CRIMINAL YEAR SEMINAR

April 4, 2014 - Phoenix, Arizona
April 11, 2014 - Tucson, Arizona
April 25, 2014 - Mesa, Arizona

2013 CASE CITATIONS
ARIZONA EVIDENCE REPORTER
CONSTITUTIONAL LAW REPORTER - UNITED STATES
CONSTITUTIONAL LAW REPORTER - ARIZONA
CRIMINAL CODE REPORTER
CRIMINAL RULES REPORTER
FUNDAMENTAL ERROR REPORTER

Prepared By:

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Judge of the Maricopa County Superior Court
Phoenix, Arizona

Distributed By:

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2014 CRIMINAL YEAR SEMINAR
2013 Case Citations—Alphabetically
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C = Constitutional Law Reporter
c = Criminal Code Reporter
r = Criminal Rules Reporter
e = Arizona Evidence Reporter

ar = appellate review
fe = fundamental error
he = harmless error
se = structural error

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State v. Zinsmeyer, 222 Ariz. 612, 218 P.3d 1069 (Ct. App. 2009),
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Baker v. University Physicians Health., 228 Ariz. 587, 269 P.3d 1211 (Ct. App. 2012),
vacated in part, 231 Ariz. 379, 296 P.3d 42 (Mar. 12, 2013).

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vac'd, ___ Ariz. ___, ___ P.3d ___ (March 26, 2014).

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Depublished

State v. Barrera, 232 Ariz. 497, 307 P.3d 64 (Ct. App. 2013).r
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Petition for Review Granted

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March 26, 2014

ARTICLE 1. GENERAL PROVISIONS.

Rule 101. Scope.

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.

Baker v. University Physicians Health., 231 Ariz. 379, 296 P.3d 42, ¶ 52 (2013) (court declines to reconsider holding in *Seisinger v. Siebel,* 220 Ariz. 85, 203 P.3d 483 (2009)).

Rule 102. Purpose.

102.015 The 2012 amendments were not intended to change the effect of the certain rules in the prior version.

State v. Bernstein (Herman et al.), 234 Ariz. 89, 317 P.3d 630, ¶ 8 (Ct. App. 2014) (court noted comment to Rule 702 for 2012 Amendments stated changes are "not intended to supplant traditional jury determinations of credibility").

McMurtry v. Weatherford Hotel Inc., 231 Ariz. 244, 293 P.3d 520, ¶ 17 (Ct. App. 2013) (Rule 702: "[T]he Comment also explains that the 2012 amendment was not intended to prevent expert testimony based on experience.").

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 but not binding, and uniformity in interpretation of the Federal rules and the Arizona rules is highly desirable.

State v. Bernstein (Herman et al.), 234 Ariz. 89, 317 P.3d 630, ¶ 11 (Ct. App. 2014) (court notes advisory committee notes to Rule 702 of the Federal Rule of Evidence provide guidance in interpreting Rule 702 of the Arizona Rules of Evidence).

Rule 103(a). Rulings on Evidence — Effect of erroneous ruling.

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. Hernandez, 232 Ariz. 313, 305 P.3d 378, ¶¶ 37–44 (2013) (defendant sought to impeach witness with two prior statements; when trial court rule against defendant and did not allow admission of either statement, defendant did not make offer of proof; court noted offer of proof was necessary for trial court and appellate court to determine whether proposed statement varied materially from that made at trial; court held defendant waived issue by not making offer of proof).

State v. Perez, 233 Ariz. 38, 308 P.3d 1189, ¶¶ 15–20 (Ct. App. 2013) (because defendant did not make offer of proof showing polygraph technology has improved or changed, defendant waived any claim trial court erred in not holding *Daubert* hearing).

103.a.164 If the trial court has ruled that the state may impeach the defendant with statements defendant made during plea negotiations if the defendant testifies contrary to those statements, if the defendant does not then testify, the defendant may not question on appeal the trial court's ruling.

State v. Duran, 233 Ariz. 310, 312 P.3d 109, ¶¶ 7–22 (2013) (at change-of-plea hearing, defendant stated he was accomplice to assault; in interview for presentence report, defendant denied participating in incident; trial court later rejected plea; trial court ruled state could not use Defendant's statements from change-of-plea hearing during case-in-chief at trial, but could use them to impeach defendant if he testified inconsistently;

defendant did not testify at trial and thus was not impeached with prior statement; court held, because defendant did not testify, state did not have opportunity to decide whether or not to use statements, and further there was no record for the court to use in determining whether use of statements might be harmless).

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. Parker, 231 Ariz. 391, 296 P.3d 54, ¶¶ 58–62 (2013) (because defendant stipulated to admission of videotape of his interview, which included his ending the interview with invoking his right to counsel, defendant could not object on appeal to admission of videotape).

State v. Herrera, 232 Ariz. 536, 307 P.3d 103, ¶¶ 33–34 (Ct. App. 2013) (state's forensic expert said defendant's home computer contained thousands of photographic images; on cross-examination, defendant's attorney asked if "around 17,500" photographs of naked women had been found on hard drive; on redirect, prosecutor asked if those 17,500 photographs included "hundreds, if not a thousand, images of female [genitalia]"; court held defendant invited any error in admission of testimony about female genitalia).

103.a.203 A party may not complain about evidence the party itself had admitted.

CSA 13–101 Loop, LLC v. Loop 101, LLC, 233 Ariz. 355, 312 P.3d 1121, ¶ 27 (Ct. App. 2013) (appellant contended trial court improperly considered evidence of potential lease in determining property's fair market value; court held appellant could not complain about admission of potential lease because appellant itself presented lease information to trial court as part of appraisal made by its expert).

CSA 13–101 Loop, LLC v. Loop 101, LLC, 233 Ariz. 355, 312 P.3d 1121, ¶ 28 (Ct. App. 2013) (appellant contended trial court improperly considered tax assessment value of property in determining property's fair market value because that evidence was hearsay; court held appellant could not complain about admission of tax assessment value of property because appellant's own expert referred to that evaluation in his appraisal of property).

103.a.220 It is the duty of the appellate court to affirm the ruling of the trial court, provided the result is legally correct, even if the trial court has reached the right result for the wrong reason.

State v. Herrera, 232 Ariz. 536, 307 P.3d 103, ¶ 17 (Ct. App. 2013) (trial court admitted other act evidence as intrinsic evidence, court upheld admission as Rule 404(c) evidence).

Rule 103(e). Rulings on Evidence —Taking Notice of Fundamental Error.

103.e.020 It is the duty of an appellate court to affirm a trial court's ruling provided the result is legally correct, even if the trial court has reached the right result for the wrong reason.

State v. Herrera, 232 Ariz. 536, 307 P.3d 103, ¶ 17 (Ct. App. 2013) (trial court admitted other act evidence as intrinsic evidence, court upheld admission as Rule 404(c) evidence).

