v Hoskins, 199 Ariz. 127, 14 P.3d 977, ¶¶ 54–58 (2001) (prosecutor asked witness when he had last seen defendant, and witness said it was when they both were arrested as juveniles while making "beer run"; court noted witness gave this testimony in violation of trial court's order, but held any error was harmless in light of other evidence presented).

State v Lee, 191 Ariz. 542, 959 P.2d 799, ¶¶ 12, 18–19 (1998) (drug courier profile evidence is not admissible on substantive issue of guilt, and reasons for suspicions about defendants and probable cause to arrest were not issues for jurors to determine, thus trial court erred in admitting this evidence, so reversal was required).

State v Hughes, 189 Ariz. 62, 938 P.2d 457 (1997) (because fire bombings were not sufficiently similar to prove identity and were not shown to be part of a particular plan, and because intent was not an issue, trial court erred in admitting other act evidence).

State v Hughes, 189 Ariz. 62, 938 P.2d 457 (1997) (because defendant committed certain of his other acts after the murder, they were irrelevant to whether a certain witness took defendant's threats seriously, thus trial court should not have admitted them).

State v Lacy, 187 Ariz. 340, 929 P.2d 1288 (1996) (because the subsequent burglary was not similar to the crime charged, trial court erred in admitting it).

State v Coghill, 216 Ariz. 578, 169 P.3d 942, ¶¶ 12–24 (Ct. App. 2007) (defendant was charged with sexual exploitation of minor based on having child pornography on his computer; defendant contended trial court abused discretion in admitting evidence that he had downloaded adult pornography on his computer; court held that evidence showing defendant's ability, willingness, and superior opportunity to download and copy other material from Internet was both relevant and admissible, but nature and content of other downloaded material was either not relevant, or else its probative value was substantially outweighed by danger of unfair prejudice; court further held that, to extent proof of downloading adult pornography made it more likely that defendant would download child pornography, that would be inadmissible character evidence).

Beijer v Adams, 196 Ariz. 79, 993 P.2d 1043, ¶¶ 18–22 (Ct. App. 1999) (because issue at trial was whether defendant committed crime and not why officer stopped defendant, testimony about drug courier profile and why those types of facts made officer suspicious of defendant and caused him to stop defendant was not relevant, and because of prejudicial effect, was not admissible).

State v Vigil, 195 Ariz. 189, 986 P.2d 222, ¶¶ 17–22 (Ct. App. 1999) (no one disputed that defendant was in car, thus identity was not an issue; only issue was whether defendant did or did not shoot gun from car; because defendant's prior and subsequent acts of throwing objects at victim's house did not make it more likely that defendant fired gun at victim, trial court erred in admitting this evidence).

State v Garland, 191 Ariz. 213, 953 P.2d 1266, ¶¶ 23–24 (Ct. App. 1998) (court held similarities— two incidents on same night in same general area, black man named "Mike" wearing baseball cap with "CR" logo and with gun tucked in front of pants— did not show that *crimes* were similar, only that man or men who perpetrated them were similar, thus trial court should not have joined counts).

State v Alatorre, 191 Ariz. 208, 953 P.2d 1261, ¶¶ 18–19 (Ct. App. 1998) (defendant charged with sexual activities with 8-year-old victim; evidence that defendant struck victim in stomach on unspecified occasion was not evidence of prior sexual offense and thus not propensity, and did not complete the story, and thus should not have been admitted; in light of other evidence, error was harmless).

State v Doody, 187 Ariz. 363, 930 P.2d 440 (Ct. App. 1996) (because details of witness's prior crimes were not relevant to show motive and bias, trial court properly precluded admission of that evidence).

404.b.cr.110 The other act must be similar to the crime charged only if the similarity of the act to the crime is the basis for the relevancy of the other act.

State v [Van] Adams, 194 Ariz. 408, 984 P.2d 16, ¶¶ 19–21 (1999) (victim was selling homes; officers found victim's disrobed body under bed upstairs; to show identity, *modus operandi,* intent, knowledge, opportunity, and preparation, state introduced testimony from saleswoman that, 6 years prior, defendant asked her to show him two-story model home and attempted to assault her sexually while there; in order to show identity, state introduced testimony of from another saleswoman that defendant had tried to get her to go upstairs in model home that same day; court noted numerous similarities between events, and held trial court did not abuse discretion in admitting evidence).

404.b.cr.120 The other act does not have to be criminal in nature to be admissible.

State v Robinson, 165 Ariz. 51, 56–57, 796 P.2d 853, 858–59 (1990) (evidence that defendant twice went to where his girlfriend was staying and forced her to return with him was admissible).

State v Castaneda, 150 Ariz. 382, 390–91, 724 P.2d 1, 9–10 (1986) (trial court properly admitted evidence defendant asked young boy if he and friend would like to earn money doing yard work).

404.b.cr.130 If the other act is criminal in nature, the state does not have to charge the person with the crime for the evidence to be admissible.

State v Fierro, 166 Ariz. 539, 547, 804 P.2d 72, 80 (1990) (trial court properly admitted evidence that home near scene of killing was burglarized 2 nights before killing, and that defendant had in his possession items taken in that burglary).

404.b.cr.140 The other crime, wrong, or act may have occurred either before or after the conduct in question.

State v Schurz, 176 Ariz. 46, 51–52, 859 P.2d 156, 161–62 (1993) (in murder prosecution where defendant allegedly robbed several persons of their beer and then burned to death someone who had said he would have tried to prevent robbery if he had been there, defendant's later actions in robbing another person by holding lighter flame to his neck tended to establish defendant's identity and motive for his earlier actions, and to rebut claim he was too intoxicated to know what he was doing).

State v Cook, 150 Ariz. 470, 472–73, 724 P.2d 556, 558–59 (1986) (defendant's action, after he killed victim, of going to another person's home and firing shots into house admissible to show intent, absence of mistake or accident, credibility of witness, and to complete story). was admissible to complete story of crime).

404.b.cr.150 The amount of time between the charged act and the other act goes to the weight and not the admissibility of the other act.

State v [Van] Adams, 194 Ariz. 408, 984 P.2d 16, ¶ 24 (1999) (victim was selling homes; officers found victim's disrobed body under bed upstairs; to show identity, *modus operandi,* intent, knowledge, opportunity, and preparation, state introduced testimony from California saleswoman that, 6 years prior, defendant asked her to show him two-story model home and attempted to assault her sexually while there; length of time between incidents affected weight and not admissibility of evidence).

State v Williams, 209 Ariz. 228, 99 P.3d 43, ¶¶ 14–17 (Ct. App. 2004) (defendant was charged with public sexual indecency based on his stopping car next to 14- and 15-year old victims and masturbating in car; trial court admitted for identification purposes evidence of four other acts when defendant was seen masturbating in car; defendant contended trial court erred in admitting one incident because it occurred over 9 years prior to charged offense; court held trial court did not err in admitting this evidence because (1) remoteness went to weight and not to admissibility, (2) defendant was in prison for 4 of the 9 years, and the three other acts occurred during intervening years).

State v Bible, 175 Ariz. 549, 592–93, 858 P.2d 1152, 1195–96 (1993) (because only remorse defendant had about prior sexual assault was he had left somebody behind to report him and he had been caught, and his statement "I'll never make this mistake again" could be interpreted to mean he would not leave victim alive to testify against him if he again committed a sex crime, trial court properly admitted evidence of prior assault, and fact statement did not refer to specific victim and was made 3 or 4 years prior to charged offense went to weight and not admissibility).

State v Hinchey, 165 Ariz. 432, 435–36, 799 P.2d 352, 355–56 (1990) (defendant charged with killing victim; trial court admitted evidence of defendant's attack on victim 14 months prior; court held arguments that prior act was too remote in time went to weight and not admissibility).

404.b.cr.160 **Extrinsic** evidence of another crime, wrong, or act is relevant to show **absence of mistake or accident.**

State v Lee(I), 189 Ariz. 590, 944 P.2d 1204 (1997) (although (1) murders were 9 days apart; (2) both victims were (a) killed with .22 caliber weapon, (b) shot in head, (c) found in same area, (d) required to carry cash, (e) called to scene, and (f) worked out of automobiles, which were vandalized; (3) similar shoe prints were found at both crime scenes; and (4) defendant admitted firing gun in both murders, there was no showing that two murders were part of a single plan, thus murders were not admissible as part of a common scheme or plan, but because defendant claimed that victims tried to pull his gun away and it went off, evidence was admissible to prove absence of mistake or accident).

State v Ives, 187 Ariz. 102, 927 P.2d 762 (1996) (because defendant denied committing acts of child molestation, evidence of his other acts of similar conduct was not relevant).

State v DePiano, 187 Ariz. 41, 926 P.2d 508 (Ct. App. 1995) (because whether defendant intended to kill herself and her two children or accidentally placed them in dangerous situation was an issue, evidence she had wrongfully taken money from her ex-boyfriend's bank account admissible to show she was sufficiently depressed over her financial condition to be suicidal), *vacated on other grounds,* 187 Ariz. 27, 926 P.2d 494 (1996).

404.b.cr.190 **Extrinsic** evidence of another crime, wrong, or act is relevant to show **consciousness of guilt.**

State v Garza, 216 Ariz. 56, 163 P.3d 1006, ¶¶ 38–39 (2007) (in telephone call from jail, when asked why he was arrested, defendant stated, "Well, remember what you wanted me to do when that one guy beat you up, well I did it to someone else"; court held statement was relevant because it showed consciousness of guilt).

State v Greene, 192 Ariz. 431, 967 P.2d 106, ¶¶ 20–23 (1998) (because letters were about offense in question, they were not evidence of another crime, wrong, or act; and even if they were, they were admissible to show consciousness of guilt and to rebut claim of remorse).

404.b.cr.200 **Extrinsic** evidence of another crime, wrong, or act may be relevant to show **credibility**.

State v Hughes, 189 Ariz. 62, 938 P.2d 457 (1997) (in jailhouse statement, defendant said he gave juveniles cocaine as payment for committing murder, and evidence that certain juvenile had committed fire bombings would show defendant's control over that juvenile, but because most of witnesses discussed arson in context of defendant's retaliatory character, there was substantial risk jurors considered this evidence for improper purpose).

State v Fish, 222 Ariz. 109, 213 P.3d 258, ¶¶ 41–49 (Ct. App. 2009) (defendant was charged with killing victim; defendant's version of events was that he was hiking on trail when victim's dogs came toward him, so he shot into ground, which caused dogs to disperse; victim then came running toward defendant, so defendant told victim to stop, and when victim did not stop, defendant shot victim three times in chest, killing him; because state attacked defendant's credibility in version he gave of events, and because there were no other witnesses to shooting, and because victim's prior acts were essentially similar to conduct defendant described, trial court should have allowed defendant to introduce evidence of victim's prior acts with his dogs to prove victim's character in order to show victim was acting in conformity with that character when defendant killed him).

404.b.cr.210 **Extrinsic** evidence of another crime, wrong, or act is relevant to show **identity**.

State v Johnson, 212 Ariz. 425, 133 P.3d 735, ¶¶ 7–14 & n.5 (2006) (defendant and codefendant (who was fellow gang member) committed armed robbery; defendant later killed victim of robbery so she could not testify against codefendant; defendant was charged with first-degree murder, burglary, armed robbery, and assisting criminal street gang; because witness elimination to benefit fellow gang member was motive for killing and served to identify defendant, evidence of assisting criminal street gang would have been admissible at trial for other three counts if tried separately, thus counts were properly joined).

State v Prion, 203 Ariz. 157, 52 P.3d 189, ¶¶ 37–44 (2002) (only similarity between two crimes was that both occurred in Tucson at end of 1992, each involved female victim, and knife or knives were used at some point; differences were one victim was 19-year-old college student and other was 35-year-old street prostitute; court held evidence was not sufficient to establish identity, and to extent this might be considered sexual propensity evidence, state failed to make necessary showing under Rule 404(c), thus evidence would not have been admissible in other trial if both charges were tried separately).

State v Phillips, 202 Ariz. 427, 46 P.3d 1048, ¶¶ 16–18 (2002) (black man and white or Hispanic man with bandana on face robbed bar while armed with handgun and sawed-off rifle; 11 days later, defendant and black man robbed bar while armed with handgun and sawed-off rifle; 5 days later, defendant and black man robbed another bar while armed with handgun and sawed-off rifle; because defendant's only defense was misidentification, evidence of other robberies would have been admissible at separate trials for purpose of proving identity, trial court did not err in denying motion to sever).

State v Nordstrom, 200 Ariz. 229, 25 P.3d 717, ¶¶ 62–65 (2001) (evidence that, a few hours before the murders, defendant and another pistol-whipped two men using same type of weapon used in murders, admissible to prove identity).

State v Martinez, 196 Ariz. 451, 999 P.2d 795, ¶¶ 29–33 (2000) (because ballistic evidence showed shell casing found at subsequent robbery was consistent with ammunition used in officer's gun, evidence that defendant committed subsequent robbery was relevant to determination of identity of defendant as person who killed officer).

State v [Van] Adams, 194 Ariz. 408, 984 P.2d 16, ¶¶ 19–21 (1999) (victim was selling homes; officers found victim's disrobed body under bed upstairs; to show identity, *modus operandi,* intent, knowledge,

opportunity, and preparation, state introduced testimony from saleswoman that, 6 years prior, defendant asked her to show him two-story model home and attempted to assault her sexually while there; to show identity, state introduced testimony of another saleswoman that defendant had tried to get her to go upstairs in model home that same day; court noted numerous similarities between events, and held trial court did not abuse discretion in admitting evidence).

404.b.cr.220 In determining whether the **extrinsic** evidence of another crime, wrong, or act is relevant to show *modus operandi* and thus to prove **identity**, the trial court should determine whether there are similarities where normally there would be expected to be differences.

* *State v Lehr*, 227 Ariz. 140, 254 P.3d 379, ¶¶ 19–21 (2011) (defendant noted other attacks occurred at different times and on different days of week, victims varied in age, and other differences; trial court identified extensive similarities; court held other acts need not be perfectly similar to be admissible under this rule).

State v [Van] Adams, 194 Ariz. 408, 984 P.2d 16, ¶¶ 19–21 (1999) (victim was selling homes; officers found victim's disrobed body under bed upstairs; to show identity, *modus operandi*, intent, knowledge, opportunity, and preparation, state introduced testimony from saleswoman that, 6 years prior, defendant asked her to show him two-story model home, and that while there, he attempted to sexually assault her; to show identity, state introduced testimony of another saleswoman that defendant had tried to get her to go upstairs in model home that same day; court noted numerous similarities between events, and held trial court did not abuse discretion in admitting evidence).

State v Hughes, 189 Ariz. 62, 938 P.2d 457 (1997) (only similarities were that both victims were women and both had angered defendant; events were not sufficiently similar to show identity).

State v Williams, 209 Ariz. 228, 99 P.3d 43, ¶¶ 18–21 (Ct. App. 2004) (defendant was charged with public sexual indecency based on his stopping car next to 14- and 15-year old victims and masturbating in car; trial court admitted for identification purposes evidence of four other acts when defendant was seen masturbating in car; defendant contended trial court erred in admitting one incident because it was not sufficiently similar in that victim was 36 years old and was riding bicycle rather than walking; court held incidents were sufficiently similar because (1) both incidents involved one or two victims walking home on street, (2) defendant followed victims in car and never left car, (3) defendant drove car next to victims and stopped car, (4) defendant partially removed clothes and masturbated while driving car, (5) defendant appeared to continue masturbating while partially unclothed and while driving off; court further noted that, for one of other incidents for which defendant had pled guilty, victim was 32 years old).

State v Garland, 191 Ariz. 213, 953 P.2d 1266, ¶¶ 23–24 (Ct. App. 1998) (court held similarities— two incidents on same night in same general area, black man named "Mike" wearing baseball cap with "CR" logo and with gun tucked in front of pants— did not show that *crimes* were similar, only that man or men who perpetrated them were similar, thus evidence was not admissible to show identity).

404.b.cr.230 **Extrinsic** evidence of another crime, wrong, or act is relevant to show **intent**, but intent is only an issue when the defendant acknowledges doing the act, but denies having the intent the statute requires, thus a blanket denial of criminal conduct does not put intent in issue.

State v Villalobos, 225 Ariz. 74, 235 P.3d 227, ¶¶ 17–19 (2010) (defendant was charged with first-degree murder and child abuse as result of death of his girlfriend's daughter; defendant contended trial court erred in admitting following evidence: (1) 3 months prior, he had violently shaken victim; (2) 2 months prior, he had bruised victim's face and buttocks; (3) 1 month prior, he had bruised victim's face; (4) weeks prior, he had bruised victim's arms; court noted child abuse required proof that defendant intentionally of knowingly injured victim, and held evidence was relevant to establish defendant's mental state).

State v Andriano, 215 Ariz. 497, 161 P.3d 540, ¶¶ 22–23 (2007) (defendant was charged with first-degree murder of her husband; trial court admitted as intrinsic evidence testimony that defendant attempted to purchase insurance on husband's life; court held that, although attempts to buy insurance was not intrinsic evidence, it was admissible to show defendant's intent to kill her husband).

State v [Van] Adams, 194 Ariz. 408, 984 P.2d 16, ¶¶ 19–21 (1999) (victim was selling homes; in one model home, officers found signs of struggle upstairs and found victim's disrobed body under bed; to show identity, *modus operandi*, intent, knowledge, opportunity, and preparation, state introduced testimony from California saleswoman that, 6 years prior, defendant asked her to show him two-story model home and attempted to assault her sexually while there; in order to show identity, state introduced testimony of another saleswoman that defendant had tried to get her to go upstairs in model home that same day; court noted numerous similarities between events, and held trial court did not abuse discretion in admitting evidence).

State v Lee(I), 189 Ariz. 590, 944 P.2d 1204 (1997) (although (1) murders were 9 days apart; (2) both victims were (a) killed with .22 caliber weapon, (b) shot in head, (c) found in same area, (d) required to carry cash, (e) called to scene, and (f) worked out of automobiles, which were vandalized; (3) similar shoe prints were found at both crime scenes; and (4) defendant admitted firing gun in both murders, there was no showing that two murders were part of a single plan, thus murders were not admissible as part of a common scheme or plan, but because defendant claimed that victims tried to pull his gun away and it went off, evidence was admissible to prove intent).

State v Hughes, 189 Ariz. 62, 938 P.2d 457 (1997) (because defendant denied committing the murder, his intent was not an issue, thus other act of firebombing was not admissible).

State v Ives, 187 Ariz. 102, 109–11, 927 P.2d 762, 769–71 (1996) (defendant denied committing acts of child molestation, thus intent was not an issue and evidence of his other acts of similar conduct was not relevant).

State v Harrison, 195 Ariz. 28, 985 P.2d 513, ¶¶ 14–16 (Ct. App. 1998) (in charge of aggravated assault against police officers, because defendant claimed he acted in self-defense, his statement while being transported to police station that, if he had possessed a gun, both he and the officer would have been shot, was admissible to show his desire to harm officer and to refute his claim that he acted in self-defense), *aff'd*, 195 Ariz. 1, 985 P.2d 486 (1999).

State v DePiano, 187 Ariz. 41, 926 P.2d 508 (Ct. App. 1995) (because whether defendant intended to kill herself and her two children was an issue, evidence that she had wrongfully taken money from her ex-boyfriend's bank account was admissible to show she was sufficiently depressed over her financial condition to be suicidal), *vacated on other grounds*, 187 Ariz. 27, 926 P.2d 494 (1996).

404.b.cr.240 **Extrinsic** evidence of another crime, wrong, or act is relevant to show **knowledge**.

State v Villalobos, 225 Ariz. 74, 235 P.3d 227, ¶¶ 17–19 (2010) (defendant charged with first-degree murder and child abuse as result of death of his girlfriend's daughter; he contended trial court erred in admitting evidence: (1) 3 months prior, he had violently shaken victim; (2) 2 months prior, he had bruised victim's face and buttocks; (3) 1 month prior, he had bruised victim's face; (4) weeks prior, he had bruised victim's arms; court noted child abuse required proof that defendant intentionally of knowingly injured victim, and held evidence was relevant to establish defendant's mental state).

State v Hargrave, 225 Ariz. 1, 234 P.3d 569, ¶¶ 20–22 (2010) (defendant contended trial court erred in admitting evidence of guns and ammunition found at defendant's campsite; although defendant and codefendant did not use those guns and that ammunition in charged robbery/murder, because they belonged to codefendant, they were relevant to rebut defendant's defense that he did not know codefendant would be armed during robbery/murder).

State v Andriano, 215 Ariz. 497, 161 P.3d 540, ¶¶ 22–23 (2007) (defendant was charged with first-degree murder of her husband; trial court admitted as intrinsic evidence testimony that defendant attempted to purchase insurance on husband's life; court held that, although attempts to buy insurance was not intrinsic evidence, it was admissible to show defendant's knowledge).

State v [Van] Adams, 194 Ariz. 408, 984 P.2d 16, ¶¶ 19–21 (1999) (victim was selling homes; in one model home, officers found signs of struggle upstairs and found victim's disrobed body under bed; to show identity, *modus operandi,* intent, knowledge, opportunity, and preparation, state introduced testimony from California saleswoman that, 6 years prior, defendant asked her to show him two-story model home and attempted to assault her sexually while there; to show identity, state introduced testimony of another saleswoman that defendant had tried to get her to go upstairs in model home that same day; court noted numerous similarities between events, and held trial court did not abuse discretion in admitting evidence).

State v Dickens, 187 Ariz. 1, 18–19, 926 P.2d 468, 485–86 (1996) (court held evidence that defendant had stolen murder weapon from co-worker was probative for several purposes outlined in Rule 404(b), especially because defendant claimed codefendant procured gun without defendant's knowledge and that he did not participate in underlying felonies).

* *State ex rel. Montgomery v Duncan (Fries),* ___ Ariz. ___, ___ P.3d ___, ¶¶ 5–8 (Ct. App. Dec. 27, 2011) (38-year-old defendant was charged with four acts of oral sexual intercourse with 15-year-old victim; trial court ruled defendant could cross-examine victim about statement defendant alleged she made to him that she previously had oral sex with two other individuals; court held trial court erred in not balancing to determine whether there was a due process or other constitutional violation that would occur if evidence were precluded and thus remanded for trial court to make that determination; court further held cross-examining victim about her past sexual acts would not be relevant to show what defendant thought about victim's age, and thus held only evidence that would be relevant would be defendant's testimony (should he choose to testify) of how victim's alleged statements about prior acts of oral sex led him to conclude she was at least 18 years of age).

404.b.cr.250 Extrinsic evidence of another crime, wrong, or act is relevant to show **motive**.

State v Hargrave, 225 Ariz. 1, 234 P.3d 569, ¶¶ 11–14 (2010) (because victims were members of minority groups, evidence that defendant and codefendant had formed paramilitary group that asserted supremacy of white race and espoused negative views of racial minorities was relevant to show defendant's motive in killing victims).

State v Andriano, 215 Ariz. 497, 161 P.3d 540, ¶¶ 24–26 (2007) (defendant was charged with first-degree murder of her husband; although testimony that defendant had extramarital sex with other men was not admissible as intrinsic evidence, court held that extramarital sex was admissible to show defendant's motive to kill her husband).

State v Johnson, 212 Ariz. 425, 133 P.3d 735, ¶¶ 7–14 & n.5 (2006) (defendant and codefendant (who was fellow gang member) committed armed robbery; defendant later killed victim of robbery so she could not testify against codefendant; defendant was charged with first-degree murder, burglary, armed robbery, and assisting criminal street gang; because witness elimination to benefit fellow gang member was motive for killing and served to identify defendant, evidence of assisting criminal street gang would have been admissible at trial for other three counts if tried separately, thus counts were properly joined).

State v Johnson, 212 Ariz. 425, 133 P.3d 735, ¶¶ 24–28 (2006) (court held evidence of defendant's gang-related activities was relevant to show motive for killing, which was to eliminate witness, and thus was admissible to prove existence of aggravating circumstance).

State v Martinez, 196 Ariz. 451, 999 P.2d 795, ¶¶ 29–33 (2000) (evidence of warrant for defendant's arrest and that defendant knew of that warrant was admissible to show motive for killing).

State v Sharp, 193 Ariz. 414, 973 P.2d 1171, ¶¶ 22–23 (1999) (in trial for kidnapping, sexual assault, and murder, pornographic magazine was relevant to show premeditation because it tended to show defendant's motive in calling victim to room was sexual).

State v Mott, 187 Ariz. 536, 931 P.2d 1046 (1997) (defendant was charged with child abuse for failure to seek treatment for her child after child was injured while in care of defendant's boyfriend; evidence of her relationship with her daughter 1 to 1½ years prior to the crime charged showed that defendant (1) left her daughter with her in-laws from time daughter was 2 months old until she was 2 years old, (2) struck her, and (3) hated her, and showed that defendant was an outgoing, expressive individual who could stand up for herself; because this evidence was relevant to defendant's motive in not seeking treatment for her daughter, it was admissible).

State v Ramsey, 211 Ariz. 529, 124 P.3d 756, ¶¶ 31–34 (Ct. App. 2005) (defendant was charged with continuous sexual abuse of child, which requires proof of three or more acts of sexual conduct with a minor, sexual assault, or child molestation of a child under 14 years of age over a period of 3 months or more; evidence showed that defendant touched daughter's breasts, vagina, and buttocks numerous times over 22-month period; defendant contended evidence of incestuous pornographic material was not relevant; court noted that, although expert testified that interest in pornography does not establish causal relationship with propensity to commit child molestation, expert testified that "it is a link," thus evidence was relevant to establish motive).

State v Beasley, 205 Ariz. 334, 70 P.3d 463, ¶¶ 13–14 (Ct. App. 2003) (defendant was mistakenly released from jail while awaiting trial on other charges; when police located defendant, he shot at them; state charged defendant with aggravated assault and attempted murder; defendant asked trial court to exclude his statement that he had fled because he did not want to return to jail, claiming this was evidence of other crime, wrong, or act; court held statement admissible to show motive for fleeing).

State v Mills, 196 Ariz. 269, 995 P.2d 705, ¶¶ 23–26 (Ct. App. 1999) (defendant and wife were seeking dissolution; defendant was charged with killing wife by paying someone to shoot her; trial court properly admitted evidence that, 2 months prior to shooting, defendant had cut brake lines on wife's truck because this showed defendant's motive to remove wife and eliminate dissolution problems).

State v Rivers, 190 Ariz. 56, 945 P.2d 367 (Ct. App. 1997) (evidence that defendant failed urinalysis and showed cocaine use was admitted to show motive for escape from home arrest).

404.b.cr.260 Extrinsic evidence of another crime, wrong, or act is relevant to show **opportunity**.

State v Nordstrom, 200 Ariz. 229, 25 P.3d 717, ¶¶ 62–65 (2001) (evidence that, a few hours before the murders, defendant and another pistol-whipped two men using same type of weapon used in murders, admissible to show opportunity).

State v [Van] Adams, 194 Ariz. 408, 984 P.2d 16, ¶¶ 19–21 (1999) (victim was selling homes; in one model home, officers found signs of struggle upstairs and found victim's disrobed body under bed; to show identity, *modus operandi,* intent, knowledge, opportunity, and preparation, state introduced testimony from California saleswoman that, 6 years prior, defendant asked her to show him two-story model home and attempted to assault her sexually that while there; to show identity, state introduced testimony of another saleswoman that defendant had tried to get her to go upstairs in model home that same day; court noted numerous similarities between events, and held trial court did not abuse discretion in admitting evidence).

404.b.cr.290 **Extrinsic** evidence of another crime, wrong, or act is relevant to show **premeditation.**

State v Sharp, 193 Ariz. 414, 973 P.2d 1171, ¶¶ 22–23 (1999) (in trial for kidnapping, sexual assault, and murder, pornographic magazine was relevant to show premeditation because it tended to show defendant's motive in calling victim to room was sexual).

404.b.cr.300 **Extrinsic** evidence of another crime, wrong, or act is relevant to show **preparation.**

State v [Van] Adams, 194 Ariz. 408, 984 P.2d 16, ¶¶ 19–21 (1999) (victim was selling homes; in one model home, officers found signs of struggle upstairs and found victim's disrobed body under bed; to show identity, *modus operandi,* intent, knowledge, opportunity, and preparation, state introduced testimony from California saleswoman that, 6 years prior, defendant asked her to show him two-story model home and attempted to assault her sexually while there; to show identity, state introduced testimony of another saleswoman that defendant had tried to get her to go upstairs in model home that same day; court noted numerous similarities between events, and held trial court did not abuse discretion in admitting evidence).

404.b.cr.320 **Extrinsic** evidence of another crime, wrong, or act is relevant **to rebut areas opened** by the other party.

State v Villalobos, 225 Ariz. 74, 235 P.3d 227, ¶¶ 17–19 (2010) (defendant was charged with first-degree murder and child abuse as result of death of his girlfriend's daughter; defendant contended trial court erred in admitting following evidence: (1) 3 months prior, he had violently shaken victim; (2) 2 months prior, he had bruised victim's face and buttocks; (3) 1 month prior, he had bruised victim's face; (4) weeks prior, he had bruised victim's arms; court held evidence was relevant to rebut defendant's claim that he did not intend to hurt victim and hit her as "reflex" as well as his contention that girlfriend could have caused injuries).

State v Pandeli, 215 Ariz. 514, 161 P.3d 557, ¶¶ 44–46 (2007) (defendant introduced evidence of his good behavior in prison to show lack of future dangerousness; evidence of defendant's aggressive sexual behavior and violent fantasies rebutted that mitigation evidence).

State v Pandeli, 215 Ariz. 514, 161 P.3d 557, ¶¶ 51–56 (2007) (evidence that defendant killed another woman in similar manner to way he killed victim rebutted testimony of defendant's expert by showing that defendant did not act impulsively).

State v Andriano, 215 Ariz. 497, 161 P.3d 540, ¶¶ 24–27 (2007) (defendant charged with first-degree murder of husband; although testimony that defendant had extramarital sex with other men was not admissible as intrinsic evidence, court held that extramarital sex was admissible to rebut defense theory that defendant was domestic violence victim who lived in fear of her abusive husband).

State v Andriano, 215 Ariz. 497, 161 P.3d 540, ¶ 29 (2007) (after defendant's expert testified that defendant needed to use personal lubricant when she had sex with her husband, prosecutor's asking expert whether defendant needed to use personal lubricant when she had sex with her extramarital affair was permissible to rebut expert's suggestion that defendant needed to use personal lubricant with her husband because her husband was abusive spouse).

State v Greene, 192 Ariz. 431, 967 P.2d 106, ¶¶ 20–23 (1998) (because letters were about offense in question, they were not evidence of another crime, wrong, or act; and even if they were, they were admissible to show consciousness of guilt and to rebut claim of remorse).

State v Connor, 215 Ariz. 553, 161 P.3d 596, ¶¶ 37–38 (Ct. App. 2007) (defendant was charged with first-degree murder; evidence showed victim had been victim of check-cashing scheme and that victim's mother told him to stay away from anyone asking him to cash checks for them; evidence that

defendant had asked victim to cash checks admissible to rebut defendant's testimony that he was friends with victim and was welcome in his apartment).

State v Mills, 196 Ariz. 269, 995 P.2d 705, ¶¶ 23–26 (Ct. App. 1999) (defendant and wife were seeking dissolution; defendant was charged with killing his wife by paying someone to shoot her; evidence that, 2 months prior to shooting, defendant had cut brake lines on wife's truck admissible to rebut defendant's claim that he loved her, wanted to get back together with her, and would not want any harm to come to her).

State v Harrison, 195 Ariz. 28, 985 P.2d 513, ¶¶ 14–16 (Ct. App. 1998) (in charge of aggravated assault against police officers, because defendant claimed he acted in self-defense, his statement while being transported to police station that, if he had possessed a gun, both he and the officer would have been shot, was admissible to show his desire to harm officer and to refute his claim that he acted in self-defense), *aff'd,* 195 Ariz. 1, 985 P.2d 486 (1999).

404.b.cr.330 **Extrinsic** evidence of another crime, wrong, or act is relevant when **sanity** or **mental state** is an issue.

State v Roque, 213 Ariz. 193, 141 P.3d 368, ¶¶ 53–59 (2006) (after 9/11/01, defendant said he wanted to shoot some "rag heads," referring to people defendant perceived to be of Arab descent; after drinking 75 ounces of beer, defendant shot and killed Sikh of Indian descent who wore turban, and shot at several other people at other locations; state's theory of case was that shootings were intentional acts of racism while intoxicated; defendant pursued insanity defense; in assessing defendant's mental health, state's expert testified that he considered defendant's 1983 conviction for attempted robbery; court noted that evidence of prior conviction is generally admissible when insanity is issue, but this evidence had only minimal probative value because there was no showing that robbery was alcohol induced or product of racism; however, although probative value was minimal, so was any prejudicial effect).

In re Leon G., 199 Ariz. 375, 18 P.3d 169, ¶ 11 (Ct. App. 2001) (because issue was whether person was likely to commit further acts of sexual violence, doctor was permitted to rely on person's past improper sexual activities in forming opinion, and was permitted to disclose factual basis for that opinion).

404.b.cr.450 Extrinsic evidence of another crime, wrong, or act is relevant to show **state of mind.**

State v Taylor, 169 Ariz. 121, 124–25, 817 P.2d 488, 491–92 (1991) (evidence of victim's prior conviction for child abuse admissible because defendant knew of this conviction, and it was relevant to determine whether defendant was justifiably apprehensive about his own safety and safety of two children in apartment).

State v Pierce, 170 Ariz. 527, 530, 826 P.2d 1153, 1156 (Ct. App. 1991) (evidence of other times 46-year- old defendant molested 12-year-old victim admissible to show defendant's state of mind when he molested victim on occasions charged).

404.b.cr.460 In death penalty case based on felony murder, extrinsic evidence of another crime, wrong, or act is relevant to show defendant acted with **reckless indifference.**

State v Garcia, 224 Ariz. 1, 226 P.3d 370, ¶¶ 32–39 (2010) (defendant was convicted of felony murder based on robbery he committed with S. where S. killed victim; evidence that defendant had committed separate robbery with S. 5 weeks earlier where S. had shot victim was admissible to show defendant acted with reckless indifference during subject robbery and killing).

404.b.cr.470 In death penalty case, extrinsic evidence of another crime, wrong, or act is relevant to show an **aggravating circumstance.**

State v Garcia, 224 Ariz. 1, 226 P.3d 370, ¶¶ 32–39 (2010) (evidence that defendant was convicted of committing robbery that happened 5 weeks before present robbery/felony murder was admissible to show (F)(2) prior conviction aggravating circumstance).

404.b.cr.480 Although only the fact of a prior conviction is admissible for impeachment under Rule 609(a), the facts underlying the prior conviction may also be relevant for purposes specified in Rule 404(b).

State v Smith, 146 Ariz. 491, 499–500, 707 P.2d 289, 297–98 (1985) (in addition to being admissible to show character for truthfulness, evidence of defendant's conviction for three prior robberies of convenience stores admissible to show identity).

404.b.cr.490 The list of "other purposes" in Rule 404(b) is not exhaustive; if the evidence is relevant for any purpose other than to show the defendant's criminal character, it is admissible even though it refers to other crimes, wrongs, or acts.

State v Smith, 170 Ariz. 481, 482–83, 826 P.2d 344, 345–46 (Ct. App. 1992) (evidence of codefendants' tattoos relevant to explain why robbers were careful to cover their arms and torsos).

State v Tassler, 159 Ariz. 183, 185, 765 P.2d 1007, 1009 (Ct. App. 1988) (evidence of prior domestic disturbance and defendant's statement, "After the last time, I made up my mind that I was going to kill the next cop that came through the door," was relevant in determining whether defendant sought to use knife and whether force used by officers was excessive).

State v Schackart, 153 Ariz. 422, 424, 737 P.2d 398, 400 (Ct. App. 1987) (defendant claimed consent; defendant's prior acts with victim admissible to show victim's state of mind when engaging in sexual intercourse with defendant).

404.b.cr.500 Evidence of another crime, wrong, or act is admissible if it is factually or conditionally relevant, which means the proponent is able to produce sufficient evidence from which the trier-of-fact could conclude, by clear and convincing evidence, that the other act happened, the person committed the act, and the circumstances of that act were as the proponent claims; proof beyond a reasonable doubt is not necessary.

State v Anthony, 218 Ariz. 439, 189 P.3d 366, ¶¶ 33–37 & n.7 (2008) (defendant was convicted of killing his wife and step-children; trial court allowed state to present evidence tending to show defendant molested 14-year old step-daughter; state argued that molestation was defendant's motive for killing her; court stated that, although jurors must ultimately determine whether other act is proved, trial court must find that there is clear and convincing proof both that other act was committed and that defendant committed that other act; court concluded there was not enough evidence for jurors to conclude by clear and convincing evidence that other act (molestation of step-daughter) occurred, and thus reversed conviction).

State v Nordstrom, 200 Ariz. 229, 25 P.3d 717, ¶ 57 (2001) (to establish that defendant conspired with third person to commit separate robbery, at trial state presented testimony of third person, evidence that details of place to be robbed were as defendant described, and testimony that defendant and third person lived and socialized together at time of robbery; court held this established other act by clear and convincing evidence).

State v Terrazas, 189 Ariz. 580, 944 P.2d 1194 (1997) (court rejected by a preponderance of the evidence test for criminal cases, and found that evidence of other act not sufficient for admission).

State v Mott, 187 Ariz. 536, 931 P.2d 1046 (1997) (because there was sufficient evidence from which the jurors could conclude defendant (1) left her daughter with her in-laws from 2 months old until 2 years old, (2) struck her, and (3) hated her, trial court properly admitted this evidence).

State v Smyers, 205 Ariz. 479, 73 P.3d 610, ¶¶ 6–8 (Ct. App. 2003) (defendant was charged with furnishing harmful items to 11-year-old minor as result of showing her pictures on computer screen of man and woman engaged in sexual intercourse; trial court ruled state could admit evidence that defendant had kissed victim on lips, tried to "French kiss" her by sticking his tongue in her mouth, and hugging her by placing his hands on her "butt" and pulling her against his body; trial court found victim's testimony to be sufficiently clear and convincing; court held trial court did not abuse discretion in admitting this evidence); *other grounds vac'd,* 207 Ariz. 314, 86 P.3d 370, ¶ 16 (2004).

State v Vigil, 195 Ariz. 189, 986 P.2d 222, ¶¶ 15–16 (Ct. App. 1999) (because there was no indication on record that trial court used clear and convincing standard, there was no indication trial court used proper standard).

State v Uriarte, 194 Ariz. 275, 981 P.2d 575, ¶¶ 35–37 (Ct. App. 1998) (defendant charged with multiple counts for sexual crimes involving his 12-year-old sister-in-law; jurors convicted defendant of two counts, could not reach verdict on one, and acquitted on remainder; on second trial for count where jurors could not reach verdict, in order to show common scheme or plan and sexual propensity, state sought admission of counts where jurors acquitted; trial court ruled it would allow admission of those counts if state could show by preponderance of evidence that those events took place; court held that trial court used wrong standard and that error was not harmless, and thus reversed conviction).

404.b.cr.503 In determining whether the proponent has sufficient evidence from which the trier-of-fact could conclude, by clear and convincing evidence, that the other act happened, the person committed the act, and the circumstances of that act were as the proponent claims, the trial court is not required to hold an evidentiary hearing at which the proponent would have to produce its witnesses and have the other party cross-examine them; the trial court is instead required to make a determination of the admissibility of the evidence under Rule 104(a), which provides that the trial court is not bound by the rules of evidence in making that ruling.

State v LeBrun, 222 Ariz. 183, 213 P.3d 332, ¶¶ 5–16 (Ct. App. 2009) (state sought to join for trial four cases with 13 counts of sexual conduct with minor and child molestation, and sought to introduce other act evidence of defendant's conduct with four other boys; trial court refused defendant's request for live evidentiary hearing and instead reviewed video and audio tapes of statements made by victims; court held that trial court's review of tapes was sufficient for it to determine whether state had sufficient evidence from which jurors could conclude by clear and convincing evidence that defendant committed other acts).

404.b.cr.505 Because the state must prove a crime beyond a reasonable doubt, but must only prove other acts by clear and convincing evidence, trial court may admit evidence of crimes for which defendant has been acquitted without violating prohibition against double jeopardy.

* *State v Lehr,* 227 Ariz. 140, 254 P.3d 379, ¶ 26 (2011) (in trial involving multiple victims, fact that at previous trial state had failed to prove murder of victim B.C. was especially heinous, cruel, or depraved did not preclude state from introducing that evidence under Rule 404(b)).

State v Uriarte, 194 Ariz. 275, 981 P.2d 575, ¶ 38 (Ct. App. 1998) (defendant was charged with multiple counts of child molestation, sexual conduct with minor, and public sexual indecency involving his 12-year-old sister-in-law; jurors convicted defendant of two counts, could not reach verdict on one, and acquitted on remainder; on second trial for count where jurors could not reach verdict, in order to show common scheme or plan and sexual propensity, state sought admission of counts where jurors

acquitted; court held that, under analysis of federal law, admission of this evidence would not violate prohibition against double jeopardy, but it still was open question under Arizona law).

404.b.cr.600 The trial court may exclude evidence of other crimes, wrongs, or acts under Rule 403 if the opponent objects on that basis and trial court determines that the probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, or misleading the jurors, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence; because this is an extraordinary remedy, it should be used sparingly.

State v [Van] Adams, 194 Ariz. 408, 984 P.2d 16, ¶¶ 22–23 (1999) (victim was selling homes; in one model home, officers found signs of struggle upstairs and found victim's disrobed body under bed; to show identity, *modus operandi,* intent, knowledge, opportunity, and preparation, state introduced testimony from California saleswoman that, 6 years prior, defendant asked her to show him two-story model home and attempted to assault her sexually while there; court stated that victim made no inflammatory remarks about defendant, and thus testimony was not unfairly prejudicial).

State v [Van] Adams, 194 Ariz. 408, 984 P.2d 16, ¶¶ 22–23 (1999) (victim was selling homes; in one model home, officers found signs of struggle upstairs and found victim's disrobed body under bed; to show identity, state introduced testimony of another subdivision saleswoman that defendant had tried to get her to go upstairs in model home that same day; court noted victim stated she did not believe defendant was there to buy house and she was uneasy because defendant walked close to her; court stated this testimony was not related to issue of identity and thus prejudicial effect may have outweighed probative value, but this was only small portion of overall testimony, so any error would have been harmless).

State v Lee(I), 189 Ariz. 590, 944 P.2d 1204 (1997) (although evidence of other murder was harmful to defense, not all harmful evidence is unfairly prejudicial; no showing that jurors were improperly influenced by emotion or horror).

State v Mott, 187 Ariz. 536, 931 P.2d 1046 (1997) (defendant objected to other act evidence on basis of prejudice; because there was nothing to show that this evidence was *unfairly* prejudicial, trial court did not abuse its discretion in admitting it).

State v Williams, 209 Ariz. 228, 99 P.3d 43, ¶¶ 22–23 (Ct. App. 2004) (defendant was charged with public sexual indecency based on his stopping car next to 14- and 15-year old victims and masturbating in car; trial court admitted for identification purposes evidence of four other acts when defendant was seen masturbating in car; because defendant contended someone else committed offenses, identity was issue; court concluded trial court did not abuse discretion in determining that probative value was not substantially outweighed by the danger of unfair prejudice).

404.b.cr.620 When evidence has both probative value and elements that make it unfairly prejudicial, trial court need not require wholesale proscription; it should instead determine (1) whether probative value of evidence is sufficient that it should be admitted in some form, (2) what restrictions should be placed on use of evidence by jury instructions, and (3) whether evidence can be narrowed or limited to reduce its potential for unfair prejudice while preserving probative value.

State v Nordstrom, 200 Ariz. 229, 25 P.3d 717, ¶¶ 62–65 (2001) (evidence that, a few hours before the murders, defendant and another pistol-whipped two men using same type of weapon used in murders, admissible to prove identity and to show opportunity; trial court adequately protected against any unfair prejudice by limiting admissibility to only those facts necessary to establish defendant was armed with type of weapon used in murders and in company of other alleged perpetrator).

State v Martinez, 196 Ariz. 451, 999 P.2d 795, ¶¶ 29–33 (2000) (because ballistic evidence showed shell casing found at subsequent robbery was consistent with ammunition used in officer's gun, evidence

that defendant committed subsequent robbery was relevant to determination of identity of defendant as person who killed officer; because trial court allowed admission only of evidence of robbery and use of weapon, and precluded evidence that defendant shot and killed store clerk during robbery, trial court adequately protected defendant against unfair prejudice).

State v Hughes, 189 Ariz. 62, 938 P.2d 457 (1997) (evidence of defendant's drug involvement with victim was relevant to motive, but trial court erred in admitting cumulative evidence because it went far beyond that necessary to establish motive, thus trial court should have limited this evidence to its probative essence by excluding irrelevant or inflammatory detail).

State v Baldenegro, 188 Ariz. 10, 932 P.2d 275 (Ct. App. 1996) (in charge of assisting and participating in criminal syndicate for benefit of street gang, state had to prove "Carson 13" was a criminal street gang, thus evidence of criminal activity by members of "Carson 13" was relevant and had substantial probative value; trial court limited prejudicial effect by excluding specific names and instances of criminal conduct by "Carson 13" members; trial court therefore did not abuse discretion by admitting this evidence).

404.b.cr.630 The trial court does not have to make explicit findings about balancing prejudicial effect against probative value when record is clear parties argued factors to the trial court, and the trial court considered them and balanced them.

State v Beasley, 205 Ariz. 334, 70 P.3d 463, ¶¶ 15 (Ct. App. 2003) (defendant was mistakenly released from jail while awaiting trial on other charges; when police located defendant, he fired shots at them; state charged defendant with aggravated assault and attempted murder; defendant asked trial court to exclude his statement that he had fled because he did not want to return to jail, claiming this was evidence of other crime, wrong, or act; court held statement admissible to show motive for fleeing; court noted parties argued probative value and prejudice to trial court, and that record showed trial court balanced these factors before admitting evidence, thus specific findings were not necessary).

404.b.cr.700 An instruction that informs the jurors of the limitation on the use for which they may consider this type of evidence adequately protects the defendant, it being presumed that the jurors follow that instruction.

State v Nordstrom, 200 Ariz. 229, 25 P.3d 717, ¶¶ 62–65 (2001) (evidence that, a few hours before the murders, defendant and another pistol-whipped two men using same type of weapon used in murders, admissible to prove identity and to show opportunity; trial court gave jurors instruction on limited use for which jurors could consider evidence).

State v Lee(I), 189 Ariz. 590, 944 P.2d 1204 (1997) (trial court instructed jurors that the state must prove each element of charges beyond a reasonable doubt, and instructed jurors on each of the 12 verdict forms and charges to which forms related; because defendant did not request a more specific instruction, he waived any error).

State v DePiano, 187 Ariz. 41, 926 P.2d 508 (Ct. App. 1995) (trial court gave proper limiting instruction to circumscribe jurors' consideration of evidence of other acts), *vacated on other grounds,* 187 Ariz. 27, 926 P.2d 494 (1996).

404.b.cr.720 If the defendant requests an instruction informing jurors of the limitation on the use for which they may consider this type of evidence, the trial court must give it, but if the defendant does not request such an instruction, the trial court is not required to give it *sua sponte.*

State v Lee(I), 189 Ariz. 590, 944 P.2d 1204 (1997) (trial court instructed jurors that the state must prove each element of charges beyond a reasonable doubt, and instructed jurors on each of the 12 verdict forms and charges to which forms related; because defendant did not request a more specific instruction, he waived any error).

State v Mott, 187 Ariz. 536, 931 P.2d 1046 (1997) (defendant neither requested a limiting instruction nor objected when trial court did not give one).

State v Miles, 211 Ariz. 475, 123 P.3d 669, ¶¶ 31–32 (Ct. App. 2005) (defendant caused collision that injured victim; state charged defendant with DUI, aggravated assault, endangerment, and criminal damage; court granted motion for judgment of acquittal for DUI and instructed jurors to disregard any evidence presented to support DUI counts and any evidence about alcohol; defendant contended trial court erred in not giving limiting instruction for his prior misdemeanor DUI convictions; court held trial court was not required *sua sponte* to give limiting instruction).

State v Smyers, 205 Ariz. 479, 73 P.3d 610, ¶¶ 6–8 (Ct. App. 2003) (defendant was charged with furnishing harmful items to 11-year-old minor as result of showing her pictures on computer screen of man and woman engaged in sexual intercourse; trial court ruled state could admit evidence that defendant had kissed victim on lips, tried to "French kiss" her by sticking his tongue in her mouth, and hugging her by placing his hands on her "butt" and pulling her against his body; trial court gave jurors limiting instruction); *other grounds vac'd*, 207 Ariz. 314, 86 P.3d 370, ¶ 16 (2004).

404.b.cr.730 Because the party opposing the other act evidence has the right to argue that the evidence is not prejudicial, an instruction that refers to other "bad" acts is error.

State v Corona, 188 Ariz. 85, 932 P.2d 1356 (Ct. App. 1997) (trial court gave instruction on limited use of "other bad acts" of defendant; court held this was error, but not fundamental).

404.b.cr.735 If the instruction properly instructs the jurors they are not to consider the other act to prove character or to prove action in conformity with that character, it is not error if the instruction refers to "bad character."

State v Nordstrom, 200 Ariz. 229, 25 P.3d 717, ¶ 84 (2001) (instruction told jurors they were not to consider other act "to prove the defendant is a person of bad character or that the defendant acted in conformity with that bad character").

404.b.cr.740 When other act evidence is admitted for a specific purpose, it is not error to instruct jurors that they may consider the evidence to show such things as motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident because the conjunction "or" allows the jurors to disregard those uses that are not supported by the evidence.

State v [Van] Adams, 194 Ariz. 408, 984 P.2d 16, ¶¶ 25–26 (1999) (defendant was charged with killing victim after what appeared to be sexual assault; trial court admitted evidence that he sexually assaulted prior victim but did not kill her, and instructed jurors that they could consider other act evidence "only as it relates to the defendant's opportunity, intent, preparation, knowledge, or identity"; court rejected defendant's contention that trial court should have further limited this evidence to identity and *modus operandi*).

404.b.cr.800 Depending on the nature of the crime charged and nature of the other crime, wrong, or act, admission of evidence of the other crime, wrong, or act may be harmless error.

State v Dann, 205 Ariz. 557, 74 P.3d 231, ¶¶ 40–46 (2003) (witness testified that, after defendant told her he killed three people, she encouraged him to turn himself in, to which he replied, "That's not an option; I can't go back to jail"; defendant contended this was inadmissible other act evidence and requested mistrial; court held this testimony constituted error, but concluded that, in light of totality of evidence presented against defendant and trial court's limiting instruction, there was no probability verdict would have been different if jurors had not heard testimony).

State v Lamar, 205 Ariz. 431, 72 P.3d 831, ¶¶ 38–44 (2003) (trial court had granted defendant's request to preclude evidence that Richard, in defendant's presence, threatened Hogan by asking her if she

would like to be buried next to Jones (victim in this case); at trial, prosecutor asked Hogan if anyone made threats against her in defendant's presence, and she responded, "When Richard said they was [*sic*] going to bury me next to— ," whereupon defendant objected and asked for mistrial, which trial court denied; court noted that trial court had concluded evidence of Richard's threat was hearsay, but held any error was harmless because (1) statement did not necessarily implicate defendant, and (2) trial court instructed jurors to disregard that testimony).

State v Hoskins, 199 Ariz. 127, 14 P.3d 977, ¶¶ 54–58 (2001) (prosecutor asked witness when he had last seen defendant, and witness said it was when they both were arrested as juveniles while making "beer run"; court noted witness gave this testimony in violation of trial court's order, but held any error was harmless in light of other evidence presented).

State v Jones, 197 Ariz. 290, 4 P.3d 345, ¶¶ 30–35 (2000) (witness gave unsolicited testimony that defendant (1) was paroled felon, (2) after murders, borrowed duct tape to use in subsequent robbery, and (3) was subsequently incarcerated; court held that, because these were merely vague reference to unproved crimes and because trial court gave limiting instruction, testimony not grounds for reversal).

Paragraph (c) — Character evidence in sexual misconduct cases.

Civil Cases

404.c.civ.010 A sexually violent persons case is civil in nature; in a civil case, Rule 404(c) allows for the admission of other act evidence when the claim is predicated on a party's alleged commission of a sexual offense, which means a sexual offense that the person is alleged to have committed in the past; in a SVP case, the state must prove (1) the person has been convicted of or found guilty but insane of a sexually violent offense, thus this is not an "alleged" offense, and (2) the person has a mental disorder that makes the person likely to engage in acts of sexual violence, which again does not require proof of an "alleged" offense; because a SVP cases does not require proof of an "alleged" offense, Rule 404(c) does not apply in SVP cases.

In re Jaramillo, 217 Ariz. 460, 176 P.3d 28, ¶¶ 5–10 (Ct. App. 2008) (in 1996, Jaramillo pled guilty but insane to attempted sexual conduct with minor; in 2006, state filed petition alleging Jaramillo was sexually violent person; at trial, psychiatrist testified about three prior acts: 1992 touching of 11-year-old female; 1992 exposing himself and touching woman on buttocks; and 1993 touching of woman's buttocks, crotch, and chest; because 1996 attempted sexual conduct with minor was offense to which Jaramillo pled, it was not "alleged" offense; because state only had to prove mental disorder, it did not have to prove Jaramillo committed 1992 and 1993 offenses; thus there were no "alleged" offenses state had to prove, thus Rule 404(c) did not apply).

Criminal Cases

404.c.cr.010 In a case in which a defendant or a party is alleged to have committed a sexual offense, evidence of other crimes, wrongs, or acts may be admitted to show the defendant or party had a character trait giving rise to an aberrant sexual propensity to commit the alleged sexual offense.

State v Aguilar, 209 Ariz. 40, 97 P.3d 865, ¶ 28 (2004) (court concluded that non-consensual heterosexual contact between adults could show aberrant sexual propensity).

404.c.cr.020 Before admitting evidence that the defendant had a character trait giving rise to an aberrant sexual propensity to commit the alleged sexual offense, the trial court must go through the analysis stated in Rule 404(c)(1)(A)–(C), and make the findings required by those sections.

State v Aguilar, 209 Ariz. 40, 97 P.3d 865, ¶ 33 (2004) (trial court made findings, but court concluded that evidence trial court considered was not sufficient to make necessary finding).

* *State v Vega*, 228 Ariz. 24, 262 P.3d 628, ¶¶ 9–25 (Ct. App. 2011) (defendant was charged with committing sexual crimes against his two nieces, ages 6 and 11; trial court admitted evidence defendant had improperly touched 11-year-old several months prior to charged incidents; court did not decide whether that evidence would have been admissible under Rule 404(b); court held it could have been admissible under Rule 404(c), but held trial court erred in not making analysis and findings required by that rule, but held any error was harmless in light of evidence admitted to prove charged offenses).

404.c.cr.030 Sexual propensity evidence must be admissible under applicable rules of criminal procedure.

State v Williams, 209 Ariz. 228, 99 P.3d 43, ¶¶ 40–44 (Ct. App. 2004) (defendant was charged with public sexual indecency based on his stopping car next to 14- and 15-year old victims and masturbating in car; trial court admitted for identification purposes evidence of four other acts when defendant was seen masturbating in car; court held trial court erred in admitting evidence of defendant's statements made in connection with preparation of presentence report from 1999 incident, but held that any error was harmless in light of fact that jurors heard testimony from victim and investigating officers from 1999 incident, and fact that defendant did not contest that 1999 incident occurred).

404.c.cr.040 Evidence that the defendant committed the other acts against the same victim is admissible to show the defendant's lewd disposition or unnatural attitude toward the particular victim, but the trial court must still go through the analysis stated in Rule 404(c)(1)(A)–(C).

State v Prion, 203 Ariz. 157, 52 P.3d 189, ¶¶ 37–44 (2002) (only similarity between two crimes was that both occurred in Tucson at end of 1992, each involved female victim, and knife or knives were used at some point; differences were one victim was 19-year-old college student and other was 35-year-old street prostitute; court held evidence was not sufficient to establish identity, and to extent this might be considered sexual propensity evidence, state failed to make necessary showing under Rule 404(c), thus evidence would not have been admissible in other trial if both charges were tried separately).

State v Herrera, 226 Ariz. 59, 243 P.3d 1041, ¶¶ 18–19 (Ct. App. 2010) (evidence defendant committed other acts on victim in Yuma when she was 13 admissible in prosecution for acts defendant committed on victim in Tucson between her 14th and 15th birthdays).

State v Ramsey, 211 Ariz. 529, 124 P.3d 756, ¶ 35 (Ct. App. 2005) (defendant was charged with continuous sexual abuse of child, which requires proof of three or more acts of sexual conduct with a minor, sexual assault, or child molestation of a child under 14 years of age over a period of 3 months or more; evidence showed that defendant touched daughter's breasts, vagina, and buttocks numerous times over 22-month period; defendant contended evidence of incestuous pornographic material was not relevant; court noted that trial court made specific findings required by Rule 404(c), and rejected defendant's contention that trial court was without authority to admit evidence under Rule 404(c) because state had not sought to admit evidence under that rule).

State v Garcia, 200 Ariz. 471, 28 P.3d 327, ¶¶ 34–37 (Ct. App. 2001) (trial court ruled it would allow admission of evidence of sexual acts by defendant against same victim and that it did not need to go through Rule 404(b) or Rule 404(c) analysis; court held such analysis was necessary even when other acts were against same victim).

404.c.cr.050 If inadmissible evidence is presented, the appropriate remedy is within the discretion of the trial court.

State v Williams, 209 Ariz. 228, 99 P.3d 43, ¶¶ 45–49 (Ct. App. 2004) (defendant was charged with public sexual indecency based on his stopping car next to 14- and 15-year old victims and masturbating in car; trial court admitted for identification purposes evidence of four other acts when defendant

was seen masturbating in car; prosecutor asked detective from 1993 incident whether he had arrested defendant, and detective said he did; court held that, assuming answer violated trial court's order not to introduce evidence of defendant's prior "convictions" and was error, any error was harmless in light of all other evidence presented in case).

Paragraph (c)(1)(A) — Character evidence in sexual misconduct cases— Sufficiency of evidence.

404.c.1.A.cr.010 Before admitting evidence of another act in a sexual misconduct case, the trial court must find that the evidence is sufficient to permit the trier-of-fact to find by clear and convincing evidence that the defendant committed the other act.

* *State v Dixon,* 226 Ariz. 545, 250 P.3d 1174, ¶¶ 12–14 (2011) (defendant was convicted of felony murder with sexual assault as charged predicate felony; trial court admitted evidence that defendant had prior conviction for sexual assault; because previous jurors had found defendant guilty beyond reasonable doubt of sexual assault, prosecutor presented sufficient evidence from which jurors could conclude by clear and convincing evidence that defendant had committed prior offense).

State v Aguilar, 209 Ariz. 40, 97 P.3d 865, ¶ 30 (2004) (court stated that "the trial court must determine that clear and convincing evidence supports a finding that the defendant committed the other act," and cited Rule 404(c)(1)(A) as authority).

State v Herrera, 226 Ariz. 59, 243 P.3d 1041, ¶ 20 (Ct. App. 2010) (victim's testimony (1) identifying herself in videotape clips depicting her breasts, (2) identifying defendant's voice in videotape, and (3) that defendant took that videotape and others was sufficient to establish by clear and convincing evidence that acts had occurred and defendant did them).

State v Marshall, 197 Ariz. 496, 4 P.3d 1039, ¶¶ 2–7 (Ct. App. 2000) (trial court denied defendant's motion to sever two counts alleging sexual conduct with minor in March 1995 with 16 counts alleging sexual conduct with same minor over 4-day period in October 1996; count concluded evidence of 16 counts would have been admissible at separate trial on other two counts; on issue of proof, court held that, assuming *arguendo* victim's testimony about first two counts was not sufficient, videotape of act underlying other counts would provide sufficient proof).

State v Amer, 195 Ariz. 394, 988 P.2d 1120, ¶¶ 6 (Ct. App. 1999) (defendant charged with molesting 10-year-old boy; at trial, witness testified that 3 years earlier when he was 11 years old, he and defendant were watching television, and defendant rubbed the witness's penis through his clothes).

404.c.1.A.cr.020 If there are conflicting versions of the other act evidence, the trial court must make a credibility determination in assessing whether the evidence is sufficient to permit the trier-of-fact to find that the defendant committed the other act.

State v Aguilar, 209 Ariz. 40, 97 P.3d 865, ¶¶ 30–35 (2004) (defendant was charged with three counts of sexual assault against three different victims; both defendant and victims agreed that defendant had sexual contact with victims, but defendant claimed acts were consensual, while victims contended acts were done without their consent; because determination of what actually happened depended largely on credibility of witnesses, trial court had to make credibility determination that victims' accounts were more credible than defendant's account; because trial court limited its review to grand jury transcripts (when only police officer testified), pleadings, and arguments of counsel, trial court neither heard from victims nor was presented with any prior testimony from them, thus material trial court considered was not sufficient to make required determination under Rule 404(c) (1)(A)).

Paragraph (c)(1)(B) — Character evidence in sexual misconduct cases— Aberrant sexual propensity.

404.c.1.B.cr.010 Before admitting character evidence in a sexual misconduct case, the trial court must first find the commission of the other act provides a reasonable basis to infer the defendant had a character trait giving rise to an aberrant sexual propensity to commit the crime charged.

* *State v Lehr*, 227 Ariz. 140, 254 P.3d 379, ¶¶ 19–20 (2011) (state presented expert testimony and trial court found evidence provided reasonable basis to infer defendant had character trait giving rise to aberrant sexual propensity to commit violent and sexual acts against non-consenting females).

* *State v Dixon*, 226 Ariz. 545, 250 P.3d 1174, ¶¶ 12–15 (2011) (defendant was convicted of felony murder with sexual assault as charged predicate felony; trial court admitted evidence that defendant had prior conviction for sexual assault; because expert testified about similarities between prior sexual assault and charged offense and opined that defendant had aberrant propensity to commit sexual assault, trial court's propensity determination was appropriate).

State v Aguilar, 209 Ariz. 40, 97 P.3d 865, ¶ 28 (2004) (court concluded that non-consensual heterosexual contact between adults could show aberrant sexual propensity).

State v Arner, 195 Ariz. 394, 988 P.2d 1120, ¶¶ 2 (Ct. App. 1999) (defendant was charged with molesting 10-year-old boy; at pretrial hearing, psychologist testified that defendant's molestation of 11-year-old boy 3 years earlier was recent enough to have predictive value and would show that defendant had a continuing propensity to commit similar acts).

404.c.1.B.cr.020 The court may admit evidence of a remote or dissimilar other act if there is a reasonable basis to infer from the defendant's commission of the other act that the defendant had an aberrant sexual propensity, and although this reasonable basis may be shown by means of expert testimony or otherwise, expert testimony is no longer required in all cases of remote or dissimilar acts.

State v Arner, 195 Ariz. 394, 988 P.2d 1120, ¶¶ 2–5 (Ct. App. 1999) (defendant was charged with molesting 10-year-old boy; at pretrial hearing, psychologist testified that defendant's molestation of 11-year-old boy 3 years earlier was recent enough to have predictive value and would show that defendant had a continuing propensity to commit similar acts; trial court admitted evidence of prior act at trial, but psychologist did not testify at trial; defendant contended trial court erred in admitting evidence without having psychologist testify; court noted that, under Rule 404(c), such testimony is no longer required).

Paragraph (c)(1)(C) — Character evidence in sexual misconduct cases— Balancing against probative value.

404.c.1.C.cr.010 Before admitting evidence of another act in a sexual misconduct case, the trial court must find that the probative value of the other act evidence is not substantially outweighed by the danger of unfair prejudice, and in making that determination, the trial court may consider the remoteness of the other act, the similarity or dissimilarity of the other act, the strength of the evidence that defendant committed the other act, the frequency of the other acts, the surrounding circumstances, any relevant intervening events, any other similarities or differences, and any other relevant factors.

* *State v Lehr*, 227 Ariz. 140, 254 P.3d 379, ¶¶ 19–20 (2011) (state presented expert testimony and trial court found evidence provided reasonable basis to infer defendant had character trait giving rise to aberrant sexual propensity to commit violent and sexual acts against non-consenting females, and trial court found probative value was not substantially outweighed by danger of unfair prejudice).

* *State v Dixon*, 226 Ariz. 545, 250 P.3d 1174, ¶¶ 12–16 (2011) (defendant was convicted of felony murder with sexual assault as charged predicate felony; trial court admitted evidence that defendant had prior conviction for sexual assault; because defendant had been out of custody for only about 1 year before date of charged offense, and because defendant repeatedly intimated sex between victim and himself was consensual, and because circumstances of prior sexual assault and charged offense were strikingly similar, trial court did not abuse discretion in finding probative value was not substantially outweighed by danger of unfair prejudice).

State v Amer, 195 Ariz. 394, 988 P.2d 1120, ¶¶ 6–9 (Ct. App. 1999) (defendant charged with molesting 10-year-old boy; witness testified that, 3 years earlier when he was 11 years old, he and defendant were watching television and defendant rubbed witness's penis through his clothes, whereupon witness became frightened and tried to leave, but defendant stepped in front of him, told him not to go, and offered him money to take off his shorts; officer testified that he arrested defendant for child molestation and false imprisonment; defendant contended evidence that he tried to detain witness was unfairly prejudicial; court held that, assuming admission of that evidence was error, any error was harmless because it was not inflammatory and there was no suggestion that defendant used violence).

Paragraph (c)(1)(D) — Character evidence in sexual misconduct cases— Specific findings.

404.c.1.D.cr.010 The court must make findings for each of each of these factors in subsection (c)(1)(A), (B), and (C).

State v Aguilar, 209 Ariz. 40, 97 P.3d 865, ¶ 33 (2004) (trial court made findings, but court concluded that evidence trial court considered was not sufficient to make necessary finding).

State v Marshall, 197 Ariz. 496, 4 P.3d 1039, ¶ 7 (Ct. App. 2000) (trial court denied defendant's motion to sever two counts alleging sexual conduct with minor in March 1995 with 16 counts alleging sexual conduct with same minor over 4-day period in October 1996; count concluded evidence of 16 counts would have been admissible at separate trial on other two counts, and because this evidence was of acts against same victim, evidence was highly probative, thus any error in not making required findings was at most harmless error).

Paragraph (c)(2) — Character evidence in sexual misconduct cases— Instructions.

404.c.2.cr.010 If the trial court admits character evidence in a sexual misconduct case, the trial court must give a limiting instruction.

State v Amer, 195 Ariz. 394, 988 P.2d 1120, ¶¶ 10–11 (Ct. App. 1999) (defendant was charged with molesting 10-year-old boy; trial court admitted evidence that defendant had molested 11-year-old boy 3 years earlier; trial court instructed jurors as follows: "Evidence of other acts of the Defendant has been admitted in this case. You must not consider this evidence to prove the Defendant's character or that the Defendant acted in conformity with that character. You may, however, consider that evidence only as it relates to the Defendant's motive or emotional propensity for sexual aberration.").

404.c.2.cr.040 Instructing jurors that they may consider the defendant's other acts to show an emotional propensity for sexual aberration is not a comment on the evidence.

State v Amer, 195 Ariz. 394, 988 P.2d 1120, ¶¶ 10–11 (Ct. App. 1999) (defendant was charged with molesting 10-year-old boy; trial court admitted evidence that defendant had molested 11-year-old boy 3 years earlier; trial court instructed jurors that they could consider other act evidence to show motive or emotional propensity for sexual aberration; court rejected defendant's contention that, without expert testimony explaining emotional propensity, instruction was comment on evidence).

404.c.2.cr.050 Because Rule 404(c) allows the jurors to consider the defendant's other acts to prove the defendant's character trait giving rise to an aberrant sexual propensity and to show action in conformity with that character trait, it is incorrect to instruct the jurors that they may not use such evidence to prove character or actions in conformity with character.

State v Amer, 195 Ariz. 394, 988 P.2d 1120, ¶ 13 (Ct. App. 1999) (defendant was charged with molesting 10-year-old boy; trial court admitted evidence that defendant had molested 11-year-old boy 3 years earlier; trial court instructed jurors that they must not consider evidence to prove defendant's character or actions in conformity with character, but could consider such evidence to show motive or emotional propensity for sexual aberration; court held it was illogical to instruct jurors that they could not use evidence to prove character or actions in conformity with character, but any error worked in defendant's favor).

Paragraph (c)(3) — Character evidence in sexual misconduct cases— Disclosure.

No Arizona cases.

Paragraph (c)(4) — Character evidence in sexual misconduct cases— Sexual offenses.

404.c.4.cr.010 In enacting Rule 404(c), the Arizona Supreme Court intended to broaden the types of sexual offenses in which other act evidence might be admissible, thus the type of sexual offenses is not limited to only those previously admissible under *McFarlin*, and instead includes any offense that is included in A.R.S. § 13–1420.

State v Aguilar, 209 Ariz. 40, 97 P.3d 865, ¶¶ 20–28 (2004) (defendant was charged with three counts of sexual assault against three different victims, and state moved to consolidate trials; because A.R.S. § 13–1420 includes offenses involving non-consensual heterosexual contact between adults, such evidence is admissible under Rule 404(c)).

404.c.4.cr.020 In enacting Rule 404(c), the Arizona Supreme Court intended to broaden the types of sexual offenses in which other act evidence might be admissible, thus the type of sexual offenses is not limited to only those included in A.R.S. § 13–1420, and instead includes any offense that was previously admissible under *McFarlin*.