Rule 104(a) — Questions of admissibility generally.

104.a.010 Admission of evidence is within the sound discretion of the trial court, and the appellate court will uphold the trial court's ruling unless there appears to be a clear abuse of discretion.

State v. Buccheri-Bianca, 233 Ariz. 324, 312 P.3d 123, ¶ 35 (Ct. App. 2013) (admissibility of other parts of statement under **Rule 106**).

State v. Herrera, 232 Ariz. 536, 307 P.3d 103, ¶ 19 (Ct. App. 2013) (relevancy of other act evidence under **Rule 401**).

State v. Forde, 233 Ariz. 543, 315 P.3d 1200, ¶ 42 (2014) (weighting prejudicial effect against probative value under **Rule 403**).

State v. Doty, 232 Ariz. 502, 307 P.3d 69, ¶ 9 (Ct. App. 2013) (prior conviction as intrinsic evidence (**Rule 404(b)**) under A.R.S. § 13–3415(E)(2)).

State v. Yonkman, 233 Ariz. 369, 312 P.3d 1135, ¶¶ x–xx (Ct. App. 2013) (other act evidence under **Rule 404(b)** for prior act for which defendant was acquitted).

State v. Buot, 232 Ariz. 432, 306 P.3d 89, ¶ 5 (Ct. App. 2013) (other act evidence to show intent under **Rule 404(b)**).

State v. Forde, 233 Ariz. 543, 315 P.3d 1200, ¶ 42 (2014) (other act evidence to show preparation and plan under **Rule 404(B)**).

State v. Glissendorf, 233 Ariz. 222, 311 P.3d 244, ¶ 33 (Ct. App. 2013) (other act evidence to show sexual propensity under **Rule 404(c)**).

State v. Herrera, 232 Ariz. 536, 307 P.3d 103, ¶ 19 (Ct. App. 2013) (other act evidence to show sexual propensity under **Rule 404(c)**).

State v. Buccheri-Bianca, 233 Ariz. 324, 312 P.3d 123, ¶ 8 (Ct. App. 2013) (trial court retains wide latitude to impose reasonable limits on cross-examination under **Rule 611(b)**).

State v. Perez, 233 Ariz. 38, 308 P.3d 1189, ¶ 22 (Ct. App. 2013) (scope of cross-examination under **Rule 611(b)**).

State v. Salazar-Mercado, 232 Ariz. 256, 304 P.3d 543, ¶ 4 (Ct. App. 2013) (expert opinion testimony under **Rule 702**).

State v. Forde, 233 Ariz. 543, 315 P.3d 1200, ¶ 79 (2014) (whether evidence violates Confrontation Clause).

State v. Forde, 233 Ariz. 543, 315 P.3d 1200, ¶ 77 (2014) (whether evidence is hearsay under **Rule 801**).

State v. Joe, 234 Ariz. 26, 316 P.3d 615, ¶ 10 (Ct. App. Jan. 21, 2014) (whether statement is prior inconsistent statement under **Rule 801(d)(1)(A)**).

State v. Franklin, 232 Ariz. 556, 307 P.3d 983, ¶10 (Ct. App. 2013) (forfeiture by wrongdoing under **Rule 804(b)(6)**).

State v. Forde, 233 Ariz. 543, 315 P.3d 1200, ¶ 74 (2014) (evidence of authentication under **Rule 901(a)**).

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

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. Buccheri-Bianca, 233 Ariz. 324, 312 P.3d 123, ¶¶ 34–35 (Ct. App. 2013) (while defendant was in jail, social worker said to him, "You're innocent until proven guilty," to which defendant stated, "I'm guilty"; court held trial court properly allowed admission of those other parts of defendant's statement that explained his comment, and properly precluded those other parts that were inflammatory statements about victim's family's immigration status).

ARTICLE 2. JUDICIAL NOTICE

Rule 201(b). Judicial Notice of Adjudicative Facts — Kinds of facts.

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

State v. John, 233 Ariz. 57, 308 P.3d 1208, ¶ 2 n.1 (Ct. App. 2013) (court took judicial notice of fact that Tuba City and its surrounding area are within territory of Navajo Nation and within Coconino County).

ARTICLE 3. PRESUMPTIONS IN CIVIL ACTIONS AND PROCEEDINGS

Rule 301. Presumptions in Civil Cases Generally.

344. Judicial officers.

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.

In re Aubuchon, 233 Ariz. 62, 309 P.3d 886, ¶¶ 12–19 (2013) (before being appointed presiding disciplinary judge, that judge was judge in various criminal matters for which Aubuchon was prosecutor; court held none of arguments presented by Aubuchon rebutted presumption that judge was free of bias or prejudice).

366. Arizona Medical Marijuana Act.

366.010 Under the Arizona Medical Marijuana Act, a qualifying patient is presumed to be engaged in the medical use of marijuana if the patient possesses a registry identification card and the amount of marijuana does not exceed the allowable amount of marijuana, but this presumption may be rebutted by evidence that the conduct related to the marijuana was not for the purpose of treating or alleviating the patient's medical condition, and once rebutted, the presumption disappears and the patient may be charged with marijuana-related offenses.

State v. Fields (Chase), 232 Ariz. 265, 304 P.3d 1088, ¶¶ 11–14 (Ct. App. 2013) (court held trial court erred in remanding matter to grand jurors with instructions that they be instructed on two different interpretations of AMMA and essentially choose which interpretation to follow).

396. Under the influence.

396.010 Pursuant to A.R.S. § 28–1381(G), if a person has a BAC of 0.08 or more, it may be presumed the person was under the influence of intoxicating liquor; if a person has a BAC of 0.05 or less, it may be presumed the person was not under the influence of intoxicating liquor; if a person has a BAC of more than 0.05 but less than 0.08, there shall be no presumption the person was or was not under the influence of intoxicating liquor.

State v. Cooperman, 230 Ariz. 245, 282 P.3d 446, ¶ 7 (Ct. App. 2012) (court makes general statement about presumption with BAC of 0.08 or more), *aff'd,* 232 Ariz. 347, 306 P.3d 4 (2013).

.010 For a charge under A.R.S. § 28–1381(A)(1), either party may introduce evidence of the defendant's BAC.

State v. Cooperman, 232 Ariz. 347, 306 P.3d 4, ¶¶ 7–16 (2013) (court rejected state's argument that statutory presumptions on being under influence arose only when expressly invoked by state, and noted in footnote either party may introduce evidence of defendant's alcohol concentration, thereby triggering statutory presumptions).

.050 The statutory presumptions arise if a party introduces evidence of the defendant's BAC in a charge under A.R.S. § 28–1381(A)(1), and the trial court has a duty to so instruct the jurors if such evidence is introduced.

State v. Cooperman, 230 Ariz. 245, 282 P.3d 446, ¶¶ 13–18 & n.6 (Ct. App. 2012) (court rejected state's argument that statutory presumptions on being under influence arose only when expressly invoked by state, and noted in footnote either party may introduce evidence of defendant's alcohol concentration, thereby triggering statutory presumptions), *aff'd,* 232 Ariz. 347, 306 P.3d 4 (2013).

ARTICLE 4. RELEVANCY AND ITS LIMITS

Rule 401. Definition of "Relevant Evidence." (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. Forde, 233 Ariz. 543, 315 P.3d 1200, ¶¶ 61–64 (2014) (police found in defendant's purse silver ring belonging to victim; expert testified partial DNA profile from ring matched defendant's DNA profile; defendant contended expert assigned relatively low statistical weight to DNA profile, thus evidence was unreliable and thus irrelevant; court held evidence was relevant because it tended to make fact of consequence in case

more probable than without evidence, and although expert could not say DNA generated from ring came from defendant, it increased probability defendant had handled ring and was involved in home invasion; court further stated it was jurors' prerogative to assess weight of this evidence).

State v. Buccheri-Bianca, 233 Ariz. 324, 312 P.3d 123, ¶¶ 31–33 (Ct. App. 2013) (while defendant was in jail, social worker said to him, "You're innocent until proven guilty," to which defendant stated, "I'm guilty"; court held trial court did not abuse discretion in ruling defendant's statement was relevant).

State v. Salamanca, 233 Ariz. 292, 311 P.3d 1105, ¶¶ 19–21 (Ct. App. 2013) (defendant was driving his SUV about twice speed limit, weaving in and out of traffic; defendant lost control, fishtailed across five lanes into oncoming traffic, collided head-on with another vehicle, and killed driver; court held trial court properly admitted evidence that defendant had completed driving program less than 1 year before collision because evidence was relevant to show defendant's knowledge of risks of speeding and driving drunk, and therefore bore on whether defendant committed second-degree murder by causing death knowingly or recklessly).

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. Forde, 233 Ariz. 543, 315 P.3d 1200, ¶¶ 61–64 (2014) (police found in defendant's purse silver ring belonging to victim; expert testified partial DNA profile from ring matched defendant's DNA profile; defendant contended expert assigned relatively low statistical weight to DNA profile, thus evidence was unreliable and thus irrelevant; court held evidence was relevant because it tended to make fact of consequence in case more probable than without evidence, and although expert could not say DNA generated from ring came from defendant, it increased probability defendant had handled ring and was involved in home invasion; court further stated it was jurors' prerogative to assess weight of this evidence).

State v. Buccheri-Bianca, 233 Ariz. 324, 312 P.3d 123, ¶¶ 31–33 (Ct. App. 2013) (while defendant was in jail, social worker said to him, "You're innocent until proven guilty," to which defendant stated, "I'm guilty"; court held trial court did not abuse discretion in ruling defendant's statement was relevant).

State v. Salamanca, 233 Ariz. 292, 311 P.3d 1105, ¶¶ 19–21 (Ct. App. 2013) (defendant was driving his SUV about twice speed limit, weaving in and out of traffic; defendant lost control, fishtailed across five lanes into oncoming traffic, collided head-on with another vehicle, and killed driver; court held trial court properly admitted evidence that defendant had completed driving program less than 1 year before collision because evidence was relevant to show defendant's knowledge of risks of speeding and driving drunk, and therefore bore on whether defendant committed second-degree murder by causing death knowingly or recklessly).

401.cr.042 For a charge of driving under the influence under A.R.S. § 28–1381(A)(1), either party may introduce evidence of the defendant's BAC.

State v. Cooperman, 232 Ariz. 347, 306 P.3d 4, ¶¶ 7–16 (2013) (court rejected state's argument that statutory presumptions on being under influence arose only when expressly invoked by state, and noted in footnote either party may introduce evidence of defendant's alcohol concentration, thereby triggering statutory presumptions).

401.cr.044 Once a party introduces evidence of the defendant's breath BAC in a charge under A.R.S. § 28–1381(A)(1), testimony about breath-to-blood partition ratios is relevant, and that includes partition ratios in the general population, and not just the defendant's partition ratio at the time of the breath test.

State v. Cooperman, 232 Ariz. 347, 306 P.3d 4, ¶¶ 7–16 (2013) (court rejected state's argument that partition ratio evidence is limited to defendant's partition ratio at time of breath test).

401.cr.046 Although it is the amount of alcohol in the 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 to a charge under § 28–1381(A)(2).

State v. Cooperman, 232 Ariz. 347, 306 P.3d 4, ¶ 10 (2013) (court reaffirms this holding from *Guthrie v. Jones,* 202 Ariz. 273, 43 P.3d 601 (Ct. App. 2002)).

401.cr.048 For a charge under A.R.S. § 28–1381(A)(1) or (A)(2), if a party introduces evidence of a BAC reading taken from a breathalyzer, testimony of how breathing patterns, breath and body temperature, and hematocrit (device for separating cells and other particulate elements of blood from plasma) could affect the BAC reading is relevant.

State v. Cooperman, 232 Ariz. 347, 306 P.3d 4, ¶¶ 7–16 (2013) (court rejected state's argument that such evidence is inadmissible unless defendant can offer evidence of own physiology at time of breath test).

Rule 402. Relevant Evidence Generally Admissible; Irrelevant Evidence Inadmissible.

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.

Baker v. University Physicians Health., 231 Ariz. 379, 296 P.3d 42, ¶ 52 (2013) (court declines to reconsider holding in *Seisinger v. Siebel,* 220 Ariz. 85, 203 P.3d 483 (2009)).

Rule 403. Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time. (Civil Cases.)

403.civ.060 If evidence is relevant and therefore admissible, a trial court may exclude that evidence if the opposing party establishes that the evidence is needlessly cumulative, and establishes that the needlessly cumulative nature substantially outweighs the probative value.

In re Aubuchon, 233 Ariz. 62, 309 P.3d 886, ¶ 20 (2013) (Aubuchon listed 64 character witnesses in pre-hearing list; judge limited her to seven character witnesses; court stated permitting testimony of additional 57 witnesses on same topic would have been needlessly cumulative).

Rule 403. Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time. (Criminal Cases.)

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. Cooperman, 232 Ariz. 347, 306 P.3d 4, ¶¶ 17–18 (2013) (when properly instructed that partition ratio evidence applies only to § 28–1381(A)(1) charge and not to § 28–1381(A)(2) charge, jurors would be able to decide issues without being confused).