State v Williams, 209 Ariz. 228, 99 P.3d 43, ¶¶ 24–39 (Ct. App. 2004) (defendant was charged with public sexual indecency based on his stopping car next to 14- and 15-year old victims and masturbating in car; trial court admitted for identification purposes evidence of four other acts when defendant was seen masturbating in car; court held that, because prior case law held that evidence of public sexual indecency was admissible as sexual propensity evidence, it was still admissible, even though public sexual indecency was not included in A.R.S. § 13–1420).

March 11, 2012

Rule 405. Methods of Proving Character.

(a) By Reputation or Opinion. When evidence of a person's character or character trait is admissible, it may be proved by testimony about the person's reputation or by testimony in the form of an opinion. On cross-examination of the character witness, the court may allow an inquiry into relevant specific instances of the person's conduct.

(b) By Specific Instances of Conduct. When a person's character or character trait is an essential element of a charge, claim, or defense, or pursuant to Rule 404(c), the character or trait may also be proved by relevant specific instances of the person's conduct.

Comment to 2012 Amendment

The language of Rule 405 has been amended to conform to the federal restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Cases

Paragraph (a) — Reputation or opinion.

405.a.010 When a party is permitted to introduce evidence of character, the party may do so either by reputation or opinion testimony.

State v Rockwell, 161 Ariz. 5, 775 P.2d 1069 (1989) (defendant was permitted to introduce his character trait of fabrication, and did so by asking witnesses whether they had an opinion about his character trait of fabricating).

State v Fish, 222 Ariz. 109, 213 P.3d 258, ¶¶ 25–28 (Ct. App. 2009) (defendant killed victim, and claimed he acted in self-defense; defendant was permitted to offer evidence of victim's character for violence, but could do so only through evidence of opinion or reputation).

405.a.020 Before a witness may testify about a person's reputation, the proponent must show that the witness had sufficient contact with the person or the person's acquaintances during a relevant time period so the witness would know what the person's reputation is.

Selby v Saward, 134 Ariz. 222, 655 P.2d 342 (1982) (because defamation action involved events after 1968, evidence of plaintiff's reputation in late 1950s was irrelevant).

State v Jessen, 130 Ariz. 1, 633 P.2d 410 (1981) (police detective's "opinion" testimony about victim's reputation for involvement in organized crime not admissible as lay opinion of victim's character or reputation because not based upon personal knowledge, nor did detective's sources have personal knowledge of victim's character or reputation).

State v Riley, 141 Ariz. 15, 684 P.2d 896 (Ct. App. 1984) (because witness did not know of informant's reputation with law-enforcement community, witness not permitted to answer question of what informant's reputation was).

405.a.030 Because a witness may give the witness's own opinion on a character trait, it is permissible to ask the witness if the witness *knows* about a certain event, rather than limiting the question to whether the witness has *heard* about the event.

State v Rainey, 137 Ariz. 523, 672 P.2d 188 (Ct. App. 1983) (proper to ask defendant's character witness, on cross-examination, if he knew defendant had been cited by racing commission for filing frivolous claim).

405.a.040 A party may established character traits by both expert and non-expert opinion.

State v Christensen, 129 Ariz. 32, 628 P.2d 580 (1981) (for first degree murder, psychiatrist may testify about defendant's character trait of impulsivity as it relates to premeditation).

State v Jessen, 130 Ariz. 1, 633 P.2d 410 (1981) (police detective's "opinion" testimony about victim's reputation for involvement in organized crime not admissible as lay opinion of victim's character or reputation because not based upon personal knowledge, nor did detective's sources have personal knowledge of victim's character or reputation).

405.a.050 Once a witness has offered character evidence on direct examination or cross-examination, the other party, on cross-examination or redirect, may ask the witness about knowledge of specific instances of conduct relevant to the character trait presented.

State v Lopez, 174 Ariz. 131, 139, 847 P.2d 1078, 1086 (1992) (defendant's character of being non-violent individual who was caring when dealing with children was relevant to murder charge resulting from beating death of 1-year-old victim, thus trial court erred in not admitting that evidence; because state would then have had right to introduce evidence that defendant had been convicted of child molestation 1 month before trial, exclusion of evidence did not prejudice defendant).

State v Rockwell, 161 Ariz. 5, 775 P.2d 1069 (1989) (because defendant was permitted on cross-examination to ask state's witnesses' opinions about defendant's character trait, state was permitted on redirect to ask witnesses about specific instances of defendant's conduct).

State v Rockwell, 161 Ariz. 5, 775 P.2d 1069 (1989) (cross-examination of character witness about specific instances is permissible so jurors can evaluate whether witness's opinion about character trait is well-founded).

State v Romero, 130 Ariz. 142, 634 P.2d 954 (1981) (in child molestation prosecution, it was proper for prosecution to ask defendant's character witnesses if they had heard of defendant's prior arrest for an incident in which he accosted two 6-year-old children).

State v Romar, 221 Ariz. 342, 212 P.3d 34, ¶¶ 5–10 (Ct. App. 2009) (defendant was charged with sexual offenses against child; defendant had two 22-year-old convictions for sexual abuse; defendant indicated he would call eight to ten character witnesses; trial court ruled that state would be permitted on cross-examination to ask character witnesses if they knew defendant had two prior convictions, but would not allow state to specify name or nature of offenses unless character witnesses gave their opinion that defendant would not commit "such a crime" (opinion does not state whether "such a crime" is offense charged or prior offense); at trial, defendant did not call any character witnesses; court held that, by failing to call character witnesses, defendant failed to preserve his claim of error, and thus court declined to consider correctness of trial court's ruling).

State v Luzanilla, 176 Ariz. 397, 861 P.2d 682 (Ct. App. 1993) (once defendant introduced expert testimony that he did not suffer from any diagnosable mental disorder often found in individuals who have a propensity for violence, state was permitted to introduce photographs of defendant's tattoos, one showing "grim reaper" and other a horned skull, and ask expert whether he had considered those tattoos in reaching his conclusion), *approved in part on other grounds and vacated in part on other grounds,* 179 Ariz. 391, 880 P.2d 611 (1994).

State v Stabler, 162 Ariz. 370, 783 P.2d 816 (Ct. App. 1989) (once psychiatrist gave his opinion about defendant's character trait of acting reflexively in response to victim's homosexual advances and gave facts upon which he had based his opinion, state was permitted to ask psychiatrist whether he had considered defendant's mother's report that defendant had been disciplined twice for homosexual activity while in custody; psychiatrist admitted he had read report but did not believe it).

State v Cano, 154 Ariz. 447, 743 P.2d 956 (Ct. App. 1987) (evidence of specific acts is admissible on cross-examination once a party puts person's character in issue; because no one put victim's character for violence in issue, defendant never had right to introduce evidence of specific acts, and therefore was not entitled to discovery of guard's records for purpose of learning whether they contained information showing that guard was predisposed to provoking altercations).

State v Lehman, 126 Ariz. 388, 616 P.2d 63 (Ct. App. 1980) (in assault prosecution, defense character witness testifying that defendant had a non-violent character was properly cross-examined about his knowledge of specific instances of violent conduct by defendant).

405.a.055 Once the trial court has ruled the state may ask defendant's character witnesses on cross-examination whether they know about the defendant's prior conviction, if the defendant does not then call those character witnesses to testify, the defendant may not question on appeal the trial court's ruling.

State v Romar, 221 Ariz. 342, 212 P.3d 34, ¶¶ 5–10 (Ct. App. 2009) (defendant was charged with sexual offenses against child; defendant had two 22-year-old convictions for sexual abuse; defendant indicated he would call eight to ten character witnesses; trial court ruled that state would be permitted on cross-examination to ask character witnesses if they knew defendant had two prior convictions, but would not allow state to specify name or nature of offenses unless character witnesses gave their opinion that defendant would not commit "such a crime" (opinion does not state whether "such a crime" is offense charged or prior offense); at trial, defendant did not call any character witnesses; court held that, by failing to call character witnesses, defendant failed to preserve his claim of error, and thus court declined to consider correctness of trial court's ruling).

405.a.060 Once a defendant has introduced evidence of the defendant's own character, the state is entitled to rebut this evidence by testimony in the form of opinion or reputation evidence.

State v Miller, 128 Ariz. 112, 624 P.2d 309 (Ct. App. 1980) (after defendant placed his character trait for truthfulness in issue, proper for state to rebut same with testimony that defendant was untruthful).

405.a.070 Evidence of a victim's specific acts of violence are admissible only when the defendant personally observed those acts or knew of them before the alleged assault or homicide.

State v Taylor, 169 Ariz. 121, 817 P.2d 488 (1991) (evidence of victim's prior conviction for child abuse was admissible because defendant knew of this conviction, and it was relevant to determine whether defendant was justifiably apprehensive about his own safety and safety of two children in apartment).

State v Santanna, 153 Ariz. 147, 735 P.2d 757 (1987) (specific acts of violence by victim would be admissible if known to defendant in order to prove defendant's state of mind, but only if defendant's state of mind is relevant; because defendant did not rely on self-defense, and evidence did not show that victim was initial aggressor, violent character of victim was not relevant, thus evidence of victim's character was not admissible).

State v Fish, 222 Ariz. 109, 213 P.3d 258, ¶ 25 (Ct. App. 2009) (defendant killed victim, and claimed he acted in self-defense; because defendant did not know of victim's specific acts of violence at time confrontation occurred, defendant was not permitted to introduce evidence of those specific acts of violence).

State v Connor, 215 Ariz. 553, 161 P.3d 596, ¶¶ 12–16 (Ct. App. 2007) (defendant was charged with first-degree murder; defendant contended he was entitled to discovery of victim's medical records to support his claim of self-defense; because defendant made no claim that medical records contained instances of violence about which defendant already knew; defendant would not be permitted to use any instances of violence contained in medical records, assuming there were any, thus defendant was not entitled to disclosure of victim's medical records).

State v Roscoe, 182 Ariz. 332, 897 P.2d 634 (Ct. App. 1994) (because defendant had no prior knowledge of officers' alleged tendencies for aggressiveness or violence, trial court properly precluded any evidence of officers' specific acts of alleged aggressiveness or violence), *vacated on other grounds,* 185 Ariz. 68, 912 P.2d 1297 (1996).

State v Cano, 154 Ariz. 447, 743 P.2d 956 (Ct. App. 1987) (because defendant made no showing he was personally aware of any specific acts of assaultive behavior by guard, he was not entitled to discovery of guard's records for purpose of learning whether they contained information showing that guard was predisposed to provoking altercations).

State v Williams, 141 Ariz. 127, 685 P.2d 764 (Ct. App. 1984) (proper to exclude evidence of victim's violent character when defendant had no knowledge of victim's conduct).

State v Zamora, 140 Ariz. 338, 681 P.2d 921 (Ct. App. 1984) (in prosecution for aggravated assault, proper to exclude testimony that victim belonged to gang called the "Eastsiders" when defendant did not know of this gang, did not know victim was member of such gang, and did not know gang to be violent).

Paragraph (b) — Specific instances of conduct.

405.b.010 To be an "essential element" under this rule, the character trait must be an operative fact that determines the rights and liabilities of the parties under the substantive law.

State v Santanna, 153 Ariz. 147, 735 P.2d 757 (1987) (because defendant did not claim self-defense, and evidence did not show that victim was initial aggressor, victim's violent character was not relevant, thus evidence of victim's character was not admissible).

State v Fish, 222 Ariz. 109, 213 P.3d 258, ¶¶ 28–29 (Ct. App. 2009) (defendant killed victim, and claimed he acted in self-defense; court held that victim's character was not essential element of claim of self-defense, thus defendant was not permitted to introduce evidence of specific acts of violence).

State v Rhodes, 219 Ariz. 476, 200 P.3d 973, ¶ 16 (Ct. App. 2008) (court held that, when defendant is charged with sexual conduct with child, evidence of defendant's sexual normalcy, or appropriateness in interacting with children, is character trait and one that pertains to charges of sexual conduct with child, but it is not essential element of the crime, thus defendant would not be entitled to offer evidence of specific acts or instances of defendant's conduct).

In re Jaramillo, 217 Ariz. 460, 176 P.3d 28, ¶ 11 (Ct. App. 2008) (in sexually violent persons case, state must prove person has mental disorder that makes person likely to engage in acts of sexual violence, thus propensity to commit acts of sexual violence is operative fact that determines rights and liabilities of allegedly sexual violent person, and as such is "essential element" under Rule 405(b), so evidence of specific instances of conduct is admissible to prove such propensity; trial court therefore properly admitted evidence of three prior sexual acts without requiring Rule 404(c) analysis).

State v Roscoe, 182 Ariz. 332, 897 P.2d 634 (Ct. App. 1994) (because defendant was not required to prove that officers had character trait of violent behavior in order to establish his defense of self-defense, and because failure to prove that officers had character trait of violent behavior would not have proved fatal to defense of self-defense, officers' alleged character for aggressiveness or violence was not "essential element" of defendant's defense, thus trial court properly precluded any evidence of officers' specific acts of alleged aggressiveness or violence), *vacated on other grounds,* 185 Ariz. 68, 912 P.2d 1297 (1996).

State v Williams, 141 Ariz. 127, 685 P.2d 764 (Ct. App. 1984) (in murder prosecution where defense is self-defense, victim's intent is not an essential element to be proved by state; therefore, evidence of victim's violent character through his prior armed assaults inadmissible under this rule).

State v Lehman, 126 Ariz. 388, 616 P.2d 63 (Ct. App. 1980) (in assault prosecution in which defendant's sole defense was insanity and in which he attempted to prove he was not a violent person in order to show he must not have known what he was doing, state in rebuttal could not use proof of specific instances of violent conduct on part of defendant for purposes of creating an inference that he had known what he was doing, but rather, under such circumstances, such proof was limited to reputation and opinion testimony because defendant's propensity for violence was not in issue).

March 11, 2012

Rule 406. Habit; Routine Practice.

Evidence of a person's habit or an organization's routine practice may be admitted to prove that on a particular occasion the person or organization acted in accordance with the habit or routine practice. The court may admit this evidence regardless of whether it is corroborated or whether there was an eyewitness.

Comment to 2012 Amendment

The language of Rule 406 has been amended to conform to the federal restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Cases

406.010 Habit describes a person's regular or semi-automatic response to a repeated specific situation, while character refers to a generalized description of a person's disposition.

State v Spreitz, 190 Ariz. 129, 945 P.2d 1260 (1997) (trial court did not abuse discretion in admitting evidence of victim's habit of rarely accepting rides, which was offered to show it was unlikely she willingly accompanied defendant in his car).

State v Slover, 220 Ariz. 239, 204 P.3d 1088, ¶¶ 15–18 (Ct. App 2009) (while intoxicated, defendant drove off roadway; truck rolled down embankment and landed on roof over shallow creek; officers found passenger-victim dead, lying in creek with head submerged in water; victim had BAC of .231; defendant contended that victim was driving truck, and claimed he and victim had habit of driving each other's trucks; defendant offered as habit evidence testimony of gas station attendant that, over 4-year period she worked at gas station, defendant frequently was driving when they arrived while victim was driving when they left; trial court precluded this evidence because it concluded victim's driving was not semi-automatic or reflexive, or sufficiently specific, regular, or numerous to qualify as habit evidence; court agreed with trial court's reasoning and held trial court did not abuse discretion in precluding that evidence).

March 11, 2012

Rule 407. Subsequent Remedial Measures.

When measures are taken that would have made an earlier injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove:

. negligence;

. culpable conduct;

. a defect in a product or its design; or

. a need for a warning or instruction.

But the court may admit this evidence for another purpose, such as impeachment or— if disputed— proving ownership, control, or the feasibility of precautionary measures.

Comment to 2012 Amendment

This rule has been amended to conform to Federal Rule of Evidence 407 in order to provide greater clarity regarding the applicable scope of the rule.

Additionally, the language of Rule 407 has been amended to conform to the federal restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent in the restyling to change any result in any ruling on evidence admissibility.

Rule 407 previously provided that evidence was not excluded if offered for a purpose not explicitly prohibited by the rule. To improve the language of the rule, it now provides that the court may admit evidence if offered for a permissible purpose. There is no intent to change the process for admitting evidence covered by the rule. It remains the case that if offered for an impermissible purpose, it must be excluded, and if offered for a purpose not barred by the rule, its admissibility remains governed by the general principles of Rules 402, 403, 801, etc.

Cases

407.010 The trial court may not admit evidence of a subsequent remedial measure to prove negligence or culpable conduct.

Jimenez v Wal-Mart Stores, Inc., 206 Ariz. 424, 79 P.3d 673, ¶ 15 (Ct. App. 2003) (plaintiff offered photographs showing various hazards near entrance to defendant's store, contending these refuted defendant's claim of "meticulously well-kept entrance"; because photographs showed that, after plaintiff's injury, defendant had painted curb area of crosswalk red, this was evidence of subsequent remedial measure, which is generally not admissible).

407.020 The purpose of Rule 407 is to encourage remedial measures by freeing a party from concern that evidence of taking of such measures might be used against the party as an admission by conduct.

Johnson v State Dept. of Transp., 224 Ariz. 554, 233 P.3d 1133, ¶ 9 (2010) (truck turned onto highway, and after truck traveled approximately 713 feet, it was struck from behind by decedent's vehicle; after collision, ADOT installed truck-crossing sign and variable message board to warn drivers that trucks would be entering highway; before trial, there was factual dispute whether ADOT knew of decedent's death when it decided to place warning signs near intersection; court held that requiring prior knowledge of collision would upset underlying policy that rule was designed to implement because potential defendant would be reluctant to make safety changes for fear that it could be sued over accidents about which it had no knowledge and would not be afforded protection of rule).

407.030 Rule 407 applies whenever measures are taken after an event; there is no requirement that the party must have known about the event prior to taking the remedial measures.

Johnson v State Dept. of Transp., 224 Ariz. 554, 233 P.3d 1133, ¶¶ 9–16 (2010) (truck turned onto highway, and after truck traveled approximately 713 feet, it was struck from behind by decedent's vehicle; after collision, ADOT installed truck-crossing sign and variable message board to warn drivers that trucks would be entering highway; before trial, there was factual dispute whether ADOT knew of decedent's death when it decided to place warning signs near intersection; court held that knowledge of collision was not prerequisite for application of Rule 407, thus whether or not ADOT knew of collision was not relevant).

407.040 Although the trial court may not admit evidence of a subsequent remedial measure to prove negligence or culpable conduct, it may do so for some relevant purpose, such as showing ownership, control, or feasibility of precautionary measures, or for impeachment.

Johnson v State Dept. of Transp., 224 Ariz. 554, 233 P.3d 1133, ¶¶ 17–22 (2010) (truck turned onto highway, and after truck traveled approximately 713 feet, it was struck from behind by decedent's vehicle; after collision, ADOT installed truck-crossing sign and variable message board to warn drivers that trucks would be entering highway; plaintiff contended evidence of sign and message board should have been admitted for other purpose, i.e., to rebut state's assertions that decedent was comparatively at fault; court held this was just another way to show defendant's negligence, thus rule precluded this evidence).

State of Arizona v City of Kingman, 217 Ariz. 485, 176 P.3d 53, ¶ 23 (Ct. App. 2008) (plaintiff was injured at intersection collision; city alleged it had no duty to plaintiff because ADOT controlled intersection; although city and ADOT entered into intergovernmental agreement (IGA) for that intersection, they did not do so until 2 years after accident, thus evidence of IGA had no bearing on control of intersection at time of accident).

Sanchez v City of Tucson, 191 Ariz. 128, 953 P.2d 168, ¶ 17 (1998) (at meeting of city counsel that took place after accident, counsel members discussed installation of traffic light in section of roadway where accident occurred, and one member said there was not yet a solution to traffic problem because either state or city said it was not working; even if this evidence was discussion of subsequent remedial measure, it would have been admissible to show control).

407.045 Although the trial court may not admit evidence of a subsequent remedial measure to prove negligence or culpable conduct, it may do so for some relevant purpose, such as to impeach other party if that party claims the condition was the safest possible.

Johnson v State Dept. of Transp., 224 Ariz. 554, 233 P.3d 1133, ¶¶ 23–25 (2010) (truck turned onto highway, and after truck traveled approximately 713 feet, it was struck from behind by decedent's vehicle; after collision, ADOT installed truck-crossing sign and variable message board to warn drivers that trucks would be entering highway; defendant made no contention intersection was safest possibility, thus rule precluded this evidence).

March 11, 2012

Rule 408. Compromise Offers and Negotiations.

(a) Prohibited Uses. Evidence of the following is not admissible— on behalf of any party— either to prove or disprove the validity or amount of a disputed claim or to impeach by a prior inconsistent statement or a contradiction:

(1) furnishing, promising, or offering— or accepting, promising to accept, or offering to accept — a valuable consideration in compromising or attempting to compromise the claim; and

(2) conduct or a statement made during compromise negotiations about the claim.

(b) Exceptions. The court may admit this evidence for another purpose, such as proving a witness's bias or prejudice, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

Comment to 2012 Amendment

The 2012 amendment does not include any substantive changes and does not include the "criminal use exception" in Federal Rule of Evidence 408(a)(2).

Otherwise, the language of Rule 408 has been amended to conform to the federal restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 408 previously provided that evidence was not excluded if offered for a purpose not explicitly prohibited by the rule. To improve the language of the rule, it now provides that the court may admit evidence if offered for a permissible purpose. There is no intent to change the process for admitting evidence covered by the rule. It remains the case that if offered for an impermissible purpose, it must be excluded, and if offered for a purpose not barred by the rule, its admissibility remains governed by the general principles of Rules 402, 403, 801, etc.

The reference to "liability" has been deleted on the ground that the deletion makes the rule flow better and easier to read, and because "liability" is covered by the broader term "validity." Courts have not made substantive decisions on the basis of any distinction between validity and liability. No change in current practice or in the coverage of the rule is intended.

Cases

408.010 Although evidence of an offer to compromise is not admissible to show liability, such evidence is admissible if relevant to some other issue in the litigation.

Hernandez v State, 203 Ariz. 196, 52 P.3d 765, ¶¶ 8–9 (2002) (court assumed for purpose of discussion, that notice of claim letter required by statute constitutes offer to compromise, and held that party could use statements contained in other party's claim letter to impeach other party's trial testimony).

Henry v Healthpartners of Southern Arizona, 203 Ariz. 393, 55 P.3d 87, ¶¶ 14–15 (Ct. App. 2002) (medical malpractice action resulting from patient's death from cancer was filed against decedent's doctor, radiologist employed by medical center, and medical center (TMC/HSA); plaintiff settled with doctors and went to trial against TMC/HSA; TMC/HSA named doctors as non-parties at fault; plaintiff's trial strategy was to minimize radiologist's fault in order to place more of blame on TMC/HSA; court held plaintiff's factual allegations contained in complaint delineating radiologist's negligence were not made in compromise of disputed claim, thus they did fall under definition in Rule 408, and even if they did, they showed why radiologist was not present at trial and refuted plaintiff's trial strategy to minimize radiologist's fault, thus they were not subject to exclusion under Rule 408).

Giles v Hill Lewis Marce, 195 Ariz. 358, 988 P.2d 143, ¶ 13 (Ct. App. 1999) (evidence of parties settlement admissible on issue of malicious prosecution).

Gutierrez v Gutierrez, 193 Ariz. 343, 972 P.2d 676, ¶ 34 (Ct. App. 1998) (because trial court must consider possibility of settlement in determining attorney's fees under A.R.S. § 12–341.01(A), and must consider reasonableness of party's position in determining attorney's fees under A.R.S. § 25–324, trial court may consider settlement offers).

Monthofer Inv v Allen, 189 Ariz. 422, 943 P.2d 782 (Ct. App. 1997) (parties agreed to a stipulated judgment; in exchange for plaintiff's agreement not to execute on judgment, defendant agreed to pursue third-party claim and assign to plaintiff any amounts collected to extent necessary to satisfy judgment; court held that evidence of settlement agreement and its details was admissible to show potential bias of witnesses and to question whether defendant mitigated damages).

408.015 If evidence of an offer to compromise is offered to show liability and for no other permissible purpose, such evidence is not admissible.

Miller v Kelly (Barrera), 212 Ariz. 283, 130 P.3d 982, ¶¶ 12–14 (Ct. App. 2006) (in wrongful death action based on medical malpractice, trial court granted plaintiff's motion to have defendant doctor disclose amounts paid in settlement of previous medical malpractice actions brought against him; court concluded that plaintiff's purpose in seeking this evidence was to prove defendant's negligence, and thus held trial court erred in ordering disclosure of settlement amounts).

S. Dev Co. v Pima Capital Mgmt Co., 201 Ariz. 10, 31 P.3d 123, ¶¶ 36–39 (Ct. App. 2001) (plaintiff bought apartment building from defendant, and later discovered apartment had been built with polybutylene pipe, which was defective; plaintiff sued defendant in tort for fraud; defendant contended evidence of its offer to rescind contract was admissible on issue of plaintiff's duty to mitigate damages; court held that, because plaintiff brought tort action, plaintiff did not have duty to mitigate damages, thus evidence of offer to rescind contract was not admissible).

State ex rel. Miller v Superior Ct. (Stephens), 189 Ariz. 228, 941 P.2d 240 (Ct. App. 1997) (property owner sought to admit AzDOT appraisal report as admission against interest; purpose of report was to negotiate stipulation so AzDOT could take immediate possession of property without court intervention; court held this rule precluded admission of report, and A.R.S. § 12–1116(J) also precluded admission).

408.017 This rule prohibiting evidence of an offer to compromise offered to show liability applies not just to offers to compromise the present litigation, but also to evidence of offers to compromise made in other lawsuits.

Miller v Kelly (Barrera), 212 Ariz. 283, 130 P.3d 982, ¶¶ 12–14 (Ct. App. 2006) (in wrongful death action based on medical malpractice, court held trial court erred in granting plaintiff's motion to have defendant doctor disclose amounts paid in settlement of previous medical malpractice actions brought against him).

408.030 At the time a party serves a notice of claim letter to the state, there is no disputed claim; because there is no disputed claim, the notice of claim letter cannot operate as an offer to compromise, thus this rule does apply to or preclude admission of a notice of claim letter to the state.

Hernandez v State, 201 Ariz. 336, 35 P.3d 97, ¶¶ 10–16 (Ct. App. 2001) (plaintiff fell off wall at Patagonia Lake Park; because plaintiff testified there was no trail and that he stepped off retaining wall, notice of claim letter to state from plaintiff's attorney stating plaintiff was walking on trail and stepped off cliff was admissible as prior inconsistent statement), *vacated,* 203 Ariz. 196, 52 P.3d 765 (2002).

March 11, 2012

Rule 409. Offers to Pay Medical and Similar Expenses.

Evidence of furnishing, promising to pay, or offering to pay medical, hospital, or similar expenses resulting from an injury is not admissible to prove liability for the injury.

Comment to 2012 Amendment

The language of Rule 409 has been amended to conform to the federal restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Cases

No Arizona cases.

March 11, 2012

Rule 410. Pleas, Plea Discussions and Related Statements.

(a) Prohibited Uses. Except as otherwise provided by statute, in a civil or criminal case, or administrative proceeding, evidence of the following is not admissible against the defendant who made the plea or participated in the plea discussions:

(1) a guilty plea that was later withdrawn;

(2) a nolo contendere or no contest plea;

(3) a statement made during a proceeding on either of those pleas under Arizona Rule of Criminal Procedure 17.4 or a comparable federal procedure; or

(4) a statement made during plea discussions with an attorney for the prosecuting authority if the discussions did not result in a guilty plea or they resulted in a later-withdrawn guilty plea.

(b) Exceptions. The court may admit a statement described in Rule 410(a)(3) or (4):

(1) in any proceeding in which another statement made during the same plea or plea discussions has been introduced, if in fairness the statements ought to be considered together; or

(2) in a criminal proceeding for perjury or false statement, if the defendant made the statement under oath, on the record, and with counsel present.

Comment to 2012 Amendment

This rule has been amended to conform to Federal Rule of Evidence 410, including the addition of subdivision (b)(2) and the Arizona-specific provision in subdivision (a)(3).

Additionally, the language of Rule 410 has been amended to conform to the federal restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent in the restyling to change any result in any ruling on evidence admissibility.

Arizona Rule of Criminal Procedure 17.4(f) has also been amended to conform to its federal counterpart, Federal Rule of Criminal Procedure 11(f).

Cases

410.010 Evidence of a plea of guilty, later withdrawn, or a plea of nolo contendere or no contest, or an offer to plead guilty, nolo contendere, or no contest to the crime charged or any other crime is not admissible against the person who made the plea or offer in any civil or criminal action or administrative proceeding.

State v Campoy (Crockwell), 220 Ariz. 539, 207 P.3d 792, ¶¶ 5–10 (Ct App. 2009) (prosecutor told defendant he would have to participate in "debriefing" or "free talk" if defendant was interested in plea agreement; on 4/11/07, defendant gave first statement; on 4/19/07, defendant and state entered into plea agreement; on 7/12/07, defendant gave second statement, and on 8/27/07, gave third statement; because in third statement, defendant contradicted what he had said in first and second statements, trial court allowed state to withdraw from plea agreement; trial court ruled that state could not use any of these statements in case-in-chief, but could use them on cross-examination; state implicitly conceded that Rule 410 precluded admission of defendant's first statement in case-in-chief).

410.020 Evidence of statements made in connection with a plea of guilty, later withdrawn, or a plea of nolo contendere or no contest, or an offer to plead guilty, nolo contendere, or no contest to the crime charged or any other crime is not admissible against the person who made the plea or offer in any civil or criminal action or administrative proceeding.

State v Vargas, 127 Ariz. 59, 60–61, 618 P.2d 229, 230–31 (1980) (during discussions concerning possible guilty plea that would require defendant to testify truthfully about events surrounding crime,

defendant signed document that affirmed that his earlier statements to police were truthful; when defendant denied truth of his statements to police, state impeached him with signed document, and state relied on signed document in closing argument; court held that trial court erred in allowing state to use document).

410.030 The phrase "statements made in connection with" a plea of guilty, nolo contendere, or no contest applies only to the statements made during the plea negotiations or the taking of the plea, and does not apply to any statements made after the plea agreement that the defendant made pursuant to a truthful-cooperation clause.

State v Campoy (Crockwell), 220 Ariz. 539, 207 P.3d 792, ¶¶ 5–25 (Ct App. 2009) (prosecutor told defendant he would have to participate in "debriefing" or "free talk" if defendant was interested in plea agreement; on 4/11/07, defendant gave first statement; on 4/19/07, defendant and state entered into plea agreement that provided that defendant would tell the truth and cooperate with investigation; on 7/12/07, defendant gave second statement, and on 8/27/07, gave third statement; because in third statement, defendant contradicted what he had said in first and second statements, trial court allowed state to withdraw from plea agreement; trial court ruled that state could not use any of these statements in case-in-chief, but could use them on cross-examination; court held that, because defendant gave second and third statements pursuant to cooperation clause, Rule 410 did not preclude state from using second and third statements in case-in-chief).

410.040 Although this rule prohibits the introduction of the plea discussions and any statements made at a hearing on the plea, a defendant may waive that protection by entering into an agreement that provides (1) that the defendant will cooperate truthfully, (2) that the state may withdraw from the plea agreement if the defendant does not cooperate truthfully, and (3) if the state withdraws from the plea agreement, it may use against the defendant any statements made pursuant to the plea agreement.

State v Campoy (Crockwell), 220 Ariz. 539, 207 P.3d 792, ¶¶ 26–34 (Ct App. 2009) (prosecutor told defendant he would have to participate in "debriefing" or "free talk" if defendant was interested in plea agreement; on 4/11/07, defendant gave statement; on 4/19/07, defendant and state entered into plea agreement that provided defendant would tell truth and cooperate with investigation; on 7/12/07, defendant gave second statement, and on 8/27/07, gave third statement; because in third statement, defendant contradicted what he had said in first and second statements, trial court allowed state to withdraw from plea agreement; trial court ruled that state could not use any of these statements in case-in-chief, but could use them on cross-examination; court held that, although Rule 410 would preclude state from using first statement, defendant waived protection of that rule by entering into agreement and then breaching it, thus state could use first statement in case-in-chief).

410.050 Evidence of a plea of guilty, nolo contendere, or no contest, or an offer to plead guilty, nolo contendere, or no contest, of statements in connection with any of these, is admissible if provided by applicable Act of Congress, Arizona statute, or the Arizona Rules of Criminal Procedure.

K.B. v State Farm F. & C. Co., 189 Ariz. 263, 266–67, 941 P.2d 1288, 1291–92 (Ct. App. 1997) (defendant pled guilty to attempted child molestation, which required intent to commit crime; under A.R.S. § 13–807, defendant was estopped from denying he acted intentionally; victim sued defendant, insurance company denied coverage under intentional act exclusion, defendant allowed judgment to be entered against him and assigned his cause of action against insurance company in exchange for covenant not to execute; because victim obtained only those rights defendant had, and because defendant was precluded from denying he acted intentionally, victim was precluded from denying intentional acts under intentional acts exclusion of insurance policy).

Republic Ins. Co. v Feidler, 178 Ariz. 528, 532–33, 875 P.2d 187, 192–93 (Ct. App. 1993) (under A.R.S. § 13–807, defendant convicted after no contest plea is estopped from denying commission of mini-

mum acts that would suffice for conviction; insured had pled no contest to aggravated assault, and because he could have acted recklessly in committing aggravated assault, he still could claim he was too intoxicated to have acted intentionally).

Bear v Nicholls, 142 Ariz. 560, 562, 691 P.2d 326, 328 (Ct. App. 1984) (plaintiff's federal convictions for income tax evasion were based on nolo contendere plea; court held that, because A.R.S. § 32-2153(B)(2) allows Real Estate Commissioner to revoke license following felony conviction and does not distinguish between guilty verdict, guilty plea, or nolo contendere plea, Commissioner properly revoked plaintiff's license).

410.060 This rule applies only to statements made in connection with formal plea negotiations, and does not protect statements a suspect made in an unsolicited offer to assist authorities in order to avoid prosecution or imprisonment.

State v Fillmore, 187 Ariz. 174, 177–79, 927 P.2d 1303, 1306–08 (Ct. App. 1996) (prior to any charges being filed, defendant approached the officers and said he did not want to go to jail, and offered to give them information about others trafficking in stolen property, but said he would not testify against those persons and said his name could not be used; court concluded this was unsolicited offer to assist authorities in order to avoid prosecution and held that this rule did not preclude admission of defendant's statements).

State v Stuck, 154 Ariz. 16, 20–21, 739 P.2d 1333, 1337–38 (Ct. App. 1987) (trial court properly admitted statement defendant made to police officers: "I want to plead guilty. I was in the wrong. I think you found enough evidence. Leave Sandra out of it").

State v Stuck, 154 Ariz. 16, 21, 739 P.2d 1333, 1337 (Ct. App. 1987) (because defendant made statements after he had been given counsel, court rejected argument that he made statements when he was attempting to act pro se).

State v Sweet, 143 Ariz. 289, 294, 693 P.2d 944, 949 (Ct. App. 1984) (rule did not preclude admission of statements made to police in conjunction with defendant's inquiries of what he could do for police in exchange for getting out of charges), *vac'd in part on other grounds,* 143 Ariz. 266, 693 P.2d 921 (1985).

410.070 When a defendant introduces evidence of plea bargain negotiations to show involuntariness of defendant's statement, the prosecutor may then inquire on cross-examination into circumstances surrounding bargaining discussions.

State v Linden, 136 Ariz. 129, 137–38, 664 P.2d 673, 681–82 (Ct. App. 1983) (once defendant testified about plea bargain negotiations to show involuntariness of his statement, he was subject to cross-examination about circumstances surrounding discussion).

410.080 Evidence that one defendant has pled guilty is not admissible against the other when both are charged with the same crime and tried separately, but us admissible if the defendant attacks the codefendant's credibility and the plea agreement supports the codefendant's credibility.

State v McDonald, 117 Ariz. 159, 161, 571 P.2d 656, 658 (1977) (co-defendant's guilty plea was improperly introduced and no cautionary instruction was requested to effect that plea was not to be considered as evidence of defendant's guilt; court examined facts and circumstances and determined any error was harmless).

State v Fendler, 127 Ariz. 464, 484–85, 622 P.2d 23, 43–44 (Ct. App. 1980) (state entitled to purge any misimpression left by defendant that state was secreting information about co-defendant's credibility by inquiring into co-defendant's guilty plea).

March 11, 2012

Rule 411. Liability Insurance.

Evidence that a person was or was not insured against liability is not admissible to prove whether the person acted negligently or otherwise wrongfully. But the court may admit this evidence for another purpose, such as proving a witness's bias or prejudice or proving agency, ownership, or control.

Comment to 2012 Amendment

The language of Rule 411 has been amended to conform to the federal restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 411 previously provided that evidence was not excluded if offered for a purpose not explicitly prohibited by the rule. To improve the language of the rule, it now provides that the court may admit evidence if offered for a permissible purpose. There is no intent to change the process for admitting evidence covered by the rule. It remains the case that if offered for an impermissible purpose, it must be excluded, and if offered for a purpose not barred by the rule, its admissibility remains governed by the general principles of Rules 402, 403, 801, etc.

Cases

411.010 The trial court may not admit evidence of liability insurance to prove that a party acted negligently or otherwise wrongfully.

Warner v Southwest Desert Images, 218 Ariz. 121, 180 P.3d 986, ¶ 37 (Ct. App. 2008) (plaintiff sued defendant weed control company after its herbicide spray entered building through air conditioning system; trial court granted defendant's motion to preclude plaintiff from introducing evidence of workers' compensation benefits she had received; court noted evidence that party is insured is typically inadmissible, and thus affirmed trial court's ruling).

Cervantes v Rijlaarsdam, 190 Ariz. 396, 949 P.2d 56 (Ct. App. 1997) (plaintiff's doctor testified that plaintiff did not have CT scan because he did not have health insurance; because this rule precludes evidence of liability insurance, it did not preclude this testimony).

411.015 Although the trial court may not admit evidence of liability insurance to prove that a party acted negligently or otherwise wrongfully, it may admit such evidence if offered for some relevant purpose, such as proof of agency, ownership, or control, or bias or prejudice of a witness.

American Fam. Mut. Ins. v Grant, 222 Ariz. 507, 217 P.3d 1212, ¶¶ 2–30 (Ct. App. 2009) (respondent made claim with petitioner for injuries from automobile collision; petitioner retained orthopedic surgeon (Dr. Zoltan), who opined that respondent's injury was result of preexisting degenerative joint disease, so petitioner denied claim; respondent sued petitioner and sought discovery involving financial arrangements between petitioner and Zoltan; trial court ordered Zoltan to provide various items of information covering last 8 years; petitioner conceded that respondent may take Zoltan's deposition to demonstrate any bias, including general inquiry into his involvement in case, who hired him, his credentials, compensation received for this case, approximate number of examinations and record reviews he performed in last year, his dealings generally with petitioner and their law firm, approximate amount received for expert services in last year, approximate percentage of practice devoted to litigation-based examinations and record reviews, and his knowledge of other cases where he testified at depositions or trials during last 4 years; court vacated challenged portions of trial court's discovery order and remanded so that trial court could assess whether respondent had explored less intrusive discovery, and if so, whether respondent could demonstrate good cause for any more expanded inquires).

Ritchie v Krasner, 221 Ariz. 288, 211 P.3d 1272, ¶¶ 40–44 (Ct App. 2009) (plaintiff injured back at work; defendant doctor opined that plaintiff's condition was stable and that he could go back to work; plaintiff's condition continued to deteriorate; he was examined by AHCCCS doctor who diagnosed cervical spinal cord compression and recommended surgery; surgery halted further deterioration of plaintiff's spinal cord, but condition prior to surgery caused part of plaintiff's spinal cord to die; which caused constant pain, so AHCCCS doctor prescribed Oxycontin and Oxycodone; plaintiff subsequently died of accidental overdose, characterized as "synergistic effects of the various medications he was taking for his cervical spinal cord injury"; defendant contended trial court abused discretion in allowing plaintiff to introduce evidence of his financial situation and loss of workers' compensation benefits; court held trial court properly admitted that evidence to rebut fact that he did not receive continuing care between when he saw defendant and when he saw AHCCCS doctor).

Sheppard v Crow-Baker-Paul No. 1, 192 Ariz. 539, 968 P.2d 612, ¶¶ 42, 44 (Ct. App. 1998) (party is entitled to introduce evidence that expert witness has done certain amount of work for insurance companies).

411.030 Mere mention of insurance in a negligence action will not be grounds for mistrial; a mistrial is appropriate only when reference would prejudice the fair trial of any party.

Cervantes v Rijlaarsdam, 190 Ariz. 396, 949 P.2d 56 (Ct. App. 1997) (plaintiff's doctor testified that plaintiff did not have CT scan because he did not have health insurance; because this testimony was unresponsive and volunteered and prejudice is not presumed, no error).

March 11, 2012

Rule 412. Sex-Offense Cases: The Victim's Sexual Behavior or Predisposition.

< Rule not adopted >

Comment to 2012 Amendment

Federal Rule of Evidence 412 has not been adopted. *See* A.R.S. § 13–1421 (Evidence relating to victim's chastity; pretrial hearing).

§ 13-1421. Evidence relating to victim's chastity; pretrial hearing

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 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.

Cases

412.010 A defendant has the constitutional right to present a defense and to cross-examine witnesses, but is limited to evidence that is relevant.

* *State ex rel. Montgomery v Duncan (Fries)*, ___ Ariz. ___, ___ P.3d ___, ¶¶ 5–8 (Ct. App. Dec. 27, 2011) (38-year-old defendant was charged with four acts of oral sexual intercourse with 15-year-old victim; trial court ruled defendant could cross-examine victim about statement defendant alleged she made to him that she previously had oral sex with two other individuals; court held trial court erred in not balancing to determine whether there was a due process or other constitutional violation that would occur if evidence were precluded and thus remanded for trial court to make that determination; court further held cross-examining victim about her past sexual acts would not be relevant to show what defendant thought about victim's age, and thus held only evidence that might be relevant would be defendant's testimony (should he choose to testify) of how victim's alleged statements about prior acts of oral sex led him to conclude she was at least 18 years of age).

State v Herrera, 226 Ariz. 59, 243 P.3d 1041, ¶ 34 (Ct. App. 2010) (court stated it held statute constitutional in *Gilfillan* and found no reason to deviate from that decision).

State v Gilfillan, 196 Ariz. 396, 998 P.2d 1069, ¶¶ 17–23 (Ct. App. 2000) (court held A.R.S. § 13–1421, which requires trial court to conduct hearing to determine whether proposed evidence is relevant and that prejudicial effect does not outweigh the probative value, properly balances victim's right not to be confronted with irrelevant, prejudicial evidence with defendant's right to present relevant evidence and to cross-examine witness to develop relevant evidence).

412.020 The Arizona Legislature is permitted to enact statutory procedural rules that are reasonable and workable and that supplement the rules promulgated by the Arizona Supreme Court.

State v Gilfillan, 196 Ariz. 396, 998 P.2d 1069, ¶¶ 24–28 (Ct. App. 2000) (court held A.R.S. § 13–1421, which prescribes when sexual assault victim's prior sexual conduct may be admitted in evidence, was reasonable and workable supplement to court's procedural rules and thus was permissible statutory rule of procedure).

412.030 The trial court has considerable discretion in determining whether proposed evidence is relevant and that prejudicial effect does not outweigh the probative value, thus the trial court's ruling will not be disturbed on appeal absent a clear abuse of the trial court's discretion.

* *State v Dixon*, 226 Ariz. 545, 250 P.3d 1174, ¶¶ 40–47 (2011) (defendant contended trial court erred in precluding entries from victim's diary, which he claimed contained victim's statement she had been sexually assaulted in Europe and would fight back if sexually assaulted again; court held statements had little probative value, thus trial court did not abuse discretion in precluding them).

* *State ex rel. Montgomery v Duncan (Fries)*, ___ Ariz. ___, ___ P.3d ___, ¶¶ 5–8 (Ct. App. Dec. 27, 2011) (38-year-old defendant was charged with four acts of oral sexual intercourse with 15-year-old victim; trial court ruled defendant could cross-examine victim about statement defendant alleged she made to him that she previously had oral sex with two other individuals; court held trial court erred in not balancing to determine whether there was a due process or other constitutional violation that would occur if evidence were precluded and thus remanded for trial court to make that determination; court further held cross-examining victim about her past sexual acts would not be relevant to show what defendant thought about victim's age, and thus held only evidence that might be relevant would be defendant's testimony (should he choose to testify) of how victim's alleged statements about prior acts of oral sex led him to conclude she was at least 18 years of age).

State v Herrera, 226 Ariz. 59, 243 P.3d 1041, ¶¶ 29–33 (Ct. App. 2010) (defendant was charged with committing sexual acts on 14-year-old step-daughter; court held trial court did not abuse discretion in precluding evidence that victim had consensual sexual relationship with female friend and had sexual intercourse with boyfriend).

State v Gilfillan, 196 Ariz. 396, 998 P.2d 1069, ¶¶ 29–33 (Ct. App. 2000) (court held defendant had not shown with clear and convincing evidence victim had made false allegations of sexual misconduct against another person).

March 11, 2012

Rule 413. Similar Crimes in Sexual-Assault Cases.

< Rule not adopted >

Comment to 2012 Amendment

Federal Rule of Evidence 413 has not been adopted. *See* Arizona Rule of Evidence 404(c).

Rule 414. Similar Crimes in Child-Molestation Cases.

< Rule not adopted >

Comment to 2012 Amendment

Federal Rule of Evidence 414 has not been adopted. *See* Arizona Rule of Evidence 404(c).

4Rule 415. Similar Acts in Civil Cases Involving Sexual Assault or Child Molestation.

< Rule not adopted >

Comment to 2012 Amendment

Federal Rule of Evidence 415 has not been adopted. *See* Arizona Rule of Evidence 404(c).

Cases

See cases under Rule 404(c), Arizona Rule of Evidence.

March 11, 2012

ARTICLE 5. PRIVILEGES

Rule 501. Privilege in General.

The common law— as interpreted by Arizona courts in the light of reason and experience— governs a claim of privilege unless any of the following provides otherwise:

- the United States or Arizona Constitution;
- an applicable statute; or
- rules prescribed by the Supreme Court.

Comment to 2012 Amendment

The language of Rule 501 has been amended to conform to the federal restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Cases

Requirements for a Privilege.

501.050 To be privileged, a communication must meet four criteria: (1) it originates in a confidence that the person making the communication believes will not be disclosed; (2) confidentiality is essential to the full maintenance of the relationship of the parties; (3) the relationship is one that the community believes should be fostered; and (4) the injury to the relationship that would occur from disclosure would be greater than the benefit gained by the aid given to the litigation.

State ex rel. Thomas v Schneider (Hanna et al.), 212 Ariz. 292, 130 P.3d 991, ¶¶ 29–32 (Ct. App. 2006) (notary and city clerk backdated financial disclosure statements that city council members did not timely file; communications were between city attorney and members of city council and city clerk about these events, made both in private and during executive sessions of the city council; court concluded that individuals in question thought they were being represented by city attorney and that he should keep communications confidential).

State ex rel. Thomas v Schneider (Hanna et al.), 212 Ariz. 292, 130 P.3d 991, ¶ 25 (Ct. App. 2006) (court noted that A.R.S. § 38–431.03(B)(4) provides that discussions made in executive session are confidential (except for investigation of violation of open-meeting law), thus persons making communications in executive session would reasonably believe that those communications would not be disclosed).

Purpose of a Privilege.

501.080 If the party that would possess the privilege believes a privileged relationship exists and the statement will not be disclosed, it does not matter that, unbeknownst to that party, the situation of the person hearing the statement is such that a privileged relationship could not exist.

Barnes v Outlaw, 188 Ariz. 401, 937 P.2d 323 (Ct. App. 1996) (although defendant was not licensed as a counselor and thus privilege would not apply to him, court held his lack of a license did not immunize defendant from a claim of counseling malpractice based on his disclosure of confidential communications), *vac'd in part on other grounds,* 192 Ariz. 283, 964 P.2d 484 (1998).

Right to Information Protected by a Privilege.

501.110 Because the public has the right to every person's testimony, and because constitutional, statutory, and common law privileges contravene the public's right, such privileges are strictly construed and should be weighed against other policy considerations when determining whether to allow a witness to claim a privilege.

Arizona Indep. Redist. Comm'n v Fields, 206 Ariz. 130, 75 P.3d 1088, ¶ 14 (Ct. App. 2003) (court construed legislative privilege).

State v Herrera, 203 Ariz. 131, 51 P.3d 353, ¶¶ 9–14 (Ct. App. 2002) (defendant was charged with DUI and child abuse as result of having children in car; A.R.S. § 13–3620(G) provides that all privileges, except the attorney-client privilege, are abrogated in any proceeding involving the abuse of a child; defendant contended § 13–3623(F)(1) limited child abuse to instances when child suffered actual injury; court rejected defendant's contention, noting that privileges are interpreted narrowly).

State v Wilson, 200 Ariz. 390, 26 P.3d 1161, ¶ 5 (Ct. App. 2001) (court made this statement, but then applied privilege to preclude admission of testimony of doctor who saw defendant for independent medical examination).

Attorney-Client.

501.150 The attorney-client privilege protects communications between a client and an attorney with whom the client has consulted for the purpose of bona fide legal advice or representation, and is intended to encourage the client in need of legal advice to tell the attorney all the information necessary so the attorney may provide effective legal representation.

Samaritan Found. v Goodfarb, 176 Ariz. 497, 501, 862 P.2d 870, 874 (1993) (court stated general principles about attorney-client privilege).

501.155 The attorney-client privilege protects communications between a client and an attorney with whom the client has consulted for the purpose of bona fide legal advice or representation, and contains no exception for communication between a government attorney and a government official that could be used in a criminal prosecution against the government official.

State ex rel. Thomas v Schneider (Hanna et al.), 212 Ariz. 292, 130 P.3d 991, ¶¶ 19–28 (Ct. App. 2006) (notary and city clerk backdated financial disclosure statements that city council members did not timely file; communications were between city attorney and members of city council and city clerk about these events, made both in private and during executive sessions of the city council; court rejected state's contention that attorney-client privilege did not apply).

501.160 An attorney-client privilege does not exist when the client retains the attorney for the purpose of promoting intended or continuing criminal or fraudulent activity.

Kline v Kline, 221 Ariz. 564, 212 P.3d 902, ¶¶ 34–37 (Ct. App. 2009) (trial court concluded husband was committing fraud against wife, and so ordered husband's attorney to testify).

501.165 For the "crime-fraud" exception to the attorney-client privilege to apply, there must be a prima facie showing that a communication with an attorney was used to perpetuate a crime or fraud.

Kline v Kline, 221 Ariz. 564, 212 P.3d 902, ¶¶ 34–37 (Ct. App. 2009) (trial court concluded husband was committing fraud against wife, and so ordered husband's attorney to testify; trial court did not find crime-fraud exception applied merely because wife claimed there was fraud, rather trial court considered facts in wife's complaint, which court held were well-pled pursuant to rules of civil procedure; court held trial court did not abuse discretion in applying crime-fraud exception).

501.175 The common interest doctrine applies if two or more clients have a common interest in a litigated or nonlitigated matter and are represented by separate lawyers, and provides that, if information is protected by the attorney-client privilege with that client's lawyer, the client may share that information with any another client with a common interest, and the attorney-client privilege will still protect that information, thus the common interest doctrine does not create a privilege, but is an exception to the rule that disclosure to a third person waives the privilege.

Arizona Indep. Redist. Comm'n v. Fields, 206 Ariz. 130, 75 P.3d 1088, ¶¶ 35–41 (Ct. App. 2003) (Arizona Independent Redistricting Commission hired National Demographics Corporation as lead consultant in redistricting process; court held that, while IRC and NDC may have had common goal of drafting legally viable redistricting plan, they did not have common legal interest, thus common interest doctrine did not apply).

501.200 Although there is no attorney-client privilege between a person and a lay representative, including a "jailhouse lawyer," if the Arizona Department of Corrections allows an inmate to obtain the services of an inmate representative for prison disciplinary proceedings, the Due Process Clause of the Arizona Constitution protects the communications and information acquired in the course of that prison representation, but if the Arizona Department of Corrections does not induce an inmate to use such representation, the communications are not so protected.

State v. Foster, 199 Ariz. 39, 13 P.3d 781, ¶¶ 9–16 (Ct. App. 2000) (defendant was suspect in murder investigation, and his parole officer returned him to AzDOC; defendant contacted inmate who was "legal representative" and asked for assistance in preparing for parole violation hearing; after defendant confessed to "legal representative" that he killed victim, "legal representative" then told police of confession; because (1) state merely regulated those who could act as legal representatives, (2) state only advised defendant he could be represented by attorney at own expense and did not advise defendant he was entitled to inmate representation, and (3) inmate would not have been allowed to represent or advise defendant at parole violation hearing, there was no quasi-attorney-client relationship, and allowing other inmate to testify against defendant did not violate due process).

501.215 By making a claim of ineffective assistance of counsel, the defendant waives the attorney-client privilege.

State v. Cuffle, 171 Ariz. 49, 51–53, 828 P.2d 773, 775–777 (1992) (although defendant did not make direct claim that his attorney provided ineffective assistance of counsel, by claiming he did not know nature of charges and thus guilty plea was involuntary, defendant implicitly, if not explicitly, questioned competency of his attorney, and therefore waived attorney-client privilege to extent necessary to resolve that question).

State v. Moreno, 128 Ariz. 257, 260, 625 P.2d 320, 323 (1981) (defendant filed motion for new trial claiming trial counsel provided ineffective assistance of counsel by failing to investigate potential defenses, failing to consult with defendant, and failing to introduce evidence to support instruction on lesser degree of murder, by claiming his attorney provided ineffective assistance of counsel, defendant waived attorney-client privilege to extent necessary to resolve that question).

State v. Paris-Sheldon, 214 Ariz. 500, 154 P.3d 1046, ¶ 15 (Ct. App. 2007) (defendant asked trial court to appoint new counsel based on what she contended her attorney had said and had failed to do; trial court held informal hearing and asked attorney about what he had said to defendant; defendant contended trial court's questioning of attorney violated attorney-client privilege; court held that, when defendant made claim based on what she claimed attorney had said, trial court was required to question attorney about statements, thus to that extent, defendant had waived attorney-client privilege).

Arizona Medical Board.

501.250 During the course of any investigation, if the Arizona Medical Board determines that a criminal violation may have occurred involving the delivery of health care, the Board shall make the evidence of violations available to the appropriate criminal justice agency for its consideration.

State ex rel. Thomas v. Ditsworth (Patel), 216 Ariz. 339, 166 P.3d 130, ¶¶ 8–18 (Ct. App. 2007) (patient alleged that, during treatment for yeast infection and annual pap smear, doctor inserted un-gloved finger into her rectum and vagina, fondled her breasts, and pulled her into his lap; Arizona Medical

Board investigated and reached consent agreement with doctor that required him to undergo treatment at Sexual Recovery Institute; after grand jury indicted doctor and trial court granted motion for new determination of probable cause, trial court granted doctor's motion to preclude statements made in response to Board's investigation and statements in SRI report; court held statements indicating that criminal violation may have occurred were not privileged, and vacated trial court's order precluding statements).

501.260 A.R.S. § 32–1451(A) abrogated the common law, which provided an absolute privilege for reports involving professional misconduct in quasi-judicial proceedings, and replaced it with a privilege for one who provides information in good faith.

Advanced Cardiac Spec. v Tri-City Cardio. Consul., 222 Ariz. 383, 214 P.3d 1024, ¶¶7–11 (Ct. App. 2009) (court concluded defendant did not abuse statutory privilege and thus affirmed trial court's grant of summary judgment to defendant).

Cleric/Priest-Penitent.

501.271 The cleric/priest-penitent privilege exists when **three** factors exist, the **first** of which is the person who received the confession was a cleric or priest.

State v Archibeque, 223 Ariz. 231, 221 P.3d 1045, ¶¶7–9 (Ct. App. 2009) (defendant and wife were members of Church of Jesus Christ of Latter-day Saints; wife told Church Bishop that defendant admitted to her that he had inappropriately touched step-daughter; defendant and wife then met with Bishop, and defendant admitted sexually touching step-daughter; record showed Church bestowed title of "Bishop," and that Bishop maintained office at local church, managed ecclesiastical and financial issues, handled repentance process and confessions, and oversaw sacrament meetings, other Sunday meetings, and youth programs; Bishop therefore qualified as cleric or priest).

501.272 The cleric/priest-penitent privilege exists when **three** factors exist, the **second** of which is the cleric or priest was acting in a professional capacity as a cleric or priest.

State v Archibeque, 223 Ariz. 231, 221 P.3d 1045, ¶¶7, 10–11 (Ct. App. 2009) (defendant and wife were members of Church of Jesus Christ of Latter-day Saints; wife told Church Bishop that defendant admitted to her that he had inappropriately touched step-daughter; defendant and wife then met with Bishop, and defendant admitted sexually touching step-daughter; record showed defendant made confession to Bishop in church office, Bishop received confessions in his "role as the Bishop," and confession was made in furtherance of repentance process as recognized by Church; defendant therefore made confession while Bishop was serving in professional capacity).

Barnes v Outlaw, 188 Ariz. 401, 937 P.2d 323 (Ct. App. 1996) (although defendant was a pastor, he treated plaintiff as a psychological therapist, so cleric/priest-penitent privilege did not apply), *vac'd in part on other grounds*, 192 Ariz. 283, 964 P.2d 484 (1998).

501.273 The cleric/priest-penitent privilege exists when **three** factors exist, the **third** of which is the confession was made in the course of discipline enjoined by the religious organization to which the cleric or priest belongs, which focuses on the duties and obligations of cleric or priest and the rules and obligations of the cleric's or priest's faith.

State v Archibeque, 223 Ariz. 231, 221 P.3d 1045, ¶¶7, 12–13 (Ct. App. 2009) (defendant and wife were members of Church of Jesus Christ of Latter-day Saints; wife told Church Bishop that defendant admitted to her that he had inappropriately touched step-daughter; defendant and wife then met with Bishop, and defendant admitted sexually touching step-daughter; Bishop testified that repentance process is official church doctrine and Bishop's duties include facilitating repentance process; defendant therefore made confession in the course of discipline enjoined by Church).

501.280 A "clergyman" is not limited only to an ordained clergy; instead, whether a person is a clergyman of a particular organization is determined by that organization's ecclesiastical rules, customs, and laws.

State v Archibeque, 223 Ariz. 231, 221 P.3d 1045, ¶¶ 7–9 (Ct. App. 2009) (defendant and wife were members of Church of Jesus Christ of Latter-day Saints; wife told Church Bishop that defendant admitted to her that he had inappropriately touched step-daughter; defendant and wife then met with Bishop, and defendant admitted sexually touching step-daughter; record showed Church bestowed title of "Bishop," and that Bishop maintained office at local church, managed ecclesiastical and financial issues, handled repentance process and confessions, and oversaw sacrament meetings, other Sunday meetings, and youth programs; Bishop therefore qualified as cleric or priest).

Waters v O'Connor, 209 Ariz. 380, 103 P.3d 292, ¶¶ 1–26 (Ct. App. 2004) (defendant was charged with sexual conduct with 16-year-old boy; defendant discussed her relationship in graphic detail with "Minister" D.W., who was volunteer music director at church defendant attended; defendant contended her communications with D.W. were privileged because she believed D.W. was a minister and confided in her as a minister; court concluded that D.W. was not a clergyman in accordance with her church's ecclesiastical rules, customs, and laws, thus communications were not privileged; court further concluded defendant's belief that D.W. was a minister was not reasonable).

Confidentiality Statute.

501.290 A.R.S. § 44–2042 provides that the names of complainants and all information or documents obtained by any officer, employee, or agent of the Arizona Corporation Commission obtained in the course of any examination or investigation are confidential unless this information is made a matter of public record; the privilege may also be waived if the Commission designates a consulting expert as a testifying expert, and that waiver will apply to all information relating to the subject matter of that expert's testimony.

Slade v Schneider (Arizona Corp. Comm'n), 212 Ariz. 176, 129 P.3d 465, ¶¶ 21–25 (Ct. App. 2006) (in its application for temporary restraining order, Commission included affidavit of accountant and designated accountant as expert witness; court held that Commission waived confidentiality statute when it designated accountant as expert witness, thus accountant's entire file was discoverable to extent it contained information or material that related to subject matter of accountant's testimony).

Slade v Schneider (Arizona Corp. Comm'n), 212 Ariz. 176, 129 P.3d 465, ¶¶ 26–28 (Ct. App. 2006) (in its application for temporary restraining order, Commission included affidavit of investigator; court held that mere inclusion of affidavit did not make investigator a testifying expert, thus inclusion of investigator's affidavit did not waive work-product immunity).

Slade v Schneider (Arizona Corp. Comm'n), 212 Ariz. 176, 129 P.3d 465, ¶¶ 29–32 (Ct. App. 2006) (in its application for temporary restraining order, Commission included affidavit of investigator; court held that inclusion of affidavit made a matter of public record all information contained in affidavit; because affidavit stated that investigator had identified "at least 104 Mathon Fund investors," Commission must disclose names of those investors).

Corporate Litigation.

501.305 In *Samaritan Foundation v Goodfarb*, the court held the civil attorney-client privilege applied only to employee-initiated communications intended to seek legal advice or to communications concerning the employee's own conduct for the purpose of assessing legal consequences for the corporation; in response to *Samaritan Foundation v Goodfarb*, the Arizona Legislature amended the civil attorney-client privilege statute to broaden the privilege for corporations in civil cases; under this amendment, any communications between an attorney and an employee or agent of the corporation, made for the purpose

of providing legal advice or obtaining information to provide legal advice, are protected, the critical distinction between the two interpretations being whether information was being sought or obtained in connection with a person's own conduct as an employee; this change only affected the privilege in civil cases and not the privilege in criminal cases.

Roman Catholic Diocese v Superior Ct., 204 Ariz. 225, 62 P.3d 970, ¶¶ 4–11, 17 (Ct. App. 2003) (trial court ordered Roman Catholic Diocese to produce certain documents in grand jury proceedings; court rejected argument that amendment to statute for civil cases should also apply in criminal cases).

501.330 A factual communication from a corporate employee to corporate counsel is within the corporation's privilege only if it concerns the employee's own conduct within the scope of the employee's employment and is made to assist counsel in assessing or responding to the legal consequences of that conduct for the corporate client, but such a factual communication is not within the privilege if the communication is from an employee who, but for the status as an employee, would be a mere witness.

State ex rel. Thomas v Schneider (Hanna et al.), 212 Ariz. 292, 130 P.3d 991, ¶¶ 15–17 (Ct. App. 2006) (communications were between city attorney and members of city council and city clerk, made both in private and during executive sessions of the city council).

501.345 If an expert retained to investigate and produce reports is also listed as a testimonial witness, that waives the work-product protection for the subject of the expert's testimony.

Emergency Care Dyn. v Superior Ct., 188 Ariz. 32, 932 P.2d 297 (Ct. App. 1997) (plaintiffs hired expert both for consultation and testimony; trial court properly allowed defendants to depose expert and rejected plaintiffs' claim that expert's file contained protected material).

Legislative and Deliberative Process.

501.410 The legislative privilege, which is in the Arizona Constitution, art. 4, pt. 2, sec. 7, is an absolute bar to criminal prosecution or civil liability, and also functions as a testimonial and evidentiary privilege.

Arizona Indep. Redist. Comm'n v Fields, 206 Ariz. 130, 75 P.3d 1088, ¶¶ 15–24 (Ct. App. 2003) (court held that legislative privilege applied to Arizona Independent Redistricting Commission).

501.415 A legislator may invoke the legislative privilege to shield from inquiry the acts of an independent contractor retained by that legislator that would be privileged legislative conduct if personally performed by that legislator.

Arizona Indep. Redist. Comm'n v Fields, 206 Ariz. 130, 75 P.3d 1088, ¶¶ 25–30 (Ct. App. 2003) (court held that legislative privilege applied to acts of National Demographics Corporation, which had been hired by Arizona Independent Redistricting Commission as lead consultant in redistricting process).

501.420 To the extent the legislative privilege protects against inquiry about a legislative act or communications about that act, the privilege also shields from disclosure documentation reflecting those acts or communications.

Arizona Indep. Redist. Comm'n v Fields, 206 Ariz. 130, 75 P.3d 1088, ¶¶ 31–32 (Ct. App. 2003) (court held legislative privilege applied to documents exchanged between Arizona Independent Redistricting Commission and National Demographics Corporation).

Litigation.

501.430 A party to a private litigation is absolutely privileged to publish defamatory matter concerning another in communications preliminary to a proposed judicial proceeding, or in the institution of, or during the course and as part of, a judicial proceeding in which the party participates, if the matter has some relation to the proceeding.

Hall v Smith, 214 Ariz. 309, 152 P.3d 1192, ¶¶ 7–8 (Ct. App. 2007) (Smith filed wrongful termination suit against CIGNA AZ; after nearly 8 years of litigation, Smith wrote letter to CEO of CIGNA Corporation stating that Hall (executive director of CIGNA AZ) and colleagues were diverting corporate funds to their own use).

501.440 For the litigation privilege to apply to a communication with a non-party to the litigation, the recipient must have had a close or direct relationship to the proceedings.

Hall v Smith, 214 Ariz. 309, 152 P.3d 1192, ¶¶ 9–21 (Ct. App. 2007) (during wrongful termination litigation against CIGNA AZ, Smith wrote letter to CEO of CIGNA Corporation (CIGNA) stating Hall (executive director of CIGNA AZ) and colleagues were diverting corporate funds to own use; Hall contended litigation privilege did not apply because CIGNA AZ and CIGNA were separate entities; court noted CIGNA was significantly involved in Smith-CIGNA AZ litigation; CIGNA sent several of its employees to investigate Hall's allegations; CIGNA selected attorneys to defend CIGNA AZ; and CIGNA controlled defense of Smith's lawsuit against CIGNA AZ; further, testimony was that, if somebody at CIGNA AZ was doing something wrong, it would have been taken to CIGNA; court concluded CIGNA's relationship was close and direct, and thus privilege applied).

Marital.

501.440 The anti-marital fact privilege applies to those events or communications that are "for or against" the person asserting the privilege, which does not mean "favorable or unfavorable," it means "on behalf of" a spouse or "on behalf of a party opposing" a spouse.

In re MH 2007–000937, 218 Ariz. 517, 189 P.3d 1090, ¶¶ 6–14 (Ct. App. 2008) (in mental health proceeding for wife, trial court allowed husband to testify about his observations of wife's behavior; court held anti-marital fact privilege applied in court-ordered mental health treatment proceedings, and rejected argument that these proceedings were non-adversarial statutory proceedings and thus husband was not testifying "against" wife).

501.450 The anti-marital fact privilege allows a party-spouse to prevent the other spouse from testifying for or against the party-spouse in a civil or criminal proceeding, and dissolution of the marriage terminates this privilege.

State v Harrod, 200 Ariz. 309, 26 P.3d 492, ¶¶ 29–31 (2001) (defendant and ex-wife were divorced; trial court precluded ex-wife from testifying about conversations, but allowed her to testify about things she observed, overheard, or did with defendant; court held that, because defendant and ex-wife were divorced, anti-marital fact privilege did not apply).

In re MH 2007–000937, 218 Ariz. 517, 189 P.3d 1090, ¶¶ 6–14 (Ct. App. 2008) (in mental health proceeding for wife, trial court allowed husband to testify about his observations of wife's behavior; court held anti-marital fact privilege applied in court-ordered mental health treatment proceedings, and rejected argument that these proceedings were non-adversarial statutory proceedings and thus husband was not testifying "against" wife).

501.460 The marital communication privilege protects confidential communications that the spouses made during the period that they were married, and dissolution of the marriage does not terminate this privilege.

State v Harrod, 200 Ariz. 309, 26 P.3d 492, ¶¶ 29–32 (2001) (defendant and ex-wife were divorced; trial court precluded ex-wife from testifying about conversations, but allowed her to testify about things she observed, overheard, or did with defendant; court held that marital communication privilege survived the marriage and thus did apply).

501.470 The marital communication privilege protects communications between husband and wife, it does not extend to non-confidential communications or non-communicative acts, or facts that are not part of the communication, thus the fact that husband and wife are or were married, and the dates and number of communications are not privileged.

State v Harrod, 200 Ariz. 309, 26 P.3d 492, ¶¶ 29–33 (2001) (defendant and ex-wife were divorced; trial court precluded ex-wife from testifying about conversations, but allowed her to testify about things she observed, overheard, or did with defendant; court held trial court properly allowed ex-wife to testify that defendant had received certain packages and then burned one package).

501.475 The anti-marital fact privilege and the marital communication privilege do not apply in the following: (1) in an action for divorce or a civil action by one against the other; (2) in a criminal action or proceeding as provided by the criminal code; (3) in an action brought by the husband or wife against another person for the alienation of the affection; and (4) in an action for damages against another person for adultery committed by either husband or wife.

In re MH 2007–000937, 218 Ariz. 517, 189 P.3d 1090, ¶¶ 15–16 (Ct. App. 2008) (in mental health proceeding for wife, trial court allowed husband to testify about his observations of wife's behavior; court held anti-marital fact privilege applied in court-ordered mental health treatment proceedings; court noted that mental health agency was one that filed petition for court-ordered evaluation and rejected argument that, because husband had submitted application for evaluation by screening agency, this was action by husband against wife).

501.480 The anti-marital fact privilege and the marital communication privilege do not apply in the following: (1) in a criminal action or proceeding for a crime committed one spouse against the other, (2) in a criminal action or proceeding against the husband for abandonment, failure to support or provide, or failure or neglect to furnish the necessities of life to the wife and minor children, which includes a proceeding involving the neglect, dependency, abuse, or abandonment of a child.

State v Mauro, 149 Ariz. 24, 27–28, 716 P.2d 393, 396–97 (1986) (privilege does not apply in proceedings involving the killing of a child from marriage).

State v Salazar, 146 Ariz. 547, 550, 707 P.2d 951, 954 (Ct. App. 1985) (defendant convicted of manslaughter, endangerment, and DUI; because wife was victim of endangerment charge, trial court properly allowed wife to testify against defendant; court rejected defendant's argument that exception should only apply to crimes involving intentional or knowing conduct and not to reckless conduct).

Peer Review.

501.525 All proceedings, records, and materials prepared in connection with peer reviews are confidential and are not subject to discovery.

Sun Health Corp. v Myers (North), 205 Ariz. 315, 70 P.3d 444, ¶¶ 6–15 (Ct. App. 2003) (plaintiff brought wrongful death action against hospital alleging certain doctor negligently performed heart surgery; plaintiffs requested all documents hospital sent to BOMAX about that doctor, and requested hospital admit that one case that peer committee review was that of plaintiff's decedent and that hospital knew of complaints against that doctor; court held that, except for decedent's medical charts and possibly complaints against doctor, requested material was privileged).

Physician-Patient.

501.600 In order for the physician-patient privilege to apply, (1) the patient must not consent to the testimony, (2) the witness must be a physician or surgeon, (3) the information must have been imparted to the physician while treating the patient, and (4) the information must be necessary to enable the physician or surgeon to prescribe or act for the treatment of the patient.

Schoeneweis v Hamner, 223 Ariz. 169, 221 P.3d 48, ¶¶ 16–19 (Ct. App. 2009) (petitioner sought to prevent disclosure of wife's autopsy report; court held that physician-patient privilege did not apply to autopsy reports).

State v Wilson, 200 Ariz. 390, 26 P.3d 1161, ¶¶ 6–8 (Ct. App. 2001) (state charged defendant with fraudulent scheme as result of filing claims for workers' compensation benefits; state claimed privilege did not apply because defendant did not see doctor for purpose of treatment, but instead for pecuniary gain; court held privilege applied when person was seeking treatment, even though person had ulterior motive, and held trial court properly precluded state from questioning doctor who saw defendant for an independent medical examination).

501.620 The physician-patient privilege protects communications between doctor and patient; it does not extend to facts that are not part of the communication, thus the fact that a patient has consulted a doctor, the identity of the patient, and the dates and number of visits to the doctor are not privileged.

Carondelet Health Network v Miller, 221 Ariz. 614, 212 P.3d 952, ¶¶ 4–18 (Ct. App. 2009) (while at hospital, decedent sustained fractured hip; later that morning, decedent's hospital roommate told decedent's wife that decedent had fallen twice that night, and that each time decedent's roommate had notified decedent's nurse; although decedent's wife spoke directly with roommate, she did not obtain roommate's name or contact information; decedent's wife asked trial court to order hospital to disclose roommate's name so she could interview him as witness; court held that, because disclosing roommate's name would not result in disclosing any information about roommate's medical treatment, for hospital to disclose roommate's name would not violate physician-patient privilege).

501.625 If disclosing the name of a patient does not disclose any information about the medical treatment the patient received, then disclosing the patient's name will not violate the physician-patient privilege, but if disclosing the name of a patient does disclose information about the medical treatment the patient received, then disclosing the patient's name will violate the physician-patient privilege.

Carondelet Health Network v Miller, 221 Ariz. 614, 212 P.3d 952, ¶¶ 4–18 (Ct. App. 2009) (while at hospital, decedent sustained fractured hip; later that morning, decedent's hospital roommate told decedent's wife that decedent had fallen twice that night, and that each time decedent's roommate had notified decedent's nurse; although decedent's wife spoke directly with roommate, she did not obtain roommate's name or contact information; decedent's wife asked trial court to order hospital to disclose roommate's name so she could interview him as witness; court held that, because disclosing roommate's name would not result in disclosing any information about roommate's medical treatment, for hospital to disclose roommate's name would not violate physician-patient privilege).

Ziegler v Superior Court, 131 Ariz. 250, 251, 640 P.3d 181, 182 (Ct. App. 1982) (plaintiff requested trial court to disclose medical records of 24 patients who had received pacemakers; trial court ordered hospital to disclose those medical records with names and other identifying information removed; because plaintiff then knew nature of medical treatment that those 24 patients had received, and because disclosing names of each of those individuals would result in plaintiff's knowing what medical treatment each then named individual patient received, court held that disclosing names of each of these patients would violate physician-patient privilege).

501.635 When a plaintiff sues a hospital and certain hospital employees in a medical malpractice case, the patient-physician privilege does not preclude the hospital's counsel from communicating with hospital employees who had treated plaintiff.

* *Phoenix Child. Hosp. v Grant*, 228 Ariz. 235, 265 P.3d 417, ¶¶ 8–18 (Ct. App. 2011) (court held trial court erred in entering order precluding hospital's counsel from communicating with hospital employees who had treated plaintiff, other than hospital employees for whom plaintiff was making claim of negligence).

501.650 A physician has the duty to assert the physician-patient privilege, and is required to do so, when served with a subpoena *duces tecum* relating to a patient's medical records, and a hospital has the duty to assert the physician-patient privilege when neither the patient nor the physician is present to assert the privilege.

Linch v Thomas-Davis Medical Ctr., 186 Ariz. 545, 925 P.2d 686 (Ct. App. 1996) (when served with subpoena, hospital refused to release patient records without court order, and when trial court issued search warrant, hospital requested that trial court conduct in camera review, after which trial court ordered records released "pursuant to the Grand Jury subpoena previously issued"; court held hospital had no further obligation or means to protect records), *review denied as improvidently granted,* 187 Ariz. 501, 930 P.2d 1304 (1997).

501.655 A physician or a hospital has no duty to assert physician-patient privilege when served with a search warrant relating to a patient's medical records.

Linch v Thomas-Davis Medical Ctr., 186 Ariz. 545, 926 P.2d 686 (Ct. App. 1996) (when served with subpoena, hospital refused to release patient records without court order, and when trial court issued search warrant, hospital requested that trial court conduct in camera review, after which trial court ordered records released "pursuant to the Grand Jury subpoena previously issued"; court held hospital had no further obligation or means to protect records), *review denied as improvidently granted,* 187 Ariz. 501, 930 P.2d 1304 (1997).

501.660 A defendant who has caused injuries to a victim does not have standing in a criminal case to assert the physician-patient privilege on behalf of the victim.

State v Miles, 211 Ariz. 475, 123 P.3d 669, ¶¶ 4–18 (Ct. App. 2005) (defendant caused collision that injured victim; defendant moved to preclude introduction of victim's medical records and testimony about seriousness of victim's injuries; state asserted victim had waived privilege by signing release form, but no such form was in record, so court did not find waiver; court held defendant did not have standing to assert victim's physician-patient privilege and held trial court properly admitted testimony and records).

501.665 The state may obtain a victim's medical records, without the victim's permission, when such records are needed for the prosecution of a criminal case.

Benton v Superior Ct., 182 Ariz. 466, 468, 897 P.2d 1352, 1354 (Ct. App. 1994) (defendant and victim had romantic relationship, but defendant assaulted victim, and state charged defendant with aggravated assault; victim refused to produce medical records, and trial court granted state's request for production; court held Victim's Bill of Rights did not preclude production of records, and held public's interest in protecting victims outweighs privacy interest reflected in physician-patient privilege, thus victim could not claim physician-patient privilege to prevent state from obtaining her medical records).

501.670 Although Arizona courts have recognized a "crime fraud" exception to the attorney-client privilege, they have not recognized such an exception to the physician-patient privilege.

State v Wilson, 200 Ariz. 390, 26 P.3d 1161, ¶ 11 (Ct. App. 2001) (state charged defendant with fraudulent scheme and artifice as result of filing claims for workers' compensation benefits; court held trial court properly precluded state from questioning doctor who saw defendant for an independent medical examination).

Psychologist-Patient.

501.700 In order for the psychologist-patient privilege to apply, (1) the patient must not consent to the testimony; (2) the witness must be a psychologist; (3) the information must have been imparted to the psychologist while treating the patient; and (4) the information must be necessary to enable the psychologist to act for the treatment of the patient.

Barnes v Outlaw, 188 Ariz. 401, 937 P.2d 323 (Ct. App. 1996) (although defendant was a pastor, he treated plaintiff as a psychological therapist, so cleric/priest-penitent privilege did not apply and did not preclude recovery when defendant disclosed communications), *vac'd in part on other grounds*, 192 Ariz. 283, 964 P.2d 484 (1998).

501.710 The psychologist-patient privilege applies only to a psychologist with a doctorate degree.

Barnes v Outlaw, 188 Ariz. 401, 937 P.2d 323 (Ct. App. 1996) (although defendant was a pastor, he treated plaintiff as psychological therapist, so cleric/priest-penitent privilege did not apply; although defendant was not licensed as counselor and thus privilege would not apply to him, court held his lack of a license did not immunize him from a claim of counseling malpractice based on his disclosure of confidential communications), *vac'd in part on other grounds*, 192 Ariz. 283, 964 P.2d 484 (1998).

Reporter-Source.

501.740 Reporter-source privilege belongs to the reporter, and protects persons engaged in newspaper, radio, television, or reportorial work, or connected with or employed by a newspaper, radio, or television station.

Flores v Cooper Tire & Rubber Co., 218 Ariz. 52, 178 P.3d 1176, ¶¶ 25–26 (Ct. App. 2008) (television station broadcast story based on documents Cooper claimed were subject to confidentiality order, and requested that television station disclose source of documents; television station contended that source of documents was privileged).

501.750 The reporter-source privilege protects a person only from disclosing the source of information procured or obtained for publication or broadcast, and does not protect all the activities of publishers or reporters, nor does it protect any and all information gathered.

State v Moody, 208 Ariz. 424, 94 P.3d 1119, ¶¶ 138–40 (2004) (because newspaper article did not involve confidential source, trial court erred in finding reporter-source privilege applied, but any error was harmless because trial court could have precluded defendant's desired cross-examination on relevancy grounds).

Special Education Records.

501.760 The federal statutes use the term "confidential" rather than "privileged," thus the federal statutes do not create an independent privilege for educational records, but they do limit the instances in which an educational agency may release the records.

Catrone v Miles, 215 Ariz. 446, 160 P.3d 1204, ¶¶ 16–36 (Ct. App. 2007) (court held trial court properly exercised discretion in reviewing records *in camera* and allowing discovery of only certain documents).

501.765 The statutory privilege for medical records only applies to records maintained for purposes of patient diagnosis or treatment, thus while special education records may contain medical, psychological, or psychiatric information, that information is usually for the purpose of formulating an educational plan, thus the medical records privilege protects only that portion of the record that is for patient diagnosis or treatment, and does not protect the entire record.

Catrone v Miles, 215 Ariz. 446, 160 P.3d 1204, ¶¶ 10–15 (Ct. App. 2007) (court rejected plaintiff's contention that medical information contained in son's special education records protected those records from discovery).

501.770 In determining whether the statutory interest in the confidentiality of special education records substantially outweighs the interest in their production, the trial court should consider the following factors: (1) the strength of the relationship between the confidential information and the issue in dispute; (2) the harm that may result from the dissemination of the confidential information; (3) whether protective devices limiting the disclosure of the information (such as in-camera inspections and "need-to-know" orders) can significantly reduce the harm from dissemination; (4) whether the information can be obtained from some other source that is either more convenient or less burdensome; (5) whether the party seeking to preclude production is the party that put the need for the documents at issue; and (6) any other factors pertinent to determining whether confidentiality should outweigh production.

Catrone v Miles, 215 Ariz. 446, 160 P.3d 1204, ¶¶ 2–3, 29–36 (Ct. App. 2007) (plaintiff contended defendants' malpractice caused younger son's hearing loss, sensory motor difficulties, neurobehaviorial problems, communication disorders, and impaired cognitive functions; defendants learned that plaintiff's older son was in special education for learning disabilities, which included speech and comprehension difficulties and cognitive impairment, and thus sought older son's medical and academic records in support of their theory that younger son's problems were genetic and not result of medical malpractice; court applied six-part test to facts of case and concluded trial court properly exercised discretion in reviewing records *in camera* and allowing discovery of only certain documents).

Waiver by Statute.

501.815 Because the legislature has created certain privileges by statute, the legislature by statute may limit those privileges.

State ex rel. Romley v Gaines (Reyes), 205 Ariz. 138, 67 P.3d 734, ¶¶ 10–11 (Ct. App. 2003) (because legislature created physician-patient privilege by state, legislature could limit that privilege in SVP cases under A.R.S. § 36–3702(B)(2)).

Martin v Reinstein, 195 Ariz. 293, 987 P.2d 779, ¶¶ 95–96 (Ct. App. 1999) (provision in Arizona's Sexually Violent Persons Act that offender's psychological reports and tests may be used in SVP proceedings did not violate offender's doctor-patient privilege).

501.820 A.R.S. § 13–3620(G) provides that all privileges, except the attorney-client privilege, are abrogated in any proceeding involving the abuse of a child, and this includes all forms of abuse of a child, not just involving physical injury to the child.

State v Herrera, 203 Ariz. 131, 51 P.3d 353, ¶¶ 9–14 (Ct. App. 2002) (defendant was charged with DUI and child abuse as result of having children in car; defendant contended § 13–3623(F)(1) limited child abuse to instances when child suffered actual injury; court rejected defendant's contention, reasoning that language of § 13–3620(G) suggested broad scope for exception to marital privilege; § 13–3623(B) prohibited conduct when health of child was endangered, thus actual abuse was not required; and § 13–3623(F)(1) expressly limited narrower definition of child abuse to that section).

Waiver by Conduct.

501.835 The party claiming a person has waived a privilege by conduct has the burden of proving that waiver by conduct.

State v Wilson, 200 Ariz. 390, 26 P.3d 1161, ¶¶ 28–29 (Ct. App. 2001) (state charged defendant with fraudulent scheme and artifice as result of filing claims for workers' compensation benefits; court held trial court implicitly ruled that state had failed to meet burden of showing defendant did not have reasonable, subjective belief that he was seeing doctor for treatment when it precluded state from questioning doctor who saw defendant for an independent medical examination).

501.840 There are three tests used to determine whether a party through litigation has waived a privilege: (1) Under the most restrictive test, the party has either expressly waived the privilege or has impliedly waived it by directly injecting knowledge from a privileged source into the litigation; (2) under the intermediate test, three criteria are present: (a) the asserting party has done an affirmative act, such as filing suit or raising an affirmative defense; (b) through this affirmative act, the asserting party has put the protected information at issue by making it relevant to the case; and (c) application of the privilege would deny the opposing party access to information vital to that party's case; and (3) under the least restrictive test, a party asserts a claim, counter-claim, or affirmative defense that raises a matter to which otherwise privileged material is relevant; Arizona has adopted the intermediate test as set forth by the Restatement: The attorney-client privilege is waived for any relevant communication if the client asserts for any material issue in the proceeding that the client acted upon the advice of a lawyer or that the legal advice was otherwise relevant to the legal significance of the client's conduct.

Twin City Fire Ins. Co. v Burke (General Star Indem. Co.), 204 Ariz. 251, 63 P.3d 282, ¶¶ 11–23 (2003) (in wrongful death action, General Star (GS) was primary liability insurer with $1 million coverage, and Twin City (TwC) was excess coverage insurer with $9 million coverage; during settlement negotiations, plaintiffs offered to settle wrongful death action for less than $1 million limit, but GS refused; TwC knew of that offer to settle and demanded that GS settle; jurors found in favor of plaintiffs, and trial court entered $6 million judgment against insureds; insureds subsequently settled with plaintiffs for $5.4 million; GS paid $1 million; TwC paid $4.4 million and brought bad-faith action against GS for the $4.4 million; GS filed motion asking trial court to order TwC to produce files pertaining to wrongful death action, including any communications between TwC and counsel about wrongful death action; TwC objected on basis that information was either irrelevant or protected by attorney-client privilege; trial court granted GS's motion, finding that information sought "may be evidence that will establish or negate bad faith on the part of General Star"; court noted that, in TwC's bad-faith action against GS, issue was GS's mental state, not TwC's mental state, thus information TwC received from its attorneys was not relevant, and to extent evaluation of case by TwC's attorneys might be similar to evaluation of case by GS's attorneys, that information was not vital because GS could obtain other expert opinion testimony about claim evaluation).

State Farm v Lee (Martin), 199 Ariz. 52, 13 P.3d 1169, ¶¶ 10–11 (2000) (plaintiffs brought class action against defendant contending breach of contract, fraud, bad faith, and consumer fraud for refusing to allow policyholders to "stack" uninsured and underinsured motorist provisions of multiple policies; defendant claimed its conduct was reasonable based on knowledge gained from its evaluation of existing case law, applicable statutes, and policies themselves; court held that, because defendant's knowledge included information gained from consulting with its attorneys, all three parts of the intermediate test were satisfied, thus trial court correctly ordered disclosure of communications defendant had with attorneys).

State v Thornton, 187 Ariz. 325, 929 P.2d 676 (1996) (by raising insanity defense, defendant waived physician-patient privilege for his mental health records).

Mendoza v McDonald's Corp., 222 Ariz. 139, 213 P.3d 288, ¶¶ 35–53 (Ct. App. 2009) (plaintiff sued defendant for breach of implied covenant of good faith and fair dealing in administration of her workers' compensation claim; jurors awarded plaintiff $250,000 in compensatory damages, but awarded no punitive damages; court concluded defendant affirmatively asserted its actions in investigating, evaluating, and paying plaintiff's claim were subjectively reasonable, thus trial court erred in refusing to order disclosure of attorney-client communications and remanded for new trial on issue of punitive damages).

Flores v Cooper Tire & Rubber Co., 218 Ariz. 52, 178 P.3d 1176, ¶¶ 27–31 (Ct. App. 2008) (television station broadcast story based on documents Cooper claimed were subject to confidentiality order, and requested that television station disclose source of documents; television station sought declaratory judgment action that it had complied with confidentiality order; court held that, by bringing that action, television station did not waive privilege).

Flores v Cooper Tire & Rubber Co., 218 Ariz. 52, 178 P.3d 1176, ¶¶ 32–35 (Ct. App. 2008) (television station broadcast story based on documents Cooper claimed were subject to confidentiality order, and requested that television station disclose source of documents; television station sought declaratory judgment action that it had complied with confidentiality order; television station disclosed it had obtained documents from whistle-blower; court held that, by disclosing that it had obtained documents from whistle-blower, television station did not waive privilege for name of whistle-blower).

P.M. v Gould (Moore), 212 Ariz. 541, 136 P.3d 223, ¶¶ 8, 35–36 (Ct. App. 2006) (defendant was convicted of sexual conduct with minor and sexual assault on his daughter; although at first sentencing state never presented any of victim's records or communications with her counselor, trial court found as aggravating circumstance emotional harm to victim and imposed aggravated sentence; defendant had to be resentenced after *Blakely*; trial court held that, in order for state to prove emotional harm to victim and for defendant to have effective cross-examination at resentencing, victim must disclose records and communications with her counselor, and held that, because it had already found emotional harm as aggravating circumstance at first sentencing, that finding resulted in victim waiving her privilege for any relevant records; court noted that victim is not a party to criminal case and thus does not control conduct that could support finding of waiver, and therefore held that victim had not waived her rights or placed her medical or behavioral health conditions at issue merely because she testified as witness).

State v Wilson, 200 Ariz. 390, 26 P.3d 1161, ¶¶ 15–18 (Ct. App. 2001) (state charged defendant with fraudulent scheme and artifice as result of filing claims for workers' compensation benefits; court noted (1) state, not defendant, sought to call doctor, (2) defendant did not threaten third party with physician-patient privilege and then invoke privilege, and (3) defendant did not testify or otherwise disclose substance of communication, and thus concluded defendant had not waived privilege by conduct, thus trial court properly precluded state from questioning doctor who saw defendant for an independent medical examination).

Elia v Pifer, 194 Ariz. 74, 977 P.2d 796, ¶¶ 37–40 (Ct. App. 1998) (defendant was plaintiff's former attorney in dissolution action; after dissolution, plaintiff filed for bankruptcy; plaintiff sued defendant for legal malpractice, claiming defendant did not have authority to agree to terms of proposed settlement agreement; court held that plaintiff's claim of malpractice placed in issue communications with bankruptcy attorneys because, if plaintiff never told them defendant settled dissolution without his approval, it would give rise to inference that defendant had not committed malpractice, and if plaintiff had told them and they failed to follow his instructions to attack dissolution decree in bankruptcy proceeding, they might be negligent, which would reduce defendant's share of the liability; court rejected

plaintiff's contention that his suing former dissolution attorney only waived attorney-client privilege with that attorney, and held instead that, because of the nature of the claim, it also waived attorney-client privilege with bankruptcy attorneys).

501.845 In a case when a litigant claiming the attorney-client privilege relies on and advances as a claim or defense a subjective and allegedly reasonable evaluation of the law, and this evaluation necessarily incorporates what the litigant learned from its attorneys, the communications are discoverable and admissible, but when a litigant claiming the attorney-client privilege defends exclusively on the basis that its actions were objectively reasonable and merely asked its attorneys to evaluate the reasonableness of its conduct under the statutes and case law, the party has not waived the attorney-client privilege because it has not put at issue any advice it received from its attorneys.

State Farm v. Lee (Martin), 199 Ariz. 52, 13 P.3d 1169, ¶¶ 15, 22, 28 (2000) (plaintiffs brought class action against defendant contending breach of contract, fraud, bad faith, and consumer fraud for refusing to allow policyholders to "stack" uninsured and underinsured motorist provisions of multiple policies; defendant claimed its conduct was reasonable based on knowledge gained from its evaluation of existing case law, applicable statutes, and policies themselves; court held that, because defendant's knowledge included information gained from consulting with its attorneys, trial court correctly ordered disclosure of communications defendant had with attorneys).

Mendoza v. McDonald's Corp., 222 Ariz. 139, 213 P.3d 288, ¶¶ 35–53 (Ct. App. 2009) (plaintiff sued defendant for breach of implied covenant of good faith and fair dealing in administration of her workers' compensation claim; jurors awarded plaintiff $250,000 in compensatory damages, but awarded no punitive damages; court concluded defendant affirmatively asserted its actions in investigating, evaluating, and paying plaintiff's claim were subjectively reasonable, thus trial court erred in refusing to order disclosure of attorney-client communications and remanded for new trial on issue of punitive damages).

501.850 When a party testifies about otherwise privileged communications, or denies having relevant communications that would otherwise be privileged, the party waives the privilege for those communications, and may be impeached by the other party to those communications.

State v. Harrod, 200 Ariz. 309, 26 P.3d 492, ¶¶ 34–37 (2001) (defendant testified and denied he had any conversations with his ex-wife about the murder; court held trial court properly allowed ex-wife to testify about conversations she had with defendant about the murder).

501.855 Because (1) Arizona allows full cross-examination of expert witnesses, (2) the rules of civil procedure allow full discovery of expert witnesses, and (3) it is beneficial to have a bright-line for discovery for expert witnesses who are both consulting experts and testifying experts, if a party designates a consulting expert as a testifying expert, the party will waive any work-product privilege for communications with that expert.

Arizona Indep. Redist. Comm'n v. Fields, 206 Ariz. 130, 75 P.3d 1088, ¶¶ 42–50 (Ct. App. 2003) (Arizona Independent Redistricting Commission hired National Demographics Corporation as lead consultant in redistricting process; court held that, because IRC named NDC personnel as testifying experts, IRC waived any legislative privilege for communication with those experts, any materials reviewed by them, and subject of expert's testimony).

501.857 If a party designates a consulting expert as a testifying expert, the party may re-establish the work-product privilege for communications with that expert if the party withdraws that expert as a testifying witness.

Green v Nygaard (Green), 213 Ariz. 460, 143 P.3d 393, ¶¶ 8–19 (Ct. App. 2006) (wife had listed expert witness as testifying expert witness; at pre-decree hearing addressing parties' possession of liquid assets *pendente lite*, wife had expert witness testify; parties later stipulated to division of assets; wife then withdrew designation of witness as testifying expert; court held that trial court erred in ordering disclosure of expert witness's entire file).

501.870 A person will usually waive the privilege if the person makes the statement when a third person is present on the ground that the person holding the privilege could not have intended to be confidential those communications the person knowingly allowed to be overheard by someone foreign to the confidential relationship, but this general rule does not apply when the third person's presence does not indicate a lack of intent to keep the communication confidential.

State v Archibeque, 223 Ariz. 231, 221 P.3d 1045, ¶¶ 15–25 (Ct. App. 2009) (defendant and wife were members of Church of Jesus Christ of Latter-day Saints; wife told Church Bishop defendant admitted to her he had inappropriately touched step-daughter; defendant and wife then met with Bishop, and defendant admitted sexually touching step-daughter; because purpose of discussion was both repentance process and spiritual guidance and marital advice, court concluded neither presence of wife during discussions with Bishop nor defendant's statement to wife prior to meeting with Bishop waived privilege).

State ex rel. Thomas v Schneider (Hanna et al.), 212 Ariz. 292, 130 P.3d 991, ¶ 33 (Ct. App. 2006) (notary and city clerk backdated financial disclosure statements that city council members did not timely file; communications were between city attorney and members of city council and city clerk about these events, made both in private and during executive sessions of the city council; court noted that A.R.S. § 38–431.03(F) provides that no disclosure of information in executive session constitutes waiver on any privilege, including attorney-client privilege).

State v Sucharew, 205 Ariz. 16, 66 P.3d 59, ¶¶ 13–16 (Ct. App. 2003) (state alleged defendant and Doyle were racing when defendant's vehicle collided with victim's vehicle, killing victim; to obtain his testimony, state granted immunity to Doyle (a minor); when cross-examining Doyle, defendant sought to question Doyle about conversations Doyle had with his attorney, and state objected on basis of attorney-client privilege, which trial court sustained; defendant contended privilege was waived because Doyle's parents were present when Doyle spoke to attorney; court noted Doyle's parents had hired and paid for the attorney, and that their presence was result of their taking interest and advisory role in their minor son's legal affairs, thus their presence during communications did not indicate lack of intent to keep communication confidential, so there was no waiver of attorney-client privilege).

State v Foster, 199 Ariz. 39, 13 P.3d 781, ¶¶ 9–16 (Ct. App. 2000) (defendant was suspect in murder investigation, and his parole officer returned him to AzDOC; while there, defendant contacted inmate who was "legal representative" and asked for assistance in preparing for parole violation hearing; after defendant confessed to "legal representative" that he killed victim, "legal representative" then told police of confession; because defendant made statements to "legal representative" while another inmate was present, defendant could not claim conversations were privileged).

501.875 Once a party has waived a privilege at a trial or otherwise, that party may not reassert that privilege.

State v Harrod, 218 Ariz. 268, 183 P.3d 519, ¶¶ 11–16 (2008) (at trial, defendant testified and denied he had any conversations with his ex-wife about the murder; court held defendant waived marital communication privilege and that trial court properly allowed ex-wife to testify about conversations she had with defendant about the murder; court held this waiver continued through resentencing proceedings and thus trial court properly allowed ex-wife to testify at resentencing).

Comment on Exercise of Privilege.

501.880 A party commits reversible error if it comments on the failure of the other party to call a privileged witness.

State v Herrera, 203 Ariz. 131, 51 P.3d 353, ¶¶ 15–17 (Ct. App. 2002) (during jury voir dire, trial court listed defendant's wife as potential witness; in opening statement, defendant told jurors wife would testify about certain matters; defendant later told trial court he had changed his mind and that he was invoking marital privilege so that wife could not testify; trial court told jurors wife would not be excluded from courtroom because defendant had invoked marital privilege and thus wife would not be witness; after trial court concluded marital privilege did not apply because defendant was charged with child abuse, trial court told jurors wife would testify; because defendant did not object at trial, on appeal court analyzed issue for fundamental error; because jurors acquitted defendant of child abuse, court found defendant was not prejudiced for those counts; for DUI counts, court concluded wife's testimony was favorable, and that favorable testimony dispelled any improper inference jurors might have drawn from defendant's attempt to invoke marital privilege, thus no fundamental error).

Improper Disclosure of Confidential Communications.

501.900 If a person has received confidential communications from another and discloses them without the other person's consent, the person may be liable for damages.

Barnes v Outlaw, 188 Ariz. 401, 937 P.2d 323 (Ct. App. 1996) (although defendant was a pastor, he treated plaintiff as a psychological therapist, so cleric/priest-penitent privilege did not apply; court upheld judgment against defendant on plaintiff's claim of counseling malpractice based on defendant's disclosure of confidential communications), *vac'd in part on other grounds*, 192 Ariz. 283, 964 P.2d 484 (1998).

March 11, 2012

Rule 502. Attorney-Client Privilege and Work Product; Limitations on Waiver.

The following provisions apply, in the circumstances set out, to disclosure of a communication or information covered by the attorney-client privilege or work-product protection.

(a) Disclosure made in an Arizona proceeding; scope of a waiver. When the disclosure is made in an Arizona proceeding and waives the attorney-client privilege or work-product protection, the waiver extends to an undisclosed communication or information in an Arizona proceeding only if:

(1) the waiver is intentional;

(2) the disclosed and undisclosed communications or information concern the same subject matter; and

(3) they ought in fairness to be considered together.

(b) Inadvertent disclosure. When made in an Arizona proceeding, the disclosure does not operate as a waiver in an Arizona proceeding if:

(1) the disclosure is inadvertent;

(2) the holder of the privilege or protection took reasonable steps to prevent disclosure; and

(3) the holder promptly took reasonable steps to rectify the error, including (if applicable) following Arizona Rule of Civil Procedure 26.1(f)(2).

(c) Disclosure made in a proceeding in federal court or another state. When the disclosure is made in a proceeding in federal court or another state and is not the subject of a court order concerning waiver, the disclosure does not operate as a waiver in an Arizona proceeding if the disclosure:

(1) would not be a waiver under this rule if it had been made in an Arizona proceeding; or

(2) is not a waiver under the law governing the federal or state proceeding where the disclosure occurred.

(d) Controlling effect of a court order. An Arizona court may order that the privilege or protection is not waived by disclosure connected with the litigation pending before the court— in which event the disclosure is also not a waiver in any other proceeding.

(e) Controlling effect of a party agreement. An agreement on the effect of disclosure in an Arizona proceeding is binding only on the parties to the agreement, unless it is incorporated into a court order.

(f) Definitions. In this rule:

(1) "attorney-client privilege" means the protection that applicable law provides for confidential attorney-client communications; and

(2) "work-product protection" means the protection that applicable law provides for tangible material (or its intangible equivalent) prepared in anticipation of litigation or for trial.

Cases

No Arizona cases.

March 11, 2012

ARTICLE 6. WITNESSES

Rule 601. Competency to Testify in General.

Every person is competent to be a witness unless these rules or an applicable statute provides otherwise.

Comment to 2012 Amendment

The language of Rule 601 has been amended to conform to the federal restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Cases

601.010 Every person is competent to be a witness except as provided by statute or by the rules.

State v Cruz, 218 Ariz. 149, 181 P.3d 196, ¶¶ 104–106 (2008) (state called witness who was visibly intoxicated; court noted that court will presume witness is competent and that witness is not rendered incompetent merely because witness was under influence of drugs at time of testimony).

601.050 The determination whether to require a witness to undergo a mental or physical examination is within the sound discretion of the trial court.

State v Moore, 222 Ariz. 1, 213 P.3d 150, ¶¶ 45–48 (2009) (because witness was talking rapidly and got "off track" during questioning, defendant asked trial court to order witness to undergo drug test; court noted that video recording of witness's testimony showed she was coherent and responded appropriately to questioning, even though she had tendency to ramble and interrupt counsel, thus trial court did not abuse discretion in finding witness competent to testify and in not ordering drug test).

601.060 A witness having undergone hypnosis may testify only about matters that the witness recalled and related before hypnosis, and the party offering this testimony must show that proper forensic hypnosis guidelines were followed.

State v Harrod, 200 Ariz. 309, 26 P.3d 492, ¶¶ 20–21 (2001) (because trial court found witness had not been successfully hypnotized, trial court properly allowed witness to testify).

601.065 In determining whether a witness has undergone hypnosis, the trial court must make that determination by a preponderance of the evidence.

State v Harrod, 200 Ariz. 309, 26 P.3d 492, ¶¶ 22–26 (2001) (trial court found by preponderance of evidence that witness had not been successfully hypnotized, but stated that, if standard were clear and convincing evidence, it would not have so found).

March 11, 2012

Rule 602. Need for Personal Knowledge.

A witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may consist of the witness's own testimony. This rule does not apply to a witness's expert testimony under Rule 703.

Comment to 2012 Amendment

The language of Rule 602 has been amended to conform to the federal restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Cases

602.010 For a witness to testify about a matter, the witness must have personal knowledge of the matter.

State v Harrod, 200 Ariz. 309, 26 P.3d 492, ¶¶ 27–28 (2001) (in case-in-chief, defendant suggested ex-wife and her family were lying about his involvement in murder because of bitterness over divorce; court held this opened door and allowed state to call ex-wife in rebuttal to ask her why she had divorced defendant; ex-wife testified that she divorced him because he told her he had killed victim).

In re MH 2008–002596, 223 Ariz. 32, 219 P.3d 242, ¶¶ 12–16 (Ct. App. 2009) (appellant sought relief from order of commitment for involuntary mental health treatment; statute required testimony of two or more witnesses acquainted with patient; appellant contended one witness did not qualify as acquaintance witness because her contact with him was limited to one 15 minute telephone conversation; court held that this telephone conversation gave witness personal knowledge).

State v Jones, 188 Ariz. 534, 937 P.2d 1182 (Ct. App. 1996) (because examining physician saw victim write note stating that her father had molested her, physician properly allowed to identify note).

602.040 A witness may testify that something did not happen or that the witness did not see or hear anything only if the witness's position, attitude, or access to information were such that the witness probably would have seen, heard, or known of the event if it had happened.

Isbell v State, 198 Ariz. 291, 9 P.3d 322, ¶ 9 (2000) (because defendant failed to make required foundational showing, including how many near accidents and how many fortuitous escapes from injury may have occurred, trial court did not abuse discretion in precluding evidence of absence of prior accidents at railroad crossing in question).

Hernandez v State, 201 Ariz. 336, 35 P.3d 97, ¶¶ 19–22 (Ct. App. 2001) (plaintiff fell off wall at Patagonia Lake Park; because park manager had served there for 8 years and lived there year-round, and because any fall off that wall would have resulted in serious injuries, park manager was permitted to testify that he knew of no other accidents at that wall), *vacated*, 203 Ariz. 196, 52 P.3d 765 (2002).

March 11, 2012

Rule 603. Oath or Affirmation to Testify Truthfully.

Before testifying, a witness must give an oath or affirmation to testify truthfully. It must be in a form designed to impress that duty on the witness's conscience.

Comment to 2012 Amendment

The language of Rule 603 has been amended to conform to the federal restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Cases

603.010 In the absence of an objection and something on the record to indicate otherwise, there exists the presumption of regularity in administering the oath.

State v Navarro, 132 Ariz. 340, 645 P.2d 1254 (Ct. App. 1982) (in absence of objection, presumption that interpreter administered oath in Spanish to Spanish-speaking witness; objection required so trial court may cure any alleged error at trial).

March 11, 2012

Rule 604. Interpreters.

An interpreter must be qualified and must give an oath or affirmation to make a true translation.

Comment to 2012 Amendment

The language of Rule 604 has been amended to conform to the federal restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Cases

604.010 The determination whether an interpreter is qualified is left to the sound discretion of the trial court.

In re MH 2007-001895, 221 Ariz. 346, 212 P.3d 38, ¶¶ 9–12 (Ct. App. 2009) (at mental health evaluation hearing, trial court used interpreter from Language Line Services, who translated via speaker phone; court held trial court did not abuse discretion in determining interpreter was qualified).

604.020 This rule requires only that an interpreter be "court qualified"; there is no requirement that an interpreter be "court certified."

In re MH 2007-001895, 221 Ariz. 306, 212 P.3d 38, ¶¶ 9–13 (Ct. App. 2009) (at mental health evaluation hearing, trial court used interpreter from Language Line Services, who translated via speaker phone; court rejected claim that interpreter had to be "court certified").

604.030 Although the determination whether an interpreter is qualified is a matter for the trial court, a party may still impeach the interpreter's translation, this resolution being for the jurors.

State v Marcham, 160 Ariz. 52, 770 P.2d 356 (Ct. App. 1988) (interpreter was for deaf juror).

State v Burris, 131 Ariz. 563, 643 P.2d 8 (Ct. App. 1982) (trial court allowed party to cross-examine interpreter about her misinterpretations, and should have let that party's own interpreter testify before jurors).

604.040 A presumption exists, based on the oath of the interpreter, that the interpreter will make a proper interpretation of the proceedings.

In re MH 2007-001895, 221 Ariz. 306, 212 P.3d 38, ¶¶ 14–15 (Ct. App. 2009) (at mental health evaluation hearing, trial court used interpreter from Language Line Services, who translated via speaker phone; because appellant made no claim to trial court that interpreter was not translating properly, appellate court presumed that all parties were able to hear and understand the proceedings).

State v Mendoza, 181 Ariz. 472, 891 P.2d 939 (Ct. App. 1995) (because of presumption, lack of transcript of communications between a deaf juror and court-appointed sign-language interpreter did not deny defendant his due process rights).

State v Marcham, 160 Ariz. 52, 770 P.2d 356 (Ct. App. 1988) (interpreter was for deaf juror; because defendant did not object, there was nothing in record to indicate sign-language interpreter did not properly interpret proceedings, thus presumption applied).

604.050 If a party is contending that the interpreter failed to translate simultaneously all crucial proceedings, the party must present that claim first to the trial court so that the trial court will be able to address and correct any problems that exist; if the party does not make such a claim to the trial court, that party will be considered to have waived any error on appeal.

In re MH 2007-001895, 221 Ariz. 306, 212 P.3d 38, ¶¶ 14–15 (Ct. App. 2009) (at mental health evaluation hearing, trial court used interpreter from Language Line Services, who translated via speaker phone; because appellant made no claim to trial court that interpreter was not translating properly, appellate court presumed that all parties were able to hear and understand the proceedings; court held that appellant waived any objection that she did not receive a continuous simultaneous translation).

604.060 The failure of an interpreter to translate simultaneously all crucial proceedings may deny a defendant due process of law.

State v Hansen, 146 Ariz. 226, 705 P.2d 466 (Ct. App. 1985) (although defendant understood some English, record was ambiguous whether defendant knew enough English to proceed without an interpreter; because many important parts of proceedings were not translated, defendant was denied due process of law).

March 11, 2012

Rule 605. Judge's Competency as a Witness.

The judge presiding at trial may not testify as a witness at the trial. A party need not object to preserve the issue.

Comment to 2012 Amendment

The language of Rule 605 has been amended to conform to the federal restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Cases

605.010 A judge presiding at a trial may not testify in that trial as a witness, thus if the judge has personal knowledge of a disputed evidentiary fact or may be a material witness in the proceeding, the judge should disqualify him- or herself.

State v Fisher, 176 Ariz. 69, 859 P.2d 179 (1993) (defendant's wife entered into plea agreement that required her to testify consistently with her prior statements, and trial judge signed it along with other parties; because this agreement was admitted in evidence at defendant's trial and because effect of this agreement on wife was a matter of dispute, this put judge in a position where he should have disqualified himself).

605.020 A trial judge may testify in a different proceeding about factual matters, but may not testify about what he or she would have done in the first proceeding if faced with a different situation.

Reed v Mitchell & Timbanard, 183 Ariz. 313, 903 P.2d 621 (Ct. App. 1995) (plaintiff claimed that attorneys were negligent because they did not include a security agreement in divorce decree; first judge would not have been allowed to testify whether he would have signed decree if security agreement had been included in it).

DeForest v DeForest, 143 Ariz. 627, 694 P.2d 1241 (Ct. App. 1985) (first judge entered order that marriage would be dissolved upon presentment of formal decree, which was never prepared; 1½ years later second judge entered *nunc pro tunc* decree; first judge allowed to testify about terms of settlement agreement).

State v Miller, 128 Ariz. 112, 624 P.2d 309 (Ct. App. 1980) (judge who presided at civil trial involving defendant allowed to testify at defendant's criminal trial and give opinion of defendant's credibility).

605.030 Trial judge should not communicate with jurors without notifying the parties and giving them the opportunity to be present.

State v McDaniel, 136 Ariz. 188, 665 P.2d 70 (1983) (any communication between judge and jurors after jurors begin deliberations, without prior notice to defendant and counsel, is error; trial court erred in answering questions from jurors, but error was harmless).

State v Mata, 125 Ariz. 233, 609 P.2d 48 (1980) (during trial, juror asked bailiff to clarify what one witness had said, and judge told bailiff to tell juror to rely on testimony he had heard; another juror asked bailiff if defendant and his brother were being tried together, and trial court told bailiff to tell juror that would be clarified by court's instructions; because judge did not give any information to jurors, court held any error was harmless).

605.040 If the trial judge communicates with jurors without notifying the parties, a party must object upon learning of such contact to allow the trial court to correct any error; if the party does not object, the party will have waived any claim of error.

State v Mata, 125 Ariz. 233, 609 P.2d 48 (1980) (when it appeared one juror may have seen defendant in handcuffs, parties agreed to have judge question juror with reporter but without attorneys; during trial, juror who was pregnant told judge she might not be able to continue, so judge discussed matter with juror and her doctor, and later told attorney what had happened, and no one objected; court held any error waived for lack of a timely objection).

March 11, 2012

Rule 606. Juror's Competency as a Witness.

(a) At the Trial. A juror may not testify as a witness before the other jurors at the trial. If a juror is called to testify, the court must give a party an opportunity to object outside the jury's presence.

(b) During an Inquiry into the Validity of a Verdict in a Civil Case.

(1) *Prohibited Testimony or Other Evidence.* During an inquiry into the validity of a verdict in a civil case, a juror may not testify about any statement made or incident that occurred during the jury's deliberations; the effect of anything on that juror's or another juror's vote; or any juror's mental processes concerning the verdict or indictment. The court may not receive a juror's affidavit or evidence of a juror's statement on these matters.

(2) *Exceptions.* A juror may testify about whether:

(A) extraneous prejudicial information was improperly brought to the jury's attention;

(B) an outside influence was improperly brought to bear on any juror; or

(C) a mistake was made in entering the verdict on the verdict form.

Comment to 2012 Amendment

This rule has been amended to conform to Federal Rule of Evidence 606, including the addition of subdivision (b)(2)(C). However, subsection (b) has not been applied to criminal cases, as is done in Federal Rule of Evidence 606(b), because the matter is covered by Arizona Rule of Criminal Procedure 24.1(d).

Additionally, the language of Rule 606 has been amended to conform to the federal restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent in the restyling to change any result in any ruling on evidence admissibility.

Cases

Paragraph (b) — Inquiry into validity of verdict in civil action.

606.b.060 If there are improper communications with the jurors, the trial court should presume prejudice when (1) the misconduct is significant, (2) the misconduct is prejudicial in nature but its extent is impossible to determine in a close case, and (3) the misconduct is apparently successful.

Leavy v Parsell, 188 Ariz. 69, 932 P.2d 1340 (1997) (trial court entered order precluding issue of a seat belt defense, but in opening statement defendant's counsel mentioned plaintiff's non-use of seat belt and cross-examined a witness about whether plaintiff was wearing one; court presumed prejudice, and suggested trial court should have imposed a monetary sanction).

Perez v Community Hosp., 187 Ariz. 355, 929 P.2d 1303 (1997) (without informing trial court, bailiff answered three questions from jurors telling them: (1) they could not have any testimony reread, (2) what bailiff thought would happen if they told trial court they were deadlocked, and (3) that getting answer to their question from trial court would take a long time, so they should be certain if they wanted to send question to trial court; because answers involved important substantive and procedural issues, information was incorrect, and nature of error prevented parties from demonstrating degree of resulting prejudice, court presumed prejudice).

March 11, 2012

Rule 607. Who May Impeach a Witness.

Any party, including the party that called the witness, may attack the witness's credibility.

Comment to 2012 Amendment

The language of Rule 607 has been amended to conform to the federal restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Cases

607.010 The party calling a witness may impeach that witness.

State v Acree, 121 Ariz. 94, 96, 588 P.2d 836, 838 (1978) (when police interviewed victim 2 days after assault, she said defendant pointed gun at her and had tried to shoot her; at trial, victim testified that defendant never pointed gun at her, that she did not believe defendant would have shot or harmed her, and that she could have blown entire matter out of proportion; state was then allowed to impeach victim's trial testimony with statement she made during police interview).

607.020 Rule 607 eliminated the requirement that a party could impeach its own witness only if it could show that it was surprised, and that the testimony was material and damaging.

State v Acree, 121 Ariz. 94, 96, 588 P.2d 836, 838 (1978) (when police interviewed victim 2 days after assault, she said defendant pointed gun at her and had tried to shoot her; at trial, victim testified that defendant never pointed gun at her, that she did not believe defendant would have shot or harmed her, and that she could have blown entire matter out of proportion; state was then allowed to impeach victim's trial testimony with statement she made during police interview; defendant contended that impeachment was improper because state was not surprised, damaged, or prejudiced by the testimony; court held that Arizona Rules of Evidence eliminated surprise as prerequisite to impeaching one's own witness).

607.025 A prior inconsistent statement may be used for substantive as well as for impeachment purposes.

State v Huerstel, 206 Ariz. 93, 75 P.3d 698, ¶ 42 n.9 (2003) (defendant introduced statements from two inmates who claimed codefendant told them he shot all three victims; trial court then allowed state to introduce codefendant's statement to police in which he claimed defendant shot all three victims; court held admission of codefendant's statement to police violated Confrontation Clause, thus trial court erred in admitting it; court noted that use of prior inconsistent statement as substantive evidence is predicated on fact that witness who made statement testifies at trial and thus is subject to cross-examination, but when prior inconsistent statement is admitted under Rule 806, declarant has not testified at trial and thus is not subject to cross-examination, so only way statement could be used is for impeachment and not as substantive evidence).

State v Acree, 121 Ariz. 94, 97, 588 P.2d 836, 839 (1978) (when police interviewed victim 2 days after assault, she said defendant pointed gun at her and had tried to shoot her; at trial, victim testified that defendant never pointed gun at her, that she did not believe defendant would have shot or harmed her, and that she could have blown entire matter out of proportion; state was then allowed to impeach victim's trial testimony with statement she made during police interview; defendant contended that trial court erred in allowing use of prior inconsistent statements for substantive purposes; court held evidence was admissible for substantive purposes).

Rule 608. A Witness's Character for Truthfulness or Untruthfulness.

(a) Reputation or Opinion Evidence. A witness's credibility may be attacked or supported by testimony about the witness's reputation for having a character for truthfulness or untruthfulness, or by testimony in the form of an opinion about that character. But evidence of truthful character is admissible only after the witness's character for truthfulness has been attacked.

(b) Specific Instances of Conduct. Except for a criminal conviction under Rule 609, extrinsic evidence is not admissible to prove specific instances of a witness's conduct in order to attack or support the witness's character for truthfulness. But the court may, on cross-examination, allow them to be inquired into if they are probative of the character for truthfulness or untruthfulness of:

(1) the witness; or

(2) another witness whose character the witness being cross-examined has testified about.

By testifying on another matter, a witness does not waive any privilege against self-incrimination for testimony that relates only to the witness's character for truthfulness.

Comment to 2012 Amendment

This rule has been amended to conform to Federal Rule of Evidence 608, including changing two references to "credibility" to "character for truthfulness" in subsection (b). Additionally, the language of Rule 608 has been amended to conform to the federal restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent in the restyling to change any result in any ruling on evidence admissibility.

Comment to Original 1977 Rule

State *ex rel.* Pope v. Superior Court (Grier), 113 Ariz. 22, 545 P.2d 946 (1976), is consistent with and interpretative of Rule 608(b).

Paragraph (a) — Opinion and reputation evidence of character.

608.a.015 A party may attack the credibility of a witness using opinion testimony only about the witness's character for truthfulness or untruthfulness.

State v Nordstrom, 200 Ariz. 229, 25 P.3d 717, ¶76 (2001) (trial court allowed witness to give opinion that another witness was not trustworthy or honest when drinking heavily or using drugs; trial court properly precluded witness from giving opinion that the other witness had propensity for violence, being hot-tempered, and taking advantage of friends because those factors did not have bearing on character for truthfulness or untruthfulness,).

608.a.030 A party may not impeach a witness by vague or speculative matters.

State v Hoskins, 199 Ariz. 127, 14 P.3d 977, ¶¶ 70–71 (2001) (defendant sought to cross-examine state's witness about another state's witness's reputation as "braggart" and "boaster"; court held proposed testimony was vague, speculative, and immaterial, thus trial court did not err in precluding that testimony).

Paragraph (b) — Specific instances of conduct.

608.b.010 The trial court may allow impeachment or rehabilitation with specific instances of conduct if it concludes that the conduct is probative of truthfulness.

State v Rienhardt, 190 Ariz. 579, 951 P.2d 454 (1997) (on cross-examination, defendant elicited inconsistent statement from state's key witness; trial court allowed state to introduce prior consistent statements on re-direct; court held such statements probative of truthfulness).

State v. Gilfillan, 196 Ariz. 396, 998 P.2d 1069, ¶¶ 24–28 (Ct. App. 2000) (27-year-old defendant held knife to throat of 11-year-old victim, bound her wrists and ankles, performed oral sex on her, digitally penetrated her vagina, attempted penile penetration, and forced her to perform oral sex on him; DNA from sperm matched defendant's DNA; trial court did not abuse discretion in concluding defendant failed to establish that victim had made prior false accusations of sexual misconduct).

State v. Uriarte, 194 Ariz. 275, 981 P.2d 575, ¶¶ 20, 24 (Ct. App. 1998) (defendant was charged with child molestation, sexual conduct with minor, and public sexual indecency involving his 12-year-old sister-in-law; defendant's wife testified; trial court did not abuse discretion in admitting evidence that defendant's wife threatened victim and victim's mother with death if defendant was convicted).

608.b.020 The trial court should preclude impeachment with specific instances of conduct if it concludes that the conduct is not probative of truthfulness.

State v. Ellison, 213 Ariz. 116, 140 P.3d 899, ¶¶ 52–53 (2006) (in February 1999, victims were killed; victims' daughter testified she saw defendant working at her parents' house in July or August 1998; defendant sought to impeach her with defendant's Arizona Department of Corrections records that showed he was in prison from May 1998 through January 1999; court held that AzDOC records did not deal with daughter's conduct, thus they did not meet requirements of Rule 608).

State v. Murray, 184 Ariz. 9, 30–31, 906 P.2d 542, 563–64 (1995) (although witness admitted he lied under oath on prior occasion, because it appeared he was merely mistaken in his testimony and thus never intentionally misled anyone, trial court concluded prior occasion was not probative of truthfulness).

State v. Prince, 160 Ariz. 268, 273, 772 P.2d 1121, 1126 (1989) (because pointing gun at person is not probative of truthfulness, trial court properly precluded this line of questioning).

State v. Oliver, 158 Ariz. 22, 31, 760 P.2d 1071, 1080 (1988) (evidence of sexual misconduct is not probative of truthfulness).

State v. Woods, 141 Ariz. 446, 449–50, 687 P.2d 1201, 1204–05 (1984) (trial court did not abuse discretion in concluding unauthorized cashing of check was not probative of truthfulness).

State v. Doody, 187 Ariz. 363, 367, 375, 930 P.2d 440, 444, 452 (Ct. App. 1996) (because defendant made no showing prior burglaries, and conspiracy to commit murder and armed robbery (the Cruz offenses) were probative of truthfulness, trial court properly precluded that evidence).

608.b.060 A party may not ask a witness on cross-examination about specific instances of conduct that are not true or that the party would not be able to prove by admissible evidence.

State v. Ellison, 213 Ariz. 116, 140 P.3d 899, ¶¶ 52–53 (2006) (in February 1999, victims were killed; victims' daughter testified she saw defendant working at her parents' house in July or August 1998; defendant sought to impeach her with defendant's Arizona Department of Corrections records that showed he was in prison from May 1998 through January 1999; trial court invited defendant's attorney to offer AzDOC records in evidence, but defendant's attorney did not do so; because defendant's attorney failed to offer AzDOC records in evidence, trial court did not abuse discretion in ruling that defendant's attorney could not use those records during cross-examination absent their admission in evidence).

State v. Madsen, 125 Ariz. 346, 349–50, 609 P.2d 1046, 1049–50 (1980) (prosecutor asked defendant's father if he had ever had to call police because of difficulties between defendant and his wife, and defendant's father denied ever having done so; state's witness who could have contradicted father's denial had already left; because state's witness could have testified, prosecutor asked question in good faith; because prosecutor did not pursue matter further, there was no prejudice).

State v Holsinger, 124 Ariz. 18, 20–22, 601 P.2d 1054, 1056–58 (1979) (prosecutor asked witness, "Did I tell you that Jeannie Holsinger had a long criminal record and that's why I wanted to get her?"; because question implied that defendant had criminal when in fact she did not, and thus question implied existence of factual predicate that prosecutor could not support by evidence, question was improper, and because mere asking of question prejudiced defendant, court reversed conviction).

608.b.065 If the testimony of two witnesses is contradictory and that could be the result of poor ability or opportunity to perceive, faulty memory, mistake, or poor ability to relate what happened, asking one witness in those situations whether the other witness is lying is improper, but when the only possible explanation for the inconsistent testimony is deceit or lying, or when one witness has opened the door by testifying about the veracity of the other witness, asking one witness whether the other witness is lying may be proper.

State v Canion, 199 Ariz. 227, 16 P.3d 788, ¶¶ 40–44 (Ct. App. 2000) (defendant claimed prosecutor acted improperly by asking him on cross-examination about differences between his testimony and officer's testimony and asking him to comment on officer's credibility; court held that, even if it assumed prosecutor's questions constituted misconduct, it was not so pervasive or pronounced that trial lacked fundamental fairness).

State v Morales, 198 Ariz. 372, 10 P.3d 630, ¶¶ 8–15 (Ct. App. 2000) (defendant's testimony directly contradicted officers' testimony, prosecutor asked defendant whether officers were lying, and defendant did not object; court held that, even assuming prosecutor's question was improper, error was not fundamental).

NOTE: Impeachment and rehabilitation evidence showing a witness's bias, prejudice, or interest is admissible under Rule 401; cases are annotated under Rule 401 Impeachment Cases.

March 11, 2012

Rule 609. Impeachment by Evidence of a Criminal Conviction.

(a) **In General.** The following rules apply to attacking a witness's character for truthfulness by evidence of a criminal conviction:

(1) for a crime that, in the convicting jurisdiction, was punishable by death or by imprisonment for more than 1 year, the evidence:

(A) must be admitted, subject to Rule 403, in a civil case or in a criminal case in which the witness is not a defendant; and

(B) must be admitted in a criminal case in which the witness is a defendant, if the probative value of the evidence outweighs its prejudicial effect to that defendant; and

(2) for any crime regardless of the punishment, the evidence must be admitted if the court can readily determine that establishing the elements of the crime required proving— or the witness's admitting— a dishonest act or false statement.

(b) **Limit on Using the Evidence After 10 Years.** This subsection (b) applies if more than 10 years have passed since the witness's conviction or release from confinement for it, whichever is later. Evidence of the conviction is admissible only if:

(1) its probative value, supported by specific facts and circumstances, substantially outweighs its prejudicial effect; and

(2) the proponent gives an adverse party reasonable written notice of the intent to use it so that the party has a fair opportunity to contest its use.

(c) **Effect of a Pardon, Annulment, or Certificate of Rehabilitation.** Evidence of a conviction is not admissible if:

(1) the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure based on a finding that the person has been rehabilitated, and the person has not been convicted of a later crime punishable by death or by imprisonment for more than 1 year; or

(2) the conviction has been the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence.

(d) **Juvenile Adjudications.** Evidence of a juvenile adjudication is admissible under this rule only if:

(1) it is offered in a criminal case;

(2) the adjudication was of a witness other than the defendant;

(3) an adult's conviction for that offense would be admissible to attack the adult's credibility; and

(4) admitting the evidence is necessary to fairly determine guilt or innocence.

(e) **Pendency of an Appeal.** A conviction that satisfies this rule is admissible even if an appeal is pending. Evidence of the pendency is also admissible.

Comment to 2012 Amendment

This rule has been amended to conform to Federal Rule of Evidence 609, including changing "credibility" to "character for truthfulness" in subsection (a) and adding language to the last clause of subdivision (a)(2) to clarify that this evidence may be admitted only "if the court can readily determine that establishing the elements of the crime required proving— or the witness's admitting— a dishonest act or false statement."

Additionally, the language of Rule 609 has been amended to conform to the federal restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent in the restyling to change any result in any ruling on evidence admissibility.

Comment to Original 1977 Rule

Subsection (d) is contrary to the provisions of A.R.S. § 8–207, but in criminal cases due process may require that the fact of a juvenile adjudication be admitted to show the existence of possible bias and prejudice. Davis v. Alaska, 415 U.S. 308 (1974). The fact of a juvenile delinquency adjudication may not be used to impeach the general credibility of a witness. The admission of such evidence may be necessary to meet due process standards.

Cases

Paragraph (a) — General rule.

609.a.010 Because this Rule provides that a trial court may admit evidence of a prior conviction "if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect," the party seeking to impeach has the burden of establishing the probative value of the prior conviction and that its probative value outweighs the prejudicial effect; this is in contrast to Rule 403, which provides a trial court may exclude relevant evidence "if its probative value is substantially outweighed by the danger of unfair prejudice,"and thus places on the party seeking to exclude relevant evidence the burden of proving that the prejudicial effect outweighs the probative value.

State v Beasley, 205 Ariz. 334, 70 P.3d 463, ¶ 21 (Ct. App. 2003) (court held, "under Rule 609, the defendant is not required to demonstrate that the prejudice of the impeachment is 'unfair' or that the prejudice of the impeachment 'substantially' outweighs its probative value").

609.a.020 A felony has probative value on the issue of the credibility of the witness because a major crime entails such an injury to and disregard of the rights of other persons that it can reasonably be expected that the witness will be untruthful if it is to his or her advantage.

State v Green, 200 Ariz. 496, 29 P.3d 271, ¶ 8 (2001) (trial court admitted 12-year-old felony under Rule 609(b); court held trial court erred in considering only one factor (centrality of credibility issue) and not considering other factors).

Ritchie v Krasner, 221 Ariz. 288, 211 P.3d 1272, ¶¶ 46 (Ct App. 2009) (defendant contended trial court abused discretion in precluding evidence of plaintiff's prior felony conviction; court noted that felony conviction was admissible only to attack plaintiff's credibility as witness, and only time plaintiff testified was at deposition; because defendant failed to raise timely plaintiff's conviction during deposition, trial court did not abuse discretion in excluding evidence of plaintiff's felony conviction at trial).

State v Hernandez, 191 Ariz. 553, 959 P.2d 810, ¶ 22 (Ct. App. 1998) (court held conviction for crime defendant committed after the crime for which he was on trial was admissible for impeachment).

609.a.025 A witness may be impeached with a prior conviction punishable by death or imprisonment in excess of 1 year.

State ex rel. Romley v Martin (Landeros), 205 Ariz. 279, 69 P.3d 1000, ¶¶ 1–24 (2003) (court stated that, while *State v Christian* and *State v Thues* make plain Proposition 200 offenses are felonies, Rule 609 does not involve technical definition of felony, but instead uses punishment in excess of 1 year; because person could not be imprisoned in excess of 1 year for first or second Proposition 200 offense, person may not be impeached with evidence of conviction of first or second Prop 200 offense).

State v Hatch, 225 Ariz. 409, 239 P.3d 432, ¶¶ 6–14 (Ct. App. 2010) (although Proposition 200 provided that person with first or second conviction of drug offense had to be placed on probation and thus could not be imprisoned in excess of 1 year, Proposition 302 provided that trial court could sentence person to prison if they failed to comply with certain conditions of probation, thus trial court properly allowed defendant to be impeached with conviction for possession of drug paraphernalia).

609.a.035 In determining whether to admit a prior conviction for impeachment purposes, the trial court should consider such factors as the nature of the prior offense, the similarity of the prior offense and the present charged offense, the age of the witness, the remoteness of the conviction, the length of the prior imprisonment, the witness's conduct since the prior offense, the importance of the witness's testimony, and the centrality of credibility issue.

State v Green, 200 Ariz. 496, 29 P.3d 271, ¶ 12 (2001) (trial court admitted 12-year-old felony under Rule 609(b); court held trial court erred in considering only one factor (centrality of credibility issue) and not considering other factors).

609.a.040 A misdemeanor is admissible only if it involves some element of deceit, untruthfulness, or falsification.

Frederickson v Superior Ct., 187 Ariz. 273, 928 P.2d 697 (Ct. App. 1996) (holds that leaving scene of accident is crime of moral turpitude in determining whether defendant was entitled to jury trial, but cites cases that made this holding under Rule 609).

609.a.080 Impeaching a witness with a prior felony conviction is limited to showing the fact of the conviction, the name of the crime, the place, and the date.

State v Dunlap, 187 Ariz. 441, 930 P.2d 518 (Ct. App. 1996) (once witness stated he had been convicted of vehicular manslaughter, prosecutor erred in asking witness whether it was true that he was drunk, ran a red light, and killed somebody).

State v Doody, 187 Ariz. 363, 930 P.2d 440 (Ct. App. 1996) (because facts of witness's prior crime were not relevant to any issue in case, trial court properly precluded defendant from inquiring into details of prior crime).

609.a.170 Evidence of multiple felony convictions is not necessarily unfairly prejudicial.

State v Hernandez, 191 Ariz. 553, 959 P.2d 810, ¶¶ 27–32 (Ct. App. 1998) (court rejected defendant's contention that multiple convictions for offenses committed on the same occasion should be treated as one conviction for impeachment).

609.a.180 The trial court has discretion to impose limits in order to minimize prejudice, such as "sanitizing" the conviction by not disclosing the nature of the prior conviction.

State v Montaño, 204 Ariz. 413, 65 P.3d 61, ¶¶ 64–66 (2003) (witness who was prison inmate had prior convictions for child pornography and attempted child molestation for crimes committed approximately 1 to 2 years prior to defendant's trial; trial court admitted fact of prior convictions, but precluded details of prior convictions; defendant contended nature of prior convictions was relevant because it gave witness motive to testify, that is, if other inmates found out witness was child molester, they would have killed him, thus witness made up testimony to get out of general population; court held trial court did not abuse discretion in precluding details of prior conviction, noting defendant was still able to bring out fact of prior convictions, but did not address defendant's contention that nature of prior conviction had own independent relevance because it gave witness motive to testify).

State v Beasley, 205 Ariz. 334, 70 P.3d 463, ¶¶ 16–26 (Ct. App. 2003) (defendant was charged with aggravated assault and attempted murder as result of trying to escape from police; trial court ruled that state could impeach defendant with prior convictions for armed robbery, two counts of aggravated assault on police officer, resisting arrest, and two other counts of aggravated assault and allowed state to disclose nature of prior convictions; court held trial court erred in not balancing prejudicial effect of nature of prior convictions against probative value of nature of prior convictions, but that error was harmless).

State v Cox, 201 Ariz. 464, 37 P.3d 437, ¶¶ 2–6 (Ct. App.2002) (trial court allowed victim to be impeached with evidence of prior conviction, but did not allow evidence of specific nature of prior offense; defendant contended evidence he should have been allowed to show prior conviction was for armed robbery to show victim was still gang member; because victim admitted he was gang member, trial court did not abuse discretion in precluding nature of prior conviction).

609.a.185 In determining whether to disclose the nature of the prior conviction, the trial court must determine the extent to which the nature of the prior conviction has probative value, and then balance that probative value against the prejudice that would result if the nature of the prior conviction were disclosed to the jurors.

State v Montaño, 204 Ariz. 413, 65 P.3d 61, ¶¶ 64–66 (2003) (prison inmate witness had prior convictions for child pornography and attempted child molestation; trial court admitted fact of prior convictions, but precluded details; defendant contended nature of prior convictions was relevant because it gave witness motive to testify: if other inmates found out witness was child molester, they would have killed him, thus he made up testimony to get out of general population; court held trial court did not abuse discretion in precluding details of prior conviction, noting that defendant was still able to bring out fact of prior convictions, but did not address defendant's contention that nature of prior conviction had own independent relevance because it gave witness motive to testify).

State v Beasley, 205 Ariz. 334, 70 P.3d 463, ¶¶ 16–26 (Ct. App. 2003) (defendant was charged with aggravated assault and attempted murder as result of trying to escape from police; trial court ruled state could impeach defendant with prior convictions for armed robbery, two counts of aggravated assault on police officer, resisting arrest, and two other counts of aggravated assault and allowed state to disclose nature of prior convictions; court held trial court erred in not balancing prejudicial effect of nature of prior convictions against probative value of nature of prior convictions, but that error was harmless).

609.a.187 A trial court should sparingly admit evidence of prior convictions when the prior convictions are similar to the charged offense, thus in an appropriate case, the trial court may reduce the risk of prejudice by admitting the fact of the prior conviction without disclosing the nature of the crime.

State v Bolton, 182 Ariz. 290, 302–03, 896 P.2d 830, 842–43 (1995) (defendant charged with kidnapping, burglary, and first-degree felony murder; trial court ruled state could impeach defendant with prior convictions for kidnapping, sexual abuse, possession of burglary tools, and battery; defendant testified and admitted prior convictions, and also admitted he had committed several other crimes for which he had never been charged, including theft and murder; court stated it saw "no reason to make a definitive ruling on the merits of his claim because, wholly apart from the prior convictions, defendant testified that he was a thief and had committed a murder other than the murder for which he was charged," thus any error harmless, but did include advise about sparingly admit evidence of similar prior convictions).

State v Beasley, 205 Ariz. 334, 70 P.3d 463, ¶¶ 22–25 (Ct. App. 2003) (defendant was charged with aggravated assault and attempted murder as result of trying to escape from police; trial court ruled that state could impeach defendant with prior convictions for armed robbery, two counts of aggravated assault on police officer, resisting arrest, and two other counts of aggravated assault and allowed state to disclose nature of prior convictions; court held trial court erred in not balancing prejudicial effect of nature of prior convictions against probative value of nature of prior convictions, but that error was harmless).

609.a.220 Once trial court rules that evidence of a prior conviction is admissible, the defendant does not waive this issue by testifying and admitting the prior conviction; however, if the defendant does not testify, the defendant may not question on appeal the trial court's ruling.

State v Smyers, 207 Ariz. 314, 86 P.3d 370, ¶¶ 5–15 (2004) (trial court ruled that defendant could be impeached with his prior conviction for attempted child abuse, and would allow in evidence (1) name of offense, (2) court, (3) date of offense, and (4) whether defendant was assisted by counsel; trial court would not allow in evidence (1) class of offense or (2) facts of offense; because defendant chose not to testify, defendant waived on appeal correctness of trial court's ruling).

609.a.230 Once the trial court rules the probative value outweighs the prejudicial effect, if the defendant does not testify, the trial court does not have to reweigh the probative value against the prejudicial effect.

State v Hernandez, 191 Ariz. 553, 959 P.2d 810, ¶¶ 20–26 (Ct. App. 1998) (court rejected defendant's contention that, once it became apparent defendant would not testify, if trial court had reweighed probative value against prejudicial effect, it would have precluded impeachment).

Paragraph (b) — Time limit.

609.b.005 In determining whether to admit a prior conviction for impeachment purposes, the trial court should consider such factors as the nature of the prior offense, the similarity of the prior offense and the present charged offense, the age of the witness, the remoteness of the conviction, the length of the prior imprisonment, the witness's conduct since the prior offense, the importance of the witness's testimony, and the centrality of credibility issue.

State v Green, 200 Ariz. 496, 29 P.3d 271, ¶¶ 12–15 (2001) (trial court admitted 12-year-old felony under Rule 609(b); court held trial court erred in considering only one factor (centrality of credibility issue) and not considering other factors).

609.b.010 Because convictions that are remote in time have less probative value on the issue of credibility, when it is more than 10 years since date of conviction or release from confinement, evidence of a prior conviction is admissible only if the probative value *substantially* outweighs the prejudicial effect.

State v Green, 200 Ariz. 496, 29 P.3d 271, ¶ 9 (2001) (trial court admitted 12-year-old felony under Rule 609(b); court held trial court erred in considering only one factor (centrality of credibility issue) and not considering other factors).

609.b.020 Before the trial court may admit for impeachment evidence of a conviction more than 10 years old, it must make a finding on the record that the probative value *substantially* outweighs the prejudicial effect, and must state the specific facts and circumstances that support this determination.

State v Green, 200 Ariz. 496, 29 P.3d 271, ¶ 9 (2001) (trial court admitted 12-year-old felony under Rule 609(b); court held trial court erred in considering only one factor (centrality of credibility issue) and not considering other factors).

609.b.030 Probation is not confinement, thus the time spent on probation does not extend the time for measuring the 10-year period.

State v. Dunlap, 187 Ariz. 441, 930 P.2d 518 (Ct. App. 1996) (trial court erred in measuring 10-year period from expiration of probation).

Paragraph (d) — Juvenile adjudications.

609.d.010 Evidence of a juvenile adjudication is generally not admissible, but the trial court in a criminal case may admit evidence of a juvenile adjudication of a witness other than the accused if admission is necessary for a fair determination of guilt or innocence of the accused.

In re Anthony H., 196 Ariz. 200, 994 P.2d 407, ¶¶ 8–11 (Ct. App. 1999) (trial court erred in admitting evidence of juvenile's juvenile adjudication, which state used to impeach juvenile's credibility).