State v. Salamanca, 233 Ariz. 292, 311 P.3d 1105, ¶¶ 16–18 (Ct. App. 2013) (defendant was driving his SUV about twice speed limit, weaving in and out of traffic; defendant lost control, fishtailed across five lanes into oncoming traffic, collided head-on with another vehicle, and killed driver; witnesses quickly called 9-1-1; cell phone found on floorboard below front passenger seat showed two text messages sent to defendant's girlfriend: first one was 2 minutes 15 seconds before 9-1-1 call and said, "I hope u die fuckwn stupid puycj"; second one was 59 seconds before 9-1-1 call and said, "Fuck u stupid bitch"; trial court admitted evidence of both calls; defendant contended trial court abused its discretion under Rule 403 by not redacting profanity from texts; court held profanity had probative value because it showed defendant was angry, and reasonable juror could conclude anger caused defendant to drive recklessly; court said mere presence of course language does not render evidence inadmissible under Rule 403).

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. Inzunza, 234 Ariz. 78, 316 P.3d 1266, ¶¶ 16–22 (Ct. App. 2014) (because of victim's mental defects and context of alleged facts in present case, victim's prior sexual assault had *de minimis* probative value to issues material to present case, thus trial court did not abuse discretion in precluding evidence of prior sexual assault because of unfair prejudice).

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. Forde, 233 Ariz. 543, 315 P.3d 1200, ¶¶ 43–44 (2014) (defendant charged with murder committed during home invasion; evidence of prior meeting when defendant related her plan to raid house to steal weapons, drugs, and money was admissible to show preparation and plan; trial court properly rejected Rule 403 argument because evidence of meeting did not suggest decision on improper basis, such as emotion, sympathy, or horror, and did not give rise to any undue prejudice).

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. Inzunza, 234 Ariz. 78, 316 P.3d 1266, ¶¶ 16–22 (Ct. App. 2014) (because of victim's mental defects and context of alleged facts in present case, victim's prior sexual assault had *de minimis* probative value to issues material to present case, thus trial court did not abuse discretion in precluding evidence of prior sexual assault because of potential to confuse jurors and waste time).

Rule 404(b). Other crimes, wrongs, or acts. (Criminal cases.)

404.b.cr.010 Evidence of an "other act" is **intrinsic** only if (1) the evidence directly proves the charged offense, or (2) the evidence shows the other act is performed contemporaneously with and directly facilitates the commission of the charged offense.

State v. Cooney, 233 Ariz. 335, 312 P.3d 134, ¶¶ 5–9 (Ct. App. 2013) (for charge of aggravated DUI based third DUI conviction within 84 months, because any time incarcerated is excluded from 84 months under A.R.S. § 28–1383(B), evidence of time defendant spent incarcerated is admissible for jurors to consider in determining whether defendant committed present offense within 84 months).

State v. Salamanca, 233 Ariz. 292, 311 P.3d 1105, ¶¶ 2–13 (Ct. App. 2013) (defendant was driving his SUV about twice speed limit, weaving in and out of traffic; defendant lost control, fishtailed across five lanes into oncoming traffic, collided head-on with another vehicle, and killed driver; witnesses quickly called 9-1-1; cell phone found on floorboard below front passenger seat showed two text messages sent to defendant's girlfriend: first one was 2 minutes 15 seconds before 9-1-1 call and said, "I hope u die fuckwn stupid puycj"; second one was 59 seconds before 9-1-1 call and said, "Fuck u stupid bitch"; trial court admitted evidence of both calls; court held second call was intrinsic evidence and thus properly admitted; court held it did not have to determine whether first call was intrinsic evidence because it was properly admitted under Rule 404(b) to show defendant's state of mind less than 3 minutes before collision was that he was distracted and angry).

State v. Doty, 232 Ariz. 502, 307 P.3d 69, ¶¶ 5–13 (Ct. App. 2013) (because statute for possession of drug paraphernalia, A.R.S. § 13–3415(E)(2), allows jurors to consider defendant's prior drug convictions in determining whether object is drug paraphernalia, trial court properly admitted evidence of defendant's 2004 conviction for possession of equipment or chemicals for manufacture of dangerous drugs).

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. d. 771 (1988) (defendant was charged with possessing and selling stolen goods (Memorex videocassette); in order to prove defendant 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.d. 579, 593 (1995) (court adopted reasoning of *Huddleston v. United States*).

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. Miller, 234 Ariz. 31, 316 P.3d 1219, ¶¶ 21–22 (2013) (declarant's statements that defendant burned down his house in Reno, buried two bodies in desert, and pulverized people with baseball bats, and that his wife was scared to death of him, had no permissible purpose, but defendant's attorney did not object, so review was for fundamental error only, and in light of evidence against defendant, defendant failed to establish prejudice).

404.b.cr.160 Extrinsic evidence of another crime, wrong, or act is relevant to show **absence of mistake or accident**.

State v. Buot, 232 Ariz. 432, 306 P.3d 89, ¶¶ 4–8 (Ct. App. 2013) (defendant was driving at more than 40 miles per hour on city street when he suddenly swerved into oncoming lane and slammed head-on into oncoming vehicle, killing driver; state charged defendant with second-degree murder; in opening statement, defendant's attorney referred to collision as "accident" and contended defendant lacked requisite intent; court held trial court did not abuse discretion in allowing state to present evidence that, many times before collision, defendant had threatened to kill himself by driving into oncoming traffic).

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. Buot, 232 Ariz. 432, 306 P.3d 89, ¶¶ 4–8 (Ct. App. 2013) (defendant was driving at more than 40 miles per hour on city street when he suddenly swerved into oncoming lane and slammed head-on into oncoming vehicle, killing driver; state charged defendant with second-degree murder; in opening statement, defendant's attorney referred to collision as "accident" and contended defendant lacked requisite intent; court held trial court did not abuse discretion in allowing state to present evidence that, many times before collision, defendant had threatened to kill himself by driving into oncoming traffic).

404.b.cr.250 Extrinsic evidence of another crime, wrong, or act is relevant to show **motive**.

State v. Buot, 232 Ariz. 432, 306 P.3d 89, ¶¶ 4–8 (Ct. App. 2013) (defendant was driving at more than 40 miles per hour on city street when he suddenly swerved into oncoming lane and slammed head-on into oncoming vehicle, killing driver; state charged defendant with second-degree murder; in opening statement, defendant's attorney referred to collision as "accident" and contended defendant lacked requisite intent; court held trial court did not abuse discretion in allowing state to present evidence that, many times before collision, defendant had threatened to kill himself by driving into oncoming traffic).

404.b.cr.300 Extrinsic evidence of another crime, wrong, or act is relevant to show **preparation or plan**.

State v. Forde, 233 Ariz. 543, 315 P.3d 1200, ¶¶ 43–44 (2014) (defendant charged with murder committed during home invasion; evidence of prior meeting when defendant related her plan to raid house to steal weapons, drugs, and money was admissible to show preparation and plan).