609.d.040 This rule precluding admission of juvenile adjudications does not preclude admission of evidence of juvenile arrests, provided such evidence is admitted for a proper purpose.

State v. Corona, 188 Ariz. 85, 932 P.2d 1356 (Ct. App. 1997) (evidence of defendant's other arrests was admissible to rebut suggestion that officers improperly recorded defendant's admission of gang membership).

March 11, 2012

Rule 610. Religious Beliefs or Opinions.

Evidence of a witness's religious beliefs or opinions is not admissible to attack or support the witness's credibility.

Comment to 2012 Amendment

The language of Rule 610 has been amended to conform to the federal restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Cases

610.010 Evidence of a witness's religious beliefs may not be introduced to show an effect on the witness's credibility, and introduction of such evidence may be fundamental error.

State v Towery, 186 Ariz. 168, 920 P.2d 290 (1996) (defendant claimed that evidence of witness's satanic beliefs might have persuaded jurors to believe that witness, rather than defendant, killed victim; once trial court sustained objection, defendant failed to make offer of proof of witness's satanic beliefs, so on record presented, evidence appeared only to go witness's credibility, thus trial court properly precluded it).

State v Rankovich, 159 Ariz. 116, 765 P.2d 518 (1988) (evidence about person's ethnic background or religious beliefs is generally irrelevant and thus introduction of such evidence is generally improper; however, in light of overwhelming evidence of defendant's guilt, evidence that defendant was a Russian Jew was not fundamental error).

State v Thomas, 130 Ariz. 432, 636 P.2d 1214 (1981) (error to argue that victim's religious upbringing made it more likely she would tell truth).

State v Martin, 124 Ariz. 555, 606 P.2d 406 (1980) (trial court properly excluded evidence of defendant's religious beliefs, intended to bolster credibility for his theory of provocation and lack of premeditation in killing wife's lover).

610.020 Evidence of a witness's religious beliefs is admissible if offered for some relevant purpose other than to show credibility.

State v Towery, 186 Ariz. 168, 920 P.2d 290 (1996) (defendant claimed that evidence of witness's satanic beliefs might have persuaded jurors to believe that witness, rather than defendant, killed victim; once trial court sustained objection, defendant failed to make offer of proof of witness's satanic beliefs, so on record presented, evidence appeared only to go witness's credibility, thus trial court properly precluded it).

State v West, 168 Ariz. 292, 812 P.2d 1110 (Ct. App. 1991) (because defendant first introduced subject of his religious beliefs, and because prosecutor's cross-examination was limited to exploring defendant's belief in rightfulness of his conduct, trial court did not err in admitting testimony).

State v Stone, 151 Ariz. 455, 728 P.2d 674 (Ct. App. 1986) (witness's religious affiliation enabled her to identify garments attacker was wearing and explained why she did not tell attacker's wife what had happened when victim telephoned wife after attack).

State v Crum, 150 Ariz. 244, 722 P.2d 971 (Ct. App. 1986) (evidence defendant was known as "Father Tim" introduced to show identity; questioning victims about their service as altar boys introduced to show defendant's modus operandi of developing relationship with victims so he could later seduce them; evidence of relationship between defendant and church introduced to determine whether clerical privilege applied).

610.030 When one party "opens the door" by questioning a witness about religious matters, the other party may cross-examine that witness about those religious matters.

State v West, 168 Ariz. 292, 812 P.2d 1110 (Ct. App. 1991) (because defendant first introduced subject of his religious beliefs, and because prosecutor's cross-examination was limited to exploring defendant's belief in rightfulness of his conduct, trial court did not err in admitting testimony).

610.040 It is permissible to inquire into religious training to determine whether the witness knew of the wrongfulness of the acts.

State v West, 168 Ariz. 292, 812 P.2d 1110 (Ct. App. 1991) (because defendant claimed that teachings of Bible justified his conduct toward wife, prosecutor permitted to question him about knowledge of Bible and about what kind of conduct he thought it justified).

610.050 It is permissible to inquire into the witness's religious beliefs when the witness uses religion to justify the conduct.

State v West, 168 Ariz. 292, 812 P.2d 1110 (Ct. App. 1991) (because defendant claimed that teachings of Bible justified his conduct toward wife, prosecutor permitted to question him about knowledge of Bible and about what kind of conduct he thought it justified).

March 11, 2012

Rule 611. Mode and Order of Examining Witnesses and Presenting Evidence.

(a) Control by the Court; Purposes. The court should exercise reasonable control over the mode and order of examining witnesses and presenting evidence so as to:

(1) make those procedures effective for determining the truth;

(2) avoid wasting time; and

(3) protect witnesses from harassment or undue embarrassment.

(b) Scope of cross-examination. A witness may be cross-examined on any relevant matter.

(c) Leading Questions. Leading questions should not be used on direct examination except as necessary to develop the witness's testimony. Ordinarily, the court should allow leading questions:

(1) on cross-examination; and

(2) when a party calls a hostile witness, an adverse party, or a witness identified with an adverse party.

Comment to 2012 Amendment

This rule has been amended to conform to Federal Rule of Evidence 611, except for subsection (b), which has not been changed.

Additionally, the language of subsections (a) and (c) has been amended to conform to the federal restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent in the restyling to change any result in any ruling on evidence admissibility.

The 2012 amendment of Rule 611(a) is not intended to diminish a trial court's ability to impose reasonable time limits on trial proceedings, which is otherwise provided for by rules of procedure. Similarly, the 2012 amendment of Rule 611(c) is not intended to change existing practice under which a witness called on direct examination and interrogated by leading questions may be interrogated by leading questions on behalf of the adverse party as well.

Comment to Rule 611(a), 1995 Amendment

Following are suggested procedures for effective document control:

(1) The trial judge should become involved as soon as possible, and no later than the pretrial conference, in controlling the number of documents to be used at trial.

(2) For purposes of trial, only one number should be applied to a document whenever referred to.

(3) Copies of key trial exhibits should be provided to the jurors for temporary viewing or for keeping in juror notebooks.

(4) Exhibits with text should and, on order of the court, shall be highlighted to direct jurors' attention to important language. Where important to an understanding of the document, that language should be explained during the course of trial.

(5) At the close of evidence in a trial involving numerous exhibits, the trial judge shall ensure that a simple and clear retrieval system, e.g., an index, is provided to the jurors to assist them in finding exhibits during deliberations.

Comment to Original 1977 Rule

The last sentence of (c) changes the Arizona Supreme Court's holding in J. & B. Motors, Inc. v. Margolis, 75 Ariz. 392, 257 P.2d 588 (1953).

Cases

611.010 An argumentative question is a question that seeks no factual testimony, but requires instead that the witness acquiesce in inferences drawn by counsel from prior testimony.

State v Bolton, 182 Ariz. 290, 307–08, 896 P.2d 830, 847–48 (1995) (prosecutor asked defendant following questions: "And you expect the jury to believe this story?"; "[W]e don't have any information with which to charge you with murder, do we?"; "But you thought you would take a gun and a shovel out into the desert to kill somebody about whom you knew virtually nothing?"; court stated these may have been argumentative questions, but not so egregious that it permeated entire trial and probably affected outcome).

Gosewisch v American Honda Motor Co, 153 Ariz. 389, 399, 737 P.2d 365, 375 (1985) (plaintiff asked defendant's representative following questions: "Do you know how many people have been crippled or killed with a forward flip of these vehicles between 1970 and 1980?" and "Have you or Honda made any effort to find out how many people are being injured in the field with your invention?"; court stated thrust and implication of both questions was that defendant loosed upon public vehicle that was maiming and killing people, and to that extent, questions were argumentative, thus trial court did not err in sustaining objection to those questions).

611.020 A compound question is a question that contains two or more questions, and is not permissible because it is likely to invite an ambiguous answer.

State v Moody, 208 Ariz. 424, 94 P.3d 1119, ¶¶ 108–10 (2004) (defendant's attorney asked state's expert whether defendant had been "called a malingerer, which is a medical term for liar," to which expert responded, "Yes"; because this was compound question, it was unclear whether expert's response was, "Yes, defendant had been called a malingerer" or "Yes, malingerer is a medical term for liar"; defendant thus was not entitled to relief on claim that expert erred in equating "malingerer" with "liar").

State v Fodor, 179 Ariz. 442, 453, 880 P.2d 662, 673 (Ct. App. 1994) (at grand jury, defendant answered "no" to following question: "Has anybody ever suggested that you give that type of evidence [letters or documents that you or anyone else wrote to Jim Robison] to [attorney] so that the state could not get it?"; because defendant had given this type of evidence to attorney, state charged defendant with perjury; court held this was compound question, and although answer of "no" to first part was untrue, answer of "no" to second part was true, thus answer could not support conviction for perjury).

611.030 A leading question is one that suggests an answer, not one whose answer is obvious.

State v McKinney, 185 Ariz. 567, 575, 917 P.2d 1214, 1222 (1996) (after prosecutor received negative response to question whether witness had seen anything in trunk of car, asking, "Did you see at any time Mike Hedlund's rifle?" was not leading question).

State v McKinney, 185 Ariz.567, 575, 917 P.2d 1214, 1222 (1996) (asking witness, "[D]id [defendant] appear to be slightly more aggressive towards you or Chris?" was not leading).

State v Agnew, 132 Ariz. 567, 577, 647 P.2d 1165, 1175 (Ct. App. 1982) (court stated that "[T]he cat was black, wasn't it?" was leading question; court held that "Had you known that the trust was not insured would you have invested?" was not leading question).

611.035 Once a party has obtained certain information from one witness by use of open-ended questions, it is not error to ask other witness leading questions that elicit the same information.

State v Garcia, 141 Ariz. 97, 101, 685 P.2d 734, 738 (Ct. App. 1984) (after witness testified that he thought iron bar could hurt him, no error in asking another witness, "[D]id you believe [the bar] to be readily capable of causing either your death or the other officers' death?" and "Did you also believe . . . it could readily cause serious physical injury?").

611.040 Only the party asking a question has the right to object on the grounds the answer is not responsive to the question.

Moschetti v City of Tucson, 9 Ariz. App. 108, 113, 449 P.2d 945, 950 (1969) (testimony about source of funds to pay condemnation award was irrelevant, but this came in non-responsive answer to appellant's question, and only appellant had right to object on that basis; once this evidence was before jurors, appellee had right to introduce evidence to rebut it).

Paragraph (a) — Control by the court.

611.a.010 The use of the term "shall" in Rule 611(a) means that the trial court should not be merely a passive observer in the trial process, but instead has an affirmative duty to conduct the trial in such a way as to carry out the goals of the Rules of Evidence.

State v Bible, 175 Ariz. 549, 595, 858 P.2d 1152, 1198 (1993) (court noted trial judges are not merely "referees at prize fights," but are instead "functionaries of justice," and thus have authority to prevent repetitive, irrelevant, or argumentative questioning, even when other party does not object).

Pool v Superior Ct., 139 Ariz. 98, 103–04, 677 P.2d 261, 266–67 (1984) (court held trial court properly controlled "verbal guerrilla warfare" exhibited by attorneys).

611.a.020 A trial court has discretion to determine the manner of the proceedings, the manner of questioning, and the order of presentation of evidence.

Gamboa v Metzler, 223 Ariz. 399, 224 P.3d 215, ¶¶ 12–18 (Ct. App. 2010) (because of scheduling problems, parties agreed witness E would testify from 1:00 p.m. to 1:30 p.m., and then parties would have from 1:30 p.m. to 4:30 p.m. for witness A; Plaintiff however did not finish with witness E until 2:41 p.m.; Defendant examined witness A from 3:04 p.m. to 4:00 p.m., and Plaintiff began cross-examination at 4:12 p.m., with a recess from 4:29 p.m. to 4:38 p.m., and continued until 5:04 p.m. when trial court stopped proceedings; Plaintiff objected to trial court's "limiting [his] cross-examination," but did not request to resume cross-examination next day; next morning, trial court considered Plaintiff's objection, and found Plaintiff's attorney was responsible for scheduling problems; trial court did allow Plaintiff's attorney to attempt to contact witness A, but Plaintiff's attorney could not reach witness A; trial court concluded it would not keep jurors waiting any longer and allowed them to begin their deliberations; Plaintiff contended trial court violated his due process rights by not allowing sufficient time to cross-examine witness A; court concluded time limits imposed were not unreasonable, noted Plaintiff had approximately 43 minutes to cross-examine witness A, and further noted Plaintiff did not make offer of proof of what he would have been able to accomplish with more cross-examination, and thus held Plaintiff failed to show how he was harmed by trial court's time limitations).

State v Wassenaar, 215 Ariz. 565, 161 P.3d 608, ¶¶ 26–33 (Ct. App. 2007) (defendant contended that requiring him to testify by responding to questions asked by advisory counsel, rather than by narrative testimony or by asking himself questions, made it appear he was not in control of his own defense and that advisory counsel was actually representing him; court held trial court has broad discretion in management of manner in which trial will be conducted, and this procedure did not violate defendant's right of self-representation).

611.a.090 The trial court may prohibit questions and may enter such orders as are necessary to protect a witness from harassment or undue embarrassment.

State v Oliver, 158 Ariz. 22, 26–29, 760 P.2d 1071, 1075–78 (1988) (because child molestation victim may be even more adversely affected by unwarranted and unreasonable inquiry into largely collateral and irrelevant evidence than adult victim, trial court should try to protect victim from unwarranted and unreasonably intrusive cross-examination by requiring counsel to demonstrate independent knowledge of sexual matters, without producing details of victim's previous sexual experience).

611.a.095 Before a party may introduce evidence about the witness's mental condition in an attempt to impeach the witness's ability to perceive, remember, or relate, the party must make an offer of proof of evidence sufficient for the jurors to find that the witness's mental condition did have an effect on the witness's ability to perceive, remember, or relate.

* *State v Delaharty*, 226 Ariz. 502, 250 P.3d 1131, ¶¶ 13–21 (2011) (defendant contended trial court abused discretion in precluding evidence that witness suffered from Schizophrenia; although past records noted witness had been diagnosed with Schizophrenia, defendant's expert was unable to make diagnosis of Schizophrenia, thus trial court did not abuse discretion inprecluding this evidence).

State v Soto-Fong, 187 Ariz. 186, 197–98, 928 P.2d 610, 621–22 (1996) (because defendant's offer of proof failed to show how officer's terminal illness, use of prescription medicine, or mood in any way affected his testimony, trial court properly precluded this evidence).

State v Dumaine, 162 Ariz. 392, 397–98, 406, 783 P.2d 1184, 1189–90, 1198 (1989) (defendant presented insufficient evidence to show mental condition affected witness's ability to perceive, remember, and relate, thus prosecutor did not commit discovery violation by failing to disclose witness's mental condition).

State v Walton, 159 Ariz. 571, 581–82, 769 P.2d 1017, 1027–28 (1989) (state's witness testified about admission defendant had made; defendant sought to introduce evidence of witness's history of drug use, but made no offer of proof beyond bare speculation; state sought to exclude evidence of witness's drug use beyond time he heard defendant's admission; court stated trial court does not abuse discretion when proponent fails to make offer of proof that witness's perception or memory was affected by condition; court held that, because defendant's offer of proof failed to show drug use did impair witness's memory or perception, trial court did not abuse discretion in granting state's motion).

State v Zuck, 134 Ariz. 509, 513, 658 P.2d 162, 662 (1982) (evidence of insanity admissible if it affected witness's ability to perceive at time of event, relate at time of testimony, or remember in meantime; court stated, "We hold that before psychiatric history of a witness may be admitted to discredit him on cross-examination, the proponent of the evidence must make an offer of proof showing how it affects the witness's ability to observe and relate the matters to which he testifies.").

Mulhern v City of Scottsdale, 165 Ariz. 395, 397–98, 799 P.2d 15, 17–18 (Ct. App. 1990) (trial court granted defendant's motion to preclude evidence of officer's drug and alcohol use; because plaintiff did not offer any evidence officer was under influence of alcohol or drugs at time of shooting, trial court properly precluded evidence of officer's alcohol and drug use).

611.a.140 The trial court has discretion to allow a party to recall a witness.

State v Hill, 174 Ariz. 313, 324, 848 P.2d 1375, 1386 (1993) (after trial court dismissed witness, trial court did not abuse discretion in allowing state to recall witness to identify photograph and physical object before offering them in evidence).

State v Johnson, 183 Ariz. 623, 635, 905 P.2d 1002, 1014 (Ct. App. 1995) (during deliberations, jurors sent note to trial court asking how photographs in photographic lineup were mounted and whether defendant had limp at time of attack; over defendant's objection, trial court recalled detective as "court's witness," told jurors it was doing so because detective was only one who could answer jurors' question, asked detective only questions jurors had asked, and gave both attorneys opportunity to cross-examine detective, which defendant declined; court held this was not an abuse of trial court's discretion and that procedure did not prejudice defendant), *approv'd on other grounds*, 186 Ariz. 329, 922 P.2d 294 (1996).

611.a.150 The trial court has broad discretion to allow, or refuse to allow, a party to reopen its case.

State v Dickens, 187 Ariz. 1, 12–13, 926 P.2d 468, 479–80 (1996) (once state had rested, one of its witnesses who previously had refused to testify now agreed to testify; trial court did not abuse discretion in allowing state to reopen when testimony did not come as surprise to defendant or prejudice his ability to respond to that evidence).

State v Patterson, 203 Ariz. 513, 56 P.3d 1097, ¶¶ 5–12 (Ct. App. 2002) (defendant was charged with murder and drive-by shooting; course of car, location of victims, and location of witness all were relevant; jurors had received as exhibits two aerial photographs, computer generated graphics, and hand drawings of area; during deliberations, jurors asked for map of area; defendant objected, but trial court found no prejudice to defendant, and so admitted map; court held that, even though jurors did not say they were deadlocked, trial court did not abuse discretion in reopening case and admitting map for jurors, even though they had begun their deliberations).

State v Doody, 187 Ariz. 363, 378, 930 P.2d 440, 455 (Ct. App. 1996) (because proposed evidence may have been inadmissible as hearsay and had little probative value, trial court did not abuse its discretion in denying defendant's motion to reopen).

State v Portis, 187 Ariz. 336, 338, 929 P.2d 687, 689 (Ct. App. 1996) (in probation revocation proceeding, after state failed to present evidence showing that urine sample came from defendant, trial court did not abuse discretion in allowing state to reopen its case to establish this).

Paragraph (b) — Scope of cross-examination.

611.b.010 The trial court has considerable discretion in controlling the scope of cross-examination and in determining the relevance and admissibility of the evidence sought; in order to find error in the trial court's restriction of cross-examination, the appellate court must find that the trial court abused that discretion.

State v Cañez, 202 Ariz. 133, 42 P.3d 564, ¶¶ 62–64 (2002) (trial court allowed defendant to cross-examine witness about his current drug usage, extent and effect of witness's drug usage on night of murder, and witness's potential motive to commit offenses in order to obtain drugs; court held trial court's ruling precluding defendant from cross-examining witness about remote drug usage did not violate defendant's rights).

State v Dickens, 187 Ariz. 1, 13–14, 926 P.2d 468, 480–81 (1996) (defendant wanted to introduce evidence of co-defendant's character for impulsivity; trial court did not err in ruling that, if defendant introduced such evidence, state would be allowed to introduce evidence of homosexual relationship between defendant and co-defendant to show extent of control defendant had over co-defendant).

Brethauer v General Motors Corp., 221 Ariz. 192, 211 P.3d 1176, ¶¶ 13–14 (Ct. App. 2009) (at pre-trial deposition, emergency medical technician (Davis) who had treated plaintiff at accident scene stated he did not remember what plaintiff said, but checked box in report that said "not wearing seat belt," and that he would not have checked that box unless he had good information; trial court granted plaintiff's motion to preclude introduction of Davis's report or his testimony about plaintiff's seat belt usage; during cross-examination of plaintiff, defendant's attorney asked, "Now, after the accident, didn't you tell the paramedics at the scene that you were not wearing your seat belt?"; court held trial court properly denied plaintiff's motion for mistrial because trial court's order only precluded asking Davis about seat belt usage, it did not preclude asking plaintiff what he said to Davis).

611.b.020 Arizona allows a broad scope of cross-examination, the unreasonable limitation of which will normally result in a reversal.

Downs v Scheffler, 206 Ariz. 496, 80 P.3d 775, ¶¶ 20–29 (Ct. App. 2003) (child was born in 1991; mother was awarded sole custody with father receiving parenting time and grandmother receiving visitation; mother and child lived with grandmother, and in 1992, mother moved out and stopped seeing child until 1999; in 2000, both parents consented to appointment of grandmother as child's guardian; in 2001, grandmother petitioned court to grant her legal custody of child; Conciliation Services evaluator prepared report concluding it was in child's best interest for mother to retain sole legal custody, and testified she had formed her opinion on information not contained in report and that she would not reveal in grandmother's presence; although trial court admitted report in evidence, it would not allow grandmother to cross-examine evaluator because grandmother had not yet established that mother was not fit parent; court held issue was best interests of child, and that trial court erred in not allowing cross-examination of evaluator).

Arizona Indep. Redrist. Comm'n v Fields, 206 Ariz. 130, 75 P.3d 1088, ¶¶ 42–50 (Ct. App. 2003) (Arizona Independent Redistricting Commission hired National Demographics Corporation as lead consultant in redistricting process and then named NDC personnel as testifying experts; court held that, because (1) Arizona allows full cross-examination of expert witnesses, (2) rules of civil procedure allow full discovery of expert witnesses, and (3) it is beneficial to have a bright-line for discovery for expert witnesses who are both consulting experts and testifying experts, if party designates consulting expert as testifying expert, party will waive any work-product privilege for communications with that expert, thus IRC waived any legislative privilege for communication with those experts, any materials reviewed by them, and subject of expert's testimony).

611.b.025 The trial court has the discretion to preclude cross-examination about a document that has not been admitted in evidence.

State v Ellison, 213 Ariz. 116, 140 P.3d 899, ¶¶ 52–53 (2006) (in February 1999, victims were killed; victims' daughter testified she saw defendant working at her parents' house in July or August 1998; defendant sought to impeach her with defendant's Arizona Department of Corrections records that showed he was in prison from May 1998 through January 1999; court noted that AzDOC records had not been admitted in evidence, and held that trial court did not abuse discretion in ruling that defendant could not use records during witness's cross-examination absent their admission in evidence).

611.b.030 The constitutional right of the defendant to cross-examine witnesses does not give the defendant the right to cross-examine on irrelevant matters.

State v Carreon, 210 Ariz. 54, 107 P.3d 900, ¶¶ 35–37 (2005) (because defendant failed to show how two other murders were related to charges against defendant, precluding cross-examination about these murders did not violate defendant's Sixth Amendment rights).

State v Cañez, 202 Ariz. 133, 42 P.3d 564, ¶¶ 62–64 (2002) (trial court allowed defendant to cross-examine witness about his current drug usage, extent and effect of witness's drug usage on night of murder, and witness's potential motive to commit offenses in order to obtain drugs; court held trial court's ruling precluding defendant from cross-examining witness about remote drug usage did not violate defendant's rights).

State v Hoskins, 199 Ariz. 127, 14 P.3d 977, ¶¶ 59–64 (2001) (defendant asserted that he told his sister that an unknown person named "Paul" gave him gun used in murder and that sister told witness about this, and contended he should have been allowed to cross-examine witness about these conversations; court held that these were self-serving hearsay statements and too vague to establish third-party culpability, thus trial court properly precluded them).

State v Riggs, 189 Ariz. 327, 334, 942 P.2d 1159, 1166 (1997) (defendant asked victim if he refused to be interviewed, state objected, and trial court sustained objection; court held defendant failed to show reason victim's refusal to be interviewed had any relevance).

611.b.035 The confrontation clause guarantees only an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defendant might wish.

State v King, 180 Ariz. 268, 275–76, 883 P.2d 1024, 1031–32 (1994) (because witness testified, defendant received right of confrontation, and it did not matter that witness did not answer numerous questions because of lack of memory, which trial court concluded was feigned).

State v Salazar, 216 Ariz. 316, 166 P.3d 107, ¶¶ 9–10 (Ct. App. 2007) (when victim testified she did not remember or could not recall, prosecutor played her tape recorded statement; because victim was present and subject to cross-examination; admission of her out-of-court statement did not violate confrontation clause; court held confrontation clause does not guarantee witness will not give testimony marred by forgetfulness, confusion, or evasion).

State v Real, 214 Ariz. 232, 150 P.3d 805, ¶¶ 2–9 (Ct. App. 2007) (officer administered FSTs to defendant and then took his statement; at trial, officer had no independent memory of investigation, so trial court allowed officer to read from his report; court held that, because officer testified and was subject to cross-examination, admission officer's testimony did not violate Sixth Amendment).

611.b.040 If the trial court improperly restricts the defendant's cross-examination of a witness, it will violate the defendant's constitutional right of cross-examination.

State v Dunlap, 187 Ariz. 441, 455–56, 930 P.2d 518, 532–33 (Ct. App. 1996) (because portions of letter could have shown witness's bias and desire to alter testimony, trial court erred in limiting cross-examination, but error was harmless).

611.b.090 There is no right, nor should a trial court permit, the use of recross-examination to repeat or re-emphasize matters already covered on cross-examination.

State v Rienhardt, 190 Ariz. 579, 587, 951 P.2d 454, 462 (1997) (on cross-examination, defendant elicited inconsistent statement from state's key witness; on re-direct, trial court allowed state to introduce prior consistent statements; defendant claimed this precluded him from cross-examining witness about inconsistencies; court held that defendant had already brought out inconsistencies in cross-examination).

Paragraph (c) — Leading questions.

611.c.010 A leading question is one that suggests an answer, not one whose answer is obvious.

State v McKinney, 185 Ariz. 567, 575, 917 P.2d 1214, 1222 (1996) (after prosecutor received negative response to question whether witness had seen anything in trunk of car, asking, "Did you see at any time Mike Hedlund's rifle?" was not leading question).

State v McKinney, 185 Ariz.567, 575, 917 P.2d 1214, 1222 (1996) (asking witness, "[D]id [defendant] appear to be slightly more aggressive towards you or Chris?" was not leading).

State v Agnew, 132 Ariz. 567, 577, 647 P.2d 1165, 1175 (Ct. App. 1982) (court stated that "[T]he cat was black, wasn't it?" was leading question; court held that "Had you known that the trust was not insured would you have invested?" was not leading question).

611.c.020 The trial court has discretion to allow leading questions on direct examination when necessary to develop testimony.

State v Duffy, 124 Ariz. 267, 273–74, 603 P.2d 538, 544–45 (Ct. App. 1979) (trial court did not abuse discretion in allowing leading questions on direct examination in complex land fraud case, where defendant's actions took place over period of 7 years, trial lasted over 1 month, and resulted in 14 volumes of transcripts).

611.c.030 The use of leading questions is not reversible error when the evidence covered by the leading questions is already before the jurors.

State v Garcia, 141 Ariz. 97, 101, 685 P.2d 734, 738 (1984) (because one witness had already testified he felt in danger because of defendant's actions, asking second witness to confirm fact that he felt threatened was not error).

611.c.040 Failure to object to the use of leading questions precludes review on appeal.

State v Cardenas, 146 Ariz. 193, 196–97, 704 P.2d 834, 837–38 (Ct. App. 1985) (counsel moved in limine to preclude leading questions; trial court reserved ruling and counsel never objected at trial).

611.c.050 When a party asks non-leading, open-ended questions on cross-examination, the party runs the risk of obtaining unfavorable answers.

State v Stuard, 176 Ariz. 589, 600–01, 863 P.2d 881, 892–93 (1993) (because defendant's attorney was aware officer knew defendant had been in prison, but nonetheless asked broad question that called for response that defendant had been in prison, rather than asking narrow, leading question, any error was invited by attorney's question).

State v Lundstrom, 161 Ariz. 141, 150, 776 P.2d 1067, 1076 (1989) (by asking non-leading, open-ended questions on cross-examination, state invited defendant's expert witness to repeat fact that opinion of non-testifying expert was same as witness's opinion).

611.c.060 When the other party's expert witness gives an opinion, discloses that the opinion is based on the opinion of a non-testifying expert, and discloses what that other opinion was, the party may call the non-testifying expert as a witness and examine that expert by cross-examination, which would include using leading questions.

State v Lundstrom, 161 Ariz. 141, 147, 776 P.2d 1067, 1073 (1989) (defendant's expert witness had relied at least to some extent on opinion of non-testifying expert; state made no request to call non-testifying expert as witness).

March 11, 2012

Rule 612. Writing Used to Refresh a Witness's Memory.

(a) **Scope.** This rule gives an adverse party certain options when a witness uses a writing to refresh memory:

(1) while testifying; or

(2) before testifying, if the court decides that justice requires the party to have those options.

(b) **Adverse Party's Options; Deleting Unrelated Matter.** An adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness about it, and to introduce in evidence any portion that relates to the witness's testimony. If the producing party claims that the writing includes unrelated matter, the court must examine the writing in camera, delete any unrelated portion, and order that the rest be delivered to the adverse party. Any portion deleted over objection must be preserved for the record.

(c) **Failure to Produce or Deliver the Writing.** If a writing is not produced or is not delivered as ordered, the court may issue any appropriate order. But if the prosecution does not comply in a criminal case, the court must strike the witness's testimony or— if justice so requires— declare a mistrial.

Comment to 2012 Amendment

The language of Rule 612 has been amended to conform to the federal restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Comment to Original 1977 Rule

Subparagraphs (1) and (2) of Federal Rule 612 have been reversed in order to clarify the intent of the rule which is to invoke the court's discretion concerning matters used before testifying and to have production as a matter of right of materials used while testifying. The word "action" in the second sentence of the rule replaces "testimony" in the Federal Rule to accord with the broader scope of cross-examination used in Arizona.

Cases

612.010 When a witness does not remember making a particular statement, a party may use a writing to refresh the witness's memory for the purpose of testifying.

State v Ortega, 220 Ariz.320, 206 P.3d 769, ¶¶ 30–33 (Ct. App. 2008) (victim's brother saw defendant molest victim; when called to testify, brother did not remember many details of events or his statements to police detective; trial court properly allowed state to read to brother excerpts from his interview with police, whereupon he remembered telling detective that defendant threatened him if he told anyone what had happened).

612.020 In order to use a writing to refresh a witness's recollection, all that is required is that the writing serves to revive the independent recollection of the witness.

State v Hall, 18 Ariz. App. 593, 596, 504 P.2d 534, 537 (1973) (defendant charged with receiving stolen property; even though witness could not read or write English, witness could recognize his signature and certain numbers, thus trial court did not err in allowing witness to refresh his recollection with one of defendant's written records).

612.030 In order to refresh a witness's recollection with a recording, the witness should listen to the recording outside of the presence of the jurors; if the witness's recollection is refreshed, the witness may then testify; if the witness's recollection is not refreshed, the party may then seek to have the recording admitted under Rule 803(5).

State v Salazar, 216 Ariz. 316, 166 P.3d 107, ¶¶ 8 & n.2 (Ct. App. 2007) (when victim testified she did not remember or could not recall, prosecutor played her tape recorded statement; to extent trial court allowed tape to be played in presence of jurors, trial court erred, but because recorded statement impeached her testimony, any error in playing of recording was harmless).

612.040 If a party allows a witness to refresh the witness's memory with a writing protected by a privilege, the party waives the privilege and the other party will have the right to have produced those portions of the writing that could have had an influence on the witness's testimony.

Samaritan Health Serv v Superior Ct., 142 Ariz. 435, 438, 690 P.2d 154, 157 (Ct. App. 1984) (defendant's attorney allowed witnesses to refresh their memories with interview summaries containing impressions and thought processes as well as factual matters; court held defendant's actions waived attorney-client and work product privileges for those portions of writings that could have had influence the witnesses's testimony).

612.050 A party may not use inadmissible evidence to refresh a witness's memory.

Tuzon v MacDougall, 137 Ariz. 482, 489, 671 P.2d 923, 930 (Ct. App. 1983) (petitioner asked witness whether polygraph examination had been arranged for him; when witness answered no, petitioner sought to use newspaper article that had not been marked as exhibit, stating he wanted to refresh witness's recollection; court held trial court did not err in ruling that newspaper article was hearsay and that it could not be used for impeachment).

March 11, 2012

Rule 613. Witness's Prior Statements of Witnesses.

(a) Showing or Disclosing the Statement During Examination. When examining a witness about the witness's prior statement, a party need not show it or disclose its contents to the witness. But the party must, on request, show it or disclose its contents to an adverse party's attorney.

(b) Extrinsic Evidence of a Prior Inconsistent Statement. Extrinsic evidence of a witness's prior inconsistent statement is admissible only if the witness is given an opportunity to explain or deny the statement and an adverse party is given an opportunity to examine the witness about it, or if justice so requires. This subdivision (b) does not apply to an opposing party's statement under Rule 801(d)(2).

Comment to 2012 Amendment

The language of Rule 613 has been amended to conform to the federal restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Cases

613.015 The trial court has the discretion to preclude cross-examination about a document that has not been admitted in evidence.

State v Ellison, 213 Ariz. 116, 140 P.3d 899, ¶¶ 52–53 (2006) (in February 1999, victims were killed; victims' daughter testified she saw defendant working at her parents' house in July or August 1998; defendant sought to impeach her with defendant's Arizona Department of Corrections records that showed he was in prison from May 1998 through January 1999; court noted that AzDOC records had not been admitted in evidence, and held that trial court did not abuse discretion in ruling that defendant could not use records during witness's cross-examination absent their admission in evidence).

Paragraph (b) — Extrinsic evidence of prior inconsistent statement of witness.

613.b.015 The trial court has the discretion to preclude cross-examination about a document that has not been admitted in evidence.

State v Ellison, 213 Ariz. 116, 140 P.3d 899, ¶¶ 52–53 (2006) (in February 1999, victims were killed; victims' daughter testified she saw defendant working at her parents' house in July or August 1998; defendant sought to impeach her with defendant's Arizona Department of Corrections records that showed he was in prison from May 1998 through January 1999; court noted that AzDOC records had not been admitted in evidence, and held that trial court did not abuse discretion in ruling that defendant could not use records during witness's cross-examination absent their admission in evidence).

613.b.050 When a witness denies or does not remember making the statement, the party may then introduce extrinsic evidence of the prior statement.

State v Ortega, 220 Ariz.320, 206 P.3d 769, ¶¶ 30–33 (Ct. App. 2008) (victim's brother saw defendant molest victim; when called to testify, brother either did not remember his prior statements to police detective or denied making them; trial court properly allowed state to read to brother excerpts from his interview with police, whereupon he remembered telling detective that defendant threatened him if he told anyone what had happened).

613.b.060 When a witness admits making the prior inconsistent statement, the trial court has discretion in deciding whether to admit extrinsic evidence of the statement; such extrinsic evidence usually will be unnecessary, but should be admitted when the statement itself has substantive use or would assist the jurors in determining which of various inconsistent statements is true.

State v Rutledge (Sherman), 205 Ariz. 7, 66 P.3d 50, ¶¶ 14–25 (2003) (witness who testified at trial admitted making prior statement to police that was videotaped, and admitted all inconsistencies between trial testimony and videotaped interview, and offered explanations for those inconsistencies; defendant contended prior statements therefore were not inconsistent with trial testimony, and thus contended trial court abused discretion in admitting extrinsic evidence of prior statement (the videotape); court noted there were, in fact, several inconsistencies between witness's trial testimony and the videotaped interview, and that witness testified that he had lied to police because he was scared, had been threatened, and was intoxicated, and thus held videotape was admissible to allow jurors to assess witness's demeanor and credibility, and helped them decide which of witness's accounts to believe).

March 11, 2012

Rule 614. Court's Calling or Examining a Witnesses.

(a) Calling. The court may call a witness on its own or at a party's request. Each party is entitled to cross-examine the witness.

(b) Examining. The court may examine a witness regardless of who calls the witness.

(c) Objections. A party may object to the court's calling or examining a witness either at that time or at the next opportunity when the jury is not present.

Comment to 2012 Amendment

The language of Rule 614 has been amended to conform to the federal restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Cases

Paragraph (a) — Calling by court.

614.a.010 The trial court has broad discretion whether and when to call its own witness.

State v Johnson, 183 Ariz. 623, 635, 905 P.2d 1002, 1014 (Ct. App. 1995) (after jurors began deliberations, they sent note to trial court asking how photographs in photographic lineup were mounted and whether defendant had a limp at time of attack; trial court consulted with attorneys, recalled detective as "court's witness," told jurors it was doing so because detective was only witness who could answer jurors' question, asked detective only questions jurors had asked, and gave both attorneys opportunity to cross-examine detective, which defendant declined; court held that this was not an abuse of trial court's discretion and that it did not prejudice defendant), *approved on other grounds*, 186 Ariz. 329, 922 P.2d 294 (1996).

State v Vaughn, 124 Ariz. 163, 165, 602 P.2d 831, 833 (Ct. App. 1979) (co-defendant gave statements implicating defendant, and entered into plea agreement; prior to trial, co-defendant recanted his earlier statements implicating defendant; trial court called co-defendant as court's witness, which allowed both parties to cross-examine him).

Paragraph (b) — Interrogation by court.

614.b.010 The trial court has discretion to ask questions of a witness as part of its duty to see that the truth is developed.

State v Schackart, 190 Ariz. 238, 256, 947 P.2d 315, 333 (1997) (trial court did not abuse discretion in questioning defendant's expert witness at aggravation/mitigation hearing).

614.b.020 The trial court has discretion to ask questions submitted in writing by a juror.

State v Johnson, 183 Ariz. 623, 635, 905 P.2d 1002, 1014 (Ct. App. 1995) (after jurors began deliberations, they sent note to trial court asking how photographs in photographic lineup were mounted and whether defendant had a limp at time of attack; trial court consulted with attorneys, recalled detective as "court's witness," told jurors it was doing so because detective was only witness who could answer jurors' question, asked detective only questions jurors had asked, and gave both attorneys opportunity to cross-examine detective, which defendant declined; court held that this was not an abuse of trial court's discretion and that it did not prejudice defendant), *approved on other grounds*, 186 Ariz. 329, 922 P.2d 294 (1996).

State v LeMaster, 137 Ariz. 159, 164, 669 P.2d 592, 597 (Ct. App. 1983) (after attorneys examined each witness, trial court had recess during which jurors were allowed to submit questions; trial court then discussed questions with attorneys, resumed trial, and asked witness questions it found acceptable).

March 11, 2012

Rule 615. Excluding Witnesses.

At a party's request, the court must order witnesses excluded so that they cannot hear other witnesses' testimony. Or the court may do so on its own. But this rule does not authorize excluding:

(a) a party who is a natural person;

(b) an officer or employee of a party that is not a natural person, after being designated as the party's representative by its attorney;

(c) a person whose presence a party shows to be essential to presenting the party's claim or defense;

(d) a person authorized by statute to be present; or

(e) a victim of crime, as defined by applicable law, who wishes to be present during proceedings against the defendant.

Comment to 2012 Amendment

This rule has been amended to conform to Federal Rule of Evidence 615, including the addition of subsection (d).

Subsection (e) (formerly subsection (d)), which is a uniquely Arizona provision, has been retained but amended to reflect that "a victim of crime" means a crime victim "as defined by applicable law," which includes any applicable rule, statute, or constitutional provision. The rule previously provided that "a victim of crime" would be "as defined by Rule 39(a), Rules of Criminal Procedure."

Additionally, the language of Rule 615 has been amended to conform to the federal restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent in the restyling to change any result in any ruling on evidence admissibility.

Comment to 1991 Amendment

The 1991 amendment to Rule 615 was necessary in order to conform the rule to the victim's right to be present at criminal proceedings, recognized in Ariz. Const. Art. II, § 2.1(A)(3).

Cases

615.025 Under the Victims' Bill of Rights, if the victim is a minor, the victim's parent may exercise all of the victim's rights in addition to the victim, including the right to be present during all proceedings when the defendant has the right to be present; when a parent is to be a witness, this provision conflicts with Rule 615, so the Constitutional provisions prevails, and thus Rule 615 will not preclude a parent from being a witness.

State v. Fulminarte, 193 Ariz. 485, 975 P.2d 75, ¶¶ 58–59 (1999) (trial court did not err in refusing to exclude minor victim's mother, who was also a witness).

State v. Uriarte, 194 Ariz. 275, 981 P.2d 575, ¶¶ 17–19 (Ct. App. 1998) (defendant was charged with child molestation, sexual conduct with minor, and public sexual indecency involving his 12-year-old sister-in-law; during trial, victim's mother was in courtroom, and defendant objected when state called mother as rebuttal witness; court rejected defendant's contention that parent may only exercise rights "instead of" victim and not "in addition to" victim, and held instead that victim and parent may exercise rights together).

ARTICLE 7. OPINION AND EXPERT TESTIMONY

Introductory Note to Original 1977 Rules: Problems of Opinion Testimony.

The rules in this article are designed to avoid unnecessary restrictions concerning the admissibility of opinion evidence; however, as this note makes clear, an adverse attorney may, by timely objection, invoke the court's power to require that before admission of an opinion there be a showing of the traditional evidentiary prerequisites. Generally, it is not intended that evidence which would have been inadmissible under pre-existing law should now become admissible.

A major objective of these rules is to eliminate or sharply reduce the use of hypothetical questions. With these rules, hypothetical questions should seldom be needed and the court will be expected to exercise its discretion to curtail the use of hypothetical questions as inappropriate and premature jury summations. Ordinarily, a qualified expert witness can be asked whether he or she has an opinion on a particular subject and then what that opinion is. If an objection is made and the court determines that the witness should disclose the underlying facts or data before giving the opinion, the witness should identify the facts or data necessary to the opinion.

In jury trials, if there is an objection and if facts or data upon which opinions are to be based have not been admitted in evidence at the time the opinion is offered, the court may admit the opinion subject to later admission of the underlying facts or data; however, the court will be expected to exercise its discretion so as to prevent the admission of such opinions if there is any serious question concerning the admissibility, under Rule 703 or otherwise, of the underlying facts or data.

Rule 701. Opinion Testimony by Lay Witnesses.

If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is:

(a) rationally based on the witness's perception;

(b) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and

(c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

Comment to 2012 Amendment

The 2012 amendment of Rule 701 adopts Federal Rule of Evidence 701, as restyled.

Cases

701.020 The opinion must be rationally based on the witness's own perceptions.

State v Hughes, 193 Ariz. 72, 969 P.2d 1184, ¶ 47 (1998) (to be competent to offer opinion on person's sanity, lay witness must have had opportunity to observe past conduct and history of person; because witnesses only saw defendant after arrest and thus not over long period of time, these witnesses were not competent to give opinion on defendant's sanity).

* *State v King*, 226 Ariz. 253, 245 P.3d 938, ¶ 13 (Ct. App. 2011) (during videotaped police interview and during trial testimony, witness was asked how hard defendant had kicked victim and then was asked to use chair to demonstrate how hard kick was; court held witness was not testifying as expert and was instead testifying based on witness's own perceptions).

State v Miller (Estrella), 226 Ariz. 202, 245 P.3d 887, ¶¶ 7–11 (Ct. App. 2010) (state's witness had monitored and transcribed numerous wiretap recordings of conversations between defendant and persons connected with defendant, many of which were in Spanish; court held witness could authenticate law enforcement interview tapes and tapes of jailhouse telephone calls by identifying voices on tapes based on her experience with the monitoring and transcribing, and was not testifying as expert and was instead testifying based on witness's own perceptions

Boomer v Frank, 196 Ariz. 55, 993 P.2d 456, ¶¶ 24–25 (Ct. App. 1999) (because witnesses' opinions were based on their perceptions, trial court, in ruling on motion for summary judgment, could consider statements of witnesses who saw the vehicle before accident and opined that vehicle was exceeding posted speed limit and did not stop for stop sign).

State v Tiscareno, 190 Ariz. 542, 950 P.2d 1163 (Ct. App. 1997) (victim permitted to testify that her nose was broken from being hit by defendant; a person does not have to be medical expert to testify that their nose is broken).

701.033 A lay witness may not give an opinion about the accuracy, reliability, or truthfulness of a particular person, or quantify the percentage of such persons who are truthful.

State v Boggs, 218 Ariz. 325, 185 P.3d 111, ¶¶ 37–40 (2008) (during videotaped interrogation of defendant, detective accused defendant of lying; defendant claimed playing videotape to jurors violated his right to fair trial; court held that detective's accusations were part of interrogation technique and not for purpose of giving opinion testimony at trial, thus no error).

701.035 If the testimony of two witnesses is contradictory and that could be the result of poor ability or opportunity to perceive, faulty memory, mistake, or poor ability to relate what happened, asking one witness in those situations whether the other witness is lying is improper, but when the only possible explanation for the inconsistent testimony is deceit or lying, or when one witness has opened the door by testifying about the veracity of the other witness, asking one witness whether the other witness is lying may be proper.

State v Canion, 199 Ariz. 227, 16 P.3d 788, ¶¶ 40–44 (Ct. App. 2000) (defendant claimed prosecutor acted improperly by asking him on cross-examination about differences between his testimony and officer's testimony and asking him to comment on officer's credibility; court held that, even if it assumed prosecutor's questions constituted misconduct, it was not so pervasive or pronounced that trial lacked fundamental fairness).

State v Morales, 198 Ariz. 372, 10 P.3d 630, ¶¶ 8–15 (Ct. App. 2000) (defendant's testimony directly contradicted officers' testimony, prosecutor asked defendant whether officers were lying, and defendant did not object; court held that, even assuming prosecutor's question was improper, error was not fundamental).

701.040 A person may give an opinion of the value of property if the person is the owner or the equivalent, and any explanation of basis for the opinion goes to weight of the evidence.

Salt River Project v Miller Park LLC, 216 Ariz. 161, 164 P.3d 667, ¶¶ 36–38 (Ct. App. 2007) (court rejected plaintiff's claim that, in condemnation action, jurors should have based verdict only on experts' valuation of property and should have disregarded owner's testimony about value of property); *vac'd in part*, 218 Ariz. 246, 183 P.3d 497 (2008).

701.050 The opinion must assist the trier-of-fact in understanding the evidence or in determining a fact in issue, and not merely tell the trier-of-fact how to decide the case.

Opinion and Expert Testimony

State v Harrod, 200 Ariz. 309, 26 P.3d 492, ¶¶ 27–28 (2001) (in case-in-chief, defendant suggested ex-wife and her family were lying about his involvement in murder because of bitterness over divorce; court held this opened door and allowed state to call ex-wife in rebuttal to ask her why she had divorced defendant; ex-wife testified that she divorced him because he told her he had killed victim; court held this was not opinion testimony about defendant's guilt).

Fuenning v Superior Ct., 139 Ariz. 590, 680 P.2d 121 (1983) (in DUI case, officer should not be asked to give opinion whether defendant was intoxicated when driving, but may give opinion whether defendant showed symptoms of intoxication).

State v Rhodes, 219 Ariz. 476, 200 P.3d 973, ¶ 13 (Ct. App. 2008) (court held that, when defendant is charged with sexual conduct with child, evidence of defendant's sexual normalcy, or appropriateness in interacting with children, is character trait and one that pertains to charges of sexual conduct with child, and such testimony would not invade province of jurors).

State v Campoy (Cordova), 214 Ariz. 132, 149 P.3d 756, ¶¶ 6–12 (Ct. App. 2006) (defendant was charged with DUI; court held trial court abused discretion in ruling that state's witnesses, when testifying about FSTs, could not use such terms as "impairment," "sobriety," "tests," "pass/fail," "marginal," or "field sobriety test").

State v Herrera, 203 Ariz. 131, 51 P.3d 353, ¶¶ 7–8 (Ct. App. 2002) (while testifying about FSTs, officer stated, "I felt he was impaired to the slightest degree"; court held officer's testimony was impermissible, but trial court did not err in denying motion for mistrial because trial court immediately struck officer's testimony and gave detailed curative instruction, and in final instruction repeated that curative instruction and told jurors to disregard any stricken testimony).

State v Lummus, 190 Ariz. 569, 950 P.2d 1190 (Ct. App. 1997) (court was concerned that officer testified that, on intoxication scale of 1 to 10, defendant was 10+, but held error was harmless beyond reasonable doubt).

March 11, 2012

Rule 702. Testimony by Expert Witnesses.

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

(a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;

(b) the testimony is based on sufficient facts or data;

(c) the testimony is the product of reliable principles and methods; and

(d) the expert has reliably applied the principles and methods to the facts of the case.

Comment to 2012 Amendment

The 2012 amendment of Rule 702 adopts Federal Rule of Evidence 702, as restyled. The amendment recognizes that trial courts should serve as gatekeepers in assuring that proposed expert testimony is reliable and thus helpful to the jury's determination of facts at issue. The amendment is not intended to supplant traditional jury determinations of credibility and the weight to be afforded otherwise admissible testimony, nor is the amendment intended to permit a challenge to the testimony of every expert, preclude the testimony of experience-based experts, or prohibit testimony based on competing methodologies within a field of expertise. The trial court's gatekeeping function is not intended to replace the adversary system. Cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence.

A trial court's ruling finding an expert's testimony reliable does not necessarily mean that contradictory expert testimony is not reliable. The amendment is broad enough to permit testimony that is the product of competing principles or methods in the same field of expertise. Where there is contradictory, but reliable, expert testimony, it is the province of the jury to determine the weight and credibility of the testimony.

This comment has been derived, in part, from the Committee Notes on Rules— 2000 Amendment to Federal Rule of Evidence 702.

Cases

702.010 Expert testimony based on the witness's own experience, observation, and study, and the witness's own research and that of others, is admissible if (1) the witness is qualified as an expert, and (2) the testimony will aid the jurors to understand the evidence or to determine a fact in issue; for such evidence, there is no requirement that the trial court undergo a reliability analysis.

Logerquist v. McVey (Danforth), 196 Ariz. 470, 1 P.3d 113, ¶¶ 30–32, 62 (2000) (because expert testimony on repressed memory caused by severe childhood trauma (including sexual abuse), dissociative amnesia, and retrieved memories was testimony about human behavior and not about some scientific principle, court held trial court erred in applying "generally accepted" standard to this testimony).

State v. Lee(II), 189 Ariz. 608, 944 P.2d 1222 (1997) (court concluded that detective's expert testimony on blood-spatter did not contradict opinion of medical examiner, thus rejected defendant's claim that detective's testimony was not reliable; because testimony helped jurors understand sequence of shots, and detective's non-inflammatory language was not unfairly prejudicial, testimony was admissible).

Lear v. Fields, 226 Ariz. 226, 245 P.3d 911, ¶¶ 14–22 (Ct. App. 2011) (A.R.S. § 12–2203 (Arizona *Daubert*) does not alter any substantive law, but instead is attempt to control admissibility of expert witness testimony in all cases and such controls procedural matters; because it conflicts with existing rules of evidence, it is unconstitutional).

Pipher v Loo, 221 Ariz. 399, 212 P.3d 91, ¶¶ 16–18 (Ct. App. 2009) (expert witness testified he was board certified with 35 years' experience, had administered thousands of injections of type at issue, and had number of patients with type of injury at issue; trial court precluded expert's testimony because it concluded testimony lacked foundation, was speculative, and lacked adequate basis under Rules 702 and 703; court held trial court erred in excluding this testimony and remanded for new trial).

Lohmeier v Hammer, 214 Ariz. 57, 148 P.3d 101, ¶¶ 36–48 (Ct. App. 2006) (expert witness was biomechanical engineer, and based on his own training and experimentation and on works of others, testified that rear-end collision did not cause plaintiff's injuries; court held trial court did not err allowing expert witness to testify).

State v Speers, 209 Ariz. 125, 98 P.3d 560, ¶¶ 14–16 (Ct. App. 2004) (defendant was charged with 18 counts of sexual exploitation of minors based on computer images; trial court admitted as propensity evidence testimony from two second-grade students of alleged misconduct with them; court held that, because propensity evidence testimony was relevant, testimony from expert witness about suggestive interview techniques was also relevant, thus trial court erred in precluding this evidence).

702.020 Expert testimony based on a novel scientific principle, formula, technique, or procedure developed or advanced by others is admissible if (1) the witness is qualified as an expert, (2) the testimony will aid the jurors to understand the evidence or to determine a fact in issue, and (3) the scientific principle, formula, technique, or procedure has gained general acceptance in the particular scientific field in which it belongs.

Logerquist v McVey (Danforth), 196 Ariz. 470, 1 P.3d 113, ¶¶ 30–32, 47, 53, 62 (2000) (because expert testimony on repressed memory caused by severe childhood trauma (including sexual abuse), dissociative amnesia, and retrieved memories was testimony about human behavior and not testimony about some scientific principle, court held trial court erred in applying "generally accepted" standard to this testimony).

* *Lear v Fields*, 226 Ariz. 226, 245 P.3d 911, ¶¶ 14–22 (Ct. App. 2011) (A.R.S. § 12–2203 (Arizona *Daubert*) does not alter any substantive law, but instead is attempt to control admissibility of expert witness testimony in all cases and such controls procedural matters; because it conflicts with existing rules of evidence, it is unconstitutional).

702.030 Expert opinion testimony is admissible if it will assist the trier-of-fact to understand the evidence or to determine a fact in issue.

In re Estate of Pouser, 193 Ariz. 574, 975 P.2d 704, ¶¶ 15 (1999) (outcome of will contest depended on application of "transitional rule," which related to wills drafted prior to changes in federal tax statutes; testimony of tax attorney about effect of federal statutes was thus admissible).

State v Fornof, 218 Ariz. 74, 179 P.3d 954, ¶¶ 20–21 (Ct. App. 2008) (officer testified that defendant had 43 grams of cocaine base that was worth $4,360, cash in predominately $20 bills, and no means of smoking that cocaine; trial court did not err in allowing expert witness to testify based on that evidence that defendant possessed the cocaine for sale rather than personal use).

State v Speers, 209 Ariz. 125, 98 P.3d 560, ¶¶ 20–25 (Ct. App. 2004) (defendant was charged with 18 counts of sexual exploitation of minors based on computer images; trial court admitted as propensity evidence testimony from two second-grade students of alleged misconduct with them; court held that testimony from expert witness about suggestive interview techniques was admissible because it was subject about which lay juror may be unfamiliar, thus trial court erred in precluding this evidence).

In re Ubaldo, 206 Ariz. 543, 81 P.3d 334, ¶¶ 8–13 (Ct. App. 2003) (because charge of criminal damage under A.R.S. § 13–1602(A)(5) requires proof that defendant drew or inscribed marks that were capable of conveying some meaning, communication, or information, state may have to present

expert to testify whether marks that defendant made were such that they conveyed some meaning, communication, or information).

Hutcherson v City of Phoenix, 188 Ariz. 183, 933 P.2d 1251 (Ct. App. 1996) (victim was player for Phoenix Cardinals; in wrongful death action, sports agent properly permitted to give opinion of victim's potential earnings).

State v Curry, 187 Ariz. 623, 931 P.2d 1133 (Ct. App. 1996) (expert witness testified about generally shared characteristics of child sexual abuse victims, explaining such phenomena as secrecy, helplessness, coping mechanisms, response to abuse, and "script memory," described familiar patterns of disclosure by victims to others, and described common techniques used by perpetrators to keep victims from disclosing abuse to others).

State v Carreon, 151 Ariz. 615, 617, 729 P.2d 969, 971 (Ct. App. 1986) (police officer permitted to give opinion that, based on way that defendant carried cocaine and money, drugs were possessed for sale).

702.040 When a matter is of such common knowledge that a lay person could reach as intelligent a conclusion as an expert, the trial court should preclude expert opinion.

State v Nordstrom, 200 Ariz. 229, 25 P.3d 717, ¶¶ 33–34 (2001) (sketch artist testified about eyewitness's description of suspect and satisfaction with resulting drawing; because sketch artist was no more qualified than jurors in determining whether eyewitness's description of suspect matched defendant's photograph, trial court properly precluded that testimony).

Crackel v Allstate Ins. Co., 208 Ariz. 252, 92 P.3d 882, ¶ 44 (Ct. App. 2004) (because jurors are capable of determining whether legal process has been used to pursue improper purpose, expert testimony is not required).

702.050 A witness may qualify as an expert on the basis of knowledge and experience.

State v Davolt, 207 Ariz. 191, 84 P.3d 456, ¶¶ 71–72 (2004) (because witness had been involved with DNA evidence since 1986 and had extensive training and experience in field, she was more qualified than ordinary juror, thus trial court did not abuse discretion in admitting her expert testimony).

State v Davolt, 207 Ariz. 191, 84 P.3d 456, ¶¶ 73–75 (2004) (because detective had attended classes on crime scene management and homicide investigation, and had watched two videos on blood spatter analysis, his training, although not extensive, was more extensive than ordinary juror, thus trial court did not abuse discretion in admitting her expert testimony).

State v Lee(II), 189 Ariz. 608, 944 P.2d 1222 (1997) (officer had 21 years with department and 15 years as homicide detective, training in ballistics and reconstruction of human remains, courses at FBI Forensic Art School and composite art, and introductory and advanced courses in blood spatter; trial court did not abuse discretion in finding detective qualified as blood-spatter expert).

State v Hughes, 189 Ariz. 62, 938 P.2d 457 (1997) (witness had been in Army for 25 years, worked in various capacities with prisoners and detainees, and had seen hundreds of people tied with ropes; trial court did not err in determining witness qualified as expert in restraint methods).

State v Speers, 209 Ariz. 125, 98 P.3d 560, ¶ 15 (Ct. App. 2004) (defendant was charged with 18 counts of sexual exploitation of minors based on computer images; trial court admitted as propensity evidence testimony from two second-grade students of alleged misconduct with them; court held that expert witness had necessary qualification to testify as expert about suggestive interview techniques, thus trial court erred in precluding this evidence).

State v Scott, 187 Ariz. 474, 930 P.2d 551 (Ct. App. 1996) (criminalist permitted to testify about "green leafy substance" based on 14 years experience).

State v Riggs, 186 Ariz. 573, 925 P.2d 714 (Ct. App. 1996) (*rev granted* 10/21/96) (handwriting examiner's opinion that signature on checks did not match defendant's signature on signature card was based on her experience working in a bank).

702.060 A witness may qualify as an expert on the basis of training and education.

State v Lee(II), 189 Ariz. 608, 944 P.2d 1222 (1997) (officer had 21 years with department and 15 years as homicide detective, training in ballistics and reconstruction of human remains, courses at FBI Forensic Art School and composite art, and introductory and advanced courses in blood spatter; trial court did not abuse discretion in finding detective qualified as blood-spatter expert).

State v Hughes, 189 Ariz. 62, 938 P.2d 457 (1997) (witness had been in Army for 25 years, and had received training in Vietnam and military interrogations schools; trial court did not err in determining witness qualified as expert in restraint methods).

State v Speers, 209 Ariz. 125, 98 P.3d 560, ¶ 15 (Ct. App. 2004) (defendant was charged with 18 counts of sexual exploitation of minors based on computer images; trial court admitted as propensity evidence testimony from two second-grade students of alleged misconduct with them; court held that expert witness had necessary qualification to testify as expert about suggestive interview techniques, thus trial court erred in precluding this evidence).

State v Scott, 187 Ariz. 474, 930 P.2d 551 (Ct. App. 1996) (criminalist permitted to testify about "green leafy substance" based on FBI and DEA training).

702.065 When an expert testifies about what is the "standard of care," that expert's personal practices in that area may be relevant.

Smethers v Campion, 210 Ariz. 167, 108 P.3d 946, ¶¶ 28–34 (Ct. App. 2005) (in medical malpractice action resulting from LASIK surgery, issue was, for patient who had worn hard contact lenses, whether standard of care required patient to stop wearing contact lenses for at least a month and then have measurements taken; expert testified that standard of care did not require that waiting period and that doctor could rely on measurements taken over the years; because medical literature suggested that standard of care did require waiting period, and because expert testified at trial that he would have done same thing as defendant in measuring without requiring waiting period, plaintiff should have been allowed to cross-examine expert about his deposition testimony wherein he said he personally would have waited before taking measurements).

702.070 The witness's specialty affects the weight of the testimony and not its admissibility, thus the witness does not necessarily need to have the same specialty as the area that is the subject of the litigation.

State v Villalobos, 225 Ariz. 74, 235 P.3d 227, ¶¶ 24–27 (2010) (medical examiner testified during aggravation stage that victim had suffered "excruciating" pain when defendant beat her; defendant contended medical examiner was not qualified to testify on subject of pain levels because he was certified only in pathology and had not ascertained a patients pain level for 10 years; court held these matters went to weight and not admissibility of testimony).

Lohmeier v Hammer, 214 Ariz. 57, 148 P.3d 101, ¶¶ 26–29 (Ct. App. 2006) (expert witness was biomechanical engineer; plaintiff contended that, because expert witness was not medical doctor, had no medical training to diagnose injuries, and did not personally examine plaintiff, trial court should not have allowed expert witness to testify that rear-end collision did not cause plaintiff's injuries; court held trial court did not err allowing expert witness to testify).

Hunter Contr. Co. v Superior Ct., 190 Ariz. 318, 947 P.2d 892 (Ct. App. 1997) (because A.R.S. § 12–2602 limits type of expert for the required affidavit, statute is unconstitutional).

Perguson v Tamis, 188 Ariz. 347, 937 P.2d 347 (Ct. App. 1996) (although doctor expert witness from Colorado acknowledged he was not familiar with law or standard of care applicable to physician assistants or their scope of practice in Arizona, because he was qualified to supervise physician assistant, he should have been allowed to give opinion whether physician assistant was negligent).

702.073 If the party against whom the testimony is offered is or claims to be a specialist or board-certified specialist, then A.R.S. § 12–2604 requires that the expert witness must be a specialist or board-certified specialist, and this requirement applies whether or not the party against whom the testimony is offered was acting as a specialist at the time of the occurrence that is the basis for the action.

* *Awsienko v Cohen,* 227 Ariz. 256, 257 P.3d 175, ¶¶ 16–18 (Ct. App. 2011) (decedent suffered cardiac arrest and died; defendant Dr. H. was board-certified specialist in cardiovascular disease and interventional cardiology; plaintiffs contended their expert witness did not have to be board-certified specialist in cardiovascular disease or interventional cardiology because (1) Dr. H. never asserted he was acting as specialist at time of alleged malpractice and (2) their expert witness's opinions were unrelated to any cardiac treatment; court rejected plaintiffs' contention, noting that statute only requires that defendant be specialist or board-certified specialist).

702.075 Under A.R.S. § 12–2604, if the party against whom the testimony is offered is or claims to be a **specialist,** the witness offering testimony must specialize in the same specialty at the time of the **occurrence** that is the basis for the action, but if the party against whom the testimony is offered is or claims to be a **board-certified specialist,** the witness offering testimony must be board-certified specialist only at the time of the **proceedings.**

* *Awsienko v Cohen,* 227 Ariz. 256, 257 P.3d 175, ¶¶ 8–15 (Ct. App. 2011) (decedent died in 2006; defendant Dr. C. was board-certified in nephrology; plaintiff's expert witness was board-certified in nephrology in 2007; trial court granted motion for summary judgment because expert witness was not board-certified at time Dr. C. treated decedent; court reversed because expert witness was board-certified at time of proceedings).

702.080 To qualify as an expert, a witness need not have the highest possible qualifications or highest degree of skill or knowledge; all the witness need have is a skill or knowledge superior to that of persons in general, and the level of skill or knowledge affects the weight of the testimony and not its admissibility.

State v Davolt, 207 Ariz. 191, 84 P.3d 456, ¶¶ 69–75 (2004) (because witness had been involved with DNA evidence since 1986 and had extensive training and experience in field, she was more qualified than ordinary juror, and because detective had attended classes on crime scene management and homicide investigation, and had watched two videos on blood spatter analysis, his training, although not extensive, was more extensive than ordinary juror, thus both were qualified as expert witnesses; the degree of qualification went to weight of testimony and not admissibility).

Webb v Omni Block Inc., 216 Ariz. 349, 166 P.3d 140, ¶¶ 7–10 (Ct. App. 2007) (plaintiff contended witness's experience and training were not sufficient to qualify him as expert beyond responsibilities of general contractor, and thus he should not have been allowed to testify about duties and responsibilities of subcontractors; court found no error and stated degree of qualification went to weight and not admissibility of testimony).

Perguson v Tamis, 188 Ariz. 347, 937 P.2d 347 (Ct. App. 1996) (although doctor expert witness from Colorado acknowledged he was not familiar with law or standard of care applicable to physician assistants or their scope of practice in Arizona, because he was qualified to supervise physician assistant, he should have been allowed to give opinion whether physician assistant was negligent, and any deficiencies would go to weight).

State v Curry, 187 Ariz. 623, 931 P.2d 1133 (Ct. App. 1996) (expert witness did not have to be licensed psychiatrist or psychologist to give opinion based on child sexual abuse accommodation syndrome).

702.100 When a party seeks to have a witness testify as an expert and the trial court determines that the witness so qualifies, the trial court should not declare in front of the jurors that the witness is an expert because this may give the appearance that the trial court is endorsing that witness's testimony and may be considered a comment on the evidence.

State v McKinney & Hedlund, 185 Ariz. 567, 585–86, 917 P.2d 1214, 1232–33 (1996) (after prosecutor elicited testimony about witness's qualifications, prosecutor stated to trial court he was submitting witness as an expert, and trial court said prosecutor could proceed).

702.110 An accurate factual basis is a necessary element of a legally sufficient opinion.

Standard Chartered PLC v Price Waterhouse, 190 Ariz. 6, 945 P.2d 317 (Ct. App. 1996) (in litigation over sale of bank, plaintiff-purchaser claimed $23 million loss reserve figure supplied by defendant-seller understated amount of uncollectible loans; defendant-seller sought to introduce tax filing made by plaintiff-purchaser 1½ years after sale showing loss reserve of $9.8 million; trial court excluded this evidence because defendant-seller's expert witness could not testify to what plaintiff-purchaser actually did in preparing tax filing and could only testify about what plaintiff-purchaser should have done; court held there was sufficient factual basis for evidence and thus it should have been admitted, and that any dispute about the $9.8 million figure went to weight and not admissibility of opinion).

702.120 Ambiguities about the factual basis for an expert's opinion go to the weight and not the admissibility of the opinion.

T.W.M. Custom Framing v Industrial Comm'n, 198 Ariz. 41, 6 P.2d 745, ¶¶ 18–20 (Ct. App. 2000) (decedent-employee committed suicide, and issue was whether decedent-employee's industrial injury so deprived him of normal judgment that his action in committing suicide would not be considered "purposeful" and thus would entitle his widow and child to collect death benefits; psychiatrist conducted psychiatric autopsy and testified that decedent's depressed mental condition resulted from his work-related injuries; employer contended that foundation for psychiatrist's testimony was inadequate because he relied on widow's testimony to formulate his opinions; court noted psychiatrist also relied medical records, police reports, and prior testimony, and concluded there was appropriate foundation for opinion).

State v Wells Fargo Bank, 194 Ariz. 126, 978 P.2d 103, ¶ 31 (Ct. App. 1998) (plaintiff contended trial court erred in admitting expert opinion because expert did not perform specific study on economic impact of freeway on defendant's property; expert based opinion on materials published on subject, his prior appraisal studies, his own experience as urban economist, and inspection of area; court held that trial court properly admitted expert's opinion testimony).

Souza v Fred Carriers Contracts, Inc., 191 Ariz. 247, 955 P.2d 3 (Ct. App. 1997) (because vehicle had been destroyed, accident reconstruction expert was not able to examine it; court held that inspection of vehicle was not always necessary for opinion of how and why accident happened, and any shortcomings went to weight and not admissibility of opinion).

702.150 Meeting the statutory criteria is not the exclusive means of admitting breath test results in evidence, thus a party may have such evidence admitted if it complies with the rules of evidence pertaining to scientific evidence.

State v Superior Ct. (Pawlowicz), 195 Ariz. 555, 991 P.2d 258, ¶¶ 10–11 (Ct. App. 1999) (although state could not establish statutory foundation for admission of test results from Intoxilyzer 5000 ADAMS, trial court erred in suppressing test results without giving state opportunity to establish foundation under Arizona Rules of Evidence).

702.170 To withstand a motion for summary judgment or a motion for directed verdict in a malpractice action, unless the defendant's negligence is so grossly apparent that a lay person would have no difficulty recognizing the negligent conduct, the plaintiff must have evidence showing (1) the general standard of care in the particular area and under similar circumstances, (2) the defendant's performance fell below the applicable standard of care, and (3) these deviations from the standard of care proximately caused the claimed injury.

* *Ryan v San Francisco Peaks Truck. Co.*, 228 Ariz. 42, 262 P.3d 863, ¶¶ 19–40 (Ct. App. 2011) (court stated these requirements apply equally to defendant asserting that nonparty health care provider negligently caused or contributed to plaintiff's injury, and held defendant could use affidavits from plaintiff's experts in its claim that persons plaintiff had originally sued as defendants but with whom plaintiff had settled were non-parties at fault).

Hunter Contr. Co. v Superior Ct., 190 Ariz. 318, 947 P.2d 892 (Ct. App. 1997) (because contractor's negligence may be apparent without expert testimony, A.R.S. § 12–2602, which limits type of expert for required affidavit when suing a contractor, is unconstitutional).

Toy v Katz, 191 Ariz. 73, 961 P.2d 1021 (Ct. App. 1997) (expert's opinion was that failure of attorney to establish and verify whether person or corporation was client prior to drafting sales agreement fell substantially below standard of practice in area at that time).

702.190 An expert may testify about behavioral characteristics of certain classes of persons, but may not give an opinion about the accuracy, reliability, or truthfulness of a particular person, or quantify the percentage of such persons who are truthful.

State v Boggs, 218 Ariz. 325, 185 P.3d 111, ¶¶ 37–40 (2008) (during videotaped interrogation of defendant, detective accused defendant of lying; defendant claimed playing videotape to jurors violated his right to fair trial; court held that detective's accusations were part of interrogation technique and not for purpose of giving opinion testimony at trial, thus no error).

State v Nordstrom, 200 Ariz. 229, 25 P.3d 717, ¶¶ 30–31 (2001) (expert testified about factors that affect ability of eyewitness to perceive, remember, and relate; trial court properly precluded expert from giving opinion of accuracy of particular eyewitness).

State v Lujan, 192 Ariz. 448, 967 P.2d 123, ¶¶ 8–9, 11–13, 16, 20–21 (1998) (because defendant admitted playing with victim in swimming pool but denied ever touching her private parts, defendant was entitled to show victim was hypersensitive to interaction with adult males and thus may have misperceived her physical contact with defendant, and thus should have been allows to introduce expert testimony about how victim's nearly contemporaneous sexual abuse by others may have caused victim to mis-perceive defendant's actions).

State v Reimer, 189 Ariz. 239, 941 P.2d 912 (Ct. App. 1997) (when victim gave a different version when testifying, trial court erred in allowing officer to give opinion that victim was not lying when she gave version at time of assault).

702.195 Although an expert may not give an opinion about the accuracy, reliability, or truthfulness of a particular person, a witness may disclose to jurors those facts that caused the witness not to believe a particular person.

State v Doerr, 193 Ariz. 56, 969 P.2d 1168, ¶¶ 25–27 (1998) (on cross-examination, defendant elicited testimony from officer that he did not believe defendant was truthful during questioning; on rebuttal, state permitted to ask officer why he did not believe defendant was being truthful).

702.200 An expert may give an opinion of the defendant's state of mind at the time of the offense only when the defendant raises an insanity defense.

State v Moody, 208 Ariz. 424, 94 P.3d 1119, ¶¶ 101–07 (2004) (because defendant's experts testified that defendant was in psychotic, dissociated state, trial court properly allowed state's expert to testify on rebuttal that, in his opinion, defendant was "malingering" and that money and cocaine were likely motives for the killings).

State v Mott, 187 Ariz. 536, 931 P.2d 1046 (1997) (defendant was charged with child abuse for failure to seek treatment for her child after child was injured while in care of defendant's boyfriend; defendant wanted to introduce evidence that her condition as a battered woman caused her to form a "traumatic bond" with her boyfriend, caused her to feel hopeless and depressed and that she could not escape, interfered with her ability to sense danger and protect others, and caused her to believe what her boyfriend told her and to lie to protect him, all of which would preclude her from forming the necessary intent; court held this was merely another form of diminished capacity, which the legislature has refused to adopt, thus evidence was not admissible).

State v Wright, 214 Ariz. 540, 155 P.3d 1064, ¶¶ 6–7 (Ct. App. 2007) (defendant was charged with theft of means of transportation, which requires knowingly controlling vehicle with intent to deprive permanently; defendant sought to introduce expert testimony that his "mental capacity was lowered and that he is a naive-type of person" and thus could not have mental state necessary to commit crime; court held that *State v Mott* precluded evidence of diminished capacity defense).

702.205 Although an expert may not give an opinion about the defendant's state of mind on the issue of *mens rea*, an expert may testify about the defendant's behavior that the expert observed.

State v Wright, 214 Ariz. 540, 155 P.3d 1064, ¶¶ 11–12, 15–17 (Ct. App. 2007) (defendant was charged with theft of means of transportation, which requires knowingly controlling vehicle with intent to deprive permanently; defendant sought to introduce expert testimony that his "mental capacity was lowered and that he is a naive-type of person" and thus could not have mental state necessary to commit crime; court concluded expert testimony was about defendant's mental capacity generally and did not constitute observation evidence about defendant's relevant behavioral characteristics bearing on defendant's state of mind at time of offense, thus trial court properly precluded this evidence).

702.210 The trier-of-fact is entitled to consider an expert witness's opinion and may believe all, some, or none of the testimony, even though it is uncontradicted, and may give it only the weight to which it deems the opinion is entitled.

In re Estate of Reinen, 198 Ariz. 283, 9 P.3d 314, ¶¶ 9–12 (2000) (in medical malpractice case, trial court granted directed verdicts in favor of nurse and one doctor because second doctor testified that he would not have changed course of his treatment even if nurse and doctor had acted differently; because jurors were not obligated to believe testimony of testifying doctor, trial court erred in granting motion for directed verdict).

State v Gomez, 211 Ariz. 111, 118 P.3d 626, ¶¶ 13–14 (Ct. App. 2005) (because trial court instructed jurors that they must determine facts from evidence presented, which consisted of testimony of experts and exhibits, and because trial court instructed jurors that they were not bound by expert testimony and should only give it weight it deserved, trial court did not abuse discretion in refusing defendant's requested instruction that they could conduct their own examination of any evidence that had been admitted in evidence).

702.215 The trier-of-fact is entitled to make an independent evaluation of the facts and evidence that support the expert's opinion.

State v Gomez, 211 Ariz. 111, 118 P.3d 626, ¶¶ 10–12 (Ct. App. 2005) (trial court did not abuse its discretion in refusing defendant's request that jurors be given magnifying glass to use to examine fingerprint cards admitted in evidence).

State v Ochoa, 189 Ariz. 454, 943 P.2d 814 (Ct. App. 1997) (although officer testified he did not know whether shooting was gang-related and was unaware of any evidence that showed it was committed to benefit or advance any specific goal of the gang, this did not preclude jurors from finding shooting was gang-related).

702.217 The trial court had discretion in what to allow for the jurors to use in examining the items admitted in evidence.

State v Gomez, 211 Ariz. 111, 118 P.3d 626, ¶¶ 10–12 (Ct. App. 2005) (trial court did not abuse its discretion in refusing defendant's request that jurors be given magnifying glass to use to examine fingerprint cards admitted in evidence).

702.230 If the evidence is not derived from application of a scientific principle or process, but is instead the result of observing and identifying the way that certain things happen, there is no requirement that the party offering the evidence show general acceptance in the particular field in which it belongs.

State v Nordstrom, 200 Ariz. 229, 25 P.3d 717, ¶¶ 28–29 (2001) (although Arizona Supreme Court has held "general acceptance" test is not required for expert testimony about human behavioral characteristics, court stated expert testimony about behavioral characteristics of eyewitnesses is admissible if opinion "conforms to an appropriately scientific explanatory theory"; this statement was dicta).

Logerquist v McVey (Danforth), 196 Ariz. 470, 1 P.3d 113, ¶¶ 30–32, 62 (2000) (because expert testimony on repressed memory caused by severe childhood trauma (including sexual abuse), dissociative amnesia, and retrieved memories was testimony about human behavior and not testimony about some scientific principle, court held trial court erred in applying "generally accepted" standard to this testimony).

State v Boles, 188 Ariz. 129, 933 P.2d 1197 (1997) (*Frye* analysis not needed when expert testified about his experiences with DNA matching).

State v Hummert, 188 Ariz. 119, 933 P.2d 1187 (1997) (*Frye* analysis not needed when expert testified about his experiences with DNA matching).

State v Speers, 209 Ariz. 125, 98 P.3d 560, ¶¶ 18–19 (Ct. App. 2004) (defendant was charged with 18 counts of sexual exploitation of minors based on computer images; trial court admitted as propensity evidence testimony from two second-grade students of alleged misconduct with them; because testimony from expert witness about suggestive interview techniques was based on experience and observations about human behavior and not on scientific principles, trial court erred in excluding it based on trial court's conclusion that proposed testimony was not accepted by scientific community).

State v Lucero, 207 Ariz. 301, 85 P.3d 1059, ¶¶ 16–21 (Ct. App. 2004) (expert's opinion that defendant was impaired by use of marijuana was based on knowledge and experience as forensic toxicologist and not on novel scientific principles, thus hearing was not necessary).

State v Fields (Medina), 201 Ariz. 321, 35 P.3d 82, ¶¶ 17–23 (Ct. App. 2001) (in SVPA proceeding, trial court required *Frye* hearing before admitting actuarial data upon which experts relied in rendering opinions on recidivism; court held that, although actuarial data was developed by others and not by person testifying, actuarial data was based on human behavior and not novel scientific principles, thus trial court erred in ordering *Frye* hearing).

State v Curry, 187 Ariz. 623, 931 P.2d 1133 (Ct. App. 1996) (no need for a *Frye* hearing before admitting evidence of child sexual abuse accommodation syndrome (CSAAS)).

702.240 Expert testimony based on a novel scientific principle, formula, technique, or procedure developed or advanced by others is admissible if the scientific principle, formula, technique, or procedure has gained general acceptance in the particular scientific field in which it belongs, which means that the principle or process is generally accepted as being capable of doing what it purports to do; if the validity of a new scientific technique is in controversy in the relevant scientific community or if it is generally regarded as merely experimental, expert testimony based on its validity may not be admitted.

Logerquist v McVey (Danforth), 196 Ariz. 470, 1 P.3d 113, ¶¶ 30–32, 47, 53, 62 (2000) (because expert testimony on repressed memory caused by severe childhood trauma (including sexual abuse), dissociative amnesia, and retrieved memories was testimony about human behavior and not testimony about some scientific principle, court held trial court erred in applying "generally accepted" standard to this testimony).

State v Tankersley, 191 Ariz. 359, 956 P.2d 486, ¶ 18 (1998) (*Frye* test does not require unanimity among scientists).

State v Esser, 205 Ariz. 320, 70 P.3d 449, ¶¶ 11–13 (Ct. App. 2003) (court noted that alcohol breath testing has been found to be generally accepted in scientific community, thus it was defendant's burden to prove testing was not accorded general acceptance; court noted defendant's evidence was only that his expert and other authors of scientific articles disagreed with traditional theory of physiology underlying alcohol-breath interchange, and held this went only to weight of traditional evidence, rather than its admissibility).

Wozniak v Galati, 200 Ariz. 550, 30 P.3d 131, ¶¶ 5, 9–12 (Ct. App. 2001) (defendant failed to present evidence that drug screen tests are not accepted in scientific community as way to identify presence of drugs; defendant's evidence went only to how accurate drug screen tests were to show presence of drugs, and that went to weight, not admissibility).

State v Garcia, 197 Ariz. 79, 3 P.3d 999, ¶¶ 7–27 (Ct. App. 1999) (testing of stains on clothing showed presence of semen from more than one person; state offered expert testimony relying on formulae used to determine statistical probability of random DNA match; court concluded methodology and formulae used were accepted by general scientific community).

State v Claybrook, 193 Ariz. 588, 975 P.2d 1101, ¶ 15 (Ct. App. 1998) (retroactive extrapolation to determine BAC at prior time is generally accepted in relevant scientific community).

702.250 When scientific evidence has been offered and received in other cases, if a party claims that the scientific principles in question have not gained general acceptance in the particular field, that party must introduce some authority to that effect before the trial court will require the other party to present evidence of general acceptance.

State v Lucero, 207 Ariz. 301, 85 P.3d 1059, ¶¶ 4–11 (Ct. App. 2004) (defendant attacked evidence based on gas chromatography/mass spectrometry (GC/MS); court noted GC/MS technology had long been accepted by courts, and that absence of reported Arizona opinion expressly approving this method did not give defendant right to hearing).

702.280 Principles and theory underlying DNA matching and match criteria are generally accepted in the scientific community, and are therefore admissible.

State v Davolt, 207 Ariz. 191, 84 P.3d 456, ¶¶ 67–68 (2004) (court noted that it had previously held DNA evidence based on product rule method of calculating probability of match acceptable when database satisfies *Frye* requirements, thus trial court did not abuse discretion in denying defendant's motion to preclude DNA evidence).

State v Lehr, 201 Ariz. 509, 38 P.3d 1172, ¶¶ 16–19 (2002) (trial court took judicial notice that principles and theories underlying DNA analysis in forensic labs are generally accepted in scientific community and that RFLP method in particular met general acceptance test).

State v (Van) Adams, 194 Ariz. 408, 984 P.2d 16, ¶¶ 31–33 (1999) (for polymerase chain reaction (PCR) technology, Arizona has recognized general scientific acceptance of RFLP, RAPD, and reverse dot blotting technology).

State v Sharp, 193 Ariz. 414, 973 P.2d 1171, ¶ 24 (1999) (Arizona Supreme Court has already held RFLP method of DNA analysis is generally accepted in Arizona and is reliable, thus trial court did not need to hold a *Frye* hearing).

State v Tankersley, 191 Ariz. 359, 956 P.2d 486, ¶ 19 (1998) (PCR technology and DQ-alpha marking system are generally accepted in relevant scientific community).

State v Hummert, 188 Ariz. 119, 933 P.2d 1187 (1997) (court noted recent scientific analysis has shown other methods of quantifying DNA matching have gained scientific acceptance).

State v Marshall, 193 Ariz. 547, 975 P.2d 137, ¶ 7 (Ct. App. 1998) (court held issue of "match window" goes to weight and not admissibility, and also noted that expert testimony was that "match window" of plus or minus 2.5% used by FBI was generally accepted in community).

702.290 DNA random match probability calculations and opinions based on those calculations are generally accepted in the relevant scientific community.

State v Hummert, 188 Ariz. 119, 933 P.2d 1187 (1997) (court noted recent scientific analysis has shown other methods of quantifying DNA matching have gained scientific acceptance).

* *State v Bigger,* 227 Ariz. 196, 254 P.3d 1142, ¶¶ 23–34 (Ct. App. 2011) (state offered testimony from expert witnesses about DNA from radio knob in victim's car using short tandem repeats (STR) and statistics using random man not excluded (RMNE) and likelihood ratio (LR) methods; defendant contended there was no generally accepted method of generating statistics for "low-level mixture" or "low-copy number (LCN)" situations; court noted LR, RMNE, and modified product rule are DNA interpretations generally accepted in relevant scientific community, and thus held trial court properly admitted expert witness testimony).

State v Marshall, 193 Ariz. 547, 975 P.2d 137, ¶¶ 9–11 (Ct. App. 1998) (because National Research Council withdrew its earlier suggestion that only modified ceiling method be used and now endorses unrestricted product rule, and because majority of cases from other jurisdictions have approved that rule, it appears unrestricted product rule is now generally accepted in relevant scientific community).

702.295 If a particular technique has gained acceptance in the scientific community, the accuracy of its implementation in a particular case is subject to ordinary foundational considerations; if claimed deficiencies in procedure are sufficiently serious, trial court should not admit evidence; otherwise, if trial court concludes claimed deficiencies in procedure do not make this evidence inadmissible, then claimed deficiencies go to weight of the evidence of the procedure, and the jurors must be permitted at trial to hear evidence of procedure.

State v Montaño, 204 Ariz. 413, 65 P.3d 61, ¶ 69 (2003) (defendant's claim that DNA is "magic" and "bogus," that one witness had judgment against him, that *USA Today* ran article calling British DNA database "flawed," and that DNA evidence was not overwhelming in this case, were merely attacks on weight of evidence, which was within province of jurors).

State v Lehr, 201 Ariz. 509, 38 P.3d 1172, ¶¶ 16–31 (2002) (in consolidated action, judge holding consolidated hearing took judicial notice of fact that principles and theories underlying DNA analysis in forensic labs are generally accepted in scientific community and that RFLP method in particular

met general acceptance test, and then held claimed deficiencies in laboratory procedure did not preclude admission of evidence; at trial, trial judge precluded defendant from cross-examining witness about laboratory procedure, ruling this would be re-litigating issues resolved at consolidated hearing; court held jurors must assess weight of evidence of laboratory procedure, and thus held trial judge erred in precluding this evidence).

State v (Van) Adams, 194 Ariz. 408, 984 P.2d 16, ¶ 34 (1999) (for polymerase chain reaction (PCR) technology, Arizona has recognized general scientific acceptance of RFLP, RAPD, and reverse dot blotting technology; challenges to application of these techniques by Arizona Department of Public Safety crime lab went to weight, not admissibility).

State v Tankersley, 191 Ariz. 359, 956 P.2d 486, ¶¶ 20–21 (1998) (defendant challenged lack of written protocols and current proficiency testing, excessive number of cycles run on thermal cycler, temperature regulation problems, failure to quantify sample's DNA before amplification, and reporting of results despite evidence of contamination).

* *State v Bigger,* 227 Ariz. 196, 254 P.3d 1142, ¶¶ 35–39 (Ct. App. 2011) (state offered testimony from expert witnesses about DNA from radio knob in victim's car using short tandem repeats (STR) and statistics using random man not excluded (RMNE) and likelihood ratio (LR) methods; defendant contended expert witnesses' formulas were flawed because they were based on partial information; court held this went to weight of evidence and not its admissibility).

State v Lucero, 207 Ariz. 301, 85 P.3d 1059, ¶¶ 12–15 (Ct. App. 2004) (defendant attacked evidence based on gas chromatography/mass spectrometry (GC/MS); court noted GC/MS technology had long been accepted by courts, and that defendant's challenges went only to test procedures and interpretations of test results).

State v Morgan, 204 Ariz. 166, 61 P.3d 460, ¶¶ 27–33 (Ct. App. 2002) (claim that expert did not use sufficiently large sample for DNA testing did not go to general acceptance but instead to accuracy of testing procedure; this went to weight and not admissibility of evidence).

Wozniak v Galati, 200 Ariz. 550, 30 P.3d 131, ¶¶ 5, 9–12 (Ct. App. 2001) (defendant failed to present evidence that drug screen tests are not accepted in scientific community as way to identify presence of drugs; defendant's evidence went only to how accurate drug screen tests were to show presence of drugs, and that went to weight, not admissibility).

702.300 All references to polygraph tests are inadmissible for any purpose in Arizona, absent a stipulation of the parties.

State v Hoskins, 199 Ariz. 127, 14 P.3d 977, ¶¶ 68–69 (2001) (witness had been willing to take polygraph test, and defendant sought to question officers about their decision not to give witness polygraph test, contending this showed officers did not consider witness to be reliable; court held any testimony about polygraph tests was inadmissible, and declined invitation to revisit what it considered was a settled area of law).

702.330 Under Rule 1(D)(4), Uniform Rules of Practice for Medical Malpractice Cases, if a party lists a witness for one area, that should not preclude the party from using that witness to testify in another area.

Perguson v Tamis, 188 Ariz. 347, 937 P.2d 347 (Ct. App. 1996) (plaintiff listed first doctor as causation witness and second doctor as standard of care witness; trial court erred in precluding plaintiff from having second doctor, rather than first doctor, give opinion on causation).

March 11, 2012

Rule 703. Bases of an Expert's Opinion Testimony.

An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted. But if the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect.

Comment to 2012 Amendment

The language of Rule 703 has been amended to conform to the federal restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

All references to an "inference" have been deleted on the grounds that the deletion made the rule flow better and easier to read, and because any "inference" is covered by the broader term "opinion." Courts have not made substantive decisions on the basis of any distinction between an opinion and an inference. No change in current practice is intended.

Comment to Original 1977 Rule

This rule, along with others in this article, is designed to expedite the reception of expert testimony. Caution is urged in its use. Particular attention is called to the Advisory Committee's Note to the Federal Rules of Evidence which accompanies Federal Rule 703. In addition, it should be emphasized that the standard "if of a type reasonably relied upon by experts in the particular field" is applicable to both sentences of the rule. The question of whether the facts or data are of a type reasonably relied upon by experts is in all instances a question of law to be resolved by the court prior to the admission of the evidence. If the facts or data meet this standard and form the basis of admissible opinion evidence they become admissible under this rule for the limited purpose of disclosing the basis for the opinion unless they should be excluded pursuant to an applicable constitutional provision, statute, rule or decision.

Evidence that is inadmissible except as it may qualify as being "reasonably relied upon by experts in the particular field" has traditionally included such things as certain medical reports and comparable sales in condemnation actions.

Cases

703.010 Expert opinion may be based on objects admitted in evidence and matters not admitted in evidence.

State v. Roque, 213 Ariz. 193, 141 P.3d 368, ¶ 56 (2006) (for charge of first-degree murder, state's theory of case was that shootings were intentional acts of racism while intoxicated, while defendant pursued insanity defense; in assessing defendant's mental health, state's expert considered defendant's 1983 conviction for attempted robbery; court noted that evidence of prior conviction could be disclosed to jurors as forming basis of opinion without regard to its independent admissibility).

Mohave Elec. Coop. v. Byers, 189 Ariz. 292, 942 P.2d 451 (Ct. App. 1997) (in ruling on motion for summary judgment, trial court could consider audit report upon which expert relied).

State v. Curry, 187 Ariz. 623, 931 P.2d 1133 (Ct. App. 1996) (one expert witness permitted to give opinion based in part on child sexual abuse accommodation syndrome research done by another; another expert witness permitted give opinion about victim based on personal examination of victim done by another doctor).

703.030 Questions about the accuracy and reliability of a witness's factual basis, data, and methods go to the weight and credibility of the witness's testimony, and are questions of fact for the jurors' determination.

Logerquist v McVey (Danforth), 196 Ariz. 470, 1 P.3d 113, ¶¶ 51–52 (2000) (court noted that Arizona Constitution preserved right to have jurors pass upon questions of fact by determining credibility of witnesses and the weight of conflicting evidence).

Pipher v Loo, 221 Ariz. 399, 212 P.3d 91, ¶¶ 16–18 (Ct. App. 2009) (expert witness testified he was board certified with 35 years' experience, had administered thousands of injections of type at issue, and had number of patients with type of injury at issue; trial court precluded expert's testimony because it concluded testimony lacked foundation, was speculative, and lacked adequate basis under Rules 702 and 703; court held that trial court erred in excluding this testimony and remanded for new trial).

T.W.M. Custom Framing v Industrial Comm'n, 198 Ariz. 41, 6 P.2d 745, ¶¶ 18–20 (Ct. App. 2000) (decedent-employee committed suicide, and issue was whether decedent-employee's industrial injury so deprived him of normal judgment that his action in committing suicide would not be considered "purposeful" and thus would entitle his widow and child to collect death benefits; psychiatrist conducted psychiatric autopsy and testified that decedent's depressed mental condition resulted from his work-related injuries; employer contended that foundation for psychiatrist's testimony was inadequate because he relied heavily on widow's testimony to formulate his opinions; court noted psychiatrist also relied medical records, police reports, and prior testimony, and concluded there was appropriate foundation for opinion).

Standard Chartered PLC v Price Waterhouse, 190 Ariz. 6, 945 P.2d 317 (Ct. App. 1996) (in litigation over sale of bank, plaintiff-purchaser claimed that $23 million loss reserve figure supplied by defendant-seller understated amount of uncollectible loans; defendant-seller sought to introduce tax filing made by plaintiff-purchaser 1½ years after sale showing a loss reserve of $9.8 million; trial court excluded this evidence because defendant-seller's expert witness could not testify to what plaintiff-purchaser actually did in preparing tax filing and could only testify about what plaintiff-purchaser should have done; court held that there was sufficient factual basis for the evidence and thus it should have been admitted, and that any dispute about the $9.8 million figure went to weight and not admissibility of opinion).

703.035 An expert may not base an opinion on sheer speculation, thus the trial court should not admit a conclusory opinion based on no facts.

Aida Renta Trust v Maricopa County, 221 Ariz. 603, 212 P.3d 941, ¶¶ 18–21 (Ct. App. 2009) (taxpayers brought action for property tax discrimination; trial court granted summary judgment for taxpayers concluding that county had engaged in deliberate and systematic conduct that resulted in greatly disproportionate tax treatment; county contended issue of fact was created by affidavit from appraiser employed by county, which stated that she did not know exactly what had happened, but it must have been an accident; court held that, because opinion in this affidavit was based on speculation, affidavit was not admissible, so it did not create any issue of material fact).

703.060 Facts or data underlying an expert's opinion need not be admissible so long as the party offering the evidence establishes they are of a type upon which experts in that particular field reasonably rely.

State v Tucker, 215 Ariz. 298, 160 P.3d 177, ¶¶ 52–59 (2007) (state's materials expert testified that duct tape used to gag victim was for industrial use, and testified he based this opinion in part on conversations he had with manufacturer's sales representatives; because information from sales representatives was of type upon which experts would reasonably rely, admission of that information was proper).

State v Tucker, 215 Ariz. 298, 160 P.3d 177, ¶¶ 45–50 (2007) (defendant contended written descriptions on some photographs in montage of 44 photographs showing corpses and autopsies were hearsay statements; because photographs and statements were not offered to prove truth of matters asserted, statements were not hearsay).

State v Smith, 215 Ariz. 221, 159 P.3d 531, ¶¶ 21–23 (2007) (to prove the especially heinous, cruel, or depraved aggravating circumstance, state presented testimony of medical examiner, who relied on findings and opinions of medical examiner from 1976; because this was type of information upon which experts in this area reasonable rely, trial court did not err in permitting expert to testify about findings and opinions of medical examiner from 1976).

State v Rogovich, 188 Ariz. 38, 932 P.2d 794 (1997) (medical examiner testified based on report done by doctor who was no longer on staff; court held such reliance was permissible, and that facts or data need not be generated by a qualified, testifying expert).

Pipher v Loo, 221 Ariz. 399, 212 P.3d 91, ¶¶ 7–11 (Ct. App. 2009) (court held that trial court properly allowed expert witness to give opinion based on his own laboratory research, his clinical experience, and his interviews with patients and their dentists, even though some of this information was hearsay).

Brethauer v General Motors Corp., 221 Ariz. 192, 211 P.3d 1176, ¶¶ 18–20 (Ct. App. 2009) (trial court precluded 3-minute videotaped collage of 10 GM-conducted tests on seat belt systems containing same buckle as involved in subject litigation because either other seat belt systems in videotape had different types of belts or the circumstances of test were different; plaintiff contended trial court erred in precluding videotape because his expert relied on videotape in forming his opinion; court stated that mere reliance by expert on data does not automatically make that data admissible).

703.080 An expert witness may disclose the facts or data on direct examination.

State v Smith, 215 Ariz. 221, 159 P.3d 531, ¶¶ 21–23 (2007) (to prove the especially heinous, cruel, or depraved aggravating circumstance, state presented testimony of medical examiner, who relied on findings and opinions of medical examiner from 1976; because this was type of information upon which experts in this area reasonable rely, trial court did not err in permitting expert to testify about findings and opinions of medical examiner from 1976).

In re Leon G., 199 Ariz. 375, 18 P.3d 169, ¶ 11 (Ct. App. 2001) (because issue was whether person was likely to commit further acts of sexual violence, doctor was permitted to rely on person's past improper sexual activities in forming opinion, and was permitted to disclose factual basis for that opinion).

703.090 An expert witness may disclose the facts or data only for limited purpose of disclosing the basis of the opinion and not as substantive evidence.

State v Snelling, 225 Ariz. 182, 236 P.3d 409, ¶¶ 18–20 (2010) (victim was killed in 1996, but police did not identify defendant as suspect until 2003; defendant contended medical examiner's testimony in 2007 violated his right of confrontation because she had not performed victim's autopsy in 1996 nor authored autopsy report; medical examiner testified she formed her own opinion and that 1996 autopsy report was only part of basis for her opinion; court held medical examiner's testimony was not hearsay and did not violate defendant's right of confrontation).

State v Hummert, 188 Ariz. 119, 933 P.2d 1187 (1997) (count noted that otherwise inadmissible scientific evidence would not be admitted as substantive evidence).

703.095 If an expert witness discloses the facts or data only for the limited purpose of disclosing the basis of the opinion, they are not substantive evidence and admission of those facts and data does not violate the right of confrontation.

* *State v Dixon*, 226 Ariz. 545, 250 P.3d 1174, ¶¶ 33–37 (2011) (Dr. H.K. conducted autopsy in 1978; at trial held 11/13/07, Dr. P.K. testified based on his review of autopsy report and photographs, neither of which were admitted in evidence; court rejected defendant's contention that Dr. P.K.'s testimony violated his right of confrontation).

State v Gomez, 226 Ariz. 165, 244 P.3d 1163, ¶¶ 22–24 (2010) (senior forensic analyst who was laboratory supervisor testified in detail about laboratory's operating procedures, standards, and safeguards, and although she did not witness all steps in process, she checked technicians' records for any deviations from laboratory's protocols, and then personally performed final step in process, interpretation and comparison, which was only step that required human analysis; court held senior analyst's testimony did not violate Confrontation Clause).

State v Snelling, 225 Ariz. 182, 236 P.3d 409, ¶¶ 18–20 (2010) (victim was killed in 1996, but police did not identify defendant as suspect until 2003; defendant contended medical examiner's testimony in 2007 violated his right of confrontation because she had not performed victim's autopsy in 1996 nor authored autopsy report; medical examiner testified she formed her own opinion and that 1996 autopsy report was only part of basis for her opinion; court held medical examiner's testimony was not hearsay and did not violate defendant's right of confrontation).

703.110 Although an expert witness is allowed to disclose facts or data not admissible in evidence if they are of the type upon which experts reasonably rely, the expert should not be allowed to act merely as a conduit for the other expert's opinion and thus circumvent the requirements excluding certain types of hearsay statements.

State v Gomez, 226 Ariz. 165, 244 P.3d 1163, ¶¶ 22–23 (2010) (senior forensic analyst who was laboratory supervisor testified in detail about laboratory's operating procedures, standards, and safeguards, and although she did not witness all steps in process, she checked technicians' records for any deviations from laboratory's protocols, and then personally performed final step in process, interpretation and comparison, which was only step that required human analysis; court held senior analyst formed her own opinion and did not act merely as conduit for opinions of others).

State v Snelling, 225 Ariz. 182, 236 P.3d 409, ¶¶ 18–20 (2010) (victim was killed in 1996, but police did not identify defendant as suspect until 2003; defendant contended medical examiner's testimony in 2007 violated his right of confrontation because she had not performed victim's autopsy in 1996 nor authored autopsy report; medical examiner testified she formed her own opinion and that 1996 autopsy report was only part of basis for her opinion; court held medical examiner's testimony was not hearsay and did not violate defendant's right of confrontation).

State v Smith, 215 Ariz. 221, 159 P.3d 531, ¶¶ 21–25 (2007) (to prove the especially heinous, cruel, or depraved aggravating circumstance, state presented testimony of medical examiner, who relied on findings and opinions of medical examiner from 1976; because record showed testifying medical examiner formed own opinion based on facts and evidence in addition to findings and opinions of previous medical examiner, testifying medical examiner did not act merely as conduit for previous medical examiner's findings and opinions).

In re Thomas R., 224 Ariz. 579, 233 P.3d 1158, ¶¶ 39–41 (Ct. App. 2010) (in SVP proceeding, expert based opinion on numerous factors, one of which was other expert's DNA report; because other expert's conclusion in DNA report was only one of several factors upon which testifying expert relied, testifying expert did not act merely as conduit for other expert's opinion).

703.130 Once an expert has given an opinion, the other party may cross-examine the expert about matters the expert considered but rejected in forming the opinion.

Standard Chartered PLC v Price Waterhouse, 190 Ariz. 6, 945 P.2d 317 (Ct. App. 1996) (in litigation over sale of bank, plaintiff-purchaser claimed that $23 million loss reserve figure supplied by defendant-seller understated amount of uncollectible loans; defendant-seller sought to introduce tax filing made by plaintiff-purchaser 1½ years after sale showing a loss reserve of $9.8 million; trial court excluded this evidence because defendant-seller's expert witness could not testify to what plaintiff-purchaser actually did in preparing tax filing and could only testify about what plaintiff-purchaser should have done; court held there was sufficient factual basis for the evidence and thus it should have been admitted, and that plaintiff-purchaser could have used any contrary evidence in cross-examination).

703.140 An expert witness may not be cross-examined on the basis of facts or data upon which the expert did not rely in formulating the opinion, when the material is itself inadmissible.

Cervantes v Rijlaarsdam, 190 Ariz. 396, 949 P.2d 56 (Ct. App. 1997) (although expert read report, he did not consider or rely on it, thus trial court properly precluded cross-examining expert about report).

Rule 704. Opinion on an Ultimate Issue.

(a) In General--Not Automatically Objectionable. An opinion is not objectionable just because it embraces an ultimate issue.

(b) Exception. In a criminal case, an expert witness must not state an opinion about whether the defendant did or did not have a mental state or condition that constitutes an element of the crime charged or of a defense. Those matters are for the trier of fact alone.

Comment to 2012 Amendment

Subsection (b) has been added to conform to Federal Rule of Evidence 704, which was amended in 1984 to add comparable language. The new language in the Arizona rule is considered to be consistent with current Arizona law.

Additionally, the language of Rule 704 has been amended to conform to the federal restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent in the restyling to change any result in any ruling on evidence admissibility.

The Court deleted the reference to an "inference" on the grounds that the deletion made the rule flow better and easier to read, and because any "inference" is covered by the broader term "opinion." Courts have not made substantive decisions on the basis of any distinction between an opinion and an inference. No change in current practice is intended.

Comment

Some opinions on ultimate issues will be rejected as failing to meet the requirement that they assist the trier of fact to understand the evidence or to determine a fact in issue. Witnesses are not permitted as experts on how juries should decide cases.

Cases

704.010 Opinion evidence is admissible even if it involves an ultimate issue in the case.

State v Chappell, 225 Ariz. 229, 236 P.3d 1176, ¶¶ 16–18 (2010) (state alleged killing was especially cruel; medical examiner testified that drowning was "horrifying experience" and "10" on "scale of 1 to 10"; defendant contended this was improper opinion on ultimate issue; court noted testimony was about experience of drowning and not opinion whether victim suffered, thus comments were neither improper nor embracing ultimate issue).

Fuenning v Superior Ct., 139 Ariz. 590, 680 P.2d 121 (1983) (in DUI case, police officer may give opinion that defendant displayed symptoms of intoxication, but should not give opinion that defendant was driving while intoxicated, which amounts to giving opinion on defendant's guilt).

State v Fornof, 218 Ariz. 74, 179 P.3d 954, ¶¶ 20–21 (Ct. App. 2008) (officer testified that defendant had 43 grams of cocaine base that was worth $4,360, cash in predominately $20 bills, and no means of smoking that cocaine; trial court did not err in allowing expert witness to testify based on that evidence that defendant possessed the cocaine for sale rather than personal use).

State v Campoy (Cordova), 214 Ariz. 132, 149 P.3d 756, ¶¶ 6–12 (Ct. App. 2006) (defendant was charged with DUI; court held trial court abused discretion in ruling that state's witnesses, when testifying about FSTs, could not use such terms as "impairment," "sobriety," "tests," "pass/fail," "marginal," or "field sobriety test").

State v Lummus, 190 Ariz. 569, 950 P.2d 1190 (Ct. App. 1997) (court was concerned that officer testified that, on intoxication scale of 1 to 10, defendant was 10+, but held error was harmless beyond reasonable doubt).

Souza v Fred Carriers Contracts, Inc., 191 Ariz. 247, 955 P.2d 3 (Ct. App. 1997) (accident reconstruction expert should have been permitted to give opinion on how and why accident happened; trial court therefore erred in granting defendant's motion for summary judgment).

State v Corona, 188 Ariz. 85, 932 P.2d 1356 (Ct. App. 1997) (expert testimony on how a person can promote a gang by stating name of gang and by making threats did not amount to telling jurors how to decide the case).

State v Carreon, 151 Ariz. 615, 617, 729 P.2d 969, 971 (Ct. App. 1986) (police officer permitted to give opinion that, based on way that defendant carried cocaine and money, drugs were possessed for sale).

704.020 Testimony must assist the jurors to understand the evidence or to determine a fact in issue and not merely tell the jurors how they should decide the case.

State v Blakley, 204 Ariz. 429, 65 P.3d 77, ¶¶ 33–39 (2003) (trial court permitted expert witness to testify about police interrogation tactics and their coercive effect court held trial court did not abuse discretion in precluding expert from giving opinion on whether tactics in this case were coercive and giving opinion whether defendant's confession was voluntary).

Webb v Omni Block Inc., 216 Ariz. 349, 166 P.3d 140, ¶¶ 11–22 (Ct. App. 2007) (court held that trial court erred in allowing defendant's expert witness to give opinion on percentage of fault to be attributed to each party, and error required reversal).

State v Herrera, 203 Ariz. 131, 51 P.3d 353, ¶¶7–8 (Ct. App. 2002) (while testifying about FSTs, officer stated, "I felt he was impaired to the slightest degree"; court held officer's testimony was impermissible, but trial court did not err in denying motion for mistrial because trial court immediately struck officer's testimony and gave detailed curative instruction, and in final instruction repeated that curative instruction and told jurors to disregard any stricken testimony).

State v Lummus, 190 Ariz. 569, 950 P.2d 1190 (Ct. App. 1997) (court was concerned that officer testified that, on intoxication scale of 1 to 10, defendant was 10+, but held error was harmless beyond reasonable doubt).

State v Reimer, 189 Ariz. 239, 941 P.2d 912 (Ct. App. 1997) (when victim gave a different version when testifying, trial court erred in allowing officer to give opinion that victim was not lying when she gave version at time of assault).

704.025 Although results of field sobriety tests (FSTs) are not admissible to quantify an accused's blood alcohol concentration, they are relevant evidence of an accused's impairment, thus an officer may testify about the manner in which defendant performed the FSTs, and may testify they administered FSTs in an attempt to determine whether defendant was in fact intoxicated and was intoxicated while driving.

State v Campoy (Cordova), 214 Ariz. 132, 149 P.3d 756, ¶¶ 6–12 (Ct. App. 2006) (defendant was charged with DUI; court held trial court abused discretion in ruling that state's witnesses, when testifying about FSTs, could not use such terms as "impairment," "sobriety," "tests," "pass/fail," "marginal," or "field sobriety test").

704.030 An expert may testify about behavioral characteristics of certain classes of persons, but may not give an opinion about the accuracy, reliability, or truthfulness of a particular person, or quantify the percentage of such persons who are truthful.

State v Lujan, 192 Ariz. 448, 967 P.2d 123,¶¶ 8–9, 11–13, 16, 20–21 (1998) (because defendant admitted playing with victim in swimming pool but denied ever touching victim's private parts, defendant was entitled to show victim was hypersensitive to interaction with adult males and thus may have mis-perceived her physical contact with defendant, and thus should have been allowed to introduce

expert testimony about how victim's nearly contemporaneous sexual abuse by others may have caused victim to mis-perceived defendant's actions).

State v Reimer, 189 Ariz. 239, 941 P.2d 912 (Ct. App. 1997) (when victim gave a different version when testifying, trial court erred in allowing officer to give opinion that victim was not lying when she gave version at time of assault).

704.035 Although an expert may not give an opinion about the accuracy, reliability, or truthfulness of a particular person, a witness may disclose to jurors those facts that caused the witness not to believe a particular person.

State v Doerr, 193 Ariz. 56, 969 P.2d 1168, ¶¶ 25–27 (1998) (on cross-examination, defendant elicited testimony from officer that he did not believe defendant was truthful during questioning on day of arrest; on rebuttal, state permitted to ask officer why he did not believe defendant was being truthful).

704.040 An expert may give an opinion of the defendant's state of mind at the time of the offense only when the defendant raises an insanity defense.

State v Mott, 187 Ariz. 536, 931 P.2d 1046 (1997) (defendant was charged with child abuse for failure to seek treatment for her child after child was injured while in care of defendant's boyfriend; defendant wanted to introduce evidence that her condition as battered woman caused her to form "traumatic bond" with her boyfriend, caused her to feel hopeless and depressed and that she could not escape, interfered with her ability to sense danger and protect others, and caused her to believe what her boyfriend told her and to lie to protect him, all of which would preclude her from forming necessary intent; court held this was merely another form of diminished capacity, which legislature has refused to adopt, thus evidence was not admissible).

State v Wright, 214 Ariz. 540, 155 P.3d 1064, ¶¶ 6–7 (Ct. App. 2007) (defendant was charged with theft of means of transportation, which requires knowingly controlling vehicle with intent to deprive permanently; defendant sought to introduce expert testimony that his "mental capacity was lowered and that he is a naive-type of person" and thus could not have mental state necessary to commit crime; court held that *State v Mott* precluded evidence of diminished capacity defense).

704.045 Although an expert may not give an opinion about the defendant's state of mind on the issue of *mens rea*, an expert may testify about the defendant's behavior that the expert observed.

State v Wright, 214 Ariz. 540, 155 P.3d 1064, ¶¶ 11–12, 15–17 (Ct. App. 2007) (defendant was charged with theft of means of transportation, which requires knowingly controlling vehicle with intent to deprive permanently; defendant sought to introduce expert testimony that his "mental capacity was lowered and that he is a naive-type of person" and thus could not have mental state necessary to commit crime; court concluded that expert testimony was about defendant's mental capacity generally and did not constitute observation evidence about defendant's relevant behavioral characteristics bearing on defendant's state of mind at time of offense, thus trial court properly precluded this evidence).

March 11, 2012

Rule 705. Disclosing the Facts or Data Underlying an Expert's Opinion.

Unless the court orders otherwise, an expert may state an opinion— and give the reasons for it— without first testifying to the underlying facts or data. But the expert may be required to disclose those facts or data on cross-examination.

Comment to 2012 Amendment

The language of Rule 705 has been amended to conform to the federal restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

The reference to an "inference" has been deleted on the grounds that the deletion made the rule flow better and easier to read, and because any "inference" is covered by the broader term "opinion." Courts have not made substantive decisions on the basis of any distinction between an opinion and an inference. No change in current practice is intended.

Cases

705.020 A witness may disclose the facts or data upon which the witness relied, but only for the limited purpose of disclosing the basis of the opinion and not as substantive evidence.

State v Hummert, 188 Ariz. 119, 933 P.2d 1187 (1997) (count noted that otherwise inadmissible scientific evidence would not be admitted as substantive evidence).

705.040 An expert witness may be cross-examined about facts or data the expert considered in formulating the opinion, and about facts or data the expert considered but rejected in formulating the opinion.

Standard Chartered PLC v Price Waterhouse, 190 Ariz. 6, 945 P.2d 317 (Ct. App. 1996) (in litigation over sale of bank, plaintiff-purchaser claimed that $23 million loss reserve figure supplied by defendant-seller understated amount of uncollectible loans; defendant-seller sought to introduce tax filing made by plaintiff-purchaser 1½ years after sale showing a loss reserve of $9.8 million; trial court excluded this evidence because defendant-seller's expert witness could not testify to what plaintiff-purchaser actually did in preparing tax filing and could only testify about what plaintiff-purchaser should have done; court held there was sufficient factual basis for the evidence and thus it should have been admitted, and that plaintiff-purchaser could have used any contrary evidence in cross-examination).

705.050 An expert witness may not be cross-examined on the basis of facts or data upon which the expert did not rely in formulating the opinion, when the material is itself inadmissible.

Cervantes v Rijlaarsdam, 190 Ariz. 396, 949 P.2d 56 (Ct. App. 1997) (although expert read report, he did not consider or rely on it, thus trial court properly precluded cross-examining expert about report).

March 11, 2012

Rule 706. Court Appointed Expert Witnesses.

(a) Appointment Process. On a party's motion or on its own, the court may order the parties to show cause why expert witnesses should not be appointed and may ask the parties to submit nominations. The court may appoint any expert that the parties agree on and any of its own choosing. But the court may only appoint someone who consents to act.

(b) Expert's Role. The court must inform the expert of the expert's duties. The court may do so in writing and have a copy filed with the clerk or may do so orally at a conference in which the parties have an opportunity to participate. The expert:

(1) must advise the parties of any findings the expert makes;

(2) may be deposed by any party;

(3) may be called to testify by the court or any party; and

(4) may be cross-examined by any party, including the party that called the expert.

(c) Compensation. The expert is entitled to a reasonable compensation, as set by the court. Except as otherwise provided by law, appointment of an expert by the court is subject to the availability of funds or the agreement of the parties concerning compensation.

(d) Disclosing the Appointment to the Jury. The court may authorize disclosure to the jury that the court appointed the expert.

(e) Parties' Choice of Their Own Experts. This rule does not limit a party in calling its own experts.

Comment to 2012 Amendment

The language of subsection (c) of Rule 706 has been amended to provide, consistent with Federal Rule of Evidence 706, that an expert is entitled to a reasonable compensation, as set by the court.

Additionally, the language of subsections (a), (b), (d), and (e) of the rule has been amended to conform to the federal restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent in the restyling to change any result in any ruling on evidence admissibility.

Comment

Federal Rules of Evidence, Rule 706(b) is appropriate in Federal Courts where the funds to compensate experts are made available by statute. Such funds are not generally available in Arizona except in capital offenses, A.R.S. § 13–673; sanity hearings, A.R.S. § 13–1674; medical liability review panels, A.R.S. § 12–567(B)(4) and (M); and mental health proceedings, A.R.S. § 36–545.04. Therefore, Arizona Rules of Evidence, Rule 706(a) was prefaced by the availability of these funds or the compensation of the experts to be agreed upon, and Federal Rules of Evidence, Rule 706(b) was not adopted, and paragraphs numbered (c) and (d) were renumbered paragraphs (b) and (c) respectively.

Paragraph (a) — Appointment.

706.a.010 The trial court has discretion in determining whether to appoint an expert.

State v Hansen, 156 Ariz. 291, 751 P.2d 951 (1988) (court refused to adopt rule that defendant is entitled to every psychiatric test possible regardless of possible results, and held trial court did not abuse discretion in refusing to appoint neurologist when doctor testified it was possible, although not highly probable, that defendant suffered from post-concussion syndrome, and that even if defendant did suffer from post-concussion syndrome, it was likely she would still be competent to stand trial).

State v Chaney, 141 Ariz. 295, 686 P.2d 1265 (1984) (because doctors found no evidence of temporal lobe epilepsy, trial court did not abuse discretion in denying request for further examination).

706.a.020 The United States Constitution may mandate appointment of experts in non-capital cases if the denial of such services would substantially prejudice the defendant.

State v Peeler, 126 Ariz. 254, 614 P.2d 335 (Ct. App. 1980) (defendant failed to establish that refusal to appoint expert to investigate jury selection system prejudiced him).

706.a.030 Trial court should not appoint an expert unless the expert agrees to act and testify.

State v Schackart, 175 Ariz. 494, 858 P.2d 639 (1993) (even though defendant told trial court that doctor in question did not accept court appointments, record showed that doctor testified at trial and at sentencing hearing).

706.a.040 To determine whether a treating physician should be considered a fact witness, for which no compensation is due, or an expert witness, for which compensation is due, the trial court should view the party's disclosure stating the capacity in which the physician will testify, with these considerations: (1) questions about the physician's experience and specialization do not mean the physician is being treated as an expert witness because this information is necessary for the jurors to determine the weight to give to that testimony; (2) if the physician testifies based on information acquired independent of the litigation, or testifies about the who, what, when, where, and why relating to the patient or the patient's records, the physician will generally be testifying as a fact witness; (3) if the physician testifies based on reviewing records of other health care providers, or based on medical research or literature, the physician will generally be testifying as an expert witness; (4) if the physician is asked to give an opinion formulated in the course of treating the patient, the physician will generally be testifying as a fact witness; (3) if the physician is asked to give an opinion in general, the physician will generally be testifying as an expert witness; and (5) asking the physician to explain terms or procedures in a manner the trier-of-fact may more easily comprehend does not turn a fact witness into an expert witness.

* *State ex rel Montgomery v Whitten (Martinez)*, 228 Ariz. 17, 262 P.3d 238, ¶¶ 10–21 (Ct. App. 2011) (more than two dozen physicians and health care professionals treated 7-week-old victim for massive brain injury and skull fractures; when victim died, state charged defendant with murder; state disclosed it would call eight of the physicians as witnesses; court entered order that state would have to pay six of them as expert witnesses; court granted relief to state and apparently ordered trial court to base payment on above considerations).

Paragraph (b) — Disclosure of appointment.

No Arizona cases.

Paragraph (c) — Parties' experts of own selection.

No Arizona cases.

March 11, 2012

Rule 801. Definitions That Apply to This Article; Exclusions from Hearsay.

(a) **Statement.** "Statement" means a person's oral assertion, written assertion, or nonverbal conduct, if the person intended it as an assertion.

(b) **Declarant.** "Declarant" means the person who made the statement.

(c) **Hearsay.** "Hearsay" means a statement that:

(1) the declarant does not make while testifying at the current trial or hearing; and

(2) a party offers in evidence to prove the truth of the matter asserted in the statement.

(d) **Statements That Are Not Hearsay.** A statement that meets the following conditions is not hearsay:

(1) *A Declarant-Witness's Prior Statement.* The declarant testifies and is subject to cross-examination about a prior statement, and the statement:

(A) is inconsistent with the declarant's testimony;

(B) is consistent with the declarant's testimony and is offered to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in so testifying; or

(C) identifies a person as someone the declarant perceived earlier.

(2) *An Opposing Party's Statement.* The statement is offered against an opposing party and:

(A) was made by the party in an individual or representative capacity;

(B) is one the party manifested that it adopted or believed to be true;

(C) was made by a person whom the party authorized to make a statement on the subject;

(D) was made by the party's agent or employee on a matter within the scope of that relationship and while it existed; or

(E) was made by the party's coconspirator during and in furtherance of the conspiracy.

The statement must be considered but does not by itself establish the declarant's authority under (C); the existence or scope of the relationship under (D); or the existence of the conspiracy or participation in it under (E).

Comment to 2012 Amendment

The last sentence of Rule 801(d)(2) has been added to conform to Federal Rule of Evidence 801(d)(2). The amendment does not, however, include the requirement in Federal Rule of Evidence 801(d)(1)(A) that a prior inconsistent statement be "given under oath" to be considered as non-hearsay.

Otherwise, the language of Rule 801 has been amended to conform to the federal restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent in the restyling to change any result in any ruling on evidence admissibility.

Statements falling under the hearsay exclusion provided by Rule 801(d)(2) are no longer referred to as "admissions" in the title to the subdivision. The term "admissions" is confusing because not all statements covered by the exclusion are admissions in the colloquial sense— a statement can be within the exclusion even if it "admitted" nothing and was not against the party's interest when made. The term "admissions" also raises confusion in comparison with the Rule 804(b)(3) exception for declarations against interest. No change in application of the exclusion is intended.

Comment to Original 1977 Rule

Evidence which is admissible under the hearsay rules may be inadmissible under some other rule or principle. A notable example is the confrontation clause of the Constitution as applied to criminal cases. The definition of "hearsay" is a utilitarian one. The exceptions to the hearsay rule are based upon considerations of reliability, need, and experience. Like all other rules which favor the admission of evidence, the exceptions to the hearsay rule are counterbalanced by Rules 102 and 403.

Rule 801(d). This subsection of the rule has been modified and is consistent with the United States Supreme Court's version of the Rule and State v. Skinner, 110 Ariz. 135, 515 P.2d 880 (1973).

NOTE: On March 8, 2004, the United States Supreme Court decided *Crawford v Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004), which greatly changed the law in determining whether admission of certain hearsay statements violated the confrontation clause. Cases decided prior to that date holding that admission of certain statements did not violate the confrontation clause therefore may no longer be good law.

Cases

801.003 The confrontation clause only applies only in a criminal proceeding.

In re Frankovitch, 211 Ariz. 370, 121 P.3d 1240, ¶ 16 (Ct. App. 2005) (jurors found Frankovitch to be sexually violent person; Frankovitch contended trial court's admission of his criminal history of arrests and convictions violated right to confrontation; court held that *Crawford* only applies in criminal cases, and because SVP proceeding is civil action, cases decided under confrontation clause did not apply).

801.004 The confrontation clause does not apply in a probation revocation proceeding.

State v Carr, 216 Ariz. 444, 167 P.3d 131, ¶¶ 9–10 (Ct. App. 2007) (court rejected defendant's contention that admission of urinalysis report at probation revocation proceeding violated right to confrontation).

801.005 In order for an out-of-court statement to be considered "testimonial evidence," the declarant must have made the statement to an agent of the state.

State v Hampton, 213 Ariz. 167, 140 P.3d 950, ¶¶ 45–50 & n.12 (2006) (at penalty phase, defendant's former girlfriend testified about several acts of violence that defendant committed; to extent girlfriend testified about what others had told her, that would not be testimonial evidence because she was not agent of state).

State v Aguilar, 210 Ariz. 51, 107 P.3d 377, ¶¶ 9–11 (Ct. App. 2005) (in prosecution for murder, state sought to admit testimony by victim's son of excited utterance made by victim, and testimony by victim's wife's brother-in-law of excited utterance made by victim's wife; court held in-court testimony by lay witness of out-of-court excited utterances that lay witness heard was not "testimonial statement" that must satisfy Sixth Amendment).

801.007 The confrontation clause does not apply to use of rebuttal evidence offered during penalty phase of capital sentencing.

State v McGill, 213 Ariz. 147, 140 P.3d 930, ¶¶ 45–52 (2006) (to rebut defendant's mitigation, state introduced hearsay statements made by victim of defendant's endangerment conviction and cell mate who said defendant asked him to kill potential witness; court rejected defendant's contention that admission of these hearsay statements violated confrontation clause).

801.009 If the defendant creates the circumstances that allow for the admissibility of a statement that would otherwise violate the right of confrontation, the defendant on essentially equitable grounds forfeits the protections of the confrontation clause.

Crawford v Washington, 541 U.S. 36, 62, 124 S. Ct. 1354, 1370 (2004) (Court stated, "[T]he rule of forfeiture by wrongdoing (which we accept) extinguishes confrontation claims on essentially equitable grounds; it does not purport to be an alternative means of determining reliability.").

State v Ellison, 213 Ariz. 116, 140 P.3d 899, ¶¶ 45–47 (2006) (court held that, if defendant introduced those parts of codefendant's statement that implicated codefendant and tended to exculpate defendant, state could inquire on cross-examination about those portions of codefendant's statement that implicated defendant, and introduction of those other portions would not implicate confrontation clause).

State v Prasertphong, 210 Ariz. 496, 114 P.3d 828, ¶¶ 24–29 (2005) (defendant sought to introduce portion of codefendant's statement as statement against penal interest; court held state was then entitled to introduce those remaining portions of codefendant's statement under Rule 106 that were necessary to keep jurors from being misled, and that by introducing portions of codefendant's statement, defendant forfeited confrontation clause protection for remaining portions).

801.010 Admission of an out-of-court statement that is non-hearsay is not "testimonial evidence" and does not violate the confrontation clause of the United States Constitution.

Crawford v Washington, 541 U.S. 36, 59, 124 S. Ct. 1354, 1369 n.9 (2004) (Court stated, "The [Confrontation] Clause also does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted.").

State v Womble, 225 Ariz. 91, 235 P.3d 244, ¶¶ 10–13 (2010) (detective testified that jail informant told him about defendant and that he used that information to get court order to listen to telephone calls; because detective testified only about defendant's existence and not about substance of what informant said, testimony did not violate Confrontation Clause).

State v Boggs, 218 Ariz. 325, 185 P.3d 111, ¶¶ 29–36 (2008) (detective testified at trial that, during defendant's interrogation, he asked defendant about statements codefendant had made; defendant contended this violated his Sixth Amendment right of confrontation; court held that, because codefendant's statements were admitted not to prove truth of matters asserted, but were instead introduced to show context of interrogation, admission did not violate right of confrontation).

State v Fischer, 219 Ariz. 408, 199 P.3d 663, ¶ 37 (Ct. App. 2008) (in prosecution stemming from plural marriage, defendant conceded statements were not "testimonial," thus admission of out-of-court statements did not violate defendant's right of confrontation).

State v Tucker, 215 Ariz. 298, 160 P.3d 177, ¶¶ 52–62 (2007) (state's materials expert testified that duct tape used to gag victim was for industrial use, and testified that he based this opinion in part on conversations he had with manufacturer's sales representatives; because statements from sales representatives were offered to show basis for opinion and not to prove truth of matters asserted, admission of that evidence did not violate confrontation clause).

State v Smith, 215 Ariz. 221, 159 P.3d 531, ¶¶ 21–26 (2007) (to prove especially heinous, cruel, or depraved aggravating circumstance, state presented testimony of medical examiner, who relied on findings and opinions of medical examiner from 1976; because findings and opinions of previous medical examiner were admitted merely to show basis for testifying medical examiner's opinion and not to prove truth of matters asserted, admission of that evidence did not violate confrontation clause).

State v Roque, 213 Ariz. 193, 141 P.3d 368, ¶¶ 69–70 (2006) (in videotape of interrogation of defendant shown to jurors, detective told defendant his wife made statements to them incriminating him; because there was no evidence defendant's wife ever made these statements, detective's statement was offered merely to show interrogation technique and not for truth of matter asserted, and trial court instructed jurors this evidence was not offered for its truth; because evidence was not offered to prove truth of matter asserted, it was not hearsay and thus did not violate confrontation clause).

State v Ellison, 213 Ariz. 116, 140 P.3d 899, ¶¶ 54–56 (2006) (trial court allowed detective to testify that, when codefendant spoke about defendant, his hands shook, his voice broke, and his eyes welled up as if about to cry; defendant contended this was inadmissible hearsay and violated confrontation clause; court stated there was no evidence showing codefendant intended these actions to be assertions, thus they did not violate confrontation clause).

State v Ruggiero, 211 Ariz. 262, 120 P.3d 690, ¶¶ 14–22 (Ct. App. 2005) (defendant was charged with murder as result of shooting of 13-year-old daughter's 28-year-old boyfriend; defendant was allowed to introduce testimony from ex-girlfriend of one of defendant's friends (Soto) that Soto had said to her he killed boyfriend; trial court then allowed state to introduce testimony from police officer that Soto had told him that defendant had killed boyfriend; court noted second statement was not offered to prove truth of matter asserted and instead was offered only for impeachment of first statement, thus confrontation clause did not bar use of that statement).

801.020 For an out-of-court statement considered "testimonial evidence" to be admissible under the confrontation clause, there are two requirements : (1) the declarant must be unavailable, and (2) the defendant must have had a prior opportunity to cross-examine the declarant.

Crawford v Washington, 541 U.S. 36, 68–69, 124 S. Ct. 1354, 1374 (2004) (Court overruled *Ohio v Roberts*, 448 U.S. 56 (1980), which had held constitutional right of confrontation did not bar admission of unavailable witness's statement if statement bore "adequate indicia of reliability," which meant evidence that either fell within "firmly rooted hearsay exception" or bore "particularized guarantees of trustworthiness").

* *State v Lehr*, 227 Ariz. 140, 254 P.3d 379, ¶¶ 27–35 (2011) (at pretrial hearing before retrial, victim T.H. testified she would not testify against defendant because she opposed capital punishment; trial court threatened her with contempt, including jail for up to 6 months; T.H. said putting her in jail or fining her would not change her mind; court held trial court did not abuse discretion in finding T.H. was unavailable and allowing admission of her testimony from first trial).

State v King, 213 Ariz. 632, 146 P.3d 1274, ¶¶ 2, 17 (Ct. App. 2006) (court held that records of prior convictions and MVD records were not testimonial evidence).

State v Alvarez, 213 Ariz. 467, 143 P.3d 668, ¶¶ 10, 19–20 (Ct. App. 2006) (court held that, when deputy saw victim staggering and with blood over face and asked victim what happened, victim's statement in response was not testimonial evidence).

State v Parks, 213 Ariz. 412, 142 P.3d 720, ¶¶ 1, 6–7 (Ct. App. 2006) (court held that, when officer questioned witness after emergency had passed and did so for purpose of gathering evidence, witness's statement was testimonial evidence, and admission of that statement without defendant's having opportunity to cross-examine violated defendant's right of confrontation).

State v King, 212 Ariz. 372, 132 P.3d 311, ¶¶18, 33–35 (Ct. App. 2006) (court held that, when officer questioned witness after emergency had passed and did so for purpose of gathering evidence, witness's statement was testimonial evidence, and admission of that statement without defendant's having opportunity to cross-examine violated defendant's right of confrontation).

Bohsancurt v Eisenberg, 212 Ariz. 182, 129 P.3d 471, ¶¶ 10, 35 (Ct. App. 2006) (court held that intoxilyzer quality assurance records are not testimonial evidence).

State v Bronson, 204 Ariz. 321, 63 P.3d 1058, ¶¶ 15–28 (Ct. App. 2003) (court held accomplice confessions that implicate criminal defendants and are sought to be admitted under Rule 804(b)(3) are not within firmly-rooted exception; court further found insufficient indicia of reliability, thus court held admission of transcript of accomplice's interview conducted by defendant's attorney was error).

State v Sullivan, 187 Ariz. 599, 931 P.2d 1109 (Ct. App. 1996) (statement of identity of person who caused injuries admissible under Rule 803(4)).

801.025 Whether a witness is considered "unavailable" for Sixth Amendment purposes is determined as a matter of constitutional law, and not as a matter of state evidentiary law.

State v Real, 214 Ariz. 232, 150 P.3d 805, ¶ 11 (Ct. App. 2007) (officer administered FSTs to defendant and then took his statement; at trial, officer had no independent memory of investigation, so trial court allowed officer to read from his report; defendant contended officer was "unavailable" under Rule 804(a)(3); court held that, because officer was present and was subject to cross-examination, officer was available).

801.030 When a witness testifies and is subject to cross-examination, any statement that witness made is admissible and its admission does not violate the confrontation clause.

Crawford v Washington, 541 U.S. 36, 59, 124 S. Ct. 1354, 1369 n.9 (2004) (Court stated, "[W]hen the declarant appears for cross-examination at trial, the confrontation clause places no constraints at all on the use of his prior testimonial statements.").

State v Anderson, 210 Ariz. 327, 111 P.3d 369, ¶¶ 31–32 (2005) (because declarant did testify, there was no valid *Bruton* objection to use of her statements).

State v Lopez, 217 Ariz. 433, 175 P.3d 682, ¶ 17 (Ct. App. 2008) (nurse testified about victim's description of attacker's physical contact with her, and about answers victim gave to questions included in sexual assault kit provided by TPD; because victim testified and was subject to cross-examination, there was no confrontation clause issue.

State v Salazar, 216 Ariz. 316, 166 P.3d 107, ¶¶ 3–8 (Ct. App. 2007) (when victim testified she did not remember or could not recall, prosecutor played her tape recorded statement; because victim was present and subject to cross-examination; admission of her out-of-court statement did not violate confrontation clause).

State v Real, 214 Ariz. 232, 150 P.3d 805, ¶¶ 2–9 (Ct. App. 2007) (officer administered FSTs to defendant and then took his statement; at trial, officer had no independent memory of investigation, so trial court allowed officer to read from his report; court held, because officer testified and was subject to cross-examination, admission of officer's testimony did not violate Sixth Amendment).

801.040 Statements made during police interrogation under circumstances objectively indicating the primary purpose of the interrogation was to enable police assistance to meet an ongoing emergency are not testimonial.

State v Boggs, 218 Ariz. 325, 185 P.3d 111, ¶¶ 55–58 (2008) (officers arrived and spoke to victim, who was outside restaurant and had been shot twice; at trial, officers testified about victim's statements; court held victim's statements described what appeared to be ongoing emergency, thus they were non-testimonial).

State v Alvarez, 213 Ariz. 467, 143 P.3d 668, ¶¶ 12, 18–19 (Ct. App. 2006) (officer found victim staggering down road with blood in hair and on face; officer asked victim what happened, and victim said three men had jumped him and had taken his car; victim died before trial; court held that, although victim gave answers in response to officer's question, primary purpose of question was to enable police assistance to meet an ongoing emergency and not to establish or prove past events for later criminal prosecution, thus victim's statement was not testimonial and admission did not violate confrontation clause).

State v King, 212 Ariz. 372, 132 P.3d 311, ¶¶ 2–6, 29–32 (Ct. App. 2006) (declarant called 9-1-1 and requested that officers come to her house, said she had restraining order against defendant, who had just thrown two puppies over her house; when operator asked where defendant was, declarant said he "just drove off" and that she did not know where he was; in response to further questions, declarant identified defendant by name, date of birth, clothing, and race, and provided model and color of vehicle; court reversed conviction and stated that, on remand, trial court should consider which portions of 9-1-1 might be admissible and which parts might not be admissible).

801.050 Statements made during police interrogation under circumstances objectively indicating there is no ongoing emergency, and that the primary purpose is to establish or prove past events potentially relevant to later criminal prosecution are testimonial.

State v Parks, 213 Ariz. 412, 142 P.3d 720, ¶¶ 4–7 (Ct. App. 2006) (police arrived after victim had been killed; after determining that defendant's son and brother had witnessed shooting, police separated and questioned them; because conduct showed police were operating in investigative mode, statements were testimonial, thus admission violated confrontation clause).

State v King, 212 Ariz. 372, 132 P.3d 311, ¶¶ 2–6, 29–32 (Ct. App. 2006) (declarant called 9-1-1 and requested that officers come to her house, said she had restraining order against defendant, who had just thrown two puppies over her house; when operator asked where defendant was, declarant said he "just drove off" and that she did not know where he was; in response to further questions, declarant identified defendant by name, date of birth, clothing, and race, and provided model and color of vehicle; court reversed conviction and stated that, on remand, trial court should consider which portions of 9-1-1 might be admissible and which parts might not be admissible).

801.060 If the out-of-court statement is the functional equivalent of in-court testimony or was made under circumstances that the declarant would reasonably expect to be available at trial against a particular defendant, it will be considered a "testimonial statement" or "testimonial evidence" and thus will not be admissible unless (1) the declarant is unavailable, and (2) the defendant has had a prior opportunity to cross-examine the declarant.

State v Parks, 211 Ariz. 19, 116 P.3d 631, ¶¶ 36–53 (Ct. App. 2005) (defendant's son witnessed actions that led to death of victim; officers arrived and one officer interviewed son, who was emotional at time; son died before trial; court held that son's statement qualified as excited utterance; court further held son's statement was "testimonial statement" because: (1) officer already knew defendant had killed victim when he interviewed son; (2) defendant had already been arrested; (3) there were no exigent safety, security, or medical concerns; (4) officer's questioning was not casual encounter; (5) officer separated son and other witness before questioning them; (6) officer was operating in investigative mode; (7) purpose of questioning was to obtain information about potential crime; and (8) son appeared to appreciate that what he had witnessed would have significance to future criminal prosecution; court held admission of son's statement violated defendant's confrontation clause rights), *aff'd,* 213 Ariz. 412, 142 P.3d 720, ¶ 8 (Ct. App. 2006).

801.070 If the out-of-court statement is not the functional equivalent of in-court testimony or was not made under circumstances that the declarant would reasonably expect to be available at trial against a particular defendant, it will not be considered a "testimonial statement" or "testimonial evidence" and thus its admissibility will be controlled by the rules governing hearsay statements.

State v Damper, 223 Ariz. 572, 225 P.3d 1148, ¶¶ 7–13 (Ct. App. 2010) (throughout morning, defendant and girlfriend (C.) argued because C. did not want defendant to go to MLK Day event because she worried defendant's ex-girlfriend might be there and because she feared violence might break out at event; at 11:21 a.m., C's friend B. received text message from C's cell phone that said, "Can you come over; me and Marcus [defendant] are fighting and I have no gas"; shortly after that, defendant's roommate heard gunshot; defendant told roommate C. had been shot; at trial, defendant claimed shooting was accidental; at trial, trial court admitted text message; on appeal, defendant contended admission of text message violated his Sixth Amendment right of confrontation; because defendant did not object at trial, court reviewed for fundamental error only; because nothing indicated C. intended text message might later be used in prosecution or at trial, court concluded text message was not testimonial, thus no Sixth Amendment violation).

State v Alvarez, 213 Ariz. 467, 143 P.3d 668, ¶¶ 16–17 (Ct. App. 2006) (officer found victim staggering down road with blood in hair and on face; officer asked victim what happened, and victim said three men had jumped him and had taken his car; victim died before trial; court held that, although victim gave answers in response to officer's question, there was nothing in record to suggest victim would have reasonably expected his statement to be used in a later criminal prosecution, thus statement was not testimonial and admission did not violate confrontation clause).

Bohsancurt v Eisenberg, 212 Ariz. 182, 129 P.3d 471, ¶¶ 12–18, 31 (Ct. App. 2006) (because applicable regulations required that each Intoxilyzer 5000 undergo calibration checks every 31 days whether or not machine is used, and because person doing calibration and maintenance test on particular machine has no idea whether affidavit of results of those tests will ever be used against particular defendant, court held that affidavit of Crime Laboratory employee who conducted calibration and maintenance test on Intoxilyzer 5000 was not "testimonial evidence," thus admission of affidavit did not violate confrontation clause).

Bohsancurt v Eisenberg, 212 Ariz. 182, 129 P.3d 471, ¶¶ 32–34 (Ct. App. 2006) (because affidavit contained no testimony against any particular person, mere fact that item in question was an affidavit does not make it "testimonial evidence").

State v Aguilar, 210 Ariz. 51, 107 P.3d 377, ¶¶ 2–13 (Ct. App. 2005) (in prosecution for murder, state sought to admit testimony by victim's son of excited utterance made by victim, and testimony by victim's wife's brother-in-law of excited utterance made by victim's wife; court held in-court testimony by lay witness of out-of-court excited utterances that lay witness heard was not "testimonial statement" that must satisfy Sixth Amendment).

State v Alvarez, 210 Ariz. 24, 107 P.3d 350, ¶¶ 18–22 (Ct. App. 2005) (officer found victim staggering down road with blood in hair and on face; officer asked victim what happened, and victim said three men had jumped him and had taken his car; victim died before trial; court held, although victim gave answers in response to officer's questions, this was not "police interrogation": victim did not call police, instead officer had found him; officer did not know crime had been committed, and instead questioned him about injuries in order to obtain medical help for him; questioning was neither structured nor conducted for purpose of producing evidence in anticipation of potential criminal prosecution, thus was not "testimonial statement"), *vac'd,* 213 Ariz. 467, 143 P.3d 668, ¶ 2 (Ct. App. 2006).

801.080 Whether the declarant would reasonably expect the statement to be available at trial against a particular defendant **is** a crucial element in determining whether the statement is "testimonial evidence."