404.b.cr.450 Extrinsic evidence of another crime, wrong, or act is relevant to show **state of mind**.

State v. Salamanca, 233 Ariz. 292, 311 P.3d 1105, ¶¶ 2–13 (Ct. App. 2013) (defendant was driving his SUV about twice speed limit, weaving in and out of traffic; defendant lost control, fishtailed across five lanes into oncoming traffic, collided head-on with another vehicle, and killed driver; witnesses quickly called 9-1-1; cell phone found on floorboard below front passenger seat showed two text messages sent to defendant's girlfriend: first one was 2 minutes 15 seconds before 9-1-1 call and said, "I hope u die fuckwn stupid puycj"; second one was 59 seconds before 9-1-1 call and said, "Fuck u stupid bitch"; trial court admitted evidence of both calls; court held second call was intrinsic evidence and thus properly admitted; court held it did not have to determine whether first call was intrinsic evidence because it was properly admitted under Rule 404(b) to show defendant's state of mind less than 3 minutes before collision as being distracted and angry).

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. Yonkman, 233 Ariz. 369, 312 P.3d 1135, ¶¶ 10–25 (Ct. App. 2013) (court held it was appropriate to instruct jurors defendant was found not guilty; although trial court did not admit evidence defendant was acquitted of committing other act, court found any error was harmless).

404.b.cr.750 If the testimony about the other act is such that the jurors have likely learned defendant was tried and found not guilty of the other act, it is appropriate to instruct the jurors defendant was found not guilty.

State v. Yonkman, 233 Ariz. 369, 312 P.3d 1135, ¶¶ 17–25 (Ct. App. 2013) (trial court did not admit evidence defendant was acquitted of committing other act, but court found any error was harmless).

Rule 404(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. Herrera, 232 Ariz. 536, 307 P.3d 103, ¶¶ 23–27 (Ct. App. 2013) (trial court found victim was credible; victim testified defendant was only person who made videotapes of her, identified location where videotapes were made, and identified defendant's voice on videotapes; court held trial court was correct in finding evidence was sufficient for jurors to find by clear and convincing evidence defendant made videotapes).

Rule 404(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. Benson, 232 Ariz. 452, 307 P.3d 19, ¶¶ 11–14 (2013) (court stated attacks did not have to align precisely for evidence to be cross-admissible; although there were some differences (attack on Y. involved second assailant and use of chemical to render her unconscious), there were similarities (defendant picked up all victims from streets, rendered them unconscious, placed his mouth on their breasts, and sexually assaulted them while they were unconscious); court held these similarities provided reasonable basis for trial court to infer that defendant's aberrant sexual propensities in each attack were probative on charges involving all victims, thus trial court did not abuse discretion in denying motion to sever counts).

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 defendant's commission of the other act that 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. Benson, 232 Ariz. 452, 307 P.3d 19, ¶ 15 (2013) (attacks on Y., K., and M. occurred within 3 month period; although attack on A. occurred 2 years and 3 months before attack on Y., this time interval did not require trial court to find that probative value of evidence of each attack was substantially outweighed by danger of unfair prejudice; thus trial court did not abuse discretion in denying motion to sever counts).

State v. Glissendorf, 233 Ariz. 222, 311 P.3d 244, ¶¶ 33–38 (Ct. App. 2013) (defendant charged with molesting O. between 1997 and 1999, and charged with molesting T. between 2009 and 2010; trial court permitted W. to testify defendant molested her in Nevada in 1976, although case against him was dismissed; court held trial court did not abuse discretion in finding that testimony was admissible to show propensity for sexual aberration, and any inconsistencies between testimony and 1976 allegations went to weight and not admissibility).

State v. Herrera, 232 Ariz. 536, 307 P.3d 103, ¶ 28 (Ct. App. 2013) (defendant charged with sexual conduct with minor for (1) having victim masturbate him, (2) placing his penis inside victim's vulva, and (3) having victim place her mouth on his penis, and sexual exploitation of minor for possessing photographs of victim engaged in actual or simulated oral sex; defendant objected to admission of videotape of victim's breasts and genitalia that he had made while family lived in Yuma and before moving to Pima County; even though other acts occurred before charged acts and were different, court held evidence of defendant's similar sex acts committed against same victim may show defendant's lewd disposition or unnatural attitude toward particular victim).

Rule 404(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. Glissendorf, 233 Ariz. 222, 311 P.3d 244, ¶¶ 39–41 (Ct. App. 2013) (in balancing prejudicial effect and probative value of W.'s testimony that defendant molested her in Nevada in 1976, trial court mistakenly determined that certain aspect of prior offense was similar, when it was in fact dissimilar; court held that "[trial] court's erroneous finding embedded in its balancing of Rule 403 factors constitutes and abuse of discretion"; court remanded for "trial court to clarify whether the error made in the courts of the evidentiary ruling has, in fact, resulted in the admission of inadmissible evidence"; if inadmissible, reverse conviction; if admissible, affirm conviction).

State v. Herrera, 232 Ariz. 536, 307 P.3d 103, ¶ 29 (Ct. App. 2013) (defendant contended admission of videotape of victim's breasts and genitalia that defendant had made while family lived in Yuma and before moving to Pima County was needlessly cumulative, confusing, and added nothing but unfair prejudice; trial court found Yuma acts provided historical context to charged acts of sexual conduct with minor and sexual exploitation of minor because sequence of escalating sexual conduct was important; court held trial court did not abuse discretion in finding that evidence was relevant).

404.c.1.C.cr.020 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.

State v. Herrera, 232 Ariz. 536, 307 P.3d 103, ¶ 29 (Ct. App. 2013) (defendant contended admission of videotape of victim's breasts and genitalia that defendant had made while family lived in Yuma and before moving to Pima County was needlessly cumulative, confusing, and added nothing but unfair prejudice; trial

court found Yuma acts provided historical context to charged acts of sexual conduct with minor and sexual exploitation of minor because sequence of escalating sexual conduct was important; court held trial court did not abuse discretion in finding that evidence was relevant).

404.c.1.C.cr.030 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 similarity or dissimilarity of the other act.

State v. Herrera, 232 Ariz. 536, 307 P.3d 103, ¶ 30 (Ct. App. 2013) (defendant charged with sexual conduct with minor for (1) having victim masturbate him, (2) placing his penis inside victim's vulva, and (3) having victim place her mouth on his penis, and sexual exploitation of minor for possessing photographs of victim engaged in actual or simulated oral sex; defendant objected to admission of videotape of victim's breasts and genitalia because those acts were dissimilar to charges in question and did not show overt sexual behavior with another person; because videotapes depicted nudity and sexually explicit statements and portrayed same victim as in charged acts, trial court did not abuse discretion in finding probative value was not substantially outweighed by danger of unfair prejudice).

Rule 404(c)(2). Character evidence in sexual misconduct cases—Instructions.

404.c.2.cr.020 As long as the jurors are properly instructed, instructing the jurors that they must find by clear and convincing evidence that the defendant committed the other acts does not lessen the jurors obligation to find the state has proved the charges beyond a reasonable doubt.

State v. Herrera, 232 Ariz. 536, 307 P.3d 103, ¶ 31 (Ct. App. 2013) (trial court instructed jurors (1) they could find defendant had character trait that predisposed him to committing charged offenses only if they found state proved other acts by clear and convincing evidence, (2) evidence of other acts did not lessen state's burden of proving defendant's guilt beyond reasonable doubt, and (3) they could not find defendant guilty of charged offenses simply because they found he had committed other acts or had character trait that predisposed him to commit the crimes charged).

Rule 412. Sex-Offense Cases: The Victim's Sexual Behavior or Predisposition.

§ 13–1421. Evidence relating to victim's chastity; pretrial hearing.

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, thus to the extent A.R.S. § 13–1421 limits the admission of evidence, it is constitutional.

State v. Herrera, 232 Ariz. 536, 307 P.3d 103, ¶ 42 (Ct. App. 2013) (defendant challenged constitutionality of A.R.S. § 13–1421; court stated it rejected those arguments in *State v. Gilfillan* and saw no reason to deviate from that decision).

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. Inzunza, 234 Ariz. 78, 316 P.3d 1266, ¶ 18 (Ct. App. 2014) (because of victim's mental defects and context of alleged facts in present case, victim's prior sexual assault had *de minimis* probative value to issues material to present case, thus trial court did not abuse discretion in precluding evidence of prior sexual assault under Rule 403 because of potential to cause unfair prejudice, to confuse jurors, and to waste time; court therefore did not have to address defendant's arguments about rape shield statute).

State v. Herrera, 232 Ariz. 536, 307 P.3d 103, ¶¶ 37–38 (Ct. App. 2013) (defendant charged with sexual conduct with minor for (1) having victim masturbate him, (2) placing his penis inside victim's vulva, and (3) having victim place her mouth on his penis, and sexual exploitation of minor for possessing photographs of

victim engaged in actual or simulated oral sex; trial court did not abuse discretion in ruling evidence that victim had consensual sexual relationship with female friend and with boyfriend was not relevant).

412.040 Evidence of specific instances of the victim's prior sexual conduct is generally not admissible on issue of victim's credibility, and is only admissible if the trial court finds the evidence is relevant to a specific fact in issue in the case.

State v. Herrera, 232 Ariz. 536, 307 P.3d 103, ¶¶ 39–41 (Ct. App. 2013) (defendant charged with sexual conduct with minor for (1) having victim masturbate him, (2) placing his penis inside victim's vulva, and (3) having victim place her mouth on his penis, and sexual exploitation of minor for possessing photographs of victim engaged in actual or simulated oral sex; trial court found no legal basis or evidentiary relationship between alleged charges and evidence victim had consensual sexual relationship with female friend and with boyfriend, thus trial court did not abuse discretion in precluding that evidence).

ARTICLE 6. WITNESSES

Rule 607. Who May Impeach a Witness.

607.010 The party calling a witness may impeach that witness.

State v. Salazar-Mercado, 232 Ariz. 256, 304 P.3d 543, ¶¶ 20–21 (Ct. App. 2013) (victim testified defendant touched her vagina, but could not remember whether defendant had penetrated her with his finger; prosecutor later asked detective whether victim had disclosed that defendant had digitally penetrated her, and detective responded that victim "did mention that").

607.025 A prior inconsistent statement may be used for substantive as well as for impeachment purposes.

State v. Salazar-Mercado, 232 Ariz. 256, 304 P.3d 543, ¶ 24 (Ct. App. 2013) (victim testified defendant touched her vagina, but could not remember whether defendant had penetrated her with his finger; prosecutor later asked detective whether victim had disclosed that defendant had digitally penetrated her, and detective responded that victim "did mention that"; court noted state introduced that testimony as substantive evidence of defendant's guilt).

Rule 611(b). Mode and Order of Examining Witnesses and Presenting Evidence — 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. Buccheri-Bianca, 233 Ariz. 324, 312 P.3d 123, ¶¶ 8–10 (Ct. App. 2013) (defendant was charged with molesting several children in family; defendant contended evidence that victim had applied for U-Visa status would show victim and her family had motive to fabricate or exaggerate any allegations; court noted nothing in record showed victim or her family knew about U-Visas when victim made allegations or that victim or any members of her family had unauthorized status, and great length of time between report of molestation and visa application supported trial court's conclusion that evidence of visa application was not relevant).

State v. Perez, 233 Ariz. 38, 308 P.3d 1189, ¶¶ 22–24 (Ct. App. 2013) (state had given plea agreement to R.F., one of defendant's friends; R.F. later had meeting with prosecutor and was released from jail following day; prosecutor avowed to trial court he had not agreed to R.F.'s pre-trial release, there had been no further promises made to R.F. during meeting, and there was nothing to disclose; court held trial court did not abuse discretion in precluding defendant from cross-examining R.F. about contents of his conversation with prosecutor during meeting).

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. Buccheri-Bianca, 233 Ariz. 324, 312 P.3d 123, ¶ 11 (Ct. App. 2013) (because record supported trial court's conclusion that victim's application for U-Visa status was not relevant, precluding cross-examination on that subject did not violate defendant's constitutional rights).

State v. Almaguer, 232 Ariz. 190, 303 P.3d 84, ¶¶ 21–26 (Ct. App. 2013) (defendant was charged with second-degree murder as result of killing victim during fight with victim and victim's family; defendant contended trial court should have allowed him to cross-examine victim's father about civil lawsuit father filed against defendant based on that fight; court agreed with defendant that father's lawsuit might show "prototypical form of bias" toward him because reasonable jurors could believe father's testimony was motivated by economic concerns; court held any error in excluding evidence of lawsuit was harmless because (1) defendant was faced with strong, if not overwhelming, evidence of guilt; (2) father was not only witness, all of whom testified consistently about fight; defendant was allowed to impeach father with statements he made in connection with lawsuit; and (3) lawsuit was already settled before defendant's trial started).

Rule 611(c). Mode and Order of Examining Witnesses and Presenting Evidence — Leading questions.

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. Payne, 233 Ariz. 484, 314 P.3d 1239, ¶¶ 119–20 (2013) (court stated no error occurs when answer suggested had already been received as result of proper questioning).

Rule 613. Witness's Prior Statements of Witnesses.