State v King, 212 Ariz. 372, 132 P.3d 311, ¶ 21 (Ct. App. 2006) ("a primary factor in determining if a hearsay statement is testimonial is whether 'a reasonable person in the position of the declarant would objectively foresee that his statement might be used in the investigation or prosecution of a crime'").

State v Parks, 211 Ariz. 19, 116 P.3d 631, ¶ 36 (Ct. App. 2005) ("a statement may be testimonial under *Crawford* if the declarant would reasonably expect it to be used prosecutorially or if it was made under circumstances that would lead an objective witness reasonably to believe the statement would be available for use at a later trial"), *aff'd*, 213 Ariz. 412, 142 P.3d 720, ¶ 8 (Ct. App. 2006).

801.090 Whether the declarant would reasonably expect the statement to be available at trial against a particular defendant **is not** a crucial element in determining whether the statement is "testimonial evidence."

State v King, 213 Ariz. 632, 146 P.3d 1274, ¶¶ 15–27 (Ct. App. 2006) (court held that records of prior convictions were public record, and that retention and production of such records was not type of evil that confrontation clause intended to avoid, thus record of prior convictions was not "testimonial evidence").

State v Alvarez, 213 Ariz. 467, 143 P.3d 668, ¶ 15 (Ct. App. 2006) (court noted that, in *Davis v Washington*, Court apparently shifted focus from motivation or reasonable expectations of declarant to primary purpose of interrogation).

Bohsancourt v Eisenberg, 212 Ariz. 182, 129 P.3d 471, ¶¶ 28–31 (Ct. App. 2006) (court acknowledged that person doing calibration and maintenance test on Intoxilyzer 5000 and preparing affidavit of results would know that affidavit may be used in court, but noted that United States Supreme Court did not specifically emphasize any of its stated formulations as determinative of whether statement was "testimonial evidence," and thus concluded that knowledge of person preparing affidavit did not make affidavit "testimonial evidence").

801.100 The Confrontation Clause does not require that every person in the chain of custody be available to cross-examination, thus not everyone whose testimony might be relevant in establishing the chain of custody, authenticity of the sample, or accuracy of the testing device must appear in person.

State v Gomez, 226 Ariz. 165, 244 P.3d 1163, ¶¶ 1–21 (2010) (DNA testing and analysis involved seven steps; during first six steps, technicians used machines to isolate and amplify DNA and generate profiles, but did not interpret data or draw conclusions, and those technicians did not testify; senior forensic analyst who was laboratory supervisor testified in detail about laboratory's operating procedures, standards, and safeguards, and although she did not witness all steps, she checked technicians' records for any deviations from laboratory's protocols, and then personally performed final step in process, interpretation and comparison, which was only step that required human analysis; that analyst then testified that several profiles derived from evidence at crime scene matched profile obtained from defendant's blood sample; court noted it was useful to separate testimony into two parts: (1) testimony about laboratory protocols and generation of DNA profiles and (2) expert opinion that profiles matched; court assumed without deciding (1) machine-generated DNA profiles were hearsay statements and (2) although profiles were not admitted in evidence, senior analyst's testimony was functional equivalent of introduction of profiles in evidence; court held that chain of custody testimony did not violate Confrontation Clause simply because every technician who handled and processed samples did not testify, and that because defendant had opportunity to cross-examine senior analyst and question her about laboratory's procedures, technicians work, and machine-generated data, admission of senior analyst's testimony did not violate Confrontation Clause).

801.200 A statement admitted in violation of the confrontation clause may be harmless error.

State v Armstrong, 218 Ariz. 451, 189 P.3d 378, ¶¶ 31–34 (2008) (witness testified extensively at guilt phase of trial, but after remand for retrial of sentencing phase (before different jury), witness refused to testify, so trial court allowed state to present to jurors transcript of witness's testimony from guilt phase; court did not have to address whether admission of transcript was error because only way transcript could have affected verdict was in determination whether defendant committed multiple murders, and there was other evidence to establish that defendant committed multiple murders, so any error would have been harmless).

State v Smith, 215 Ariz. 221, 159 P.3d 531, ¶¶ 32–33 (2007) (because detective's report was admissible as recorded recollection, and because statements of medical examiner contained in report were admissible as present sense impressions, report satisfied hearsay requirements; because jurors heard other evidence about manner in which victims died and wounds they suffered, even if admission of detective's report was error, any error was harmless).

Paragraph (a) — Statement.

801.a.005 In order to be considered a "statement," the words must contain an assertion; thus if the words do not contain an assertion, they are not considered to be a "statement," and by definition are not hearsay.

State v Fischer, 219 Ariz. 408, 199 P.3d 663, ¶ 31 (Ct. App. 2008) (in prosecution stemming from plural marriage, witness was merely giving his observations about FLDS Church and what he saw occur; because he was not testifying about out-of-court declarations by third persons, his testimony was not hearsay).

801.a.010 If verbal or nonverbal conduct is not intended to be an assertion, by definition it is not hearsay, even if it is offered as evidence of the declarant's implicit belief of a fact.

State v Ellison, 213 Ariz. 116, 140 P.3d 899, ¶¶ 54–56 (2006) (trial court allowed detective to testify that, when codefendant spoke about defendant, his hands shook, his voice broke, and his eyes welled up as if about to cry; defendant contended this was inadmissible hearsay and violated confrontation clause; court stated there was no evidence showing codefendant intended these actions to be assertions, thus they were not hearsay).

State v Chavez, 225 Ariz. 442, 239 P.3d 761, ¶¶ 6–10 (Ct. App. 2010) (in inventory search of defendant's vehicle, officers found drugs and two cell phones; on cell phones were text messages in which unidentified senders apparently sought to buy drugs from defendant; defendant contended these messages were hearsay; court held these messages were not offered to prove truth of matters asserted (that senders wanted to purchase drugs), and they were not assertions that defendant had drugs for sale; rather they were offered as circumstantial evidence that defendant had drugs for sale, and fact that they showed declarants thought defendant had drugs for sale did not make them assertions).

Paragraph (c) — Hearsay.

801.c.010 Hearsay is an oral, written, or non-verbal assertion, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

State v Tucker, 215 Ariz. 298, 160 P.3d 177, ¶¶ 45–50 (2007) (defendant contended written descriptions on some photographs in montage of 44 photographs showing corpses and autopsies were hearsay statements; because photographs and statements were not offered to prove truth of matters asserted, statements were not hearsay).

State v Tucker, 215 Ariz. 298, 160 P.3d 177, ¶¶ 52–60 (2007) (state's materials expert testified that duct tape used to gag victim was for industrial use, and testified that he based this opinion in part on conversations he had with manufacturer's sales representatives; because statements from sales representatives were offered to show basis for opinion and not to prove truth of matters asserted, they were not hearsay).

State v Smith, 215 Ariz. 221, 159 P.3d 531, ¶¶ 21–26 (2007) (to prove the especially heinous, cruel, or depraved aggravating circumstance, state presented testimony of medical examiner, who relied on findings and opinions of medical examiner from 1976; because findings and opinions of previous medical examiner were admitted merely to show basis for testifying medical examiner's opinion and not to prove truth of matters asserted, statements were not hearsay).

State v Pandeli, 200 Ariz. 365, 26 P.3d 1136, ¶ 19 (2001) (because defendant wanted to introduce confession to exculpate himself and thus for truth of matter asserted, confession was hearsay and not admissible unless it came under some exception).

State v Dickens, 187 Ariz. 1, 926 P.2d 468 (1996) (detective's testimony that he was unable to obtain any information from two different people was not hearsay because it did not relate any out-of-court statement, and because it was offered to show steps the detective had taken to investigate case and rebut defendant's claim that police were making him take the fall for someone else).

State v Damper, 223 Ariz. 572, 225 P.3d 1148, ¶¶ 14–15 (Ct. App. 2010) (trial court admitted text message from victim's cell phone that said, "Can you come over; me and Marcus [defendant] are fighting and I have no gas"; because this was out-of-court statement offered to prove truth of matter asserted (that victim and defendant were fighting shortly before defendant shot victim), statement was hearsay).

State v May, 210 Ariz. 452, 112 P.3d 39, ¶¶ 11–14 (Ct. App. 2005) (defendant charged with DUI with person under 15 in vehicle; officer testified that man had arrived at scene and said that he was defendant's brother and that person in vehicle was his 13-year-old son; court held that man's statement was offered to prove truth of matter asserted, and thus was hearsay).

Fuentes v Fuentes, 209 Ariz. 51, 97 P.3d 876, ¶¶ 24–25 (Ct. App. 2004) (exhibit was copy of budget wife prepared for trial; because this budget of average anticipated monthly expenses was out-of-court statement offered to prove truth of matters asserted, it was hearsay, even though wife discussed budget while testifying; court concluded admission of exhibit did not prejudice husband because (1) wife testified and was subject to cross-examination, (2) information in exhibit was similar to affidavit of financial information that was admitted at trial, (3) admission of this type of evidence is fairly routine in dissolution proceedings, and (4) this was bench trial and court assumed trial court considered only competent evidence).

State v Davis, 205 Ariz. 174, 68 P.3d 127, ¶ 29 (Ct. App. 2003) (in attempt to show someone else might have killed victim, defendant wanted to offer as exculpatory evidence witness's testimony that victim had told her she was pregnant with M.H.'s child; court held this was hearsay because it was offered for truth of matter asserted, and that is was not admissible as state of mind under Rule 803(3) or statement for medical purpose under Rule 803(4)).

Ogden v J.M. Steel Erecting, Inc., 201 Ariz. 32, 31 P.3d 806, ¶¶ 36–37, 40 (Ct. App. 2001) (to prove driving record of driver who caused accident, plaintiffs presented driver's MVD record (listing three prior offenses) and police report of investigating officer, which contained supplement by another officer purporting to show driver's alleged driving record (listing 10 additional prior offenses); because plaintiffs offered supplement to prove driving record, supplement was hearsay; plaintiff cited only Rule 803(24) for admission of supplement).

Higgins v Higgins, 194 Ariz. 266, 981 P.2d 134, ¶¶ 27–29 (Ct. App. 1999) (father's testimony of what his mother told him the children told her was double hearsay, and because neither level came under some hearsay exception, trial court should not have admitted testimony).

State v Hernandez, 191 Ariz. 553, 959 P.2d 810, ¶ 8 (Ct. App. 1998) (20 minutes after killing victim, defendant called 9-1-1 and told operator that victim had attacked him with two broken bottles and so he shot victim in self-defense; court rejected defendant's claim that statement was not hearsay because he was offering it to rebut premeditation, and held it was offered to prove truth of matter asserted— that defendant acted in self-defense).

State v Tinajero, 188 Ariz. 350, 935 P.2d 928 (Ct. App. 1997) (because what translator told officer was statement made out of court offered to prove truth of matter asserted, it was hearsay; court held it was admissible under catch-all exception). (**Note:** this probably could have been admissible under Rule 803(1), present sense impressions.)

State v Geotis, 187 Ariz. 521, 930 P.2d 1324 (Ct. App. 1996) (officer testified about finding cash, club, water pistol, and pager inside defendant's car; defendant claimed that, because state did not offer these item in evidence, this testimony was hearsay; court found defendant's argument "frivolous").

State v Dunlap, 187 Ariz. 441, 930 P.2d 518 (Ct. App. 1996) (because statement was offered to prove truth of matter asserted (Boles was investigating Marley) it was hearsay).

801.c.020 If the evidence is an out-of-court assertion, it is not hearsay if it is offered for a purpose other than to prove the truth of the matter asserted, but that other purpose still must be relevant.

State v Dickens, 187 Ariz. 1, 926 P.2d 468 (1996) (detective's testimony that he was unable to obtain any information from two different people was not hearsay because it did not relate any out-of-court statement, and because it was offered to show steps the detective had taken to investigate case and rebut defendant's claim that police were making him take the fall for someone else).

State v Fischer, 219 Ariz. 408, 199 P.3d 663, ¶ 35 (Ct. App. 2008) (in prosecution stemming from plural marriage, testimony about how church had taken action against witness by removing him from church was for purpose of determining whether witness had any bias against church and "prophet," and thus was not hearsay).

Crackel v Allstate Ins. Co., 208 Ariz. 252, 92 P.3d 882, ¶¶ 59–64 (Ct. App. 2004) (trial court ordered parties to participate in settlement conference before Judge O'Neil; based on their conduct, Judge O'Neil found Allstate's employees had not participated in settlement conference in good faith, and ordered case to be tried on issue of damages only, at which point Allstate settled plaintiffs' claims; plaintiffs then sued Allstate for abuse of process, and sought to introduce Judge O'Neil's order sanctioning Allstate; court held sanction order was not hearsay because it was not offered to prove truth of matters asserted, but was instead offered to show effect it had on Allstate and its employees in settling plaintiffs' claims, and that this evidence was relevant on issue of punitive damages).

State v Supinger, 190 Ariz. 326, 947 P.2d 900 (Ct. App. 1997) (officer's testimony that victim's mother said victim had been telling lies, had been sexually abused as a child, and had not been given sufficient counseling were not offered to prove truth of matters asserted, but were offered to support state's position that victim's recantation was false).

State v Rivers, 190 Ariz. 56, 945 P.2d 367 (Ct. App. 1997) (testimony of parole officer that he called defendant's home and was told defendant was not there was admitted not to prove defendant was not home, but instead to explain why parole officer took steps he did).

State v Dunlap, 187 Ariz. 441, 930 P.2d 518 (Ct. App. 1996) (because statement was not offered to prove truth of matter asserted (Boles was investigating Funk family) but was instead offered to show inadequacy of police investigation, it was not hearsay).

State v McCoy, 187 Ariz. 223, 928 P.2d 647 (Ct. App. 1996) (because notes, letters, photographs, and "roll call," all with gang logos and insignia on them, not offered to prove truth of matters asserted in them, but to show knowledge and participation of possessor, they were not hearsay, and identity of their author was not relevant).

801.c.025 If the out-of-court statement is offered simply for the purpose of proving that the statement was made, then it is not an assertion and it is not hearsay.

State v Fischer, 219 Ariz. 408, 199 P.3d 663, ¶ 33 (Ct. App. 2008) (in prosecution stemming from plural marriage, statement that "prophet" told witness that "the Lord wants to bless you with another lady" was not offered to prove truth of matter asserted and thus was not hearsay).

Penn-American Ins. v Sanchez, 220 Ariz. 7, 202 P.3d 472, ¶¶ 36–39 & n.9 (Ct. App. 2008) (Inside Arizona (IA) arranged for Cusmir, independent owner-operator, to deliver goods to Tucson; on return trip, Cusmir was involved in accident that killed three people; Statutory Beneficiaries sued IA, who had $1,000,000 commercial general liability policy with Penn-American and $1,000,000 automobile insurance policy with NAICC; Penn-American at first defended without reservation of rights, and then 10 months into litigation, tendered defense to NAICC and issued reservation of rights letter to IA; IA later entered into *Morris* agreement with Statutory Beneficiaries wherein it stipulated to $4.3 million judgment and assigned to Statutory Beneficiaries any claims it might have against Penn-American; on motions for summary judgment, issue was whether 10 months was unreasonable delay and whether delay prejudiced IA; Statutory Beneficiaries contended IA was prejudiced because NAICC refused to commit to coverage; Penn-American contended Statutory Beneficiaries failed to produce any admissible evidence that NAICC had actually refused to commit to coverage; Statutory Beneficiaries relied on three letters authored by NAICC's counsel that they claimed were "evidence [of] NAICC's refusal to commit to coverage as a result of Penn-American's untimely reservation of rights," two of which described NAICC's concerns that it may be prejudiced by the "late notice situation"; Penn-American contended letters contained inadmissible hearsay; court held that letters were not offered to prove truth of matters asserted and were instead "verbal acts" and as such were properly before the trial court and constituted evidence of NAICC's position on coverage).

801.c.027 A statement made as a command is not hearsay if it is not intended as an assertion.

State v Fischer, 219 Ariz. 408, 199 P.3d 663, ¶ 34 (Ct. App. 2008) (in prosecution stemming from plural marriage, statement that "prophet" "read some scriptures relative to multiply and replenish the earth" was command, not statement of fact, and thus was not hearsay).

801.c.030 If the out-of-court assertion is admitted for a purpose other than to prove the truth of the matter asserted, then its admission does not violate the right of confrontation.

State v Boggs, 218 Ariz. 325, 185 P.3d 111, ¶¶ 29–36 (2008) (detective testified at trial that, during defendant's interrogation, he asked defendant about statements codefendant had made; defendant contended this violated his Sixth Amendment right of confrontation; court held that, because codefendant's statements were admitted not to prove truth of matters asserted, but were instead introduced to show context of interrogation, admission did not violate right of confrontation).

State v Rogovich, 188 Ariz. 38, 932 P.2d 794 (1997) (because the out-of-court facts or data upon which expert relied were offered only to show basis for expert's opinion and not as substantive evidence, admission of this evidence did not violate defendant's right of confrontation).

State v Larson, 222 Ariz. 341, 214 P.3d 429, ¶¶ 20–22 (Ct. App. 2009) (trial court admitted in evidence recorded portions of defendant's interrogation by police in which detective asserted defendant was guilty; defendant contended detective's statement was hearsay and should not have been admitted; court held that, because those portions were admitted to provide context for defendant's response and not to prove truth of matters asserted, detective's statements were not hearsay).

Paragraph (d)(1)(A)— Statements that are not hearsay: Prior inconsistent statement by witness.

801.d.1.A.010 A prior statement is admissible if it is inconsistent with trial testimony, based on the rationale that the jurors should be allowed to hear the conflicting statements and determine which story represents the truth in light of all the facts, such as the demeanor of the witness, the matters brought out in direct and cross-examination, and the testimony of others.

State v Ortega, 220 Ariz.320, 206 P.3d 769, ¶¶ 30–33 (Ct. App. 2008) (victim's brother saw defendant molest victim; when called to testify, brother either did not remember his prior statements to police detective or denied making them; trial court properly allowed state to read to brother excerpts from his interview with police, whereupon he remembered telling detective that defendant threatened him if he told anyone what had happened).

State v Mills, 196 Ariz. 269, 995 P.2d 705, ¶¶ 17–20 (Ct. App. 1999) (trial court allowed state to impeach witness with videotape of testimony from preliminary hearing).

State v Miller, 187 Ariz. 254, 928 P.2d 678 (Ct. App. 1996) (trial court allowed admission of prior statements of co-defendant and two others who were there at the time).

801.d.1.A.020 The degree of contradiction determines whether a statement is inconsistent, but an inconsistent statement is not limited to one diametrically opposed to trial testimony.

State v Rutledge (Sherman), 205 Ariz. 7, 66 P.3d 50, ¶¶ 14–25 (2003) (witness who testified at trial admitted making prior statement to police that was videotaped, and admitted all inconsistencies between trial testimony and videotaped interview, and offered explanations for those inconsistencies; defendant contended prior statements therefore were not inconsistent with trial testimony, and thus contended trial court abused discretion in admitting extrinsic evidence of prior statement (the videotape); court noted there were, in fact, several inconsistencies between witness's trial testimony and the videotaped interview, and that witness testified that he had lied to police because he was scared, had been threatened, and was intoxicated, and thus held videotape was admissible to allow jurors to assess witness's demeanor and credibility, and helped them decide which of witness's accounts to believe).

801.d.1.A.030 Failure of a witness to address a subject or state a fact in a prior statement under circumstances in which the witness naturally would have addressed that subject or stated that fact may be an inconsistency and may be subject for impeachment.

State v Rutledge (Sherman), 205 Ariz. 7, 66 P.3d 50, ¶¶ 14–25 (2003) (witness who testified at trial admitted making prior statement to police that was videotaped, and admitted all inconsistencies between trial testimony and videotaped interview, and offered explanations for those inconsistencies; defendant contended prior statements therefore were not inconsistent with trial testimony, and thus contended trial court abused discretion in admitting extrinsic evidence of prior statement (the videotape); court noted there were, in fact, several inconsistencies between witness's trial testimony and videotaped interview, and that witness testified he had lied to police because he was scared, had been threatened, and was intoxicated, and thus held videotape was admissible to allow jurors to assess witness's demeanor and credibility, and helped them decide which of witness's accounts to believe).

801.d.1.A.035 Inconsistencies between trial testimony and prior statement go to the weight of the trial testimony, not its admissibility.

State v Rivera, 210 Ariz. 188, 109 P.3d 83, ¶ 20 (2005) (plea agreements required witnesses to testify truthfully; defendant contended witnesses did not understand terms of plea agreements; court noted witnesses' statements indicated they understood they had to testify truthfully, and inconsistencies between trial testimony and prior statements went to weight of testimony, not admissibility).

State v Ortega, 220 Ariz.320, 206 P.3d 769, ¶¶ 30–33 (Ct. App. 2008) (victim's brother saw defendant molest victim; when called to testify, brother either did not remember his prior statements to detective or denied making them; trial court properly allowed state to read to brother excerpts from his interview with police, whereupon he remembered telling detective defendant threatened him if he told anyone what had happened; court stated to extent defendant was contending brother's testimony was unreliable because it was inconsistent, that was issue of credibility for jurors to resolve).

801.d.1.A.070 If the witness cannot remember making a prior statement, the prior statement is admissible if the trial court determines the witness is feigning loss of memory, or if the trial court is not able to determine whether the witness is feigning loss of memory or if the loss of memory is real.

State v King, 180 Ariz. 268, 275, 883 P.2d 1024, 1031 (1994) (once trial court concluded witness was feigning lack of memory, it allowed detective to testify about witness's prior statements).

State v Robinson, 165 Ariz. 51, 58–59, 796 P.2d 853, 860–61 (1990) (witness told officers he saw Washington, Robinson, and Mathers together, and Washington was wearing bandana; at trial, witness testified that he could not recall whether it was Mathers and Robinson he saw together or Mathers and Washington, and did not recall who was wearing bandana; trial court allowed officer to testify about witness's prior statements; trial court stated it did not know whether witness was being evasive or was merely typical of many people with poor recollection; court held trial court did not abuse discretion when it permitted state to impeach witness with prior statement).

State v Salazar, 216 Ariz. 316, 166 P.3d 107, ¶¶ 13–15 (Ct. App. 2007) (victim testified she did not remember or could not recall; prosecutor played her tape recorded statement; court stated trial court has considerable discretion in determining whether witness's evasive answers of lack of recollection may be considered inconsistent with witness's prior out-of-court statements, and that trial court did not abuse discretion in determining witness was feigning inability to recall her prior statements).

801.d.1.A.090 In determining under Rule 403 whether to admit a prior inconsistent statement, the trial court should consider, *inter alia:* (1) whether the witness being impeached admits or denies making impeaching statement and whether the witness being impeached is subject to any factors affecting reliability, such as age or mental capacity; (2) whether the witness presenting the impeaching statement has an interest in the proceedings and whether there is any other evidence showing the witness made the impeaching statement; (3) whether the witness presenting impeaching statement is subject to any other factors affecting reliability, such as age or mental capacity; (4) whether the true purpose of the statement is to impeach witness or to serve as substantive evidence; and (5) whether there is any evidence of guilt other than the statement.

State v Sucharew, 205 Ariz. 16, 66 P.3d 59, ¶¶ 19–23 (Ct. App. 2003) (state alleged defendant and D. were racing when defendant's vehicle hit and killed victim; state granted D. immunity to obtain his testimony; D. initially testified he did not know how fast he was going and he never drove side-by side with defendant's car; he later admitted telling officer he was going 60 m.p.h.; officer then testified, over defendant's objection, that D. told him he was going 80 m.p.h. and was "kind of" racing defendant; court stated only fourth factor (substantive use rather than impeachment) militated against admission of prior inconsistent statement, and because there was other evidence of defendant's guilt, held trial court did not abuse discretion in admitting evidence of prior inconsistent statement).

State v Miller, 187 Ariz. 254, 928 P.2d 678 (Ct. App. 1996) (for five *Allred* factors, (1) three witnesses denied making statements, (2) impeaching witnesses had no interest in proceedings and three statements corroborated each other, (3) there were no factors affecting reliability of impeaching witnesses, (4) true purpose of admission was to establish guilt, and (5) impeaching statements were only evidence of guilt; even though three of five factors were in favor of exclusion, because statements corroborated each other, court concluded trial court did not err in admitting them).

801.d.1.A.100 A police officer is not "interested" merely because of involvement in the criminal investigation, and is "interested" only if the officer has some personal connection with the participants or personal stake in the outcome of the case.

State v Sucharew, 205 Ariz. 16, 66 P.3d 59, ¶ 22 (Ct. App. 2003) (court rejected defendant's contention that officer testifying had interest in proceedings by citing *State v Miller* and not discussing issue further).

State v Miller, 187 Ariz. 254, 928 P.2d 678 (Ct. App. 1996) (there was no showing that any of the three officers who took prior statements had any personal interest in case).

801.d.1.A.110 A prior inconsistent statement may be considered as substantive evidence as well as used for impeachment purposes.

State v Huerstel, 206 Ariz. 93, 75 P.3d 698, ¶ 42 n.9 (2003) (defendant's witnesses testified that codefendant told them he shot all three victims; trial court then allowed state to introduce codefendant's statement to police in which he claimed defendant shot all three victims; court held admission of codefendant's statement to police violated confrontation clause, thus trial court erred in admitting it; court noted that use of prior inconsistent statement as substantive evidence is predicated on fact that witness who made statement testifies at trial and thus is subject to cross-examination, but when prior inconsistent statement is admitted under Rule 806, declarant has not testified at trial and thus is not subject to cross-examination, so only way statement could be used is for impeachment and not as substantive evidence).

State v Acree, 121 Ariz. 94, 97, 588 P.2d 836, 839 (1978) (when police interviewed victim 2 days after assault, she said defendant pointed gun at her and had tried to shoot her; at trial, victim testified that defendant never pointed gun at her, that she did not believe defendant would have shot or harmed her, and that she could have blown entire matter out of proportion; state was then allowed to impeach victim's trial testimony with statement she made during police interview; defendant contended that trial court erred in allowing use of prior inconsistent statements for substantive purposes; court held evidence was admissible for substantive purposes).

State v Mills, 196 Ariz. 269, 995 P.2d 705, ¶ 21 (Ct. App. 1999) (trial court allowed state to impeach witness with videotape of testimony from preliminary hearing; court rejected defendant's claim that statement should not have been admitted because jurors might have used it as substantive evidence).

801.d.1.A.120 The trial court is not required to instruct the jurors that a prior inconsistent statement may be considered as substantive evidence if the trial court instructs the jurors that they are to determine the facts and assess the credibility of the witnesses.

State v Nordstrom, 200 Ariz. 229, 25 P.3d 717, ¶ 83 (2001) (trial court did not abuse discretion in refusing to instruct jurors they could consider prior inconsistent statement both for impeachment and as substantive evidence).

Paragraph (d)(1)(B)— Statements that are not hearsay: Prior consistent statement by witness.

801.d.1.B.010 A prior consistent statement is admissible to rebut an express or implied charge of recent fabrication or improper influence or motive.

State v Jones, 197 Ariz. 290, 4 P.3d 345, ¶¶ 13–18 (2000) (defendant implied that two witnesses had motives to fabricate because state gave them plea bargains, and third witness had motive to fabricate because he, rather than defendant, was responsible for killings).

State v Trani, 200 Ariz. 383, 26 P.3d 1154, ¶¶ 3, 13 (Ct. App. 2001) (on cross-examination, defendant's attorney asked witness about several violations of her plea agreement, implying that witness had fabricated testimony to retain benefits of plea agreement; state properly permitted to read consistent statement witness made before entering into plea agreement).

Sheppard v Crow-Baker-Paul No. 1, 192 Ariz. 539, 968 P.2d 612, ¶ 34 (Ct. App. 1998) (because defendant both in cross-examining plaintiff and in final argument sought to persuade jurors that plaintiff was misrepresenting how injury occurred, statement was admissible as prior consistent statement).

801.d.1.B.030 Cross-examination can trigger the use of a prior consistent statement.

State v Trani, 200 Ariz. 383, 26 P.3d 1154, ¶¶ 3, 13 (Ct. App. 2001) (on cross-examination, defendant's attorney asked witness about several violations of her plea agreement, implying that witness had fabricated testimony to retain benefits of plea agreement; state properly permitted to read consistent statement witness made before entering into plea agreement).

801.d.1.B.040 To be admissible, a prior consistent statement must have been made prior to the time the motive to fabricate arose or the improper influence was applied.

State v Hoskins, 199 Ariz. 127, 14 P.3d 977, ¶¶ 65–67 (2001) (detective testified about statements witness made to him about defendant's wanting to commit car-jacking and kill victim; although defendant had claimed witness was biased and had motive to fabricate, court concluded that bias and motive to fabricate arose prior to time witness made statements to detective, but held that, even if testimony was improperly admitted, any error was harmless because witness testified and told jurors same things that detective told them).

State v Jones, 197 Ariz. 290, 4 P.3d 345, ¶¶ 13–18 (2000) (defendant implied that two witnesses had motives to fabricate because state gave them plea bargains; because those witnesses made statements prior to time state offered plea bargains, prior statements were admissible; defendant implied third witness had motive to fabricate because he, rather than defendant, was responsible for killings; because motive to fabricate would have arisen at time of killing, statement was made after motive arose, thus trial court erred in admitting prior statement, but any error was harmless).

Sheppard v Crow-Baker-Paul No. 1, 192 Ariz. 539, 968 P.2d 612, ¶ 35 (Ct. App. 1998) (because defendant did not raise claim at trial that prior consistent statement was not made prior to time motive to fabricate arose, defendant waived this claim on appeal).

State v Tinajero, 188 Ariz. 350, 935 P.2d 928 (Ct. App. 1997) (because trial court could have concluded that defendant's motive to fabricate arose once he was arrested, trial court properly excluded prior consistent statement defendant made after being arrested).

State v Jones, 188 Ariz. 534, 937 P.2d 1182 (Ct. App. 1996) (because victim made statements prior to being placed in juvenile detention, which defendant claimed gave her motive to fabricate, trial court properly admitted statements that were consistent with victim's trial testimony).

Paragraph (d)(2)(A) — Statements that are not hearsay: Party-opponent's own admission.

801.d.2.A.005 A party's statement is admissible.

State v Cruz, 218 Ariz. 149, 181 P.3d 196, ¶¶ 5, 50–51 (2008) (officers were chasing defendant; when officer saw defendant and drew his gun, defendant said, "Just do it. . . . Just go ahead and kill me now. Kill me now. Just get it over with"; court held defendant's statement qualified as party admission and thus was admissible).

Picaso v Tucson Unif. S.D., 217 Ariz. 178, 171 P.3d 1219, ¶ 7 (2007) (plaintiff's guilty plea in criminal case was admissible in civil case).

801.d.2.A.010 A party's statement does not have to be against the party's interest, thus any statement of a party is admissible as long as it is relevant.

State v Nordstrom, 200 Ariz. 229, 25 P.3d 717, ¶¶ 50, 55 (2001) (because defendant's letter to third person and defendant's statement to third person were defendant's own statements, they were not hearsay).

State v Bocharski, 200 Ariz. 50, 22 P.3d 43, ¶¶ 37–39 (2001) (while in jail, defendant allegedly assaulted fellow inmate; trial court admitted by stipulation inmate's statement of what defendant said during assault; court noted this was statement of a party, thus not hearsay, but held statement, "If it were up to me, you would be dead right now," had no relevance, thus it was error to admit statement, but any error was harmless in light of other evidence).

801.d.2.A.025 A party's factual allegations in a civil complaint are evidentiary admissions and may be introduced against the party.

Henry v Healthpartners of Southern Ariz., 203 Ariz. 393, 55 P.3d 87, ¶¶ 6–9 (Ct. App. 2002) (medical malpractice action resulting from patient's death from cancer was filed against decedent's doctor, radiologist employed by medical center, and medical center (TMC/HSA); plaintiff settled with doctors and went to trial against TMC/HSA; TMC/HSA named doctors as non-parties at fault; plaintiff's trial strategy was to minimize radiologist's fault in order to place more of blame on TMC/HSA; court held plaintiff's factual allegations contained in complaint delineating radiologist's negligence were relevant and admissible against plaintiff).

801.d.2.A.045 Because a statement under this rule is an admission by a party opponent, there is no requirement that it be independently corroborated.

State v Garza, 216 Ariz. 56, 163 P.3d 1006, ¶ 41 (2007) (in telephone call from jail, when asked why he was arrested, defendant stated, "Well, remember what you wanted me to do when that one guy beat you up, well I did it to someone else"; court rejected defendant's contention that statement's trustworthiness had to be independently corroborated).

801.d.2.A.050 To be admissible, the statement must be offered against a party, thus a criminal defendant's prior exculpatory statement, offered by the defendant and not by the party-opponent, is hearsay and not admissible.

State v Wooten, 193 Ariz. 357, 972 P.2d 993, ¶¶ 46–47 (Ct. App. 1998) (trial court properly precluded defendant from offering own statement denying responsibility for killing).

801.d.2.A.060 Before the state may introduce, as additional evidence of a crime, the defendant's extra-judicial confession or admission made after the crime, the state must establish, independent of the defendant's statement, a reasonable inference of the *corpus delicti* of the crime, the elements of which are (1) that a certain result has been produced, and (2) that the result was caused by criminal agency rather than by accident or some other non-criminal action.

State v Chappell, 225 Ariz. 229, 236 P.3d 1176, ¶¶ 8–10 (2010) (2-year-old victim died by drowning in swimming pool; on appeal, defendant contended his statements about murder should have been excluded because state failed to proved *corpus delicti*; because defendant did not object to admission of his statements at trial, court reviewed for fundamental error only; court held following evidence corroborated defendant's statements: Several days before victim's death, defendant was seen inspecting swimming pool area at apartment complex where victim and his mother lived; rock similar to rocks found near defendant's parents' house was used to prop open pool gate; mother routinely locked apartment door at night, making it unlikely victim could have opened door himself; at one time, defendant had key to mother's apartment; and victim's body was found in pre-dawn hours in pool located some distance from mother's apartment; court held this corroborating evidence made it very unlikely victim's death was accident; court found no error, fundamental or otherwise).

State v Morris, 215 Ariz. 324, 160 P.3d 203, ¶¶ 33–35 (2007) (court held following evidence established *corpus delicti*: bodies were found naked in alley; drag marks indicated they had been moved to alley; DNA on clothing in defendant's camper matched DNA of bodies; one body had defendant's DNA under her fingernails; hair extensions found in defendant's camper were similar to hair extensions of one body; and defendant possessed identification cards from one body when arrested).

State v Hall, 204 Ariz. 442, 65 P.3d 90, ¶¶ 43–47 (2003) (even though state never found body of victim, state presented evidence victim was missing and circumstantial evidence that victim met with foul play, and evidence of others using victim's property was sufficient for jurors to conclude victim was dead and that death resulted from criminal conduct).

State v Scott, 177 Ariz. 131, 142–43, 865 P.2d 792, 803–04 (1993) (stated that, before uncorroborated confession is admissible as evidence of crime, state must establish *corpus delicti* by proving (1) certain result has been produced and (2) that someone is criminally responsible for that result, but only reasonable inference of *corpus delicti* need exist before confession may be considered; held *corpus delicti* doctrine did not apply at sentencing stage).

State v Atwood, 171 Ariz. 576, 598, 832 P.2d 593, 615 (1992) (circumstances of child's disappearance, expert testimony about paint and nickel transfers between defendant's car and victim's bicycle, and testimony placing defendant in neighborhood and with a young child provided *corpus delicti* for kidnapping).

State v Atwood, 171 Ariz. 576, 598–99, 832 P.2d 593, 615–16 (1992) (evidence that 8-year-old girl disappeared from neighborhood and was found dead in desert several miles from home, that defendant was a known pedophile and was within yards of girl seconds before she vanished, that defendant was with young girl in his car, and that he later had blood on his hands and his clothing and cactus needles in his arms and legs provided *corpus delicti* for murder).

State v Gillies, 135 Ariz. 500, 505–06, 662 P.2d 1007, 1012–13 (1983) (for charge of sexual assault, following evidence established *corpus delicti*: victim was found not wearing panties, panties were discovered in area where victim was allegedly raped, and girlfriend testified that victim normally wore panties; victim's shoe was pushed inside leg of pantyhose in manner suggestive of violence; medical examiner discovered seminal fluid in victim's vagina; and foreign pubic hairs were found in victim's pubic area).

State v Gerlaugh, 134 Ariz. 164, 169–70, 654 P.2d 800, 805–06 (1982) (for charges of kidnapping and armed robbery, following evidence established *corpus delicti*: defendant and codefendant both confessed and each indicated kidnapping, armed robbery, and murder had taken place; mutilated body of victim was found in field far from his home and car; condition of body was consistent with activities described in confessions; court noted corroboration points to veracity of confessions, which is purpose of *corpus delicti* requirement).

State v Sarullo, 219 Ariz. 431, 199 P.3d 686, ¶¶ 6–10 (Ct. App. 2008) (defendant was victim's ex-boyfriend; victim kept gun unloaded on closet shelf; on 8/25, victim awoke at night and saw defendant standing in her bedroom; defendant walked over to victim, pointed gun at her, and threatened her; after defendant put down gun and left, victim saw it was her gun and it was loaded; after being arrested, defendant told police he had entered victim's home 8/24 and took gun; defendant contended there was no *corpus delicti* for burglary and theft for entering and taking gun on 8/24; court stated that, although there was no evidence, apart from defendant's confession, of 8/24 burglary and theft, there was uncontradicted evidence of 8/25 burglary and aggravated assault, thus there was independent evidence of "closely related" crimes; moreover, defendant had told victim that he had entered her home 8/24 and had taken her gun, and gun was unloaded when taken and loaded when recovered; court concluded defendant's confession was sufficiently corroborated and that evidence supported reasonable inference he committed 8/24 offenses).

State v Barragan-Sierra, 219 Ariz. 276, 196 P.3d 879, ¶¶ 11–15 (Ct. App. 2008) (defendant was convicted of conspiracy to commit human smuggling; court held following evidence supported reasonable inference that defendant committed offense: (1) when officers tried to stop truck, it sped off reaching speeds in excess of 100 mph; (2) once truck stopped, driver and three other persons fled into nearby cornfield and were not found; (3) defendant was found with four other persons hiding under piece of carpet in bed of truck; (4) defendant appeared tired and his clothes were soiled; and (5) federal documents showed defendant was not in country legally).

State v Nieves, 207 Ariz. 438, 87 P.3d 851, ¶¶ 6–26 (Ct. App. 2004) (defendant said she placed her hand over mouth of 10-month-old daughter until she stopped breathing; court concluded body of victim and unexplained death were not sufficient to establish *corpus delicti* of crime).

State v Morgan, 204 Ariz. 166, 61 P.3d 460, ¶¶ 17–23 (Ct. App. 2002) (defendant was charged with two counts of sexual conduct with minor based on oral sexual conduct, one count of child molestation for touching victim's genitals with his hand, and one count of sexual assault for engaging in sexual intercourse with victim without her consent; defendant confessed that he engaged in oral sexual contact with victim; neither victim nor any other witness testified about any oral sexual contact; defendant contended there was no *corpus delicti* for sexual conduct counts; although there was no independent evidence of oral sexual contact, following evidence was presented about other offenses: victim testified that defendant touched her between legs and had forceful sexual intercourse with her, and witness saw defendant and victim in back seat of car, both naked from waist down, and with victim straddling defendant; court held that, even though there was no independent evidence of oral sexual contact, there was evidence to support the other charged offenses, which were closely related, and this supported a reasonable inference the oral sexual conduct had occurred).

State v Morgan, 204 Ariz. 166, 61 P.3d 460, ¶ 24 (Ct. App. 2002) (defendant was charged with sexual conduct with minor based on oral sexual conduct, child molestation for touching victim's genitals with his hand, and sexual assault for engaging in sexual intercourse with victim without her consent; defendant contended there was no *corpus delicti* for child molestation; court noted victim testified that defendant touched her between legs, which court held was sufficient independent evidence of child molestation).

State v Flores, 202 Ariz. 221, 42 P.3d 1186, ¶¶ 4–19 (Ct. App. 2002) (defendant was found with two small rocks of crack cocaine, and when questioned, told officers he was holding drugs for third person, who would tell him to whom to deliver the drugs; state charged defendant with possession for sale; because only evidence of sale was defendant's statement, there was no *corpus delicti* for crime of possession for sale, trial court properly suppressed defendant's statement).

State ex rel. McDougall v Superior Ct. (Plummer), 188 Ariz. 147, 933 P.2d 1215 (Ct. App. 1996) (in DUI prosecution, evidence showed vehicle was being driven improperly and only two occupants in it were intoxicated, and husband said wife was driving; this established *corpus delicti* for charge against wife).

801.d.2.A.061 Because the purpose of a preliminary hearing is to determine whether probable cause exists that the person charged committed the offense, the doctrine of *corpus delicti* does not apply at a preliminary hearing

State v Jones (Roche), 198 Ariz. 18, 6 P.3d 323, ¶¶ 7, 15–18 (Ct. App. 2000) (trial court applied *corpus delicti* rule, excluded defendant's statement, held there otherwise was not sufficient evidence to show probable cause, and granted motion for new determination of probable cause; court held trial court erred in concluding that *corpus delicti* rule applied at preliminary hearing).

801.d.2.A.063 Because the *corpus delicti* rule applies only to extra-judicial statements, it does not apply to a defendant's in-court statement establishing the factual basis for a guilty plea.

State v Rubiano, 214 Ariz. 184, 150 P.3d 271, ¶¶ 1, 10 (Ct. App. 2008) (court rejected defendant's claim his guilty plea was insufficient because there was no evidence of *corpus delicti* independent of his admission at change-of-plea proceeding).

801.d.2.A.065 Because the *corpus delicti* rule applies only to extra-judicial statements, it does not apply to a defendant's testimony in court.

State v Rubiano, 214 Ariz. 184, 150 P.3d 271, ¶ 10 (Ct. App. 2008) (court cites numerous cases from other jurisdictions holding *corpus delicti* rule does not apply to in-court testimony).

801.d.2.A.067 In order for the state to establish the *corpus delicti* of the crime, the state does not have to produce the body of the victim.

State v Hall, 204 Ariz. 442, 65 P.3d 90, ¶ 48 (2003) (even though state never found body of victim, state presented evidence victim was missing and circumstantial evidence that victim met with foul play, and evidence of others using victim's property was sufficient for jurors to conclude victim was dead and that death resulted from criminal conduct; court noted only Texas requires production of body of victim, and court stated it declines to adopt that rule).

801.d.2.A.069 In order for the state to establish the *corpus delicti* of the crime, the state does not have to prove the cause of death.

State v Morris, 215 Ariz. 324, 160 P.3d 203, ¶¶ 33–36 (2007) (evidence showed following: bodies were found naked in alley; drag marks indicated they had been moved to alley; DNA on clothing in defendant's camper matched DNA of bodies; one body had defendant's DNA under her fingernails; hair extensions found in defendant's camper were similar to hair extensions of one body; and defendant possessed identification cards from one body when arrested; defendant contended evidence did not establish *corpus delicti* because medical examiners believed both deaths resulted from drug overdoses; court held state did not have to prove cause of death).

801.d.2.A.070 The state need not prove the *corpus delicti* beyond a reasonable doubt; all the state need do is present facts that would allow a reasonable inference of the *corpus delicti.*

State v Morris, 215 Ariz. 324, 160 P.3d 203, ¶¶ 33–35 (2007) (court held following evidence established *corpus delicti*: bodies were found naked in alley; drag marks indicated they had been moved to alley; DNA on clothing in defendant's camper matched DNA of bodies; one body had defendant's DNA under her fingernails; hair extensions found in defendant's camper were similar to hair extensions of one body; and defendant possessed identification cards from one body when arrested).

State v Gerlaugh, 134 Ariz. 164, 170, 654 P.2d 800, 806 (1982) (noted *corpus delicti* need not be proved beyond reasonable doubt; condition and location of victim's body corroborated defendant's statement).

State v Sarullo, 219 Ariz. 431, 199 P.3d 686, ¶¶ 6–10 (Ct. App. 2008) (defendant was victim's ex-boyfriend; victim kept gun unloaded on closet shelf; on 8/25, victim awoke at night and saw defendant standing in her bedroom; defendant walked over to victim, pointed gun at her, and threatened her; after defendant put down gun and left, victim saw it was her gun and it was loaded; after being arrested, defendant told police he had entered victim's home 8/24 and took gun; defendant contended there was no *corpus delicti* for burglary and theft for entering and taking gun on 8/24; court stated that, although there was no evidence, apart from defendant's confession, of 8/24 burglary and theft, there was uncontradicted evidence of 8/25 burglary and aggravated assault, thus there was independent evidence of "closely related" crimes; moreover, defendant had told victim that he had entered her home 8/24 and had taken her gun, and gun was unloaded when taken and loaded when recovered; court concluded defendant's confession was sufficiently corroborated and that evidence supported reasonable inference he committed 8/24 offenses).

State v Barragan-Sierra, 219 Ariz. 276, 196 P.3d 879, ¶ 12 (Ct. App. 2008) (defendant was convicted of conspiracy to commit human smuggling; court stated "evidence offered to support the inference need not even be admissible at trial"; court held following evidence supported reasonable inference that defendant committed offense: (1) when officers tried to stop truck, it sped off reaching speeds in excess of 100 mph; (2) once truck stopped, driver and three other persons fled into nearby cornfield and were not found; (3) defendant was found with four other persons hiding under piece of carpet in bed of truck; (4) defendant appeared tired and his clothes were soiled; and (5) federal documents showed defendant was not in country legally).

State v Alatorre, 191 Ariz. 208, 953 P.2d 1261, ¶ 14 (Ct. App. 1998) (victim's statement "and they licked me and stuff" was sufficient to allow admission of defendant's statement that he "licked [the victim] between the legs").

801.d.2.A.080 The state need only show that a certain offense has occurred; the state need not present independent evidence that raises the offense to a higher degree.

State v Flores, 202 Ariz. 221, 42 P.3d 1186, ¶¶ 8–11 (Ct. App. 2002) (defendant was found with two small rocks of crack cocaine, and when questioned, told officers he was holding drugs for third person who would tell him to whom to deliver the drugs; state charged defendant with possession for sale; state contended possession for sale was merely higher degree of possession, but court disagree and held possession for sale was quantitatively different from possession; because only evidence of sale was defendant's statement, there was no *corpus delicti* for crime of possession for sale, thus trial court properly suppressed defendant's statement).

801.d.2.A.085 If a defendant confesses to several closely related events, the corroborating evidence does not have to support each of the charged offenses as long as the corroborating evidence supports some of them.

State v Sarullo, 219 Ariz. 431, 199 P.3d 686, ¶¶ 6–10 (Ct. App. 2008) (defendant was victim's ex-boyfriend; victim kept gun unloaded on closet shelf; on 8/25, victim awoke at night and saw defendant standing in her bedroom; defendant walked over to victim, pointed gun at her, and threatened her; after defendant put down gun and left, victim saw it was her gun and it was loaded; after being arrested, defendant told police he had entered victim's home 8/24 and took gun; defendant contended there was no *corpus delicti* for burglary and theft for entering and taking gun on 8/24; court stated that, although there was no evidence, apart from defendant's confession, of 8/24 burglary and theft, there was uncontradicted evidence of 8/25 burglary and aggravated assault, thus there was

independent evidence of "closely related" crimes; moreover, defendant had told victim that he had entered her home 8/24 and had taken her gun, and gun was unloaded when taken and loaded when recovered; court concluded defendant's confession was sufficiently corroborated and that evidence supported reasonable inference he committed 8/24 offenses).

State v Morgan, 204 Ariz. 166, 61 P.3d 460, ¶¶ 17–23 (Ct. App. 2002) (defendant was charged with two counts of sexual conduct with minor based on oral sexual conduct, one count of child molestation for touching victim's genitals with his hand, and one count of sexual assault for engaging in sexual intercourse with victim without her consent; defendant confessed that he engaged in oral sexual contact with victim; neither victim nor any other witness testified about any oral sexual contact; defendant contended there was no *corpus delicti* for sexual conduct counts; although there was no independent evidence of oral sexual contact, following evidence was presented about other offenses: victim testified that defendant touched her between legs and had forceful sexual intercourse with her, and witness saw defendant and victim in back seat of car, both naked from waist down, and with victim straddling defendant; court held that, even though there was no independent evidence of oral sexual contact, there was evidence to support the other charged offenses, which were closely related, and this supported a reasonable inference the oral sexual conduct had occurred).

801.d.2.A.130 An admission may be written or spoken.

Randall v Alvardo-Wells, 187 Ariz. 308, 928 P.2d 732 (Ct. App. 1996) (although defendant denied making any statements to witnesses, they testified she made certain statements, thus statements were admissions by a party and not hearsay).

Paragraph (d)(2)(B) — Statements that are not hearsay: Statement adopted by party.

801.d.2.B.010 An out-of-court statement is not hearsay if a party has adopted the statement or indicated that the party believes the statement to be true.

State v Anderson, 210 Ariz. 327, 111 P.3d 369, ¶¶ 31–36 (2005) (because defendant agreed with and expounded upon statement about premeditation attributed to other person, trial court correctly found that defendant had adopted statement).

Standard Chartered PLC v Price Waterhouse, 190 Ariz. 6, 945 P.2d 317 (Ct. App. 1996) (because defendant-seller was unable to show who wrote the memorandum or that plaintiff-buyer had adopted it, trial court properly excluded it).

Paragraph (d)(2)(C) — Statements that are not hearsay: Statement by authorized person.

801.d.2.C.030 This section allows for admission of factual statements by agents or employees, and not opinions on the law from a party's counsel.

State v Fulminante, 193 Ariz. 485, 975 P.2d 75, ¶ 18 (1999) (prosecutor's opinion that, without confession, state's case was insufficient to prove guilt beyond a reasonable doubt was not admissible under this section).

Paragraph (d)(2)(D) — Statements that are not hearsay: Statement by party's agent.

801.d.2.D.020 A statement by an agent is admissible against a principal if it was (1) made by the principal's agent or servant, (2) made during the existence of the agency relationship, and (3) concerned matters within the scope of the agency or employment.

State ex rel. Ariz. DHS v Gottsfield (Medrano), 213 Ariz. 583, 146 P.3d 574, ¶ 11 (Ct. App. 2006) (because statements made by petitioner's employees about matters within scope of their employment would be imputed to employer, trial court erred in ordering that respondent's attorney could conduct *ex parte* interviews with petitioner's employees).

Henry v Healthpartners of Southern Arizona, 203 Ariz. 393, 55 P.3d 87, ¶¶ 6–9 (Ct. App. 2002) (medical malpractice action resulting from patient's death from cancer was filed against decedent's doctor, radiologist employed by medical center, and medical center (TMC/HSA); plaintiff settled with doctors and went to trial against TMC/HSA; TMC/HSA named doctors as non-parties at fault; plaintiff's trial strategy was to minimize radiologist's fault in order to place more of blame on TMC/HSA; court held factual allegations contained in complaint delineating radiologist's negligence were made by plaintiff's attorney during existence of agency relationship and were within scope of agency, thus they were admissible against plaintiff).

Hernandez v State, 201 Ariz. 336, 35 P.3d 97, ¶¶ 8–9 (Ct. App. 2001) (plaintiff fell off wall at Patagonia Lake Park; because plaintiff testified there was no trail and that he stepped off retaining wall, notice of claim letter to state from plaintiff's attorney stating plaintiff was walking on trail and stepped off cliff was admissible as prior inconsistent statement), *vacated*, 203 Ariz. 196, 52 P.3d 765 (2002).

801.d.2.D.023 Because a party's disclosure statement prepared by the party's attorney was (1) made by the party's agent, (2) made during the existence of the agency relationship, and (3) concerned matters within the scope of the agency or employment, it is not hearsay and may be offered as affirmative evidence of the truth of the matters asserted.

* *Ryan v San Francisco Peaks Truck. Co.*, 228 Ariz. 42, 262 P.3d 863, ¶¶ 12–17 (Ct. App. 2011) (court held trial court properly ruled plaintiff's disclosure statement was admissible as admission by party-opponent, but further held evidence was not conclusive of nonparty-at-fault, thus plaintiff was properly given opportunity to explain or deny information contained in disclosure statement).

801.d.2.D.025 This section allows for admission of factual statements by agents or employees, and not opinions on the law from a party's counsel.

State v Fulminante, 193 Ariz. 485, 975 P.2d 75, ¶ 18 (1999) (prosecutor's opinion that, without confession, state's case was insufficient to prove guilt beyond a reasonable doubt was not admissible under this section).

Paragraph (d)(2)(E) — Statements that are not hearsay: Statement by co-conspirator.

801.d.2.E.005 A statement by a co-conspirator is admissible.

State v Montaño, 204 Ariz. 413, 65 P.3d 61, ¶¶ 67–68 (2003) (court stated that defendant seemed to concede existence of conspiracy, but "unconvincingly argues that there is no evidence linking him to it"; trial court thus did not abuse discretion in allowing witness to testify about conversation he overheard between two other inmates).

State v Nordstrom, 200 Ariz. 229, 25 P.3d 717, ¶ 55 (2001) (statement of third person to defendant about committing robbery was admissible).

801.d.2.E.050 In order to admit the statement of a co-conspirator, the trial court must find the existence of three factors, the first of which is that a conspiracy existed and both the defendant and the declarant were parties to it.

State v Dunlap, 187 Ariz. 441, 930 P.2d 518 (Ct. App. 1996) (state contended declarant and defendant were conspiring to cover up their involvement in killing and obstruct investigation and prosecution of case).

801.d.2.E.060 In order to admit the statement of a co-conspirator, the trial court must find the existence of three factors, the second of which is that the co-conspirator made the statement during the course of the conspiracy.

State v Dunlap, 187 Ariz. 441, 930 P.2d 518 (Ct. App. 1996) (state contended declarant made diary entries while he and defendant were conspiring to cover up their involvement in killing and obstruct investigation and prosecution of case).

801.d.2.E.070 In order to admit the statement of a co-conspirator, the trial court must find the existence of three factors, the third of which is that the co-conspirator made the statement in furtherance of the conspiracy.

State v Dunlap, 187 Ariz. 441, 930 P.2d 518 (Ct. App. 1996) (because declarant could have used diary entries to formulate plan to cover up involvement in killing and obstruct investigation and prosecution of case, and remind him of things to do to accomplish this, trial court did not abuse discretion in concluding diary entries were in furtherance of conspiracy).

March 11, 2012

Rule 802. The Rule Against Hearsay.

Hearsay is not admissible unless any of the following provides otherwise:

- an applicable constitutional provision or statute;
- these rules; or
- other rules prescribed by the Supreme Court.

Comment on 2012 Amendment

The language of Rule 802 has been amended to conform to the federal restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

NOTE: On March 8, 2004, the United States Supreme Court decided *Crawford v Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004), which greatly changed the law in determining whether admission of certain hearsay statements violated the confrontation clause. Cases decided prior to that date holding that admission of certain statements did not violate the confrontation clause therefore may no longer be good law.

Cases

802.010 Evidence that is hearsay is inadmissible.

Higgins v Higgins, 194 Ariz. 266, 981 P.2d 134, ¶¶ 27–29 (Ct. App. 1999) (father's testimony of what his mother told him children told her was double hearsay, and because neither level came under some hearsay exception, trial court should not have admitted testimony).

Cervantes v Rijlaarsdam, 190 Ariz. 396, 949 P.2d 56 (Ct. App. 1997) (trial court allowed defendants to question plaintiff about letter from plaintiff's former employer; because letter was hearsay, trial court did not err in precluding defendants from reading letter).

Keith Equip. v Casa Grande Cotton Fin., 187 Ariz. 259, 928 P.2d 683 (Ct. App. 1996) (trial court erred in admitting hearsay statement merely because declarant was available).

802.015 Hearsay evidence is admissible as provided by applicable statute.

In re Juv Action No. JS–7499, 163 Ariz. 153, 156–57, 786 P.2d 1004, 1007–08 (Ct. App. 1989) (father was convicted of rape and sodomy upon his daughter; in action to terminate father's parent-child relationship with daughter, trial court properly allowed admission in evidence transcript of daughter's testimony at father's trial on rape and sodomy charges).

802.020 Sixth Amendment right to confront and cross-examine the witness applies only in criminal proceedings, and does not apply in civil proceedings.

In re Juv Action No. JS–7499, 163 Ariz. 153, 157–59, 786 P.2d 1004, 1008–10 (Ct. App. 1989) (father was convicted of rape and sodomy upon his daughter; in action to terminate father's parent-child relationship with daughter, trial court allowed admission in evidence transcript of daughter's testimony at father's trial on rape and sodomy charges; father contended this violated his right of confrontation; court noted that proceeding to terminate parental rights is civil in nature, and held that right of confrontation did not apply; court further held that, because father had opportunity to cross-examine daughter at criminal trial, admission of transcript of her testimony did not violate his due process right to cross-examine witness).

802.035 Although a defendant is entitled to a hearing on a motion to redetermine the conditions of release under Rule 7.4(b) of the Arizona Rules of Criminal Procedure, Rule 7.4(c) provides the trial court may make release determinations based on evidence not admissible under the Rules of Evidence.

Mendez v Robertson (State), 202 Ariz. 128, 42 P.3d 14, ¶ 10 (Ct. App. 2002) (trial court properly considered prosecutor's avowals of what victim would say, and defendant did not have right to cross-examine victim).

802.050 The Arizona Legislature is permitted to enact a statute allowing the admission of hearsay provided the statute is reasonable and workable and supplements the rules promulgated by the Arizona Supreme Court.

State v Vincent, 159 Ariz. 418, 768 P.2d 150 (1989) (A.R.S. § 13–4252, which allows for the presentation of videotaped testimony, is constitutional and admission of such testimony is permissible as long as the trial court makes the necessary findings).

In re Maricopa Cty. Juv. No. JD–6123, 191 Ariz. 384, 956 P.2d 511 (Ct. App. 1997) (Juvenile Rule 16.1(f) is a reasonable and workable supplement to the Arizona Rules of Evidence).

802.055 Although the Arizona Legislature is permitted to enact a statute allowing the admission of hearsay provided the statute is reasonable and workable and supplements the rules promulgated by the Arizona Supreme Court, if a conflict arises, or a statutory rule tends to engulf a rule the court has promulgated, the court rule will prevail.

State v Taylor, 196 Ariz. 584, 2 P.3d 674, ¶¶ 4–11 (Ct. App. 1999) (A.R.S. § 13–4252 allows for admission of pretrial videotaped statement made by minor; this statute is both more restrictive and less restrictive than existing hearsay exceptions, and so it engulfs Rules of Evidence and is therefore unconstitutional).

802.110 Hearsay evidence that is improperly admitted may be harmless error.

State v Lamar, 205 Ariz. 431, 72 P.3d 831, ¶¶ 38–44 (2003) (trial court had granted defendant's request to preclude evidence that Richard, in defendant's presence, threatened Hogan by asking her if she would like to be buried next to Jones (victim in this case); at trial, prosecutor asked Hogan if anyone made threats against her in defendant's presence, and she responded, "When Richard said they was [*sic*] going to bury me next to— ," whereupon defendant objected and asked for mistrial, which trial court denied; court noted that trial court had concluded Richard's threat was hearsay, but concluded any error was harmless because (1) statement did not necessarily implicate defendant, and (2) trial court instructed jurors to disregard that testimony).

State v Dickens, 187 Ariz. 1, 19, 926 P.2d 468, 486 (1996) (although theft report did not qualify as business record, because victim of theft testified to same information as in report, any error in admitting report was harmless).

March 11, 2012

Rule 803. Exceptions to the Rule Against Hearsay— Regardless of Whether the Declarant Is Available as a Witness.

The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness:

(1) *Present Sense Impression.* A statement describing or explaining an event or condition, made while or immediately after the declarant perceived it.

(2) *Excited Utterance.* A statement relating to a startling event or condition, made while the declarant was under the stress of excitement that it caused.

(3) *Then-Existing Mental, Emotional, or Physical Condition.* A statement of the declarant's then-existing state of mind (such as motive, intent, or plan) or emotional, sensory, or physical condition (such as mental feeling, pain, or bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the validity or terms of the declarant's will.

(4) *Statement Made for Medical Diagnosis or Treatment.* A statement that:

(A) is made for— and is reasonably pertinent to— medical diagnosis or treatment; and

(B) describes medical history; past or present symptoms or sensations; their inception; or their general cause.

(5) *Recorded Recollection.* A record that:

(A) is on a matter the witness once knew about but now cannot recall well enough to testify fully and accurately;

(B) was made or adopted by the witness when the matter was fresh in the witness's memory; and

(C) accurately reflects the witness's knowledge.

If admitted, the record may be read into evidence but may be received as an exhibit only if offered by an adverse party.

(6) *Records of a Regularly Conducted Activity.* A record of an act, event, condition, opinion, or diagnosis if:

(A) the record was made at or near the time by— or from information transmitted by— someone with knowledge;

(B) the record was kept in the course of a regularly conducted activity of a business, organization, occupation, or calling, whether or not for profit;

(C) making the record was a regular practice of that activity;

(D) all these conditions are shown by the testimony of the custodian or another qualified witness, or by a certification that complies with Rule 902(11) or (12) or with a statute permitting certification; and

(E) neither the source of information nor the method or circumstances of preparation indicate a lack of trustworthiness.

(7) *Absence of a Record of a Regularly Conducted Activity.* Evidence that a matter is not included in a record described in paragraph (6) if:

(A) the evidence is admitted to prove that the matter did not occur or exist;

(B) a record was regularly kept for a matter of that kind; and

(C) neither the possible source of the information nor other circumstances indicate a lack of trustworthiness.

(8) *Public Records.* A record or statement of a public office if:

(A) it sets out:

(i) the office's activities;

(ii) a matter observed while under a legal duty to report, but not including, in a criminal case, a matter observed by law-enforcement personnel; or

(iii) in a civil case or against the government in a criminal case, factual findings from a legally authorized investigation; and

(B) neither the source of information nor other circumstances indicate a lack of trustworthiness.

(9) *Public Records of Vital Statistics.* A record of a birth, death, or marriage, if reported to a public office in accordance with a legal duty.

(10) *Absence of a Public Record.* Testimony— or a certification under Rule 902— that a diligent search failed to disclose a public record or statement if the testimony or certification is admitted to prove that:

(A) the record or statement does not exist; or

(B) a matter did not occur or exist, if a public office regularly kept a record or statement for a matter of that kind.

(11) *Records of Religious Organizations Concerning Personal or Family History.* A statement of birth, legitimacy, ancestry, marriage, divorce, death, relationship by blood or marriage, or similar facts of personal or family history, contained in a regularly kept record of a religious organization.

(12) *Certificates of Marriage, Baptism, and Similar Ceremonies.* A statement of fact contained in a certificate:

(A) made by a person who is authorized by a religious organization or by law to perform the act certified;

(B) attesting that the person performed a marriage or similar ceremony or administered a sacrament; and

(C) purporting to have been issued at the time of the act or within a reasonable time after it.

(13) *Family Records.* A statement of fact about personal or family history contained in a family record, such as a Bible, genealogy, chart, engraving on a ring, inscription on a portrait, or engraving on an urn or burial marker.

(14) *Records of Documents That Affect an Interest in Property.* The record of a document that purports to establish or affect an interest in property if:

(A) the record is admitted to prove the content of the original recorded document, along with its signing and its delivery by each person who purports to have signed it;

(B) the record is kept in a public office; and

(C) a statute authorizes recording documents of that kind in that office.

(15) *Statements in Documents That Affect an Interest in Property.* A statement contained in a document that purports to establish or affect an interest in property if the matter stated was relevant to the document's purpose— unless later dealings with the property are inconsistent with the truth of the statement or the purport of the document.

(16) *Statements in Ancient Documents.* A statement in a document that is at least 20 years old and whose authenticity is established.

(17) *Market Reports and Similar Commercial Publications.* Market quotations, lists, directories, or other compilations that are generally relied on by the public or by persons in particular occupations.

(18) *Statements in Learned Treatises, Periodicals, or Pamphlets.* A statement contained in a treatise, periodical, or pamphlet if:

(A) the statement is called to the attention of an expert witness on cross-examination or relied on by the expert on direct examination; and

(B) the publication is established as a reliable authority by the expert's admission or testimony, by another expert's testimony, or by judicial notice.

If admitted, the statement may be read into evidence but not received as an exhibit.

(19) *Reputation Concerning Personal or Family History.* A reputation among a person's family by blood, adoption, or marriage— or among a person's associates or in the community— concerning the person's birth, adoption, legitimacy, ancestry, marriage, divorce, death, relationship by blood, adoption, or marriage, or similar facts of personal or family history.

(20) *Reputation Concerning Boundaries or General History.* A reputation in a community — arising before the controversy— concerning boundaries of land in the community or customs that affect the land, or concerning general historical events important to that community, state, or nation.

(21) *Reputation Concerning Character.* A reputation among a person's associates or in the community concerning the person's character.

(22) *Judgment of a Previous Conviction.* Evidence of a final judgment of conviction if:

(A) the judgment was entered after a trial or guilty plea, but not a nolo contendere plea;

(B) the conviction was for a crime punishable by death or by imprisonment for more than a year;

(C) the evidence is admitted to prove any fact essential to the judgment; and

(D) when offered by the prosecutor in a criminal case for a purpose other than impeachment, the judgment was against the defendant.

The pendency of an appeal may be shown but does not affect admissibility.

(23) *Judgments Involving Personal, Family, or General History or a Boundary.* A judgment that is admitted to prove a matter of personal, family, or general history, or boundaries, if the matter:

(A) was essential to the judgment; and

(B) could be proved by evidence of reputation.

(24) [**Other exceptions.**] [Transferred to Rule 807.]

(25) *Former testimony (non-criminal action or proceeding).* Except in a criminal action or proceeding, testimony given as a witness at another hearing of the same or different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

Comment to 2012 Amendment

To conform to Federal Rule of Evidence 803(6)(A), as restyled, the language "first hand knowledge" in Rule 803(6)(b) has been changed to "knowledge" in amended Rule 803(6)(A). The new language is not intended to change the requirement that the record be made by— or from information transmitted by— someone with personal or first hand knowledge.

To conform to Federal Rules of Evidence 803(24) and 807, Rule 803(24) has been deleted and transferred to Rule 807.

Additionally, the language of Rule 803 has been amended to conform to the federal restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent in the restyling to change any result in any ruling on evidence admissibility.

Comment to 1994 Amendment

For provisions governing former testimony in criminal actions or proceedings, *see* Rule 804(b)(1) and Rule 19.3(c), Rules of Criminal Procedure.

NOTE: On March 8, 2004, the United States Supreme Court decided *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004), which greatly changed the law in determining whether admission of certain hearsay statements violated the confrontation clause. Cases decided prior to that date holding that admission of certain statements did not violate the confrontation clause therefore may no longer be good law.

Cases

803.013 Statements made during police interrogation under circumstances objectively indicating that the primary purpose of the interrogation was to enable police assistance to meet an ongoing emergency are not testimonial.

State v. Boggs, 218 Ariz. 325, 185 P.3d 111, ¶¶ 55–58 (2008) (officers arrived and spoke to victim, who was outside restaurant and had been shot twice; at trial, officers testified about victim's statements; court held victim's statements described what appeared to be ongoing emergency, thus they were non-testimonial).

State v Alvarez, 213 Ariz. 467, 143 P.3d 668, ¶¶ 12, 18–19 (Ct. App. 2006) (officer found victim staggering down road with blood in hair and on face; officer asked victim what happened, and victim said three men had jumped him and had taken his car; victim died before trial; court held that, although victim gave answers in response to officer's question, primary purpose of question was to enable police assistance to meet an ongoing emergency and not to establish or prove past events for later criminal prosecution, thus victim's statement was not testimonial and admission did not violate confrontation clause.

State v King, 212 Ariz. 372, 132 P.3d 311, ¶¶ 2–6, 29–32 (Ct. App. 2006) (declarant called 9-1-1 and requested that officers come to her house, said she had restraining order against defendant, who had just thrown two puppies over her house; when operator asked where defendant was, declarant said he "just drove off" and that she did not know where he was; in response to further questions, declarant identified defendant by name, date of birth, clothing, and race, and provided model and color of vehicle; court reversed conviction and stated that, on remand, trial court should consider which portions of 9-1-1 might be admissible and which parts might not be admissible).

803.014 Statements made during police interrogation under circumstances objectively indicating that there is no ongoing emergency, and that the primary purpose is to establish or prove past events potentially relevant to later criminal prosecution are testimonial.

State v Parks, 213 Ariz. 412, 142 P.3d 720, ¶¶ 4–7 (Ct. App. 2006) (police arrived after victim had been killed; after determining that defendant's son and brother had witnessed shooting, police separated and questioned them; because conduct showed police were operating in investigative mode, statements were testimonial, thus admission violated confrontation clause).

State v King, 212 Ariz. 372, 132 P.3d 311, ¶¶ 2–6, 29–32 (Ct. App. 2006) (declarant called 9-1-1 and requested that officers come to her house, said she had restraining order against defendant, who had just thrown two puppies over her house; when operator asked where defendant was, declarant said he "just drove off" and that she did not know where he was; in response to further questions, declarant identified defendant by name, date of birth, clothing, and race, and provided model and color of vehicle; court reversed conviction and stated that, on remand, trial court should consider which portions of 9-1-1 might be admissible and which parts might not be admissible).

803.016 If the out-of-court statement is the functional equivalent of in-court testimony or was made under circumstances that the declarant would reasonably expect to be available at trial, it will be considered a "testimonial statement" or "testimonial evidence" and thus will not be admissible unless (1) the declarant is unavailable, and (2) the defendant has had a prior opportunity to cross-examine the declarant.