613.040 In order for the trial court to determine whether the proposed statement varies materially from that made at trial, the offering party must inform the trial court what the proposed statement is, typically by offer of proof, and if the offering party does not make an offer of proof, the reviewing court may determine that the party has waived the issue on appeal.

State v. Hernandez, 232 Ariz. 313, 305 P.3d 378, ¶¶ 37–44 (2013) (defendant sought to impeach witness with two prior statements; when trial court rule against defendant and did not allow admission of either statement, defendant did not make offer of proof; on appeal court held defendant waived issue by not making offer of proof).

613.050 A prior inconsistent statement may be used for substantive as well as impeachment purposes.

State v. Salazar-Mercado, 232 Ariz. 256, 304 P.3d 543, ¶ 24 (Ct. App. 2013) (victim testified defendant touched her vagina, but could not remember whether defendant had penetrated her with his finger; prosecutor later asked detective whether victim had disclosed that defendant had digitally penetrated her, and detective responded that victim "did mention that"; court noted state introduced that testimony as substantive evidence of defendant's guilt).

Rule 613(a). Witness's Prior Statements of Witnesses — Showing or Disclosing the Statement During Examination.

613.a.025 Merely because this rule requires a party to show or disclose the contents of a witness's prior statement to an adverse party's attorney does not preclude a trial court from ordering disclosure before trial of impeachment evidence in an appropriate case.

Wells v. Fell, 231 Ariz. 525, 297 P.3d 931, ¶¶ 15–16 (Ct. App. 2013) (defendant was charged with assaulting police office; unbeknownst to prosecutor, defendant's attorney interviewed some police-officer witnesses; court rejected defendant's contention that he was not required to disclose interview statements because he intended to use them for impeachment only; court held statements were subject to disclosure if state could show substantial need and undue hardship).

ARTICLE 7. OPINION AND EXPERT TESTIMONY

Rule 702. Testimony by Expert Witnesses.

702.003 A party offering testimony by an expert witness must show by a preponderance of the evidence that the testimony satisfies the requirements of this rule.

State v. Bernstein (Herman et al.), 234 Ariz. 89, 317 P.3d 630, ¶ 10 (Ct. App. 2014) (opinion uses term "preponderance of the evidence" 13 times: ¶¶ 4, 10, 14, 15, 16, 19, 27).

702.005 In *Daubert,* the United States Supreme Court set forth several non-exclusive factors for determining whether scientific evidence is admissible: (1) whether the scientific methodology has been tested; (2) whether the methodology has been subjected to peer review; (3) the known or potential rate of error; (4) whether the methodology has general acceptance; and (5) the existence and maintenance of standards controlling the technique's operation; these factors may or may not be pertinent in assessing reliability, depending on the nature of the issue, the expert's particular expertise, and the subject of the testimony.

State v. Bernstein (Herman et al.), 234 Ariz. 89, 317 P.3d 630, ¶ 12 (Ct. App. 2014) (opinion cites several Arizona cases).

702.007 Rule 702 of the Federal Rules of Evidence made no attempt to codify the *Daubert* factors, and because the 2012 amendment to Rule 702 of the Arizona Rules of Evidence adopted the text of the federal rule, the Arizona rule similarly does not codify the *Daubert* factors.

State v. Bernstein (Herman et al.), 234 Ariz. 89, 317 P.3d 630, ¶ 13 (Ct. App. 2014) (opinion notes *Daubert* factors are discussed in context of Rule 702(c)).

702.010 A witness may be qualified as an expert by knowledge, skill, or experience.

State v. Buccheri-Bianca, 233 Ariz. 324, 312 P.3d 123, ¶ 28 (Ct. App. 2013) (court relied on its discussion in *State v. Salazar-Mercado* to uphold admission of testimony by Dr. Wendy Dutton).

State v. Delgado, 232 Ariz. 182, 303 P.3d 76, ¶¶ 9–12 (Ct. App. 2013) (defendant contended state's "strangulation expert" had no specialized training in strangulation; state's expert was medical doctor with extensive experience working in emergency medicine and had expertise on physical process body undergoes during strangulation; court held trial court did not abuse discretion in concluding state's witness qualified as expert).

State v. Salazar-Mercado, 232 Ariz. 256, 304 P.3d 543, ¶ 18 (Ct. App. 2013) (court states Rule 702 was "not intended to prevent expert testimony based on experience," and *Daubert* does not require trial court to evaluate all expert testimony for known or potential rates of error, and is instead flexible and thus trial court should rely on rate of error factor only to extent it is relevant; trial court properly allowed Dr. Wendy Dutton to testify).

McMurtry v. Weatherford Hotel Inc., 231 Ariz. 244, 293 P.3d 520, ¶¶ 14–18 (Ct. App. 2013) (defendant contended witness's opinions should be excluded because he was not qualified as expert due to lack of specialized knowledge or experience with hotel safety, fire and building code compliance, or architectural design of historic hotels; court stated degree of qualification goes to weight and not admissibility of testimony and held witness had sufficient relevant experience to qualify as expert; court noted case was tried under old version of Rule 702, and stated it did not believe amendments to Rule 702 would change outcome on facts presented, and noted Comment explained 2012 amendment was "not intended to prevent expert testimony based on experience"; court stated trial court's gatekeeping function was not intended to replace adversary system).

702.030 To qualify as an expert, a witness need not have the highest possible qualifications or highest degree of skill or knowledge, and the trial court should construe liberally whether the witness is qualified as an expert; 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. Delgado, 232 Ariz. 182, 303 P.3d 76, ¶¶ 9–12 (Ct. App. 2013) (defendant contended state's "strangulation expert" had no specialized training in strangulation; court said whether witness is qualified as

expert should be construed liberally; state's expert was medical doctor with extensive experience working in emergency medicine and had expertise on physical process body undergoes during strangulation; court held trial court did not abuse discretion in concluding state's witness qualified as expert).

McMurtry v. Weatherford Hotel Inc., 231 Ariz. 244, 293 P.3d 520, ¶¶ 14–18 (Ct. App. 2013) (defendant contended witness's opinions should be excluded because he was not qualified as expert due to lack of specialized knowledge or experience with hotel safety, fire and building code compliance, or architectural design of historic hotels; court stated degree of qualification goes to weight and not admissibility of testimony and held witness had sufficient relevant experience to qualify as expert; court noted case was tried under old version of Rule 702, and stated it did not believe amendments to Rule 702 would change outcome on facts presented, and noted Comment explained 2012 amendment was not intended to prevent expert testimony based on experience; court stated trial court's gatekeeping function was not intended to replace adversary system).

702.055 Credibility of an expert witness and the weight and value to be given to that testimony are questions exclusively for the jurors.

State v. Bernstein (Herman et al.), 234 Ariz. 89, 317 P.3d 630, ¶ 8 (Ct. App. 2014) (court noted comment to Rule 702 for 2012 Amendments stated changes are "not intended to supplant traditional jury determinations of credibility").