State v Parks, 211 Ariz. 19, 116 P.3d 631, ¶¶ 36–53 (Ct. App. 2005) (defendant's son witnessed actions that led to death of victim; officers arrived and one officer interviewed son, who was emotional at time; son died before trial; court held that son's statement qualified as excited utterance; court further held son's statement was "testimonial statement" because: (1) officer already knew defendant had killed victim when he interviewed son; (2) defendant had already been arrested; (3) there were no exigent safety, security, or medical concerns; (4) officer's questioning was not casual encounter; (5) officer separated son and other witness before questioning them; (6) officer was operating in investigative mode; (7) purpose of questioning was to obtain information about potential crime; and (8) son appeared to appreciate that what he had witnessed would have significance to future criminal prosecution; court held admission of son's statement violated defendant's confrontation clause rights), *aff'd,* 213 Ariz. 412, 142 P.3d 720, ¶ 8 (Ct. App. 2006).

803.017 If the out-of-court statement is not the functional equivalent of in-court testimony or was not made under circumstances that the declarant would reasonably expect to be available at trial, it will not be considered a "testimonial statement" or "testimonial evidence" and thus its admissibility will be controlled by the rules governing hearsay statements.

State v Alvarez, 213 Ariz. 467, 143 P.3d 668, ¶¶ 16–17 (Ct. App. 2006) (officer found victim staggering down road with blood in hair and on face; officer asked victim what happened, and victim said three men had jumped him and had taken his car; victim died before trial; court held that, although victim gave answers in response to officer's question, there was nothing in record to suggest victim would have reasonably expected his statement to be used in a later criminal prosecution, thus statement was not testimonial and admission did not violate confrontation clause).

State v Aguilar, 210 Ariz. 51, 107 P.3d 377, ¶¶ 2–13 (Ct. App. 2005) (in prosecution for murder, state sought to admit testimony by victim's son of excited utterance made by victim, and testimony by victim's wife's brother-in-law of excited utterance made by victim's wife; court held in-court testimony by lay witness of out-of-court excited utterances that lay witness heard was not "testimonial statement" that must satisfy Sixth Amendment).

State v Alvarez, 210 Ariz. 24, 107 P.3d 350, ¶¶ 18–22 (Ct. App. 2005) (officer found victim staggering down road with blood in hair and on face; officer asked victim what happened, and victim said three men jumped him and took his car; victim died before trial; court held that, although victim gave answers in response to officer's questions, this was not "police interrogation": victim did not call police, but rather officer had found victim; officer did not know that crime had been committed, but rather was questioned victim about injuries in order to obtain medical help for him; questioning was neither structured nor conducted for purpose of producing evidence in anticipation of potential criminal prosecution, thus was not "testimonial statement"), *vac'd,* 213 Ariz. 467, 143 P.3d 668, ¶ 2 (Ct. App. 2006).

803.019 This rule allows hearsay testimony even when the declarant is available; there is still a requirement that, if the declarant is not identified, the proponent of the evidence has the burden of establishing the circumstantial trustworthiness of the statement.

State v Bass, 198 Ariz. 571, 12 P.3d 796, ¶¶ 31–33 (2000) (defendant drove above speed limit in right lane when vehicle in left lane moved partially into right lane, whereupon defendant swerved right and vehicle's right wheels rode curb for moment, until passenger grabbed steering wheel and jerked it to left, which caused defendant to lose control of vehicle, which then spun across center line and into incoming traffic, causing multi-car collision and death and injuries to others; declarant stopped and made statement about defendant's speed to driver of vehicle that had moved toward right lane; court noted sole evidence of declarant's personal perception was declaration itself, and further, person who related hearsay statements was person whose vehicle had move partially into defendant's lane, thus that person had motive to shift all blame to defendant; court therefore concluded hearsay statement had insufficient trustworthiness to be admissible).

803.020 The constitutional right of confrontation is satisfied when the defendant has the opportunity to cross-examine the witness.

Crawford v Washington, 541 U.S. 36, 124 S. Ct. 1354, 1369 n.9 (2004) (Court stated, "[W]hen the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements.").

803.025 If a statement falls within a firmly rooted hearsay exception, the statement is considered sufficiently reliable to satisfy the reliability requirement of the confrontation clause.

State v Bass, 198 Ariz. 571, 12 P.3d 796, ¶¶ 34–38 (2000) (defendant drove above speed limit in right lane when vehicle in left lane moved partially into right lane, whereupon defendant swerved right and vehicle's right wheels rode curb for moment, until passenger grabbed steering wheel and jerked it to left, which caused defendant to lose control of vehicle, which then spun across center line and into incoming traffic, causing multi-car collision and death and injuries to others; declarant stopped and made statement about defendant's speed to driver of vehicle that had moved toward right lane, who then related hearsay statements at trial; court concluded statement did not satisfy hearsay requirements for excited utterance, and did not have any other basis to satisfy confrontation clause, thus statement was not admissible).

State v Wooten, 193 Ariz. 357, 972 P.2d 993, ¶¶ 42–43 (Ct. App. 1998) (murder victim telephoned friend and told her "Vonnie" was at her apartment, "so if anything happens to me you know who was here"; two neighbors heard someone knocking on victim's door and then heard victim say, "I haven't seen you in a long time"; court held this statement was admissible as present-sense impression exception to hearsay rule, and thus admission satisfied confrontation clause).

803.050 Before a statement is admissible as an exception to the hearsay rule, the proponent of the evidence must show that the declarant had an opportunity to observe, or had personal knowledge of, the fact declared.

State v Bass, 198 Ariz. 571, 12 P.3d 796, ¶ 20 (2000) (defendant drove above speed limit in right lane when vehicle in left lane moved partially into right lane, whereupon defendant swerved right and vehicle's right wheels rode curb for moment, until passenger grabbed steering wheel and jerked it to left, which caused defendant to lose control of vehicle, which then spun across center line and into incoming traffic, causing multi-car collision and death and injuries to others; declarant stopped and made statement about defendant's speed to driver of vehicle that had moved toward right lane; court included language that declarant must personally observe matter in question, but did not discuss that aspect further).

803.060 An out-of-court statement is not admissible merely because the declarant is available to testify at trial; such a hearsay statement is admissible only if it fits under one of the exceptions.

Keith Equip. v Casa Grande Cotton Fin., 187 Ariz. 259, 928 P.2d 683 (Ct. App. 1996) (trial court erred in admitting hearsay statement merely because declarant was available).

Paragraph (1) — Present sense impressions.

803.1.010 A hearsay statement is admissible as a present sense impression if (1) the declarant perceived the event or condition, (2) the statement described the event or condition, and (3) the declarant made the statement while perceiving the event or condition or immediately thereafter.

State v Smith, 215 Ariz. 221, 159 P.3d 531, ¶ 31 (2007) (because (1) medical examiner was performing autopsy, (2) medical examiner's statements described autopsy, and (3) medical examiner made statements while performing autopsy, medical examiner's statements were admissible as present sense impressions).

State v Tucker, 205 Ariz. 157, 68 P.3d 110, ¶¶ 38–47 (2003) (trial court admitted as present sense impression witness's testimony that, during telephone conversation, victim said she had "just got[ten] off the phone" with defendant, that victim sounded upset and crying, and that victim had told her defendant was upset with her and was verbally abusive toward her, and that when she refused to go the defendant's house, defendant got upset and called her names; court held trial court did not abuse discretion in admitting this statement).

State v Damper, 223 Ariz. 572, 225 P.3d 1148, ¶¶ 16–17 (Ct. App. 2010) (trial court admitted text message from victim's cell phone that said, "Can you come over; me and Marcus [defendant] are fighting and I have no gas"; court concluded (1) declarant perceived event, (2) statement described event, and (3) use of present tense (we "are fighting") suggested declarant sent message during fight or shortly after it, thus statement qualified as present-sense impression).

State v Sucharew, 205 Ariz. 16, 66 P.3d 59, ¶¶ 24–26 (Ct. App. 2003) (state alleged defendant and Doyle were racing when defendant's vehicle collided with victim's vehicle, killing victim; two witnesses testified that, as they saw vehicles drive by, one stated, "There goes your *Fast and Furious* movie"; court held this hearsay statement was admissible as present sense impression).

State v Wooten, 193 Ariz. 357, 972 P.2d 993, ¶¶ 36–41 (Ct. App. 1998) (murder victim telephoned friend and told her "Vonnie" was at her apartment, "so if anything happens to me you know who was here"; two neighbors heard someone knocking on victim's door and then heard victim say, "I haven't seen you in a long time"; court held this was sufficient evidence that victim perceived the visitor prior to identifying him as "Vonnie," thus first part of statement satisfied this hearsay exception).

State v Wooten, 193 Ariz. 357, 972 P.2d 993, ¶ 44 (Ct. App. 1998) (murder victim telephoned friend and told her "Vonnie" was at her apartment, "so if anything happens to me you know who was here"; two neighbors heard someone knocking on victim's door and then heard victim say, "I haven't seen you in a long time"; court held this was sufficient evidence that victim perceived visitor prior to identifying him as "Vonnie," and victim's expression of concern for her own safety was sufficiently tied to event of defendant's (Vonnie's) appearance to constitute an "explanation," thus second part of statement satisfied this hearsay exception).

803.1.020 This rule requires that the event and the statement be contemporaneous to a certain degree; to what degree they have to be contemporaneous has never been specified because each case is decided on its individual facts, thus the trial court has latitude and discretion in making this determination.

State v Tucker, 205 Ariz. 157, 68 P.3d 110, ¶¶ 43–47 (2003) (victim said she had "just got[ten] off the phone" with defendant; court noted this phrase might denote lapse of mere seconds, or could mean passage of longer time; court referred to cases that held statements were present sense impression when declarant walked approximately 100 feet before making statement and when declarant made statement 23 minutes after event; court held that, because trial court observed witness while witness described declarant and statement, trial court did not abuse discretion in determining statement was sufficiently contemporaneous with event).

Paragraph (2) — Excited utterances.

803.2.003 Statements made during police interrogation under circumstances objectively indicating that the primary purpose of the interrogation was to enable police assistance to meet an ongoing emergency are not testimonial.

State v Boggs, 218 Ariz. 325, 185 P.3d 111, ¶¶ 55–58 (2008) (officers arrived and spoke to victim, who was outside restaurant and had been shot twice; at trial, officers testified about victim's statements; court held victim's statements described what appeared to be ongoing emergency, thus they were non-testimonial).

State v Alvarez, 213 Ariz. 467, 143 P.3d 668, ¶¶ 12, 18–19 (Ct. App. 2006) (officer found victim staggering down road with blood in hair and on face; officer asked him what happened, and he said three men had jumped him and had taken his car; victim died before trial; court held, although victim gave answers in response to officer's question, primary purpose of question was to enable police to meet ongoing emergency and not to prove past events for later criminal prosecution, thus victim's statement was not "testimonial statement" and admission did not violate confrontation clause.

State v King, 212 Ariz. 372, 132 P.3d 311, ¶¶ 2–6, 29–32 (Ct. App. 2006) (declarant called 9-1-1 and requested that officers come to her house, said she had restraining order against defendant, who had just thrown two puppies over her house; when operator asked where defendant was, declarant said he "just drove off" and that she did not know where he was; in response to further questions, declarant identified defendant by name, date of birth, clothing, and race, and provided model and color of vehicle; court reversed conviction and stated that, on remand, trial court should consider which portions of 9-1-1 might be admissible and which parts might not be admissible).

803.2.004 Statements made during police interrogation under circumstances objectively indicating that there is no ongoing emergency, and that the primary purpose is to establish or prove past events potentially relevant to later criminal prosecution are testimonial.

State v Parks, 213 Ariz. 412, 142 P.3d 720, ¶¶ 4–7 (Ct. App. 2006) (police arrived after victim had been killed; after determining that defendant's son and brother had witnessed shooting, police separated and questioned them; because conduct showed police were operating in investigative mode, statements were testimonial, thus admission violated confrontation clause).

State v King, 212 Ariz. 372, 132 P.3d 311, ¶¶ 2–6, 29–32 (Ct. App. 2006) (declarant called 9-1-1 and requested that officers come to her house, said she had restraining order against defendant, who had just thrown two puppies over her house; when operator asked where defendant was, declarant said he "just drove off" and that she did not know where he was; in response to further questions, declarant identified defendant by name, date of birth, clothing, and race, and provided model and color of vehicle; court reversed conviction and stated that, on remand, trial court should consider which portions of 9-1-1 might be admissible and which parts might not be admissible).

803.2.006 An excited utterance that **was made** under circumstances that the declarant would reasonably expect to be available at trial will be considered a "testimonial statement" or "testimonial evidence" and thus must satisfy the requirements of the Sixth Amendment.

State v King, 212 Ariz. 372, 132 P.3d 311, ¶¶ 33–35 (Ct. App. 2006) (after declarant made 9-1-1 call, officer arrived and questioned declarant about what had happened; court held declarant would have expected these statements would be used in investigation and prosecution of defendant, thus statements were "testimonial evidence").

State v Parks, 211 Ariz. 19, 116 P.3d 631, ¶¶ 36–53 (Ct. App. 2005) (defendant's son witnessed actions that led to death of victim; officers arrived and one officer interviewed son, who was emotional at time; son died before trial; court held that son's statement qualified as excited utterance; court further held son's statement was "testimonial statement" because: (1) officer already knew defendant had killed victim when he interviewed son; (2) defendant had already been arrested; (3) there were no exigent safety, security, or medical concerns; (4) officer's questioning was not casual encounter; (5) officer separated son and other witness before questioning them; (6) officer was operating in investigative mode; (7) purpose of questioning was to obtain information about potential crime; and (8) son appeared to appreciate that what he had witnessed would have significance to future criminal prosecution; court held admission of son's statement violated defendant's confrontation clause rights), *aff'd*, 213 Ariz. 412, 142 P.3d 720, ¶ 8 (Ct. App. 2006).

803.2.007 An excited utterance that **was not made** under circumstances that the declarant would reasonably expect to be available at trial will not be considered a "testimonial statement" or "testimonial evidence" and thus its admissibility will be controlled by the rules governing hearsay statements.

State v Alvarez, 213 Ariz. 467, 143 P.3d 668, ¶¶ 16–17 (Ct. App. 2006) (officer found victim staggering down road with blood in hair and on face; officer asked him what happened, and he said three men had jumped him and had taken his car; victim died before trial; court held, although victim gave answers in response to officer's question, there was nothing in record to suggest victim would have

reasonably expected his statement to be used in later criminal prosecution, thus statement was not testimonial and admission did not violate confrontation clause).

State v Aguilar, 210 Ariz. 51, 107 P.3d 377, ¶¶ 2–13 (Ct. App. 2005) (in prosecution for murder, state sought to admit testimony by victim's son of excited utterance made by victim, and testimony by victim's wife's brother-in-law of excited utterance made by victim's wife; court held in-court testimony by lay witness of out-of-court excited utterances that lay witness heard was not "testimonial statement" that must satisfy Sixth Amendment).

State v Alvarez, 210 Ariz. 24, 107 P.3d 350, ¶¶ 18–22 (Ct. App. 2005) (officer found victim staggering down road with blood in hair and on face; officer asked victim what happened, and victim said three men jumped him and took his car; victim died before trial; court held, although victim gave answers in response to officer's questions, this was not "police interrogation": victim did not call police, but rather officer had found him; officer did not know that crime had been committed, but rather was questioned him about injuries in order to obtain medical help for him; questioning was neither structured nor conducted for purpose of producing evidence in anticipation of potential criminal prosecution, thus was not "testimonial statement"), *vac'd,* 213 Ariz. 467, 143 P.3d 668, ¶ 2 (Ct. App. 2006).

803.2.010 This rule has three requirements: (1) there must be a startling event; (2) the statement must relate to the startling event; and (3) the statement must be made soon enough after the event so that the declarant does not have time to fabricate.

State v Bass, 198 Ariz. 571, 12 P.3d 796, ¶¶ 20–29 (2000) (defendant drove above speed limit in right lane when vehicle in left lane moved partially into right lane, whereupon defendant swerved right and vehicle's right wheels rode curb for moment, until passenger grabbed steering wheel and jerked it to left, which caused defendant to lose control of vehicle, which then spun across center line and into incoming traffic, causing multi-car collision and death and injuries to others; declarant stopped and made statement about defendant's speed to driver of vehicle that had moved toward right lane; court stated either high rate of speed or accident itself could have been startling event, but hearsay statement related only to speed defendant was traveling, and because there was no foundation to show that speed defendant was traveling was startling event, there was insufficient foundation to admit hearsay testimony, and thus reversed conviction).

State v Alvarez, 210 Ariz. 24, 107 P.3d 350, ¶¶ 13–17 (Ct. App. 2005) (officer found victim staggering down road with blood in hair and on face; officer asked victim what happened, and victim said three men had jumped him and had taken his car; victim died before trial; court held that victim was under stress of startling event and that statement related to startling event, thus it qualified as excited utterance; any issues of reliability went to weight of evidence, not admissibility), *vac'd,* 213 Ariz. 467, 143 P.3d 668, ¶ 2 (Ct. App. 2006).

State v Beasley, 205 Ariz. 334, 70 P.3d 463, ¶¶ 28–31 (Ct. App. 2003) (trial court admitted following statement made 30 minutes after shooting: "I got shot for no reason, but I don't want to sue; I just want this to be over").

State v Taylor, 196 Ariz. 584, 2 P.3d 674, ¶¶ 18–20 (Ct. App. 1999) (trial court admitted step-mother's testimony of what victim said to her about the alleged sexual assault 45 minutes after the incident; because victim was still screaming, yelling, and crying when she made statement, trial court did not err in admitting statement).

803.2.020 A statement does not have to be contemporaneous with the startling event, but may be made after a lapse of time as long as the declarant is under the effect of the event.

State v Beasley, 205 Ariz. 334, 70 P.3d 463, ¶¶ 28–31 (Ct. App. 2003) (trial court admitted following statement: "I got shot for no reason, but I don't want to sue; I just want this to be over"; although declarant made statement 30 minutes after shooting, and although declarant was less excited that he was at time of shooting, record showed he was still excited, thus trial court did not abuse discretion in admitting it).

State v Taylor, 196 Ariz. 584, 2 P.3d 674, ¶¶ 18–20 (Ct. App. 1999) (trial court admitted step-mother's testimony of what victim said to her about the alleged sexual assault 45 minutes after the incident; because victim was still screaming, yelling, and crying when she made statement, trial court did not err in admitting statement).

803.2.030 A statement is inadmissible if the declarant had enough time to fabricate.

State v Cruz, 218 Ariz. 149, 181 P.3d 196, ¶¶ 52–56 (2008) (paramedic remained with defendant until 1 hour after shooting; on way to hospital, defendant told paramedic that "Arturo Sandoval" had shot police officer; although shooting of police officer was startling event and words spoken related to that startling event, trial court concluded defendant had ample opportunity for conscious reflection and had so reflected; thus court concluded trial court did not abuse discretion in excluding statement).

803.2.060 An excited utterance qualifies as a firmly rooted hearsay exception, and generally any evidence that falls within such an exception for that reason alone would satisfy the reliability requirement of the confrontation clause.

Paragraph (3) — Then existing mental, emotional, or physical condition.

803.3.010 This exception allows the introduction of evidence showing the declarant's then existing state of mind.

State v Huerstel, 206 Ariz. 93, 75 P.3d 698, ¶¶ 66–68 (2003) (defendant was charged with robbing Pizza Hut; court held that defendant's statement he made a few days prior to that robbery that he intended to rob Auto Zone was statement of plan or intent).

State v Pandeli, 200 Ariz. 365, 26 P.3d 1136, ¶¶ 24–25 (2001) (because defendant's statement 2 days after killing that he felt threatened by victim described his prior mental state and not his then existing state of mind, it did not qualify under this exception).

State v Fulminante, 193 Ariz. 485, 975 P.2d 75, ¶¶ 44–48 (1999) (declarant's statement showing fear of another is admissible to show declarant's later conduct).

803.3.015 The rationale for this hearsay exception rests on two assumptions: (1) declarant's statements have special reliability due to spontaneity and probable sincerity; and (2) because declarant's knowledge of his or her state of mind is inherently superior to any external, circumstantial account, there is a "fair necessity" to use those statements.

State v Fulminante, 193 Ariz. 485, 975 P.2d 75, ¶ 31 (1999) (court reversed conviction because trial court admitted not just state-of-mind evidence, it also allowed admission of statements of memory or belief).

803.3.020 The purpose of this exception is to allow introduction of evidence to show that the declarant acted in accordance with the declarant's stated intention, that is, to prove the declarant's future conduct, not the future conduct of another person, although statements having some bearing on the conduct and whereabouts of another are nonetheless admissible if they relate primarily to the declarant's state of mind.

Keith Equip. v Casa Grande Cotton Fin., 187 Ariz. 259, 928 P.2d 683 (Ct. App. 1996) (appellee claimed hearsay statement was admissible to show state of mind of person who heard statement; court held listener's state of mind was not relevant, thus trial court erred in admitting statement).

803.3.025 To be admissible under this exception, the declarant's statement must be relevant to prove the declarant's state of mind.

State v Hoskins, 199 Ariz. 127, 14 P.3d 977, ¶¶ 59–63 (2001) (defendant asserted that he told his sister that an unknown person named "Paul" gave him gun used in murder and that sister told witness about this, and contended he should have been allowed to cross-examine witness about these conversations because it would have shown witness's state of mind that he was aware of defendant's claims about "Paul"; court held that these were self-serving unreliable hearsay statements unrelated to the witness's state of mind).

State v Fulminante, 193 Ariz. 485, 975 P.2d 75, ¶ 33 (1999) (declarant-victim's statements showed she was afraid of defendant).

803.3.030 To be admissible under this exception, the declarant's state of mind must be relevant to some issue in the proceedings.

State v Huerstel, 206 Ariz. 93, 75 P.3d 698, ¶¶ 69–70 (2003) (defendant was charged with robbing Pizza Hut; court held that defendant's statement he made a few days prior to that robbery that he intended to rob Auto Zone was statement of plan or intent; defendant contended statement was inadmissible because his intent was not an issue; court held that, because defendant never raised that intent issue with trial court, defendant waived that argument on appeal).

State v Fulminante, 193 Ariz. 485, 975 P.2d 75, ¶ 34 (1999) (declarant-victim's statements showed she was afraid of defendant and that she disliked him, which would have shown defendant had a motive to kill victim and would refute defendant's claim that he had a good relationship with victim).

State v Supinger, 190 Ariz. 326, 947 P.2d 900 (Ct. App. 1997) (officer's testimony that victim's mother said she did not believe victim was hearsay, but was admissible because it showed mother's state of mind, and that state of mind was relevant because this lack of parental support might explain victim's later recantation of the molestation).

803.3.035 The state is permitted to introduce a statement showing declarant's state of mind to show the defendant's motive; not just to refute the defendant's claim of a lack of motive.

State v Fulminante, 193 Ariz. 485, 975 P.2d 75, ¶ 35 (1999) (declarant-victim's statements showed she was afraid of defendant and that she disliked him, which would have shown defendant had a motive to kill victim).

803.3.040 A statement showing the declarant intended to do some act is admissible under this rule.

State v Huerstel, 206 Ariz. 93, 75 P.3d 698, ¶¶ 69–70 (2003) (defendant was charged with robbing Pizza Hut; court held that defendant's statement he made a few days prior to that robbery that he intended to rob Auto Zone was statement of plan or intent).

803.3.050 This rule does not allow the admission of a statement of memory or belief, and must not include a description of the factual occurrence that produced the state of mind.

State v Pandeli, 200 Ariz. 365, 26 P.3d 1136, ¶¶ 24–26 (2001) (defendant's statements that he and victim disrobed in back of the van, that he became angry when he could not perform sexually and victim refused to return money, that she pulled knife and defendant took it from her, and that he excised breast parts because of his anger described neither present feeling nor future intent, and were

instead nothing more than asserted memory of past events, thus trial court properly precluded admission of that statement as failing to satisfy requirements of this exception).

State v Hoskins, 199 Ariz. 127, 14 P.3d 977, ¶¶ 59–63 (2001) (defendant asserted that he told his sister that an unknown person named "Paul" gave him gun used in murder and that sister told witness about this, and contended he should have been allowed to cross-examine witness about these conversations because it would have shown witness's state of mind that he was aware of defendant's claims about "Paul"; court held that these were self-serving unreliable hearsay statements unrelated to the witness's state of mind).

State v Fulminante, 193 Ariz. 485, 975 P.2d 75, ¶ 41 (1999) (statements, "He's going to kill me," and "I'm afraid he's going to kill me," are statements of belief and should not have been admitted).

State v Fulminante, 193 Ariz. 485, 975 P.2d 75, ¶ 41 (1999) (victim's statement about conversation she heard between her mother and defendant was statement of victim's memory, and should not have been admitted).

Paragraph (4) — Statements for purposes of medical diagnosis or treatment.

803.4.010 To be admissible under this exception, (1) the declarant's motive for giving the statement must be consistent with receiving medical care, and (2) the information must be of the type upon which a physician would rely for diagnosis or treatment.

State v Robinson, 153 Ariz. 191, 199, 735 P.2d 801, 809 (1987) (5-year-old victim made statements to her treating psychologist; nothing in record indicated victim's motive for making statements was other than for purpose of receiving medical care, and information concerning cause of injuries was critical to effective diagnosis and treatment).

State v Jeffers, 135 Ariz. 404, 661 P.2d 1105 (1983) (declarant's identification of who administered narcotic not reasonably pertinent to diagnosis or treatment, and refusal to identify narcotic showed ability to fabricate, thus reducing reliability; trial court should not have admitted statement).

State v Lopez, 217 Ariz. 433, 175 P.3d 682, ¶¶ 3, 8–13 (Ct. App. 2008) (witness was registered nurse, certified inpatient obstetrics nurse, forensic nurse, and sexual assault nurse examiner; nurse testified about victim's description of attacker's physical contact with her, and about answers victim gave to questions included in sexual assault kit provided by TPD; court held victim's apparent motive in making statements was to receive medical care, and that it was reasonable for physician to rely on that information for diagnosis or treatment, thus statements qualified as hearsay exceptions).

803.4.015 If (1) the declarant's motive for giving the statement is consistent with receiving medical care, and (2) the information is of the type upon which a physician would rely for diagnosis or treatment, the statements qualify as a hearsay exception even if the statements were answers given in response to questions included in a sexual assault kit provided by the police.

State v Lopez, 217 Ariz. 433, 175 P.3d 682, ¶¶ 8–14 (Ct. App. 2008) (nurse testified about victim's description of attacker's physical contact with her, and about answers victim gave to questions included in sexual assault kit provided by TPD; court held victim's apparent motive in making statements was to receive medical care, and that it was reasonable for physician to rely on that information for diagnosis or treatment; court stated that, mere fact that questions might be asked routinely in sexual assault cases did not necessarily determine their admissibility as hearsay exceptions).

803.4.020 If the identity of the person who caused the injuries is relevant to proper diagnosis and treatment, then the declarant's statement of who caused the injuries is admissible.

State v Robinson, 153 Ariz. 191, 200, 735 P.2d 801, 810 (1987) (court held that, because exact nature and extent of psychological problems that ensue from child sexual abuse often depend on identity of abuser, statement of abuser's identity was admissible, thus trial court properly allowed treating psychologist to testify that 5-year-old victim said defendant had engaged in acts of molestation).

State v Jones, 188 Ariz. 534, 541, 937 P.2d 1182, 1189 (Ct. App. 1996) (defendant was charged with sexually abusing daughter over 10-year period when victim was from age 4 to age 14; when physician examined victim 2 weeks after she reported incidents to police, victim was reluctant to discuss details of sexual assaults, so victim wrote note in response to question of what happened; physician indicated that questions asked of victim were routine in sex abuse cases; court held that contents of note were reasonably pertinent to diagnosis and treatment, thus trial court properly admitted note stating father had molested her).

State v Sullivan, 187 Ariz. 599, 601–02, 931 P.2d 1109, 1111–12 (Ct. App. 1996) (defendant charged with causing physical injuries (cigarette burns) to 2-year-old victim; court held that, because prevention of further abuse and facilitation of recovery apply in cases of physical abuse the same as in cases of sexual abuse, victim's statement identifying person who caused injuries would qualify as statement made for diagnosis and treatment, thus trial court properly allowed pediatrician to testify that victim said defendant caused burns on his leg).

803.4.030 If the identity of the person who caused the injuries is not relevant to proper diagnosis and treatment, then the declarant's statement of who caused the injuries is not admissible.

State v Jeffers, 135 Ariz. 404, 418, 420–21, 661 P.2d 1105, 1119, 1121–22 (1983) (on previous occasion, victim was taken to hospital, where nurse determined that victim had injuries to hand and leg, and showed symptoms of drug intoxication; nurse testified that, in response to question of what happened, victim said defendant had drugged her, that friends were coming to help kill her, and that she jumped from window to get away; nurse testified that identity of person who administered narcotic drug was not reasonably pertinent to diagnosis or treatment, thus trial court erred in admitting statement identifying defendant as person who gave drugs to victim).

State v Reidhead, 146 Ariz. 314, 315–16, 705 P.2d 1365, 1366–67 (Ct. App. 1985) (defendant was charged with child (physical) abuse committed on his 4-year-old son; court held that identity of person who caused injury not reasonably pertinent to diagnosis or treatment, thus held that trial court erred in allowing treating physician to testify that victim said "daddy twisted my arm"). (**Note:** It appears the Arizona Supreme Court implicitly overruled *Reidhead* because (1) dissent was of opinion that identity of person who caused injury was reasonably pertinent to diagnosis or treatment, thus trial court properly allowed hearsay statement identifying person who caused injury, and (2) Arizona Supreme Court cited with approval that dissent in *State v Robinson,* 153 Ariz. at 199, 735 P.2d at 809.)

State v Lopez, 217 Ariz. 433, 175 P.3d 682, ¶¶ 12 & n.2 (Ct. App. 2008) (nurse testified that victim told her that defendant pulled her shirt over her head so she was unable to see her attacker; assuming this statement was not relevant to medical treatment, any error was harmless because victim testified at trial and told same thing to jurors).

803.4.040 Statements of a victim of a sexual assault made to a psychiatrist, psychologist, or counselor in the course of treatment resulting from the assault are admissible.

State v Robinson, 153 Ariz. 191, 199, 735 P.2d 801, 809 (1987) (trial court properly allowed treating psychologist to testify that 5-year-old victim said defendant had engaged in acts of molestation).

State v Rushton, 172 Ariz. 454, 456, 837 P.2d 1189, 1191 (Ct. App. 1992) (trial court properly admitted statements victim made to social worker during mental health treatments and counseling).

803.4.050 The person receiving the statements of a victim of a sexual assault does not have to be a licensed or certified counselor or physician as long as the statements were made in the course of treatment and counseling that was a result of the assault.

State v Lopez, 217 Ariz. 433, 175 P.3d 682, ¶¶ 15–16 (Ct. App. 2008) (nurse testified about victim's description of attacker's physical contact with her, and about answers victim gave to questions included in sexual assault kit provided by TPD; defendant contended statements did not qualify as hearsay exception because they were never forwarded to physician; court noted that nurse provided treatment, thus it did not matter if no physician was involved).

State v Rushton, 172 Ariz. 454, 457, 837 P.2d 1189, 1192 (Ct. App. 1992) (although social worker was not licensed or certified, she was authorized to counsel victims of sexual assaults).

Paragraph (5) — Recorded recollection.

803.5.005 In order to be admissible under this exception, the requirements are: (1) the declarant (a) once had knowledge of the event, (b) now has insufficient recollection to testify fully and accurately, and (c) made or adopted the statement when the matter was fresh in the declarant's memory; and (2) the statement correctly reflects the declarant's knowledge.

State v Smith, 215 Ariz. 221, 159 P.3d 531, ¶¶ 29–30 (2007) (detective testified he (a) wrote in his report what medical examiner said during autopsy, (b) now had insufficient recollection of details of autopsy, (c) wrote his report while medical examiner was performing autopsy, (d) reviewed report for accuracy, and (e) adopted report by signing it; report was thus admissible as recorded recollection).

State v Martin, 225 Ariz. 162, 235 P.3d 1045, ¶ 12 (Ct. App. 2010) (after alleged molestations, forensic specialist conducted videotaped forensic interview of 5-year-old victim; victim testified at trial, and could remember details of one incident; for other incident, victim testified she could not remember it, but she remembered talking to "a lady" to whom she told "the truth" at time when she could better remember "some other stuff that happened with [Defendant]," and detective testified videotape accurately reflected forensic interview he observed; court held this met foundational requirements of rule).

Goy v Jones (State), 205 Ariz. 421, 72 P.3d 351, ¶¶ 4–12 (Ct. App. 2003) (court held that, if police officer and police officer's report meet requirements of Rule 803(5), report is admissible, but only to extent report may be read in evidence).

803.5.007 When a witness testifies and is subject to cross-examination, any statement that witness made is admissible and its admission does not violate the confrontation clause.

Crawford v Washington, 541 U.S. 36, 59, 124 S. Ct. 1354, 1369 n.9 (2004) (Court stated, "[W]hen the declarant appears for cross-examination at trial, the confrontation clause places no constraints at all on the use of his prior testimonial statements.").

State v Martin, 225 Ariz. 162, 235 P.3d 1045, ¶¶ 16–20 (Ct. App. 2010) (after alleged molestations, forensic specialist conducted videotaped forensic interview of 5-year-old victim; victim testified at trial, and could not remember details of one incident, so trial court had videotape played to jurors; defendant contended interviewer's statements in videotape were testimonial, and because interviewer did not testify, that violated his right to confront witnesses; court noted interviewer only asked questions and at times requested clarification, but did not repeat statements made by others or recount any other information that might have implicated defendant, thus what interviewer said was not testimonial hearsay; court held no violation of right of confrontation).

State v Salazar, 216 Ariz. 316, 166 P.3d 107, ¶¶ 3–8 (Ct. App. 2007) (when victim testified she did not remember or could not recall, prosecutor played her tape recorded statement to police; because victim was present and subject to cross-examination, admission of her out-of-court statement did not violate confrontation clause).

State v Real, 214 Ariz. 232, 150 P.3d 805, ¶¶ 2–9 (Ct. App. 2007) (officer administered FSTs to defendant and then took his statement; at trial, officer had no independent memory of investigation, so trial court allowed officer to read from his report; court held that, because officer testified and was subject to cross-examination, admission officer's testimony did not violate Sixth Amendment).

803.5.015 There is no requirement that the memorandum be made by or at the direction of the declarant; what is necessary is that the declarant (1) once had knowledge of the event, (2) now has insufficient recollection to testify fully and accurately, and (3) made or adopted the statement when fresh in the declarant's memory, and if the declarant did not make or adopt the memorandum, that the person who did make the memorandum made an accurate account of what the declarant said.

State v Alatorre, 191 Ariz. 208, 953 P.2d 1261, ¶ 10 (Ct. App. 1998) (8-year-old victim testified she remembered events more clearly when she spoke to detective than she did at time of trial and her memory had since diminished, and that she spoke truthfully to detective and told him everything she remembered at time; detective testified that tape-recording was accurate recording of victim's statement and that transcript of recording was accurate as well; trial court properly admitted victim's recorded statements).

803.5.016 In order to refresh a witness's recollection with a recording, the witness should listen to the recording outside of the presence of the jurors; if the witness's recollection is refreshed, the witness may then testify; if the witness's recollection is not refreshed, the party may then seek to have the recording admitted under Rule 803(5).

State v Salazar, 216 Ariz. 316, 166 P.3d 107, ¶¶ 8 & n.2 (Ct. App. 2007) (when victim testified she did not remember or could not recall, prosecutor played her tape recorded statement; to extent trial court allowed tape to be played in presence of jurors, trial court erred, but because recorded statement impeached her testimony, any error in playing of recording was harmless).

803.5.017 If a memorandum or record is admissible under this rule, the memorandum or record may be read in evidence, but the memorandum or record may not itself be received as an exhibit unless the adverse party offers it.

State v Martin, 225 Ariz. 162, 235 P.3d 1045, ¶¶ 13–15 (Ct. App. 2010) (trial court ruled videotape of forensic interview of 5-year-old victim was recorded recollection and played it to jurors during trial over defendant's objection; in response to question from jurors, trial court and parties agreed jurors would be able to review videotape during deliberations; on appeal, defendant contended trial court erred in allowing videotape to be admitted in evidence and making it available to jurors during deliberations; because defendant did not object at trial, court reviewed for fundamental error only; court held defendant failed to prove jurors reviewed videotape during deliberations, and further held that, even if jurors did view videotape during deliberations, other evidence supported his conviction, thus defendant failed to establish prejudice).

State v Ortega, 220 Ariz. 320, 206 P.3d 769, ¶¶ 30–33 (Ct. App. 2008) (victim's brother saw defendant molest victim; when called to testify, brother did not remember many details of events or his statements to police detective; trial court properly allowed state to read to brother excerpts from his interview with police, whereupon he remembered telling detective that defendant threatened him if he told anyone what had happened).

Goy v Jones, 205 Ariz. 421, 72 P.3d 351, ¶¶ 4–12 (Ct. App. 2003) (court held that, if police officer and police officer's report meet the requirements of Rule 803(5), the report is admissible, but only to extent report may be read in evidence; court noted that Rule 803(8) would preclude admission of report itself, but that Rule 803(5) allows admission of report if opposing party offers it in evidence).

803.5.040 This rule is not limited to written materials, thus a videotape may qualify as a recorded recollection.

State v Martin, 225 Ariz. 162, 235 P.3d 1045, ¶¶ 10–11 (Ct. App. 2010) (after alleged molestations, forensic specialist conducted videotaped forensic interview of 5-year-old victim; victim testified at trial, and could remember details of one incident but not of other incident; trial court played for jurors videotaped interview where victim described other incident; court rejected defendant's contention that Rule 803(5) is limited to written material).

Paragraph (6) — Records of regularly conducted activity.

803.6.010 This exception allows for admission of a memorandum, report, record, or data compilation if made at or near the time of the underlying event.

State v Dickens, 187 Ariz. 1, 926 P.2d 468 (1996) (because report of theft was made 2 months after theft, which was not customary, and was not on business's official incident report form, it did not qualify as a business record).

Bohsancurt v Eisenberg, 212 Ariz. 182, 129 P.3d 471, ¶ 17 (Ct. App. 2006) (technician who conducted calibration checks on Intoxilyzer 5000 recorded results at or near time of tests).

Standard Chartered PLC v Price Waterhouse, 190 Ariz. 6, 945 P.2d 317 (Ct. App. 1996) (defendant-seller sought to introduce December memorandum of conversations; although some testimony indicated conversation took place in summer or fall, other testimony indicated it took place as early as May; court held that trial court did not abuse discretion in concluding memorandum was not made at or near time of conversations).

803.6.020 This exception allows for admission of a memorandum, report, record, or data compilation if the information is either compiled or transmitted by someone with firsthand knowledge.

State v McCurdy, 216 Ariz. 567, 169 P.3d 931, ¶ 12 (Ct. App. 2007) (as part of proof of defendant's prior conviction, trial court admitted "Inmate Personal Property Receipt" for defendant; defendant contended records were inadmissible because former jail supervisor testified only that "booker" was "Mr. Kent"; jail supervisor testified about booking process and how such receipts were created in normal course of business at jail, and who bookers were and how they processed inmates; court concluded trial court did not abuse discretion in finding jail supervisor provided sufficient information for admission of business records).

803.6.040 This allows for admission of a memorandum, report, record, or data compilation if made and kept entirely in the course of a regularly conducted business activity.

State v Dickens, 187 Ariz. 1, 926 P.2d 468 (1996) (because report of theft was made 2 months after theft, which was not customary, and was not on business's official incident report form, it did not qualify as a business record).

Bohsancurt v Eisenberg, 212 Ariz. 182, 129 P.3d 471, ¶ 17 (Ct. App. 2006) (regulation required that each Intoxilyzer 5000 undergo calibration checks every 31 days and that person doing calibration and maintenance test complete affidavit listing results of tests).

Taeger v Catholic Fam & Com Serv, 196 Ariz. 285, 995 P.2d 721, ¶ 43 (Ct. App. 1999) (because plaintiffs were able to establish only that they received documents in course of litigation, this was not sufficient to establish they were made and kept in course of a regularly conducted business activity).

803.6.060 For records to be admissible under this exception, the requirements of this rule must be shown by testimony of the custodian of records or another qualified witness, who need not be an employee of the entity that prepared them.

State v McCurdy, 216 Ariz. 567, 169 P.3d 931, ¶¶ 5–10 (Ct. App. 2007) (as part of proof of defendant's prior conviction, trial court admitted "Inmate Personal Property Receipt" for defendant; former jail supervisor testified about booking process and how such receipts were created in normal course of business at jail; court concluded trial court did not abuse discretion in finding jail supervisor was qualified witness for business records purpose).

Bohsancurt v Eisenberg, 212 Ariz. 182, 129 P.3d 471, ¶ 17 (Ct. App. 2006) (affidavit listing results of calibration checks was made by person doing calibration and maintenance tests).

Taeger v Catholic Fam & Com Serv, 196 Ariz. 285, 995 P.2d 721, ¶ 41 (Ct. App. 1999) (plaintiffs attempted to establish foundation by testimony of someone who was not defendant's employee, but that person could not testify whether records were kept in regular course of defendant's business).

803.6.070 If a business record contains a further hearsay statement, the business record is admissible as long as the hearsay statement was made by a person acting in the routine course of the business; if not, the record is not admissible unless the hearsay statement itself is admissible under some exception.

Taeger v Catholic Fam & Com Serv, 196 Ariz. 285, 995 P.2d 721, ¶ 38 (Ct. App. 1999) (plaintiffs offered in evidence minutes of defendant's board meeting, which contained statements of persons; court noted plaintiffs would have had to show that statements within minutes were either business records themselves, or else satisfied some other hearsay exception).

803.6.090 Evidence that meets the foundational requirements is subject to exclusion if the source of the information or the method or circumstances of the preparation indicate a lack of trustworthiness, or to the extent that portions of the evidence lack an appropriate foundation.

State v McCurdy, 216 Ariz. 567, 169 P.3d 931, ¶¶ 9–11 (Ct. App. 2007) (as part of proof of defendant's prior conviction, trial court admitted "Inmate Personal Property Receipt" for defendant; court noted source of identifying information was defendant himself, and so it should be reliable).

State v King, 213 Ariz. 632, 146 P.3d 1274, ¶¶ 28–31 (Ct. App. 2006) (defendant contended MVD records were not reliable because custodian of records did not know who had retrieved records or level of training of person who had retrieved them, did not know how many people had input access to MVD computers, and did not believe that there was any one person responsible for determining accuracy of records; court noted that custodian of records had been employed at MVD for 17 years and had been custodian of records for 10 years, that she had followed statutory requirements for admission of records, and that she was "100 percent confident" that information in records was accurate; court held trial court did not abuse discretion in admitting MVD records).

Bohsancurt v Eisenberg, 212 Ariz. 182, 129 P.3d 471, ¶¶ 19–20 (Ct. App. 2006) (defendant contended that affidavit of results of calibration and maintenance tests on Intoxilyzer 5000 was not trustworthy because affidavits were produced by state for state's prosecution of defendant; court noted that maintenance records contain only factual memorializations generated by scientific machine and not opinions of person doing tests, and because person doing testing had no interest in whether information was favorable or adverse to defendant, records were trustworthy).

Larsen v Decker, 196 Ariz. 239, 995 P.2d 281, ¶¶ 18–26 (Ct. App. 2000) (plaintiff brought action for damages resulting from automobile accident; because plaintiff failed to present evidence that treatment reflected in medical records and bills was for injuries from the automobile accident, trial court properly excluded medical records and bills).

Paragraph (7) — Absence of entry in records kept in accordance with the provisions of paragraph (6).

803.7.010 Evidence that a company has a procedure for reporting certain events, and that there is no record of a certain event is admissible to show that either the event did not happen or it is not of the type required to be reported.

Mohave Elec. Coop. v Byers, 189 Ariz. 292, 942 P.2d 451 (Ct. App. 1997) (because company required reporting of business expenses, and because there was no stated business purpose for 1,157 credit card transactions, this created factual question that should have precluded summary judgment).

Paragraph (8) — Public records and reports.

803.8.005 The retention and production of public records is not the type of evil that the confrontation clause intended to avoid, thus public records are not "testimonial evidence."

State v Bennett, 216 Ariz. 15, 162 P.3d 654, ¶¶ 1–8 (Ct. App. 2007) (court held affidavit authenticating record of prior conviction was not "testimonial evidence").

State v King, 213 Ariz. 632, 146 P.3d 1274, ¶¶ 15–27 (Ct. App. 2006) (court held that record of prior convictions was not "testimonial evidence").

Bohsancurt v Eisenberg, 212 Ariz. 182, 129 P.3d 471, ¶¶ 12–18 (Ct. App. 2006) (court held record of calibration and maintenance test of intoxilyzer was not "testimonial evidence").

803.8.033 This exception allows for admission of records, reports, statements, or data compilations of matters when there is a duty imposed by law to observe and report those matters.

Hudgins v Southwest Airlines, Co., 221 Ariz. 472, 212 P.3d 810, ¶¶ 25–31 (Ct. App. 2009) (plaintiffs were bail enforcement agents (bounty hunters); before trip from Baltimore to Phoenix, they obtained instructions from Southwest Airlines (SWA) on how to transport handguns lawfully on airplane; plaintiffs followed those instructions, but were arrested because they were not law enforcement officers; plaintiffs sued SWA claiming it was negligent in actions that led to their arrest; court held trial court properly admitted three FBI reports about this incident drafted by special agent R.S. because they reflected matters R.S. observed or heard and reported pursuant to his FBI duties; court rejected SWA's claim that these were merely preliminary reports and thus should not have been admitted).

803.8.035 This exception does not allow admission of reports of matters observed by police officers or other law enforcement personnel acting in an adversarial setting.

Goy v Jones, 205 Ariz. 421, 72 P.3d 351, ¶¶ 4–12 (Ct. App. 2003) (court held that, if police officer and police officer's report meet the requirements of Rule 803(5), the report is admissible, but only to extent report may be read in evidence; court noted that Rule 803(8) would preclude admission of report itself, but that Rule 803(5) allows admission of report if opposing party offers it in evidence).

State v Meza, 203 Ariz. 50, 50 P.3d 407, ¶ 20 (Ct. App. 2002) (in aggravated assault charged as result of driving under influence, defendant sought records of all calibration checks and standard quality assurance procedure ("SQAP") tests performed on Intoxilyzer 5000 unit used for defendant; court held, although information was in possession of Phoenix Police Department Crime Laboratory rather than prosecutor's office, law enforcement agency investigating criminal action operates as arm of pro-

secutor for purposes of obtaining information that falls within required disclosure provisions of Rule 15.1, thus state should have disclosed calibration check test results deleted from computer main file).

803.8.040 Although this exception does not allow admission of reports of matters observed by police officers or other law enforcement personnel acting in an adversarial setting, this limitation does not apply to police or law enforcement personnel acting in routine, non-adversarial situations.

Bohsancurt v Eisenberg, 212 Ariz. 182, 129 P.3d 471, ¶¶ 36–39 (Ct. App. 2006) (report of calibration and maintenance is not result of investigating particular crime and is instead routine task removed from adversarial setting, thus information is not precluded by Rule 803(8)(B)).

State v Best, 146 Ariz. 1, 3–4, 703 P.2d 548, 550–51 (Ct. App. 1985) (police report stating certain fingerprints came from certain items would be admissible under this exception).

803.8.045 This rule allows for admission of records, reports, statements, or data compilations of factual findings resulting from investigation made pursuant to authority granted by law.

Shotwell v Dohahoe, 207 Ariz. 287, 85 P.3d 1045, ¶ 28 (2004) (court rejected position that EEOC determination letter is automatically admissible in Title VII employment discrimination lawsuit, and held instead admissibility is controlled by Ariz. R. Evid.; court held EEOC letter is admissible hearsay).

Bogard v Cannon & Wendt Elec. Co., 221 Ariz. 325, 212 P.3d 17, ¶¶ 32–37 (Ct. App. 2009) (court did not follow rule that EEOC determination letter is automatically admissible in Title VII employment discrimination lawsuit, but instead followed rule that trial court has discretion to admit such letter under Ariz. R. Evid.; court held trial court did not abuse discretion in determining EEOC letter was relevant and that its probative value was not substantially outweighed by danger of unfair prejudice).

803.8.050 This exception allows admission of both the factual findings resulting from an investigation and the opinions and conclusions of the investigator as long as they are based on the factual investigation and satisfy the rule's trustworthiness requirement.

Shotwell v Dohahoe, 207 Ariz. 287, 85 P.3d 1045, ¶¶ 31–32 (2004) (court stated document is not necessarily inadmissible merely because it contains conclusions or is conclusory).

Larsen v Decker, 196 Ariz. 239, 995 P.2d 281, ¶¶ 9–13, 17 (Ct. App. 2000) (plaintiff brought action for damages resulting from automobile accident; trial court excluded Social Security Administration (SSA) report finding plaintiff permanently disabled because it concluded SSA proceedings were essentially *ex parte*, ALJ was not qualified as medical expert, and none of plaintiff's treating doctors testified, thus report was not sufficiently reliable; court adopted rule that allowed for admission of opinions and conclusions in addition to factual findings in a report, but held trial court properly excluded report based on trial court's conclusion that report was not reliable (trustworthy)).

State ex rel. Miller v Tucson Assoc. Ltd. Partnership, 165 Ariz. 519, 799 P.2d 860 (Ct. App. 1990) (expressly overrules *Ferguson v Cessna Aircraft Co.*).

Ferguson v Cessna Aircraft Co., 132 Ariz. 47, 643 P.2d 1017 (Ct. App. 1981) (expert witness relied upon factual data in report to arrive at his conclusions, but did not rely upon any opinions or conclusions contained in report).

803.8.060 This exception allows admission of the factual findings resulting from an investigation, but does not allow for the admission of the opinions and conclusions of the investigator.

Davis v Cessna Aircraft Corp., 182 Ariz. 26, 893 P.2d 26 (Ct. App. 1994) (this holding appears to be in direct conflict with *State ex rel. Miller v Tucson Assoc. Ltd. Partnership*, 165 Ariz. 519, 520, 799 P.2d 860, 861 (Ct. App. 1990)).

803.8.070 The trial court may exclude records, reports, statements, or data compilations of public offices or agencies if the sources of information or other circumstances indicate lack of trustworthiness.

Hudgins v Southwest Airlines, Co., 221 Ariz. 472, 212 P.3d 810, ¶¶ 32–34 (Ct. App. 2009) (plaintiffs were bail enforcement agents (bounty hunters); before trip from Baltimore to Phoenix, they called Southwest Airlines (SWA) to obtain instructions on how to transport handguns lawfully on airplane; plaintiffs followed those instructions, but were arrested in Phoenix because they were not law enforcement officers; plaintiffs sued SWA claiming that SWA was negligent in actions that led to plaintiffs' arrest; court held trial court did not abuse discretion in concluding FBI reports were trustworthy because (1) they contained relatively straightforward information (customer service agent was on vacation and not available for interview and that messages were left for agent's supervisor), (2) SWA security representative had noted information on SWA form that corroborated reports, (3) FBI agent who prepared reports had no motive to lie, and (4) another FBI agent had approved reports).

803.8.080 As long as the sources of information or other circumstances indicate trustworthiness, any errors or defects in records, reports, statements, or data compilations of public offices or agencies go to the weight and not the admissibility of the documents.

Hudgins v Southwest Airlines, Co., 221 Ariz. 472, 212 P.3d 810, ¶ 33 (Ct. App. 2009) (plaintiffs were bail enforcement agents (bounty hunters); on 9/11/99, they flew from Baltimore to Phoenix; before trip, they called Southwest Airlines (SWA) to obtain instructions on how to transport handguns lawfully on airplane; plaintiffs followed those instructions, but were arrested in Phoenix because they were not law enforcement officers; plaintiffs sued SWA claiming that SWA was negligent in actions that led to their arrest; court held, because sources of information and other circumstances indicate trustworthiness of FBI reports, length of time between event and report (nearly 7 weeks), lack of full explanation, misspellings, and ambiguities in reports went to weight and not the admissibility of reports).

Paragraph (19) — Reputation concerning personal or family history.

803.19.010 Reputation among members of a person's family by blood, adoption, or marriage, or among a person's associates, or in the community, about a person's birth, adoption, marriage, divorce, death, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history is admissible as a hearsay exception.

State v May, 210 Ariz. 452, 112 P.3d 39, ¶¶ 11[14 (Ct. App. 2005) (defendant charged with DUI with person under 15 in vehicle; officer testified that man at scene said he was defendant's brother and that person in vehicle was his 13-year-old son; court held statement was offered to prove truth of matter asserted and thus was hearsay; court noted there was no showing officer knew anyone in 13-year-old's family, and held officer was not sufficiently familiar with 13-year-old for officer's testimony to be admissible under this exception).

Paragraph (22) — Judgment of previous conviction.

803.22.005 Evidence of a final judgment, entered after a trial or upon a plea of guilty, adjudging a person guilty of a crime punishable by death or imprisonment in excess of one year, is admissible to prove any fact essential to sustain the judgment,

Picaso v Tucson Unif. S.D., 217 Ariz. 178, 171 P.3d 1219, ¶ 7 (2007) (plaintiff's guilty plea in criminal case was admissible in civil case).

803.22.020 Under A.R.S. § 13–807, a defendant is estopped from denying the commission of the acts forming the basis for the conviction.

American Family Mutual Ins. Co. v. White, 204 Ariz. 500, 65 P.3d 449, ¶¶ 15–16 (Ct. App. 2003) (to stop White from assaulting smaller person, Travis hit White in head with metal pipe; state charged Travis with aggravated assault dangerous; to avoid mandatory prison, Travis pled guilty to non-dangerous aggravated assault; White sued Travis and his parents (the Wildes); Wildes' insurance carrier, American Family (AmF), brought declaratory judgment action and moved for summary judgment contending White's claim against AmF was barred by provision in policy precluding coverage if any insured violated criminal law; trial court held White stood in shoes of Travis, and because Travis was precluded from collecting from AmF, White was precluded from recovering, and thus granted summary judgment for AmF; White contended that, despite plea of guilty in criminal action, Travis should be allowed in civil action to claim he was acting in self-defense or defense of third person; court held A.R.S. § 13–807 precluded Travis from denying he violated criminal law, which would thus preclude Travis from collecting from AmF, and this precluded White from recovering from AmF).

March 11, 2012

Rule 804. Exceptions to the Rule Against Hearsay— When the Declarant Is Unavailable as a Witness

(a) Criteria for Being Unavailable. A declarant is considered to be unavailable as a witness if the declarant:

(1) is exempted from testifying about the subject matter of the declarant's statement because the court rules that a privilege applies;

(2) refuses to testify about the subject matter despite a court order to do so;

(3) testifies to not remembering the subject matter;

(4) cannot be present or testify at the trial or hearing because of death or a then-existing infirmity, physical illness, or mental illness; or

(5) is absent from the trial or hearing and the statement's proponent has not been able, by process or other reasonable means, to procure:

(A) the declarant's attendance, in the case of a hearsay exception under Rule 804(b)(1) or (5); or

(B) the declarant's attendance or testimony, in the case of a hearsay exception under Rule 804(b)(2), (3), or (4).

But this subsection (a) does not apply if the statement's proponent procured or wrongfully caused the declarant's unavailability as a witness in order to prevent the declarant from attending or testifying.

(b) The Exceptions. The following are not excluded by the rule against hearsay if the declarant is unavailable as a witness:

(1) *Former Testimony in a Criminal Case.* Testimony that:

(A) was made under oath by a party or witness during a previous judicial proceeding or a deposition under Arizona Rule of Criminal Procedure 15.3 shall be admissible in evidence if:

(i) The party against whom the former testimony is offered was a party to the action or proceeding during which a statement was given and had the right and opportunity to cross-examine the declarant with an interest and motive similar to that which the party now has (no person who was unrepresented by counsel at the proceeding during which a statement was made shall be deemed to have had the right and opportunity to cross-examine the declarant, unless such representation was waived) and

(ii) The declarant is unavailable as a witness, or is present and subject to cross-examination.

(B) The admissibility of former testimony under this subsection is subject to the same limitations and objections as though the declarant were testifying at the hearing, except that the former testimony offered under this subsection is not subject to:

(i) Objections to the form of the question which were not made at the time the prior testimony was given.

(ii) Objections based on competency or privilege which did not exist at the time the former testimony was given.

(2) *Statement Under the Belief of Imminent Death.* In a prosecution for homicide or in a civil case, a statement that the declarant, while believing the declarant's death to be imminent, made about its cause or circumstances.

(3) *Statement Against Interest.* A statement that:

(A) a reasonable person in the declarant's position would have made only if the person believed it to be true because, when made, it was so contrary to the declarant's proprietary or pecuniary interest or had so great a tendency to invalidate the declarant's claim against someone else or to expose the declarant to civil or criminal liability; and

(B) is supported by corroborating circumstances that clearly indicate its trustworthiness, if it is offered in a criminal case as one that tends to expose the declarant to criminal liability.

(4) *Statement of Personal or Family History.* A statement about:

(A) the declarant's own birth, adoption, legitimacy, ancestry, marriage, divorce, relationship by blood, adoption, or marriage, or similar facts of personal or family history, even though the declarant had no way of acquiring personal knowledge about that fact; or

(B) another person concerning any of these facts, as well as death, if the declarant was related to the person by blood, adoption, or marriage or was so intimately associated with the person's family that the declarant's information is likely to be accurate.

(5) [Formerly (7) *Other exceptions.*] [Transferred to Rule 807.]

(6) *Statement Offered Against a Party That Wrongfully Caused the Declarant's Unavailability.* A statement offered against a party that wrongfully caused— or acquiesced in wrongfully causing— the declarant's unavailability as a witness, and did so intending that result.

Comment to 2012 Amendment

Rule 804(b)(1) has been amended to incorporate the language of Arizona Rule of Criminal Procedure 19.3(c).

Rule 804(b)(3) has been amended to conform to Federal Rule of Evidence 804(b)(3), as amended effective December 1, 2010.

To conform to Federal Rules of Evidence 804(b)(5) and 807, Rule 804(b)(7) has been deleted and transferred to Rule 807.

Additionally, the language of Rule 804 has been amended to conform to the federal restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent in the restyling to change any result in any ruling on evidence admissibility.

Comment to 1994 Amendment

For provisions governing former testimony in non-criminal actions or proceedings, *see* Rule 803(25).

NOTE: On March 8, 2004, the United States Supreme Court decided *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004), which greatly changed the law in determining whether admission of certain hearsay statements violated the confrontation clause. Cases decided prior to that date holding that admission of certain statements did not violate the confrontation clause therefore may no longer be good law.

Cases

804.010 Considerations of public policy and the necessities of the case permit dispensing with confrontation at trial if two conditions exist: (1) the declarant's in-court testimony is unavailable; and (2) the declarant's out-of-court statement bears adequate indicia of reliability. (**Note:** contrary to *Crawford.*)

State v. Huerstel, 206 Ariz. 93, 75 P.3d 698, ¶¶ 27–34 (2003) (defendant introduced statements from two inmates who claimed codefendant told them he shot all three victims; trial court then allowed state to introduce codefendant's statement to police in which he claimed defendant shot all three vic-

tims; court held accomplice confession that implicates defendant is not within firmly rooted hearsay exception to hearsay rule, and trial court made no finding that codefendant's statement to police bore sufficient indicia of reliability, thus trial court erred in admitting codefendant's statement).

804.025 If a statement falls within a firmly rooted hearsay exception, the statement is considered sufficiently reliable to satisfy the reliability requirement of the confrontation clause. (**Note:** contrary to *Crawford.*)

State v Huerstel, 206 Ariz. 93, 75 P.3d 698, ¶¶ 27–34 (2003) (defendant introduced statements from two inmates who claimed codefendant told them he shot all three victims; trial court then allowed state to introduce codefendant's statement to police in which he claimed defendant shot all three victims; court held accomplice confession that implicates defendant is not within firmly rooted hearsay exception to hearsay rule, and trial court made no finding that codefendant's statement to police bore sufficient indicia of reliability, thus trial court erred in admitting codefendant's statement).

State v Prasertphong, 206 Ariz. 70, 75 P.3d 675, ¶¶ 34–39 (2003) (defendant sought to admit portions of codefendant's statement that were self-incriminating; state contended entire statement must be admitted, which included portions wherein codefendant shifted some responsibility to defendant; court agreed with trial court that admitting only portions of statement offered by defendant would have been misleading, thus entire statement would have to be admitted, but portion state wanted admitted would not be admissible if it violated confrontation clause; court held, however, that portion state wanted admitted sufficiently inculpated codefendant to make it admissible under Rule 804(b)(3), and fact that it was somewhat inculpatory of defendant did not make it any less inculpatory, reliable, or admissible).

State v Bronson, 204 Ariz. 321, 63 P.3d 1058, ¶¶ 15–28 (Ct. App. 2003) (court held accomplice confessions that implicate criminal defendants and are sought to be admitted under Rule 804(b)(3) are not within firmly-rooted exception; court further found insufficient indicia of reliability, thus court held admission of transcript of accomplice's interview conducted by defendant's attorney was error).

Paragraph (a)(1) — Definition of unavailability— Exempt from testifying because of privilege.

804.a.1.010 If the witness has a good faith basis for invoking the Fifth Amendment privilege, the witness will be considered unavailable.

804.a.1.020 Unless the record clearly shows the declarant will invoke the Fifth Amendment privilege, the declarant will not be considered unavailable.

State v Harrod, 200 Ariz. 309, 26 P.3d 492, ¶¶ 14–17 (2001) (defendant contended that, because declarant was under sentence of death in California, declarant would not come to Arizona and admit to committing another murder; court held that, because there was no affirmative showing declarant would have refused to testify if called as witness, defendant failed to show declarant was "unavailable" within meaning of rule 804(b)(3)).

Paragraph (a)(2) — Definition of unavailability— Refusal to testify.

804.a.2.010 A witness will be considered unavailable if the witness persists in refusing to testify about the subject matter of the witness's statement despite an order of the court to do so.

* *State v Lehr,* 227 Ariz. 140, 254 P.3d 379, ¶¶ 27–35 (2011) (at pretrial hearing before retrial, victim T.H. testified she would not testify against defendant because she opposed capital punishment; trial court threatened her with contempt, including jail for up to 6 months; T.H. said putting her in jail or fining her would not change her mind; court held trial court did not abuse discretion in finding T.H. was unavailable and allowing admission of her testimony from first trial).

Paragraph (a)(3) — Definition of unavailability— Unable to testify because of lack of memory.

804.a.4.010 If the witness has a good faith loss of memory, the witness will be considered unavailable.

804.a.4.020 Whether a witness is considered "unavailable" for Sixth Amendment purposes is determined as a matter of constitutional law, and not as a matter or state evidentiary law.

State v Real, 214 Ariz. 232, 150 P.3d 805, ¶ 11 (Ct. App. 2007) (officer administered FSTs to defendant and then took his statement; at trial, officer had no independent memory of investigation, so trial court allowed officer to read from his report; defendant contended officer was "unavailable" under Rule 804(a)(3); court held that, because officer was present and was subject to cross-examination, officer was available).

Paragraph (a)(4) — Definition of unavailability— Unable to testify because of injury or death.

804.a.4.010 A declarant who is seriously injured or incapacitated, or is dead, is unavailable.

Aranada v Cardenas, 215 Ariz. 210, 159 P.3d 76, ¶¶ 35–37 (Ct. App. 2007) (in wrongful death action where mother and child died, because mother was dead, she was unavailable, so mother's statement in her medical history and mother's statement to relative that plaintiff was father of child would be admissible).

State v Dunlap, 187 Ariz. 441, 930 P.2d 518 (Ct. App. 1996) (declarant was dead).

Paragraph (a)(5) — Definition of unavailability— Unable to testify because of absence.

804.a.5.001 A declarant who cannot be found after a good faith effort is unavailable.

State v Montaño, 204 Ariz. 413, 65 P.3d 61, ¶¶ 25–31 (2003) (two witnesses, who were illegal aliens, testified at preliminary hearing but were then out of country during trial; because state was able to subpoena one witness before he left country, state made good-faith effort for that witness; although state did not subpoena other witness, court concluded state had made sufficient efforts, thus trial court did not abuse discretion in concluding that witness were "unavailable" and that preliminary hearing videotape was admissible).

State v Tankersley, 191 Ariz. 359, 956 P.2d 486, ¶¶ 44, 46 (1998) (because neither state nor defendant could find declarant, declarant was unavailable).

804.a.5.020 "Good faith effort" to locate a witness is not subject to a precise definition and is instead left to the sound discretion of the trial court.

State v Montaño, 204 Ariz. 413, 65 P.3d 61, ¶¶ 25–31 (2003) (two witnesses, who were illegal aliens, testified at preliminary hearing but were then out of country during trial; because state was able to subpoena one witness before he left country, state made good-faith effort for that witness; although state did not subpoena other witness, court concluded state had made sufficient efforts, thus trial court did not abuse discretion in concluding that witness were "unavailable" and that preliminary hearing videotape was admissible).

* *State v Rivera,* 226 Ariz. 325, 247 P.3d 560, ¶¶ 12–16 (Ct. App. 2011) (evidence showed state attempted to contact witness through attorney who had been contact during first trial, mailed subpoena to last known address, checked utilities, driver's licenses, and criminal history, contacted law enforcement personnel and other civilian witnesses, and called three telephone numbers it had for witness; court held these efforts were reasonable; because state did not know if witness was in Mexico, state was not required to invoke international treaties in attempt to locate witness).

804.a.5.030 In a criminal prosecution, the state must make a good faith effort to obtain the witness's presence at trial, which ordinarily would require the issuance of a subpoena, including the utilization of the Uniform Act To Secure the Attendance of a Witness From Without a State; if the witness's whereabouts are unknown and if the state makes a diligent effort to locate the witness, issuance of a subpoena would be futile and therefore is not necessary.

State v Montaño, 204 Ariz. 413, 65 P.3d 61, ¶¶ 25–31 (2003) (two witnesses, who were illegal aliens, testified at preliminary hearing but were then out of country during trial; because state was able to subpoena one witness before he left country, state made good-faith effort for that witness; although state did not subpoena other witness, court concluded state had made sufficient efforts, thus trial court did not abuse discretion in concluding that witness were "unavailable" and that preliminary hearing videotape was admissible).

Paragraph (b)(1) — Former testimony.

804.b.1.010 The use of former testimony is an exception to the rule against hearsay whenever a witness is declared incompetent to testify or is otherwise unavailable.

State v Montaño, 204 Ariz. 413, 65 P.3d 61, ¶¶ 25–31 (2003) (two witnesses, who were illegal aliens, testified at preliminary hearing but were then out of country during trial; because state was able to subpoena one witness before he left country, state made good-faith effort for that witness; although state did not subpoena other witness, court concluded state had made sufficient efforts, thus trial court did not abuse discretion in concluding that witness were "unavailable" and that preliminary hearing videotape was admissible).

804.b.1.020 An exception to the confrontation clause exists when the witness is unavailable but has previously testified at a judicial proceeding, subject to cross-examination, against the same defendant.

* *State v Prince*, 226 Ariz. 516, 250 P.3d 1145, ¶¶ 41–43 (2011) (issue of defendant's guilt was determined by one jury, and issue of sentence was determined by another jury; at aggravation phase, state had read to jurors transcript of testimony state's gun expert gave at guilt phase; court noted such testimony would be admissible if (1) declarant were unavailable, and (2) defendant had right and opportunity to cross-examine witness; because defendant did not object at trial, court reviewed for fundamental error only, and held defendant failed to prove prejudice because testimony had no bearing on aggravating circumstance state presented).

State v Montaño, 204 Ariz. 413, 65 P.3d 61, ¶¶ 21–32 (2003) (two witnesses, who were illegal aliens, testified at preliminary hearing, but were then out of country during trial; because defendant had adequate opportunity to cross-examine witnesses at preliminary hearing and availed himself of that opportunity, preliminary hearing videotape bore sufficient indicia of reliability to be admissible).

804.b.1.030 The party against whom the statement is offered must have had the opportunity and a similar motive to cross-examine.

State v Montaño, 204 Ariz. 413, 65 P.3d 61, ¶ 32 (2003) (two illegal aliens, testified at preliminary hearing, but were then out of country during trial; defendant contended that his attorney did not have sufficient time to prepare for preliminary hearing and thus did not have complete and adequate opportunity to cross-examine witnesses at preliminary hearing; court noted defendant's attorney was appointed 6 days after complaint was filed and that preliminary was held 6 weeks after defendant's attorney was appointed, and thus concluded that attorney had adequate opportunity to cross-examine witnesses at preliminary hearing).

804.b.1.040 Former testimony in a criminal action is admissible as provided by Rule 19.3(c), ARIZ. R. CRIM. P.

State v Montaño, 204 Ariz. 413, 65 P.3d 61, ¶¶ 21–32 (2003) (two witnesses, who were illegal aliens, testified at preliminary hearing, but were then out of country during trial; because defendant had adequate opportunity to cross-examine witnesses at preliminary hearing and availed himself of that opportunity, preliminary hearing videotape bore sufficient indicia of reliability, and thus was admissible under Rule 19.3(c)).

Paragraph (b)(3) — Statements against interest.

804.b.3.005 For a statement to be admissible under this exception: (1) the declarant must be unavailable; (2) the statement must be against the declarant's interest; and (3) there must be corroborating evidence that indicates the statement's trustworthiness.

* *State v Machado*, 226 Ariz. 281, 246 P.3d 632, ¶¶ 19–22 (2011) ((1) because telephone call was from anonymous caller, caller was unavailable; (2) although call from anonymous caller usually would not be against caller's penal interest (because caller was seeking to protect against consequences of call), in this case, police used call to get warrant for suspect's voice sample, thus call was against penal interest; (3) other evidence corroborated statements in call about vehicles and when they arrived at house; evidence of telephone call was thus admissible).

State v Pandeli, 200 Ariz. 365, 26 P.3d 1136, ¶ 21 (2001) (court made general statement about admissibility).

State v Harrod, 200 Ariz. 309, 26 P.3d 492, ¶¶ 14–17 (2001) (defendant contended that, because declarant was under sentence of death in California, declarant would not come to Arizona and admit to committing another murder; court held that, because there was no affirmative showing declarant would have refused to testify if called as witness, defendant failed to show declarant was "unavailable" within meaning of rule 804(b)(3)).

804.b.3.007 Because the defendant has the choice whether or not to testify, the defendant is not "unavailable" to himself or herself, thus when the defendant seeks to introduce his or her own statement, that statement does not qualify under this exception.

State v Pandeli, 200 Ariz. 365, 26 P.3d 1136, ¶¶ 21–23 (2001) (defendant sought to introduce his own statement under this exception; court held trial court properly held statement was not admissible under this exception).

804.b.3.020 Exclusion of a statement offered under this exception by the defendant does not violate the defendant's constitutional right to present evidence.

804.b.3.030 A statement is admissible if, at the time that the declarant made it, it was so contrary to the declarant's pecuniary or proprietary interest, or subjected the declarant to civil or criminal liability, that the declarant would not have made it if it were not true.

State v Tankersley, 191 Ariz. 359, 956 P.2d 486, ¶ 46 (1998) (because letter suggested that declarant had killed the victim, it was against his penal interest).

804.b.3.050 This exception is not limited to a direct confession, but the statement must at least implicate the declarant in a crime.

State v Tankersley, 191 Ariz. 359, 956 P.2d 486, ¶ 46 (1998) (even though letter was not a confession that declarant had killed victim, because it suggested that he had killed the victim, letter was against his penal interest).

804.b.3.060 A statement offered to **exculpate** the defendant is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement; at least seven factors suggest the trustworthiness of a statement: (1) the existence of corroborating and contradicting evidence; (2) the relationship between the declarant and the listener; (3) the relationship between the declarant and the defendant; (4) the number of times the declarant made the statement and the consistency of the multiple statements; (5) the amount of time between the event and the making of the statement; (6) whether the declarant will benefit from the statement; and (7) the psychological and physical environment surrounding the making of the statement; in determining whether to admit the statement, the trial court should determine only whether evidence presented corroborating and contradicting the statement would permit a reasonable person to believe it could be true, and if so should admit the statement; only after the statement is admitted in evidence should factors other than the corroborating and contradicting evidence be considered, and then only by the jurors; appellate decisions have, however, determined admissibility of the statement based on the additional consideration of one or more of the other six factors.

State v Ellison, 213 Ariz. 116, 140 P.3d 899, ¶¶ 48–51 (2006) (defendant sought to introduce statements codefendant made to fellow jail inmate; in concluding that trial court correctly excluded statements, court did not discuss any corroborating or contradicting evidence, but instead noted that trial court found that codefendant made statements while in administrative segregation in jail and housed with "the baddest of the bad," and that codefendant feared retaliation and may have simply bragged about murders to protect himself).

State v Harrod, 200 Ariz. 309, 26 P.3d 492, ¶¶ 18–19 (2001) (defendant was charged with murder, and offered in evidence purported confession of Majors, who was under sentence of death in California; as contradiction, court noted there was no evidence Majors was at scene of crime, details in Majors' statement were inconsistent with crime, and Majors denied any involvement in crime; court concluded trial court did not err in precluding admission of statement).

State v Tankersley, 191 Ariz. 359, 956 P.2d 486, ¶¶ 44–47 (1998) (defendant was charged with murder, and offered in evidence letter from Thompson to Bauer stating "this is the year for me to settle up with all who have fucked over me," and containing newspaper clipping about victim's murder and lawsuit Thompson had filed against victim; as contradiction, court noted there was no evidence that linked Thompson to victim's murder, and there was evidence that eye-witness saw defendant enter victim's room, DNA and bite-mark evidence connected defendant to victim, and no evidence placed Thompson near area where victim was killed; court also considered factor (2) and (6) Thompson could have made statement to collect debt from Bauer, and factor (4) Thompson made statement only once; court concluded trial court did not err in precluding admission of statement).

State v Henry, 176 Ariz. 569, 575–76, 863 P.2d 861, 867–68 (1993) (defendant was charged with murder, and offered in evidence Foote's statement indicating only he, and not defendant, dragged victim to where body was found; as contradiction, court noted there were sets of footprints on either side of drag marks made by victim, there was blood on defendant's clothing and not on Foote's clothing, and Foote was extremely intoxicated, which made it unlikely Foote could have stabbed victim without getting blood on his own clothing; court also considered factor (2) Foote made statement to police, factor (3) defendant threatened Foote and his family, factor (4) statement was not spontaneous and Foote never repeated it, factor (5) Foote made statement 6 months after event, and factor (7) Foote was intoxicated at time of event, which would have cast doubt on his ability to recollect; court stated, "[w]hile the issues of trustworthiness raises questions of veracity, reliability and credibility, which are traditionally reserved to the trier of fact, we conclude here that no reasonable person could have believed Foote's statements under the circumstances," thus trial court did not err in precluding admission of statement).

State v Lopez, 159 Ariz. 52, 54–55, 764 P.2d 1111, 1113–14 (1988) (defendant was charged with leaving scene of accident, and offered in evidence Guerrero's statement that he, and not defendant, was driving car at time of accident, but trial court did not admit statement; court noted there was other evidence contradicting Guerrero's statement, including defendant's own admission of guilt, but as corroboration, court noted Guerrero often drove Lopez's car and drove it night of accident, Guerrero was with Lopez night of accident, seat was forward, which was position Guerrero, and not Lopez, would use, and Guerrero offered to assume partial responsibility for repairing car; as additional evidence of corroboration, court considered factor (2) Guerrero made statement to mutual friends, defendant's parents, and prosecuting attorney, and factor (4) Guerrero made statement no less than eight times; court concluded trial court erred in precluding admission of statement).

State v LaGrand (Walter), 153 Ariz. 21, 25–29, 734 P.2d 563, 567–71 (1987) (brothers Walter and Karl were charged with murder; Walter offered in evidence Karl's statement that he stabbed victims at time when Walter was out of room; court identified seven factors that could be considered, and stated that only corroborating and contradicting evidence went to admissibility of statement, and that other six factors related to veracity, reliability, and credibility, which were the province of the jurors, thus trial court should consider only corroborating and contradicting evidence and not other six factors; as corroboration, court noted one victim said other victim kicked someone, and Karl had bruise on leg as he stated, victim said only one person stabbed her, and defendant said he was out of room when stabbings occurred; as contradiction, court noted one victim said she saw other victim struggling with two men, she was "positive" Walter stabbed her, and that, after stabbing, one man said to other twice, "Just make sure he's dead," and medical examiner said more than one instrument was used to stab victim; court stated that, after reviewing corroborating and contradicting evidence, it did not think any reasonable person could have concluded statement could have been true, thus trial court did not err in precluding admission of statement).

State v Macumber, 119 Ariz. 516, 520–21, 582 P.2d 162, 166–67 (1978) (defendant was charged with murder, and offered in evidence Valenzuela's statement made to two attorneys and psychiatrist wherein he said he killed victims; court noted statements were vague and lacked details, and those details given did not correspond with physical evidence; statements therefore were inadmissible).

State v Doody, 187 Ariz. 363, 377, 930 P.2d 440, 454 (Ct. App. 1996) (defendant was charged with murder, and offered in evidence statement Caratachea made to Herron wherein Caratachea supposedly said someone other than Doody killed victims; court considered only corroborating and contradicting evidence, and as corroboration, noted Herron had piece of paper with Caratachea's signature on it, but said signature corroborated only that conversation took place and not substance of conversation; court concluded trial court did not err in precluding admission of statement).

State v Grijalva, 137 Ariz. 10, 14–15, 667 P.2d 1336, 1340–41 (Ct. App. 1983) (defendant offered statement Corrales made wherein Corrales allegedly said that he, and not defendant, committed offense; court considered only corroborating and contradicting evidence; court noted there was no corroboration that Corrales either made statement or committed offense; court concluded trial court did not err in precluding admission of statement).

804.b.3.070 A statement offered to **inculpate** the defendant is not admissible unless corroborating circumstances and the circumstances of the making of the statement clearly indicate the trustworthiness of the statement; in assessing the circumstances of the making of the statement, the court should consider both the motives of the out-of-court declarant and the veracity of the in-court witness.

State v Latimer, 171 Ariz. 439, 831 P.2d 438 (Ct. App. 1992) (because co-defendant had reason to deny or minimize his involvement and to fabricate or at least exaggerate defendant's culpability, co-defendant's testimony in his own trial was not reliable and should not have been admitted against defendant at defendant's trial).

State v Daniel, 169 Ariz. 73, 817 P.2d 18 (Ct. App. 1991) (trial court erred in considering extrinsic evidence; because there was some evidence that declarant had ingested drugs, that he may have been trying to improve his own situation with police, and that he may have had some motives for revenge against defendant, statement was not admissible).

State v Canaday, 141 Ariz. 31, 684 P.2d 912 (Ct. App. 1984) (court concluded that, considering all circumstances surrounding taking of declarant's statement, which was during custodial interrogation, there were not sufficient indicia of trustworthiness present, thus it was error to admit statement).

804.b.3.075 An out-of-court statement satisfies the requirements of the confrontation clause if it comes under a firmly rooted exception to the hearsay rule; the statement of an accomplice that shifts or spreads the blame to a criminal defendant is outside the realm of those hearsay exceptions that are so trustworthy that adversarial testing can be expected to add little to the statement's reliability, thus the statement of an accomplice that inculpates a criminal defendant and does not, at the same time, implicate the declarant, is not within a firmly rooted exception to the hearsay rule and thus does not satisfy the requirements of the confrontation clause.

State v Huerstel, 206 Ariz. 93, 75 P.3d 698, ¶¶ 27–34 (2003) (defendant introduced statements from two inmates who claimed codefendant told them he shot all three victims; trial court then allowed state to introduce codefendant's statement to police in which he claimed defendant shot all three victims; court held accomplice confession that implicates defendant is not within firmly rooted hearsay exception to hearsay rule, and trial court made no finding that codefendant's statement to police bore sufficient indicia of reliability, thus trial court erred in admitting codefendant's statement).

State v Prasertphong, 206 Ariz. 70, 75 P.3d 675, ¶¶ 34–39 (2003) (defendant sought to admit portions of codefendant's statement that were self-incriminating; state contended entire statement must be admitted, which included portions wherein codefendant shifted some responsibility for crimes to defendant; court agreed with trial court that admitting only portions of statement offered by defendant would have been misleading, thus entire statement would have to be admitted, but portion state wanted admitted would not be admissible if it violated confrontation clause; court held, however, that portion state wanted admitted sufficiently inculpated codefendant to make it admissible under Rule 804(b)(3), and fact that it was somewhat inculpatory of defendant did not make it any less inculpatory, reliable, or admissible).

State v Bronson, 204 Ariz. 321, 63 P.3d 1058, ¶¶ 21–22 (Ct. App. 2003) (court held admission of transcript of accomplice's interview conducted by defendant's attorney was error).

804.b.3.080 Only a statement that inculpates the declarant is admissible, and those portions of a statement that inculpate the defendant, but do not at the same time inculpate the declarant, are not admissible.

State v Huerstel, 206 Ariz. 93, 75 P.3d 698, ¶¶ 27–34 (2003) (defendant introduced statements from two inmates who claimed codefendant told them he shot all three victims; trial court then allowed state to introduce codefendant's statement to police in which he claimed defendant shot all three victims; court held accomplice confession that implicates defendant is not within firmly rooted hearsay exception to hearsay rule, and trial court made no finding that codefendant's statement to police bore sufficient indicia of reliability, thus trial court erred in admitting codefendant's statement).

State v Prasertphong, 206 Ariz. 70, 75 P.3d 675, ¶¶ 34–39 (2003) (defendant sought to admit portions of codefendant's statement that were self-incriminating; state contended entire statement must be admitted, which included portions wherein codefendant shifted some responsibility for crimes to defendant; court agreed with trial court that admitting only portions of statement offered by defendant would have been misleading, thus entire statement would have to be admitted, but portion state wanted admitted would not be admissible if it violated confrontation clause; court held, however, that

portion state wanted admitted sufficiently inculpated codefendant to make it admissible under Rule 804(b)(3), and fact that it was somewhat inculpatory of defendant did not make it any less inculpatory, reliable, or admissible).

State v Bronson, 204 Ariz. 321, 63 P.3d 1058, ¶¶ 15–28 (Ct. App. 2003) (court held accomplice confessions that implicate criminal defendants and are sought to be admitted under Rule 804(b)(3) are not within firmly-rooted exception; court further found insufficient indicia of reliability, thus court held admission of transcript of accomplice's interview conducted by defendant's attorney was error).

Paragraph (b)(4) — Statement of personal or family history.

804.b.4.020 If the declarant is unavailable, the declarant's statement concerning another person's birth, adoption, marriage, divorce, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history is admissible if the declarant was related to the other by blood, adoption, or marriage or was so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared.

Aranada v Cardenas, 215 Ariz. 210, 159 P.3d 76, ¶¶ 35–37 (Ct. App. 2007) (in wrongful death action where mother and child died, mother's statement in her medical history and mother's statement to relative that plaintiff was father of child would be admissible).

Paragraph (b)(5) — [Transferred to Rule 807.]

Paragraph (b)(6) — Statement Offered Against a Party That Wrongfully Caused the Declarant's Unavailability.

No Arizona cases.

March 11, 2012

Rule 805. Hearsay Within Hearsay.

Hearsay within hearsay is not excluded by the rule against hearsay if each part of the combined statements conforms with an exception to the rule.

Comment to 2012 Amendment

The language of Rule 805 has been amended to conform to the federal restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Cases

805.010 Multiple hearsay is admissible if each part is admissible under a hearsay exception.

State v Smith, 215 Ariz. 221, 159 P.3d 531, ¶ 28 (2007) (because detective's report was admissible as recorded recollection, and because statements of medical examiner contained in report were admissible as present sense impressions, report satisfied hearsay requirements).

Diaz v Magma Copper Co, 190 Ariz. 544, 950 P.2d 1165 (Ct. App. 1997) (although statement attributed to mine manager would have been admissible under Rule 801(d)(2)(D), there was no evidence of who heard mine manager make the statement, thus second level of hearsay failed).

805.020 Multiple hearsay is not admissible if either part fails to satisfy a hearsay exception.

Diaz v Magma Copper Co, 190 Ariz. 544, 950 P.2d 1165 (Ct. App. 1997) (although statement attributed to mine manager would have been admissible under Rule 801(d)(2)(D), there was no evidence of who heard mine manager make the statement, thus second level of hearsay failed).

State v Doody, 187 Ariz. 363, 930 P.2d 440 (Ct. App. 1996) (first level of hearsay did not qualify under Rule 804(b)(3), and second level did not qualify under Rule 804(b)(5), thus trial court did not err in precluding this evidence).

March 11, 2012

Rule 806. Attacking and Supporting the Declarant's Credibility.

When a hearsay statement— or a statement described in Rule 801(d)(2)(C), (D), or (E)— has been admitted in evidence, the declarant's credibility may be attacked, and then supported, by any evidence that would be admissible for those purposes if the declarant had testified as a witness. The court may admit evidence of the declarant's inconsistent statement or conduct, regardless of when it occurred or whether the declarant had an opportunity to explain or deny it. If the party against whom the statement was admitted calls the declarant as a witness, the party may examine the declarant on the statement as if on cross-examination.

Comment to 2012 Amendment

The language of Rule 806 has been amended to conform to the federal restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Cases

806.010 When a hearsay statement, or a statement defined in Rule 801(d)(2)(C), (D), or (E), has been admitted in evidence, a party may introduce evidence to attack the credibility of the declarant.

State v Ruggiero, 211 Ariz. 262, 120 P.3d 690, ¶¶ 14–17 (Ct. App. 2005) (defendant was charged with murder as result of shooting of 13-year-old daughter's 28-year-old boyfriend; defendant was allowed to introduce testimony from ex-girlfriend of one of defendant's friends (Soto) that Soto had said to her he killed boyfriend; trial court then allowed state to introduce for impeachment testimony from police officer that Soto had told him that defendant had killed boyfriend).

State v Hernandez, 191 Ariz. 553, 959 P.2d 810, ¶¶ 9–15 (Ct. App. 1998) (20 minutes after killing victim, defendant called 9-1-1 and told operator that victim had attacked him with two broken bottles and so he shot victim in self-defense; trial court held this was excited utterance, and thus admissible as a hearsay exception, but then allowed state to impeach defendant with fact of his prior conviction; court rejected defendant's contention that impeachment should not be allowed to impeach excited utterances because they are inherently reliable).

806.015 Although a party may introduce evidence to attack the credibility of a hearsay declarant, if that evidence is offered both to impeach and as substantive evidence, that evidence must satisfy the requirements of the confrontation clause; if the evidence does not satisfy the requirements of the confrontation clause, that evidence may be admitted for impeachment only, and the trial court must instruct the jurors on the limited purpose for which the evidence is admitted.

State v Huerstel, 206 Ariz. 93, 75 P.3d 698, ¶¶ 35–36, 42 (2003) (defendant introduced statements from two inmates who claimed codefendant told them he shot all three victims; trial court then allowed state to introduce codefendant's statement to police in which he claimed defendant shot all three victims; court held accomplice confession that implicates defendant is not within firmly rooted hearsay exception to hearsay rule, and trial court made no finding that codefendant's statement to police bore sufficient indicia of reliability, thus evidence did not satisfy confrontation clause, so trial court erred in admitting codefendant's statement; court further held that, upon retrial, statement may be admitted for impeachment only, and that trial court would have to give limiting instruction, but cautioned trial court to consider whether statement should be excluded under Rule 403).

State v Huerstel, 206 Ariz. 93, 75 P.3d 698, ¶ 42 n.9 (2003) (court noted that use of prior inconsistent statement as substantive evidence is predicated on fact that witness who made statement testifies at trial and thus is subject to cross-examination, but when prior inconsistent statement is admitted under

Rule 806, declarant has not testified at trial and thus is not subject to cross-examination, so only way statement could be used is for impeachment and not as substantive evidence).

State v Ruggiero, 211 Ariz. 262, 120 P.3d 690, ¶¶ 14–22 (Ct. App. 2005) (defendant was charged with murder as result of shooting of 13-year-old daughter's 28-year-old boyfriend; defendant was allowed to introduce testimony from ex-girlfriend of one of defendant's friends (Soto) that Soto had said to her he killed boyfriend; trial court then allowed state to introduce for impeachment testimony from police officer that Soto had told him that defendant had killed boyfriend; court noted second statement was not offered to prove truth of matter asserted and instead was offered only for impeachment of first statement, thus confrontation clause did not bar use of that statement).

806.020 If a statement is not admitted for the truth of the matter asserted (and thus is not hearsay), the credibility of the declarant is not relevant, so the opposing party may not introduce evidence to attack the credibility of the declarant.

State v Dunlap, 187 Ariz. 441, 930 P.2d 518 (Ct. App. 1996) (because statement was not offered to prove truth of matter asserted (Boles was investigating Funk family) but to show inadequacy of police investigation, it was not hearsay, and because it was not hearsay, state should not have been allowed to introduce evidence to impeach credibility of declarant).

806.040 The fact that the declarant is the defendant does not preclude impeachment of declarant/defendant.

State v Hernandez, 191 Ariz. 553, 959 P.2d 810, ¶¶ 16–17 (Ct. App. 1998) (20 minutes after killing victim, defendant called 9-1-1 and told operator that victim had attacked him with two broken bottles, so he shot victim in self-defense; trial court held this was excited utterance, and thus admissible as hearsay exception, but then allowed state to impeach defendant with fact of his prior conviction; court rejected defendant's contention that impeachment should not be allowed because declarant was defendant, and impeachment would have been unduly prejudicial).

March 11, 2012

Rule 807. Residual Exception.

(a) In General. Under the following circumstances, a hearsay statement is not excluded by the rule against hearsay even if the statement is not specifically covered by a hearsay exception in Rule 803 or 804:

(1) the statement has equivalent circumstantial guarantees of trustworthiness;

(2) it is offered as evidence of a material fact;

(3) it is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts; and

(4) admitting it will best serve the purposes of these rules and the interests of justice.

(b) Notice. The statement is admissible only if, before the trial or hearing, the proponent gives an adverse party reasonable notice of the intent to offer the statement and its particulars, including the declarant's name and address, so that the party has a fair opportunity to meet it.

Comment to 2012 Amendment

Rule 807 has been adopted to conform to Federal Rule of Evidence 807, as restyled.

Cases

807.010 To be admissible, the statement must have equivalent circumstantial guarantees of trustworthiness that make it at least as reliable as evidence admitted under a firmly rooted hearsay exception.

State v Cruz, 218 Ariz. 149, 181 P.3d 196, ¶¶ 59–66 (2008) (some time after shooting, woman made statement suggesting third party may have shot police officer; woman died before trial, so defendant sought to introduce her statement; court concluded statement did not have equivalent circumstantial guarantees of trustworthiness because (1) woman had motive to lie because of her close relationship with defendant and his family, (2) she had significant criminal history, (3) statement contained several levels of hearsay, and (4) her alternative version did not fit facts of case, thus trial court did not abuse discretion in precluding statement).

807.020 To be admissible, the statement must have equivalent circumstantial guarantees of trustworthiness, which must be determined from the circumstances of the making of the statement itself, and not from other extrinsic evidence that may corroborate the statement.

State v Roque, 213 Ariz. 193, 141 P.3d 368, ¶¶ 60–64 (2006) (for charge of first-degree murder, state's theory of case was that shootings were intentional acts of racism while intoxicated, while defendant pursued insanity defense; defendant's sister testified about their mother's mental illness; on cross-examination, prosecutor asked if her mother had ever hit her, and sister said that her grandmother told her that once her mother tried to push her into traffic; prosecutor objected and asked to have the testimony struck, which trial court did; defendant contended testimony was admissible under subsection 24; court stated there was no showing that grandmother made the statement under oath or near time of event, nor was any other indicator of reliability present, thus trial court did not err in concluding that statement did not exhibit reliability necessary to qualify as exception to hearsay rule).

Ogden v J.M. Steel Erecting, Inc., 201 Ariz. 32, 31 P.3d 806, ¶¶ 36–38, 40 (Ct. App. 2001) (in order to prove driving record of truck driver who caused accident, plaintiffs presented truck driver's MVD record (listing three prior offenses) and police report of investigating officer, which contained supplement by another officer purporting to show truck driver's alleged driving record (listing 10 additional prior offenses); because supplement was not authenticated, and because there was no evidence from which trial court could conclude it was in any way trustworthy, and because of discrepancies with certified MVD record, supplement did not have circumstantial guarantees of trustworthiness, thus trial court should not have admitted it).

State v Dunlap, 187 Ariz. 441, 930 P.2d 518 (Ct. App. 1996) (because declarant made statements to grand jury while under oath, was defendant's friend and had no motive to harm him, testified to matters of personal knowledge, and never recanted his testimony, statements had circumstantial guarantees of trustworthiness).

State v Doody, 187 Ariz. 363, 930 P.2d 440 (Ct. App. 1996) (although declarant did not know defendant and therefore had no motive to lie, made statement voluntarily under oath to police, and made similar statements in other interviews, trial court reviewed his mental condition and juvenile record, and therefore did not abuse its discretion in concluding that prior statement lacked equivalent circumstantial guarantees of trustworthiness).

807.030 The statement must be offered as evidence of a material fact.

Ogden v J.M. Steel Erecting, Inc., 201 Ariz. 32, 31 P.3d 806, ¶¶ 36–38, 40 (Ct. App. 2001) (in order to prove driving record of truck driver who caused accident, plaintiffs presented truck driver's MVD record (listing three prior offenses) and police report of investigating officer, which contained supplement by another officer purporting to show truck driver's alleged driving record (listing 10 additional prior offenses); because plaintiffs offered supplement to prove driving record, it was offered as evidence of a material fact).

807.040 The statement must be more probative on the point for which it is offered than other evidence that the proponent can procure through reasonable efforts.

State v Taylor, 196 Ariz. 584, 2 P.3d 674, ¶¶ 12–14 (Ct. App. 1999) (trial court admitted pretrial videotaped statement made by minor victim; because victim was available and testified in court, hearsay statement was not more probative than the in-court testimony, and thus was not admissible under this exception).

807.050 Self-serving statements, such as claims of innocence, lack circumstantial guarantees of trustworthiness.

State v Tinajero, 188 Ariz. 350, 935 P.2d 928 (Ct. App. 1997) (after defendant was arrested for leaving the scene of an accident, he said he was not the one who had been driving the car; court held this statement lacked trustworthiness and thus was not admissible).

March 11, 2012

Rule 901. Authenticating and Identifying Evidence.

(a) **In General.** To satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is.

(b) **Examples.** The following are examples only— not a complete list— of evidence that satisfies the requirement:

(1) *Testimony of a Witness with Knowledge.* Testimony that an item is what it is claimed to be.

(2) *Nonexpert Opinion About Handwriting.* A nonexpert's opinion that handwriting is genuine, based on a familiarity with it that was not acquired for the current litigation.

(3) *Comparison by an Expert Witness or the Trier of Fact.* A comparison with an authenticated specimen by an expert witness or the trier of fact.

(4) *Distinctive Characteristics and the Like.* The appearance, contents, substance, internal patterns, or other distinctive characteristics of the item, taken together with all the circumstances.

(5) *Opinion About a Voice.* An opinion identifying a person's voice— whether heard firsthand or through mechanical or electronic transmission or recording— based on hearing the voice at any time under circumstances that connect it with the alleged speaker.

(6) *Evidence About a Telephone Conversation.* For a telephone conversation, evidence that a call was made to the number assigned at the time to:

(A) a particular person, if circumstances, including self-identification, show that the person answering was the one called; or

(B) a particular business, if the call was made to a business and the call related to business reasonably transacted over the telephone.

(7) *Evidence About Public Records.* Evidence that:

(A) a document was recorded or filed in a public office as authorized by law; or

(B) a purported public record or statement is from the office where items of this kind are kept.

(8) *Evidence About Ancient Documents or Data Compilations.* For a document or data compilation, evidence that it:

(A) is in a condition that creates no suspicion about its authenticity;

(B) was in a place where, if authentic, it would likely be; and

(C) is at least 20 years old when offered.

(9) *Evidence About a Process or System.* Evidence describing a process or system and showing that it produces an accurate result.

(10) *Methods Provided by a Statute or Rule.* Any method of authentication or identification allowed by a statute or a rule prescribed by the Supreme Court.

Comment to 2012 Amendment

The language of Rule 901 has been amended to conform to the federal restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Comment to Original 1977 Rule

This rule is declaratory of general evidence law and deals only with identification or authentication and not with grounds for admissibility.

Cases

Paragraph (a) — General provision.

901.a.010 For the matter in question to be admissible in evidence, the proponent need only present sufficient evidence from which the trier-of-fact could conclude that the matter in question is what the proponent claims it to be; whether the matter in question is in fact what the proponent claims and whether it is connected to the litigation is a question of weight and not admissibility, and is for the trier-of-fact.

State v Jones, 197 Ariz. 290, 4 P.3d 345, ¶¶ 47–48 (2000) (because witness was one who gave description to sketch artist and identified sketch as the one drawn from his description, state provided sufficient authentication for admission of sketch, and thus there was no need to have sketch artist testify and identify sketch).

State v Doerr, 193 Ariz. 56, 969 P.2d 1168, ¶¶ 46–48 (1998) (because diagram helped jurors understand where various blood groups were found in apartment, it was admissible).

State v Miller (Estrella), 226 Ariz. 202, 245 P.3d 887, ¶¶ 7–11 (Ct. App. 2010) (state's witness had monitored and transcribed numerous wiretap recordings of conversations between defendant and persons connected with defendant, many of which were in Spanish; court held witness could authenticate law enforcement interview tapes and tapes of jailhouse telephone calls by identifying voices on tapes based on her experience with the monitoring and transcribing).

State v Haight-Gyuro, 218 Ariz. 356, 186 P.3d 33, ¶¶ 7–19 (Ct. App. 2008) (state offered in evidence videotape of defendant using stolen credit card to purchase various items at retail store; court held following evidence was sufficient to authenticate videotape: store's loss prevention officer testified about his job responsibilities in installing and maintaining store's surveillance system, how cameras were placed, and how he could match time stamps and dollar amounts to certain transactions; how he had used that procedure to identify videotape in question; and how he had made copy of videotape to give to detective; and he testified about specific item purchased with stolen credit card; photograph in evidence of defendant at time of arrest showed him wearing shirt similar to shirt in videotape; and items recovered from defendant's home matched those being purchased in videotape).

Ogden v J.M. Steel Erecting, Inc., 201 Ariz. 32, 31 P.3d 806, ¶¶ 34–35, 40 (Ct. App. 2001) (in order to prove driving record of truck driver who caused accident, plaintiffs presented truck driver's MVD record (listing three prior offenses) and police report of investigating officer, which contained supplement by another officer purporting to show truck driver's alleged driving record (listing 10 additional prior offenses); court concluded there was not sufficient evidence for jurors to conclude (1) that document was report of the other officer or (2) that it was accurate account of truck driver's driving record, thus trial court should not have admitted it).

State v Wooten, 193 Ariz. 357, 972 P.2d 993, ¶¶ 56–58 (Ct. App. 1998) (evidence presented was that all jail telephone conversations were recorded on master microcomputer tape, and then must be transferred to cassette tape; although officer did not listen to master tape, he did listen to cassette tapes, and was able to identify most of the parties to calls; court held this was sufficient for jurors to find that these were conversations made by defendant).

901.a.020 The trial court does not determine whether the matter in question is what the proponent claims it to be; the extent of the trial court's duty is to determine whether the proponent has presented sufficient evidence from which the trier-of-fact could find that the matter in question is what the proponent claims it to be; whether the matter in question is in fact what the proponent claims and whether it is connected to the litigation are questions of weight and not admissibility, and are for the trier-of-fact.

* *State v. King*, 226 Ariz. 253, 245 P.3d 938, ¶¶ 8–9 (Ct. App. 2011) (during videotaped police interview and during trial testimony, witness was asked how hard defendant had kicked victim and then was asked to use chair to demonstrate how hard kick was; court held kicking of chairs was not purported replication and was instead more in nature of demonstration, thus conditions did not have to be similar and instead only had to illustrate fairly disputed trait or characteristic; trial court properly concluded it was question for jurors whether demonstrations accurately showed force defendant used).

State v. Damper, 223 Ariz. 572, 225 P.3d 1148, ¶¶ 18–19 (Ct. App. 2010) (defendant was charged with killing girlfriend (C); defendant claimed shooting was accidental; shortly before shooting, C's friend B received text message from C's cell phone that said, "Can you come over; me and Marcus [defendant] are fighting and I have no gas"; defendant contended text message could not be authenticated because state did not prove C sent message; court held following was sufficient for jurors to determine C. sent message: At trial, B testified she and C often communicated with text messages, that she had C's cell-phone number on her cell-phone with nickname for C, and when message arrived, it displayed that nickname as sender of message; C's cell-phone was found on bed next to C's body, and there was no evidence anyone other than C used that cell-phone that morning).

State v. Haight-Gyuro, 218 Ariz. 356, 186 P.3d 33, ¶¶ 8, 17 & n.6 (Ct. App. 2008) (state offered in evidence videotape of defendant using stolen credit card to purchase various items at retail store; court stated that relative quality of videotape does not necessarily make it inaccurate, and that it is ultimately for jurors to decide whether they can identify objects and persons depicted in videotape).

State v. King, 213 Ariz. 632, 146 P.3d 1274, ¶¶ 9–11 & n.4 (Ct. App. 2006) (municipal court clerk included with records letter stating she had searched court's records under name provided to her, and records were court's records for that individual; records consisted of copy of traffic ticket and complaint, plea agreement, signed waiver of jury trial form, and minute entries from change-of-plea proceedings and sentencing; court held this was sufficient for jurors to find records were defendant's records; court noted defendant did not challenge admissibility of records on hearsay grounds).

State v. Wooten, 193 Ariz. 357, 972 P.2d 993, ¶ 57 (Ct. App. 1998) (evidence presented was that all jail telephone conversations were recorded on master microcomputer tape, and then must be transferred to cassette tape; although officer did not listen to master tape, he did listen to cassette tapes, and was able to identify most of the parties to calls; court held this was sufficient for jurors to find that these were conversations made by defendant).

901.a.030 Objection of "no foundation" is insufficient to preserve the issue; the objecting party must indicate how the foundation is lacking so the party offering the evidence can overcome the shortcoming, if possible.

State v. Rodriguez, 186 Ariz. 240, 250, 921 P.2d 643, 653 (1996) (defendant objected to improper foundation for admission of earring; because defendant did not identify what foundation was lacking, trial court did not abuse discretion in admitting exhibit).

State v. Guerrero, 173 Ariz. 169, 171, 840 P.2d 1034, 1036 (Ct. App. 1992) (defendant contended on appeal state failed to provide specifics about times, dates, places, or quantities of prior acts; court held that claim of insufficient foundation may not be raised on appeal unless appellant specifically points out to trial court alleged defects in foundation so that opponent may cure any defects).

Packard v. Reidhead, 22 Ariz. App. 420, 423, 528 P.2d 171, 174 (1974) (court noted that appellee laid tenuous foundation for admission of traffic signal installation report, but held appellant's "no foundation" objection was inadequate to preserve issue for review on appeal; purpose of rule is to enable adversary to obviate objection if possible and to permit trial court to make intelligent ruling).

901.a.035 Circumstantial evidence may be used to prove authenticity of sound or video recording.

State v Rienhardt, 190 Ariz. 579, 951 P.2d 454 (1997) (although recipient had never heard defendant's voice, person talking on telephone said various things from which jurors could conclude person was defendant).

State v Haight-Gyuro, 218 Ariz. 356, 186 P.3d 33, ¶¶ 7–19 (Ct. App. 2008) (state offered in evidence videotape of defendant using stolen credit card to purchase various items at retail store; because state had no witness who had viewed transaction as it happened, state was not able to present testimony that videotape accurately reflected what had happened; court held, however, that testimony about workings of surveillance system, matching of transactions with video recording, matching of items shown on videotape with items on transaction records, preparation of copy of videotape, comparison of clothing worn by person in videotape with clothing defendant wore when arrested, and comparison of items being purchased in videotape with item found on defendant's property provided sufficient information for jurors to use in determining authenticity of videotape.).

901.a.040 A proponent of physical evidence need not disprove the possibility of tampering or contamination if the party makes a reasonable showing that the item is intact and unaltered.

State v McCray, 218 Ariz. 252, 183 P.3d 503, ¶¶ 8–15 (2008) (defendant contended state failed to establish sufficient chain of custody from time fluid samples were taken from victim's body at time of autopsy until they were delivered later that day to DPS for DNA testing; court noted that, even though neither medical examiner nor assistant testified about taking of samples, detective who attended autopsy testified he was present when swabs were taken, that swabs were then each wiped on filter paper, and that medical examiner then gave him samples in separate envelopes, and that he later delivered samples to DPS; court held trial court did abuse discretion in admitting DNA evidence).

901.a.070 In order to enhance the punishment with a prior conviction, the state must present sufficient evidence for the trial court to conclude that a prior conviction actually occurred and that the defendant was the person who was convicted of that offense; this may be done through the use of extrinsic evidence, and a photograph and fingerprints are not required.

State v Adams, 194 Ariz. 408, 984 P.2d 16, ¶¶ 35–37 (1999) (state presented certified copy of California Disposition of Arrest and Court Action that showed that "Adams, James Van" "dob 1/30/64" had been convicted of assault with intent to commit rape; even though California material did not include photograph and fingerprints, because name, date of birth, physical description, and social security number in California material matched those items for defendant, state presented sufficient evidence for trial court to conclude that defendant had prior conviction).to have right to tell jurors what sentence victims thought should be imposed).

State v Robles, 213 Ariz. 268, 141 P.3d 748, ¶¶ 3, 11–17 (Ct. App. 2006) (state relied upon certified copy of record abstract ("pen pack") from Arizona Department of Corrections to prove defendant's prior convictions).

Paragraph (b)(1) — Testimony of witness with knowledge.

901.b.1.010 This section permits authentication or identification by a person with knowledge that the matter is what it is claimed to be.

State v Boggs, 218 Ariz. 325, 185 P.3d 111, ¶¶ 68–70 (2008) (defendant objected to admission of threatening letters because he contended state presented insufficient proof he wrote them; among factors court considered was jail staff intercepted letter inmate stated defendant asked him to mail).

* *State v King,* 226 Ariz. 253, 245 P.3d 938, ¶¶ 8–9 (Ct. App. 2011) (during videotaped police interview and during trial testimony, witness was asked how hard defendant had kicked victim and then was asked to use chair to demonstrate how hard kick was; trial court properly concluded it was question for jurors whether demonstrations accurately showed force defendant used; court held witness was person with knowledge that demonstrations were what they were claimed to be).

State v Haight-Gyuro, 218 Ariz. 356, 186 P.3d 33, ¶¶ 15–16 (Ct. App. 2008) (state offered in evidence videotape of defendant using stolen credit card to purchase various items at retail store; store's loss prevention officer testified about his job responsibilities in installing and maintaining store's surveillance system, how cameras were placed, and how he could match time stamps and dollar amounts to certain transactions; how he had used that procedure to identify videotape in question; and how he had made copy of videotape to give to detective; and he testified about specific item purchased with stolen credit card).

901.b.1.020 The person must have personal knowledge that the matter is what it is claimed to be, and may not rely on hearsay statements of others.

Fuentes v Fuentes, 209 Ariz. 51, 97 P.3d 876, ¶¶ 24–25 (Ct. App. 2004) (because wife testified that exhibit was copy of budget she personally prepared for trial, she properly identified exhibit).

State v Curry, 187 Ariz. 623, 931 P.2d 1133 (Ct. App. 1996) (because witness neither impounded exhibits nor filled out reports, and was not custodian of records, his testimony based on police reports was hearsay, thus trial court erred in admitting exhibits).

901.b.1.030 A party may establish the condition precedent for the admission of evidence either by chain of custody or identification testimony.

State v Secord, 207 Ariz. 517, 88 P.3d 587, ¶¶ 17–18 (Ct. App. 2004) (testimony that each person who handled samples had signed for them and that samples were always in police possession was sufficient to show chain of custody).

State v Portis, 187 Ariz. 336, 929 P.2d 687 (Ct. App. 1996) (because state failed to present evidence showing urine sample in question came from defendant, state failed to establish chain of custody).

901.b.1.033 A party seeking to authenticate evidence based on a chain of custody must show continuity of possession, but it need not disprove every remote possibility of tampering.

State v McCray, 218 Ariz. 252, 183 P.3d 503, ¶¶ 8–15 (2008) (defendant contended state failed to establish sufficient chain of custody from time fluid samples were taken from victim's body at time of autopsy until they were delivered later that day to DPS for DNA testing; court noted that, even though neither medical examiner nor assistant testified about taking of samples, detective who attended autopsy testified he was present when swabs were taken, that swabs were then each wiped on filter paper, and that medical examiner then gave him samples in separate envelopes, and that he later delivered samples to DPS; court held trial court did abuse discretion in admitting DNA evidence).

901.b.1.035 Any flaws in the chain of custody go to the weight and not the admissibility of the evidence.

State v McCray, 218 Ariz. 252, 183 P.3d 503, ¶¶ 8–15 (2008) (defendant contended state failed to establish sufficient chain of custody from time fluid samples were taken from victim's body at time of autopsy until they were delivered later that day to DPS for DNA testing; detective who attended autopsy testified he was present when swabs were taken, that swabs were then each wiped on filter paper, and that medical examiner then gave him samples in separate envelopes, and that he later delivered samples to DPS, while DPS criminalist testified samples were in one envelope; court held that, to extent testimony was incomplete or conflicted with testimony of other witnesses, that went to weight and not admissibility).

State v Secord, 207 Ariz. 517, 88 P.3d 587, ¶ 18 (Ct. App. 2004) (evidence that identifying labels on vials had been removed; trial court correctly ruled this went to weight and not admissibility).

901.b.1.060 For admission of a photograph in evidence, the party must present sufficient evidence from which the jurors could determine that the photograph accurately depicts the object in the photograph.

Lohmeier v Hammer, 214 Ariz. 57, 148 P.3d 101, ¶¶ 7–9 (Ct. App. 2006) (defendant offered photographs of plaintiff's vehicle and testified that photographs showed condition of vehicle after accident; court held this testimony was sufficient to support admission of photographs).

State v Pereida, 170 Ariz. 450, 454–55, 825 P.2d 975, 979–80 (Ct. App. 1992) (because state presented testimony that photographs reflected condition of defendant's van at time photographs were taken, trial court properly admitted photographs).

901.b.1.070 The person who took the photograph need not be the one to provide the authentication testimony.

Lohmeier v Hammer, 214 Ariz. 57, 148 P.3d 101, ¶¶ 7–9 (Ct. App. 2006) (defendant offered photographs of plaintiff's vehicle purportedly taken by auto body shop, and testified that photographs showed condition of vehicle after accident; court held this testimony was sufficient to support admission of photographs).

901.b.1.080 Any testimony that the photograph does not accurately depict the object in the photograph goes to the weight of the photograph, not its admissibility.

Lohmeier v Hammer, 214 Ariz. 57, 148 P.3d 101, ¶¶ 9–11 (Ct. App. 2006) (defendant offered two photographs of plaintiff's vehicle and testified that photographs showed condition of vehicle after accident; plaintiff testified that photograph appeared to be of vehicle after it had been repaired; court held trial court did not abuse discretion in admitting photographs).

Paragraph (b)(3) — Comparison by trier or expert.

901.b.3.010 Authentication or identification may be established by comparison by the trier-of-fact.

State v Boggs, 218 Ariz. 325, 185 P.3d 111, ¶¶ 68–70 (2008) (defendant objected to admission of threatening letters because he contended state presented insufficient proof that he wrote them; among factors court considered was that nearly identical letters were sent to lead detective and to prosecutor).

State v Cons, 208 Ariz. 409, 94 P.3d 609, ¶¶ 17–18 (Ct. App. 2004) (state submitted certified copy of defendant's prior conviction containing defendant's name, date of birth, and fingerprint; trial judge stated she recognized defendant as person she had sentenced in that case).

State v Cons, 208 Ariz. 409, 94 P.3d 609, ¶¶ 17–18 (Ct. App. 2004) (state submitted certified copy of defendant's prior Pinal County conviction that contained defendant's name, date of birth, and fingerprint, and submitted certified copy of defendant's prior Maricopa County conviction that tied that conviction to Pinal county conviction).

901.b.3.020 Authentication or identification may be made by comparison by expert witness.

State v Cons, 208 Ariz. 409, 94 P.3d 609, ¶¶ 17–18 (Ct. App. 2004) (state submitted certified copy of defendant's prior Pinal County conviction that contained defendant's name, date of birth, and fingerprint; state's expert identified fingerprint as belonging to defendant).

Paragraph (b)(4) — Distinctive characteristics and the like.

901.b.4.010 Distinctive characteristics, taken in conjunction with other circumstances, may provide authentication or identification.

State v Boggs, 218 Ariz. 325, 185 P.3d 111, ¶¶ 68–70 (2008) (defendant objected to admission of threatening letters because he contended state presented insufficient proof that he wrote them; among factors court considered was that defendant's militia title was "Chief of Staff" and letters specifically referred to "Chief").

State v Boggs, 218 Ariz. 325, 185 P.3d 111, ¶¶ 68–70 (2008) (defendant objected to admission of threatening letters because he contended state presented insufficient proof that he wrote them; among factors court considered was that letters stated "we know where you live," and defendant knew address of lead detective).

* *State v Trujillo*, 227 Ariz. 314, 257 P.3d 1194, ¶ 28 (Ct. App. 2011) (in defendant's "pen pack," name at top of fingerprint page could not be read because of way pages were stapled together, and as result, on copy disclosed to defendant's attorney, defendant's name did not appear at top of fingerprint page; court noted defendant's social security number was visible on fingerprint page, and held this connected document to defendant).

State v George, 206 Ariz. 436, 79 P.3d 1050, ¶¶ 28–31 (Ct. App. 2003) (correction officer testified he found letter in defendant's cell beside her bed between pages in book defendant had checked out of library; letter contained angry, inculpatory statements about victim, as well as personal knowledge about attacks on victim; court held this was sufficient for jurors to conclude defendant wrote letter).

901.b.4.020 Authentication may be accomplished by circumstantial evidence.

State v George, 206 Ariz. 436, 79 P.3d 1050, ¶¶ 28–31 (Ct. App. 2003) (correction officer testified he found letter in defendant's cell beside her bed between pages in book defendant had checked out of library; letter contained angry, inculpatory statements about victim, as well as personal knowledge about attacks on victim;court held this was sufficient for jurors to conclude defendant wrote letter).

Paragraph (b)(5) — Voice identification.

901.b.5.010 A witness may identify a voice from a tape recording.

State v Miller (Estrella), 226 Ariz. 202, 245 P.3d 887, ¶¶ 7–11 (Ct. App. 2010) (state's witness had monitored and transcribed numerous wiretap recordings of conversations between defendant and persons connected with defendant, many of which were in Spanish; court held that witness could authenticate law enforcement interview tapes and tapes of jailhouse telephone calls by identifying voices on tapes based on her experience with the monitoring and transcribing).

Paragraph (b)(7) — Public records or reports.

901.b.7.010 This section requires the testimony of a witness that the document is a public record or report, that it is authorized by law, and was kept according to the law.

State v King, 213 Ariz. 632, 146 P.3d 1274, ¶¶ 9–11 & n.4 (Ct. App. 2006) (municipal court clerk included with records letter stating she had searched court's records under name provided to her, and records were court's records for that individual; records consisted of copy of traffic ticket and complaint, plea agreement, signed waiver of jury trial form, and minute entries from change-of-plea proceedings and sentencing; court held this was sufficient for jurors to find records were defendant's records; court noted defendant did not challenge admissibility of records on hearsay grounds).

Paragraph (b)(9) — Process or system.

901.b.9.010 To admit evidence of a process or system, the party may present evidence describing how the process or system is used to produce a result and showing that the process or system produces an accurate result.

State v Haight-Gyuro, 218 Ariz. 356, 186 P.3d 33, ¶¶ 15–16 (Ct. App. 2008) (state offered in evidence videotape of defendant using stolen credit card to purchase various items at retail store; state presented store's loss prevention officer, who testified about his job responsibilities in installing and maintaining store's surveillance system, how cameras were placed, and how he could match time stamps and dollar amounts to certain transactions; how he had used that procedure to identify videotape in question).

901.b.9.020 To admit evidence of electronic equipment, all that is necessary is evidence from which the jurors could conclude the equipment was functioning properly; expert testimony is not necessary.

State v Rivers, 190 Ariz. 56, 945 P.2d 367 (Ct. App. 1997) (state presented testimony of parole officer who installed electronic monitoring ankle device, and defendant's parole officer; these officers acknowledged they were not experts, but testified about their experience with such devices; court held this was sufficient foundation to allow admission of the evidence).

901.b.9.030 Circumstantial evidence may be used to prove authenticity of sound or video recording.

State v Rienhardt, 190 Ariz. 579, 951 P.2d 454 (1997) (although recipient had never heard defendant's voice, person talking on telephone said various things from which jurors could conclude person was defendant).

State v Haight-Gyuro, 218 Ariz. 356, 186 P.3d 33, ¶¶ 7–19 (Ct. App. 2008) (state offered in evidence videotape of defendant using stolen credit card to purchase various items at retail store; because state had no witness who had viewed transaction as it happened, state was not able to present testimony that videotape accurately reflected what had happened; court held, however, that testimony about workings of surveillance system, matching of transactions with video recording, matching of items shown on videotape with items on transaction records, preparation of copy of videotape, comparison of clothing worn by person in videotape with clothing defendant wore when arrested, and comparison of items being purchased in videotape with item found on defendant's property provided sufficient information for jurors to use in determining authenticity of videotape.).

Paragraph (b)(10) — Methods provided by statute or rule.

901.b.10.010 A.R.S. § 13–3989.01(A) provides the records and recordings of 911 emergency telephone calls are admissible in any action without testimony from a custodian of records if they are accompanied by the form prescribed in subsection (A), and A.R.S. § 13–3989.01(B) provides 911 emergency records and recordings and any copies of them that comply with subsection (A) are deemed to be authenticated pursuant to Rule 901(b)(10).

No Arizona cases.

901.b.10.020 A.R.S. § 13–3989.02(A) provides the records and recordings of public safety radio traffic calls are admissible in any action without testimony from a custodian of records if the records and recordings are accompanied by the form prescribed in subsection (A), and A.R.S. § 13–3989.02(B) provides that radio records and recordings and any copies of them that comply with subsection (A) are deemed to be authenticated pursuant to Rule 901(b)(10).

No Arizona cases.

Rule 902. Evidence That Is Self-Authenticating.

The following items of evidence are self-authenticating; they require no extrinsic evidence of authenticity in order to be admitted:

(1) *Domestic Public Documents That Are Sealed and Signed.* A document that bears:

(A) a seal purporting to be that of the United States; any state, district, commonwealth, territory, or insular possession of the United States; the former Panama Canal Zone; the Trust Territory of the Pacific Islands; a political subdivision of any of these entities; or a department, agency, or officer of any entity named above; and

(B) a signature purporting to be an execution or attestation.

(2) *Domestic Public Documents That Are Not Sealed but Are Signed and Certified.* A document that bears no seal if:

(A) it bears the signature of an officer or employee of an entity named in Rule 902(1)(A); and

(B) another public officer who has a seal and official duties within that same entity certifies under seal— or its equivalent— that the signer has the official capacity and that the signature is genuine.

(3) *Foreign Public Documents.* A document that purports to be signed or attested by a person who is authorized by a foreign country's law to do so. The document must be accompanied by a final certification that certifies the genuineness of the signature and official position of the signer or attester— or of any foreign official whose certificate of genuineness relates to the signature or attestation or is in a chain of certificates of genuineness relating to the signature or attestation. The certification may be made by a secretary of a United States embassy or legation; by a consul general, vice consul, or consular agent of the United States; or by a diplomatic or consular official of the foreign country assigned or accredited to the United States. If all parties have been given a reasonable opportunity to investigate the document's authenticity and accuracy, the court may, for good cause, either:

(A) order that it be treated as presumptively authentic without final certification; or

(B) allow it to be evidenced by an attested summary with or without final certification.

(4) *Certified Copies of Public Records.* A copy of an official record— or a copy of a document that was recorded or filed in a public office as authorized by law— if the copy is certified as correct by:

(A) the custodian or another person authorized to make the certification; or

(B) a certificate that complies with Rule 902(1), (2), or (3), a statute, or a rule prescribed by the Supreme Court.

(5) *Official Publications.* A book, pamphlet, or other publication purporting to be issued by a public authority.

(6) *Newspapers and Periodicals.* Printed material purporting to be a newspaper or periodical.

(7) *Trade Inscriptions and the Like.* An inscription, sign, tag, or label purporting to have been affixed in the course of business and indicating origin, ownership, or control.

(8) *Acknowledged Documents.* A document accompanied by a certificate of acknowledgment that is lawfully executed by a notary public or another officer who is authorized to take acknowledgments.

(9) *Commercial Paper and Related Documents*. Commercial paper, a signature on it, and related documents, to the extent allowed by general commercial law.

(10) *Presumptions Under a Statute*. A signature, document, or anything else that a statute declares to be presumptively or prima facie genuine or authentic.

(11) *Certified Domestic Records of a Regularly Conducted Activity*. The original or a copy of a domestic record that meets the requirements of Rule 803(6)(A)–(C), as shown by a certification of the custodian or another qualified person that complies with a statute or a rule prescribed by the Supreme Court. Before the trial or hearing, the proponent must give an adverse party reasonable written notice of the intent to offer the record— and must make the record and certification available for inspection— so that the party has a fair opportunity to challenge them.

(12) *Certified Foreign Records of a Regularly Conducted Activity*. In a civil case, the original or a copy of a foreign record that meets the requirements of Rule 902(11), modified as follows: the certification, rather than complying with a statute or Supreme Court rule, must be signed in a manner that, if falsely made, would subject the maker to a criminal penalty in the country where the certification is signed. The proponent must also meet the notice requirements of Rule 902(11).

Comment to 2012 Amendment

The language of Rule 902 has been amended to conform to the federal restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Comment to Original 1977 Rule

The language "general commercial law" in (9) is carried forward from the Federal Rule. In Arizona, the reference is to the Uniform Commercial Code as adopted in this State.

Cases

Paragraph (4) — Certified copies of public records.

902.4.010 A copy of a public record is admissible if it is accompanied by a certificate from the custodian or other person so authorized certifying that the copy is correct, and the certificate satisfies the requirements of either paragraph (1), (2), or (3).

State v King, 213 Ariz. 632, 146 P.3d 1274, ¶¶ 5–8 (Ct. App. 2006) (records from municipal court did not include certificate required by this rule, thus they were not self-authenticating under this rule; court held, however, that they were authenticated under Rule 901(b)(7)).

State v Cons, 208 Ariz. 409, 94 P.3d 609, ¶ 18 (Ct. App. 2004) (court held certified copies of defendant's prior convictions were admissible under this rule).

Ogden v J.M. Steel Erecting, Inc., 201 Ariz. 32, 31 P.3d 806, ¶¶ 34–35 (Ct. App. 2001) (plaintiffs offered driver's MVD record (listing three prior offenses) and police reports purporting to show truck alleged driving record (listing 10 additional prior offenses); MVD record was certified and thus self-authenticating, a fact to which parties stipulated).

March 11, 2012

Rule 903. Subscribing Witness's Testimony.

A subscribing witness's testimony is necessary to authenticate a writing only if required by the law of the jurisdiction that governs its validity.

Comment to 2012 Amendment

The language of Rule 903 has been amended to conform to the federal restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Cases

No Arizona cases.

March 11, 2012

ARTICLE 10. CONTENTS OF WRITINGS, RECORDINGS, AND PHOTOGRAPHS

Rule 1001. Definitions That Apply to This Article.

In this article:

(a) A "writing" consists of letters, words, numbers, or their equivalent set down in any form.

(b) A "recording" consists of letters, words, numbers, or their equivalent recorded in any manner.

(c) A "photograph" means a photographic image or its equivalent stored in any form.

(d) An "original" of a writing or recording means the writing or recording itself or any counterpart intended to have the same effect by the person who executed or issued it. For electronically stored information, "original" means any printout— or other output readable by sight— if it accurately reflects the information. An "original" of a photograph includes the negative or a print from it.

(e) A "duplicate" means a counterpart produced by a mechanical, photographic, chemical, electronic, or other equivalent process or technique that accurately reproduces the original.

Comment to 2012 Amendment

The language of Rule 1001 has been amended to conform to the federal restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Paragraph (1) — Writings and recordings.

No Arizona cases.

Paragraph (2) — Photographs.

No Arizona cases.

Paragraph (3) — Original.

1001.3.010 Any printout or other output readable by sight, shown to reflect accurately the data stored in a computer or similar device, is an original.

State v. Irving, 165 Ariz. 219, 797 P.2d 1237 (Ct. App. 1990) (because statute required custodian of records to certify that computer printout was true reproduction of motor vehicle records contained in computer, printout was an original).

Paragraph (4) — Duplicate.

No Arizona cases.

March 11, 2012

Rule 1002. Requirement of the Original.

An original writing, recording, or photograph is required in order to prove its content unless these rules or an applicable statute provides otherwise.

Comment to 2012 Amendment

The language of Rule 1002 has been amended to conform to the federal restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Cases

1002.010 The rule requiring production of the original applies only when a party seeks to prove the contents of a writing, recording, or photograph.

State v Smith, 122 Ariz. 58, 593 P.2d 281 (1979) (rule does not prohibit party from introducing photograph of physical object rather than object itself).

Strawberry Water Co. v Paulsen, 220 Ariz. 401, 207 P.3d 654, ¶ 9 & n.2 (Ct. App. 2008) (lawsuit was over ownership of water used to fill pond; defendant contended plaintiff was required to prove ownership using sales documents and ownership certificates; court stated that plaintiff was not limited to sales documents and ownership certificates, but could have used any other admissible evidence to establish its rights to water).

W.F. Dunn, Sr. & Son v Industrial Comm'n, 160 Ariz. 343, 773 P.2d 241 (Ct. App. 1989) (because plaintiff was attempting to prove fact of his prior conviction and not contents of documentary evidence of conviction, plaintiff did not need original writing).

State v Lacey, 143 Ariz. 507, 694 P.2d 795 (Ct. App. 1984) (state had filed petition asking trial court to require bond of witness; trial court properly refused defendant's request to admit in evidence petition and minute entry setting bond because (a) they were not relevant, (b) witness testified about petition to set bond, and (c) rule requiring production of original documents did not apply).

March 11, 2012

Rule 1003. Admissibility of Duplicates.

A duplicate is admissible to the same extent as the original unless a genuine question is raised about the original's authenticity or the circumstances make it unfair to admit the duplicate.

Comment to 2012 Amendment

The language of Rule 1003 has been amended to conform to the federal restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Cases

1003.010 A duplicate is admissible to the same extent as an original unless there is a genuine question whether the original is authentic.

State v. Ritacca, 169 Ariz. 401, 819 P.2d 987 (Ct. App. 1991) (defendant made no claim that original business records were not authentic; trial court properly admitted duplicates).

1003.020 A duplicate is admissible to the same extent as an original unless, under the circumstances, it would be unfair to admit the duplicate in lieu of the original.

State v. Ritacca, 169 Ariz. 401, 819 P.2d 987 (Ct. App. 1991) (defendant made no claim that it would be unfair to admit duplicate business records; trial court properly admitted them).

March 11, 2012

Rule 1004. Admissibility of Other Evidence of Contents.

An original is not required and other evidence of the content of a writing, recording, or photograph is admissible if:

(a) all the originals are lost or destroyed, and not by the proponent acting in bad faith;

(b) an original cannot be obtained by any available judicial process;

(c) the party against whom the original would be offered had control of the original; was at that time put on notice, by pleadings or otherwise, that the original would be a subject of proof at the trial or hearing; and fails to produce it at the trial or hearing; or

(d) the writing, recording, or photograph is not closely related to a controlling issue.

Comment to 2012 Amendment

The language of Rule 1004 has been amended to conform to the federal restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Cases

1004.010 If a party is able to prove that a writing did exist and establish one of the requirements of Rule 1004, the party may present oral evidence of the contents of the writing.

Coombs v Lufkin, 123 Ariz. 210, 598 P.2d 1029 (Ct. App. 1979) (plaintiffs claimed that defendants had signed letter agreement wherein they agreed to pay plaintiffs' creditors; defendants contended letter never existed).

March 11, 2012

Rule 1005. Copies of Public Records to Prove Content.

The proponent may use a copy to prove the content of an official record— or of a document that was recorded or filed in a public office as authorized by law— if these conditions are met: the record or document is otherwise admissible; and the copy is certified as correct in accordance with Rule 902(4) or is testified to be correct by a witness who has compared it with the original. If no such copy can be obtained by reasonable diligence, then the proponent may use other evidence to prove the content.

Comment to 2012 Amendment

The language of Rule 1005 has been amended to conform to the federal restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Cases

1005.010 If an original minute entry is admissible, a certified copy would be admissible.

State v Stone, 122 Ariz. 304, 594 P.2d 558 (Ct. App. 1979) (to prove prior conviction, state introduced certified copy of minute entry showing pronouncement of judgment and sentence).

March 11, 2012

Rule 1006. Summaries to Prove Content.

The proponent may use a summary, chart, or calculation to prove the content of voluminous writings, recordings, or photographs that cannot be conveniently examined in court. The proponent must make the originals or duplicates available for examination or copying, or both, by other parties at a reasonable time or place. And the court may order the proponent to produce them in court.

Comment to 2012 Amendment

The language of Rule 1006 has been amended to conform to the federal restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Comment to Original 1977 Rule

This rule is not intended to change foundation requirements for summaries. The person creating a summary will ordinarily be required to lay the foundation and be available for cross-examination.

Cases

1006.010 This rule authorizes use of summaries when the contents of "voluminous writings" cannot be conveniently examined in court.

State v Apelt (Michael), 176 Ariz. 349, 861 P.2d 634 (1993) (state was allowed to have accountant summarize deposits and expenditures in joint checking account belonging to defendant and victim).

Rayner v Stauffer Chem Co., 120 Ariz. 328, 585 P.2d 1240 (Ct. App. 1978) (witness allowed to summarize results of tests made in course of defendant's business).

1006.020 The court shall allow the contents of voluminous writings, recordings, or photographs to be presented in the form of a chart, summary, or calculation if they cannot conveniently be examined in court, and the originals or duplicates are made available for examination or copying by other parties.

Crackel v Allstate Ins. Co., 208 Ariz. 252, 92 P.3d 882, ¶¶ 55–57 (Ct. App. 2004) (defendant's expert presented statistical study and charts showing relationship between defendant's offers in minor impact soft tissue cases and ultimate jury awards in those cases, and relied in part on information defendant had supplied; court concluded defendant had produced all information used to produce charts).

March 11, 2012

Rule 1007. Testimony or Statement of a Party To Prove Content.

The proponent may prove the content of a writing, recording, or photograph by the testimony, deposition, or written statement of the party against whom the evidence is offered. The proponent need not account for the original.

Comment to 2012 Amendment

The language of Rule 1007 has been amended to conform to the federal restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Cases

No Arizona cases.

March 11, 2012

Rule 1008. Functions of the Court and Jury.

Ordinarily, the court determines whether the proponent has fulfilled the factual conditions for admitting other evidence of the content of a writing, recording, or photograph under Rule 1004 or1005. But in a jury trial, the jury determines— in accordance with Rule 104(b)— any issue about whether:

(a) an asserted writing, recording, or photograph ever existed;

(b) another one produced at the trial or hearing is the original; or

(c) other evidence of content accurately reflects the content.

Comment to 2012 Amendment

The language of Rule 1008 has been amended to conform to the federal restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Cases

No Arizona cases.

March 11, 2012

ARTICLE 11. MISCELLANEOUS RULES

Rule 1101. Applicability of the Rules.

(a) Courts and magistrates. These rules apply to all courts of the State and to magistrates, and court commissioners and justices of the peace, masters and referees in actions, cases, and proceedings and to the extent hereinafter set forth. The terms "judge" and "court" in these rules include magistrates, court commissioners and justices of the peace.

(b) Proceedings generally. These rules apply generally to civil actions and proceedings, to contempt proceedings except those in which the court may act summarily, and to criminal cases and proceedings except as otherwise provided in the Arizona Rules of Criminal Procedure.

(c) Rule of privilege. The rule with respect to privileges applies at all stages of all actions, cases, and proceedings.

(d) Exceptions. These rules— except those on privilege— do not apply to grand jury proceedings.

Comment to 2012 Amendment

The title and language of Rule 1101(d) have been amended to conform to the federal restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

No changes have been made to Rule 1101(a), (b), and (c).

Comment to Original 1977 Rule

Federal Rule 1101 has been supplanted by one that conforms to Arizona state practice. *See also* Rule 19.3, Arizona Rules of Criminal Procedure.

Cases

Paragraph (a) — Courts and magistrates.

1101.a.010 Information sufficient to establish probable cause to believe the existence of criminal behavior need not pass the test of admissibility under the Rules of Evidence.

State v Superior Ct. (Blake), 149 Ariz. 269, 718 P.2d 171 (1986) (all that is needed is reasonably trustworthy information sufficient to lead a reasonable person to believe an offense has been committed and that a particular person committed it).

Paragraph (b) — Proceedings generally.

1101.b.010 Information sufficient to establish probable cause to arrest need not pass the test of admissibility under the Rules of Evidence.

State v Superior Ct. (Blake), 149 Ariz. 269, 718 P.2d 171 (1986) (evidence does not have to be admissible to establish probable cause).

1101.b.020 The Rules of Evidence do not apply in those criminal proceedings when the Arizona Rules of Criminal Procedure provide they do not apply.

Mendez v Robertson (State), 202 Ariz. 128, 42 P.3d 14, ¶ 10 (Ct. App. 2002) (Rule 7.4(c) of Arizona Rules of Criminal Procedure provides trial court may make release determinations based on evidence not admissible under rules of evidence, thus trial court properly considered prosecutor's avowals of what victim would say, and defendant did not have right to cross-examine victim).

Davis v Winkler, 164 Ariz. 342, 793 P.2d 99 (Ct. App. 1990) (Rule 7.4(d), ARIZ. R. CRIM. P., provides that release determinations may be based on evidence not admissible under Rules of Evidence, thus trial court properly considered 11-year-old police report on defendant).

1101.b.030 Information relevant to mitigation at a capital sentencing may be presented without regard to its admissibility under the Rules of Evidence for criminal trials.

State v Walton, 159 Ariz. 571, 769 P.2d 1017 (1989) (pre-Rule 11 screening report).

1101.b.040 The admissibility of evidence in a juvenile dependency, guardianship, or termination proceeding shall be governed by the Arizona Rules of Evidence.

Kimu P. v Arizona D.E.S., 218 Ariz. 39, 178 P.3d 511, ¶ 10 & n.2 (Ct. App. 2008) (court cited to Rule 45(A) of the Rules of Procedure for the Juvenile Court, and assessed relevance of evidence under Rule 401 of the Arizona Rules of Evidence).

1101.b.050 If a statute so provides, the Arizona Rules of Evidence do not apply in an administrative hearing; the administrative law judge nonetheless is required to apply procedural rules to achieve substantial justice.

T.W.M. Custom Framing v Industrial Comm'n, 198 Ariz. 41, 6 P.2d 745, ¶ 23 (Ct. App. 2000) (one witness testified by telephone, ALJ considered deposition of another, and nine witnesses gave live testimony; court cited to A.R.S. § 23–941(F) and concluded substantial justice was done).

Ciulla v Miller, 169 Ariz. 539, 821 P.2d 201 (Ct. App. 1991) (statute provided that Arizona Rules of Evidence do not apply in Department of Transportation administrative hearing; because state followed rules and regulations of MVD pertaining to admission of intoxilyzer results, ALJ properly admitted this evidence).

Ciulla v Miller, 169 Ariz. 539, 821 P.2d 201 (Ct. App. 1991) (because document showed that person was qualified by Arizona Department of Health Services and followed proper steps in testing intoxilyzer, ALJ properly admitted this evidence).

Ciulla v Miller, 169 Ariz. 539, 821 P.2d 201 (Ct. App. 1991) (because defendant could have subpoenaed original Department of Health Services records and person who tested intoxilyzer, admission of document showing testing of intoxilyzer, which verified it was functioning properly, did not deny defendant the right of confrontation).

State v Industrial Comm'n, 159 Ariz. 553, 769 P.2d 461 (Ct. App. 1989) (although ALJ in a workers' compensation proceeding was not bound by Rules of Evidence, right of cross-examination was necessary for substantial justice; ALJ therefore erred in considering as substantive evidence report upon which witness relied because party did not have opportunity to cross-examine person who prepared report).

Paragraph (c) — Rule of privilege.

No Arizona cases.

Paragraph (d) — Rules inapplicable.

1101.d.005 Except for rules relating to privilege, the Rules of Evidence do not apply in proceedings before a grand jury.

State v Baumann, 125 Ariz. 404, 408, 610 P.2d 38, 42 (1980) (grand jurors may consider hearsay evidence).

State ex rel. Berger v Myers (James), 108 Ariz. 248, 250, 495 P.2d 844, 846 (1972) (defendant contended grand jurors were not permissible to hear what defendant characterized as illegally obtained wiretap evidence; court held exclusionary rule did not apply in grand jury proceedings).

1101.d.020 It is permissible to use hearsay evidence to support a grand jury indictment.

State v Baumann, 125 Ariz. 404, 408, 610 P.2d 38, 42 (1980) (court stated, "Appellant's claim that an indictment may not be returned on hearsay evidence finds no support in the law of Arizona").

Korzep v Superior Ct., 155 Ariz. 303, 746 P.2d 44 (Ct. App. 1987) (police officer summarized opinion given by medical examiner about injuries to victim and victim's ability to move after being stabbed).

1101.d.030 If it is highly probable the grand jurors would not have indicted had they heard the testimony of the expert declarant rather than a hearsay version, the matter must be remanded to allow the grand jurors the opportunity to make the determination from the live testimony.

Korzep v Superior Ct., 155 Ariz. 303, 746 P.2d 44 (Ct. App. 1987) (because police officer misconstrued opinion given by medical examiner about injuries to victim and victim's ability to move after being stabbed, appellate court held matter must be remanded to grand jurors for new determination).

1101.d.040 It is permissible to use hearsay evidence at a hearing under A.R.S. § 13–3961 to determine whether the proof is evident or the presumption is great that the defendant committed one of the offenses for which bail is not available.

Simpson v Owens, 207 Ariz. 261, 85 P.3d 478, ¶¶ 43–44 (Ct. App. 2004) (court concluded procedure at bail hearing is more like probable cause determination than a trial).

March 11, 2012

Rule 1102. Amendments.

These rules may be amended as provided in Rule 28, Rules of the Supreme Court.

Comment to 2012 Amendment

Rule 1102 has been added to be consistent with Federal Rule of Evidence 1102, as restyled.

Cases

No Arizona cases.

March 11, 2012

Rule 1103. Title.

These rules may be cited as the Arizona Rules of Evidence.

Comment to 2012 Amendment

The language of Rule 1103 has been amended to conform to the federal restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Cases

No Arizona cases.

March 11, 2012