702.090 All references to polygraph tests are inadmissible for any purpose in Arizona, absent a stipulation of the parties, and nothing indicates any change in polygraph technology that would require the court to reconsider that issue under *Daubert*.

State v. Perez, 233 Ariz. 38, 308 P.3d 1189, ¶¶ 15–20 (Ct. App. 2013) (defendant sought to introduce results of polygraph because he considered them favorable).

Rule 702(a). Testimony by Expert Witnesses — Assist trier of fact.

702.a.010 A witness who is qualified as an expert may testify in the form of an opinion or otherwise if 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.

State v. Bernstein (Herman et al.), 234 Ariz. 89, 317 P.3d 630, ¶ 14 (Ct. App. 2014) (court held record fully supported trial court's finding that state showed by preponderance of evidence that criminalist's scientific and technical knowledge about Scottsdale Crime Lab's relevant and would assist trier of fact in understanding evidence).

State v. Delgado, 232 Ariz. 182, 303 P.3d 76, ¶¶ 13–17 (Ct. App. 2013) (defendant contended state's "strangulation expert" was not helpful to jurors because "[a] person does not need to be a doctor to listen to a person's [allegation they have been strangled], which may or may not be true"; stated contended expert witness's testimony would assist jurors in determining whether victim's injuries were consistent with her story; court held trial court did not abuse discretion in allowing state's witness to testify as expert).

Arizona State Hospital v. Klein, 231 Ariz. 467, 296 P.3d 1003, ¶¶ 11–24 (Ct. App. 2013) (court held Rule 702 applied to discharge proceeding under A.R.S. § 36–3714).

702.a.030 Merely because the expert is testifying as a "cold" witness does not mean that witness's testimony will not assist the jurors in determining a fact in issue.

State v. Buccheri-Bianca, 233 Ariz. 324, 312 P.3d 123, ¶ 29 (Ct. App. 2013) (court relied on its discussion in *State v. Salazar-Mercado* to uphold admission of testimony by Dr. Wendy Dutton).

State v. Buccheri-Bianca, 233 Ariz. 324, 312 P.3d 123, ¶¶ 26–27 (Ct. App. 2013) (court again rejected defendant's contention that trial court abused discretion in allowing Dr. Wendy Dutton to testify about general characteristics of child victims of sexual abuse without applying that testimony to facts of case).

State v. Salazar-Mercado, 232 Ariz. 256, 304 P.3d 543, ¶ 19 (Ct. App. 2013) (court rejected defendant's contention that trial court abused discretion in allowing Dr. Wendy Dutton to testify about general characteristics of child victims of sexual abuse without applying that testimony to facts of case).

702.a.040 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. Forde, 233 Ariz. 543, 315 P.3d 1200, ¶¶ 67–68 (2014) (trial court allowed defendant's expert witness to testify about factors affecting accuracy of eyewitness identification, but precluded specific opinions about reliability of victim's identification of defendant, and sustained objection to hypothetical questions that matched circumstances surrounding victim's identification of defendant; court held expert may educate jurors by testifying about behavioral characteristics affecting accuracy of eyewitness identification, but may not usurp jurors' role by offering opinions about accuracy, reliability, or credibility of particular witness, and may not do so under guise of hypothetical questions).

State v. Buccheri-Bianca, 233 Ariz. 324, 312 P.3d 123, ¶ 30 (Ct. App. 2013) (court held testimony by Dr. Wendy Dutton was sufficiently general to avoid running afoul of holding in *Lindsey*).

State v. Herrera, 232 Ariz. 536, 307 P.3d 103, ¶¶ 43–48 (Ct. App. 2013) (Dr. Wendy Dutton testified about behavior and characteristics of child abuse victims, and testified generally about in what situations alleged victims make false allegations; after jurors' submitted questions, "What percentage of allegations later prove to be false" and "What are the statistics of stepparents abusing stepchildren," defendant did not object to Dutton's answers; court noted none of Dutton's testimony dealt with victim's veracity; court held defendant failed to establish fundamental prejudicial error).

702.a.060 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. Buot, 232 Ariz. 432, 306 P.3d 89, ¶¶ 9–20 (Ct. App. 2013) (defendant was driving at more than 40 miles per hour on city street when he suddenly swerved into oncoming lane and slammed head-on into oncoming vehicle, killing driver; state charged defendant with second-degree murder; defendant sought to call expert witness to testify defendant had character trait of impulsivity that caused him to act reflexively rather than reflectively, and thus argue that defendant lacked requisite mental state for second-degree murder; court held trial court did not abuse discretion in ruling expert could testify based on defendant's behavior he had personally observed, but could not testify about "mental diseases or conditions" that might relate to defendant's capacity to form requisite *mens rea*).

Rule 702(b). Testimony by Expert Witnesses — Testimony based on sufficient facts or data.

702.b.010 A witness who is qualified as an expert may testify in the form of an opinion or otherwise if the testimony is based on sufficient facts or data.

State v. Bernstein (Herman et al.), 234 Ariz. 89, 317 P.3d 630, ¶ 15 (Ct. App. 2014) (court held record fully supported trial court's finding that state showed by preponderance of evidence that Scottsdale Crime Lab's BAC test results were based on sufficient facts or data).

702.b.030 Merely because a "cold" expert testifies about principles and methods without applying those principles and methods to the facts of the case does not mean the expert testimony is not based on sufficient facts or data.

State v. Salazar-Mercado, 232 Ariz. 256, 304 P.3d 543, ¶ 17 (Ct. App. 2013) (court states, "To the extent [defendant] has developed this argument, we do not agree that Rule 702 prohibits testimony simply because it is 'general,' ").

Rule 702(c). Testimony by Expert Witnesses — Reliable principles and methods.

702.c.010 A witness who is qualified as an expert may testify in the form of an opinion or otherwise if the testimony is the product of reliable principles and methods.

State v. Bernstein (Herman et al.), 234 Ariz. 89, 317 P.3d 630, ¶¶ 16–18 (Ct. App. 2014) (trial court found gas chromatography was accepted within scientific community, which showed methodology had been tested, subjected to peer review, gained general acceptance; and met international standards; court held record fully supported trial court's finding that state showed by preponderance of evidence that Scottsdale Crime Lab's BAC test results were based on reliable principles and methods; court discussed known or potential rate of error in context of Rule 702(d)).

702.c.015 The non-exclusive factors identified in *Daubert* are: (1) whether the scientific methodology has been tested; (2) whether the methodology has been subjected to peer review; (3) the known or potential rate of error; (4) whether the methodology has general acceptance; and (5) the existence and maintenance of standards controlling the technique's operation; because Rule 702 of the Federal Rules of Evidence made no attempt to codify the *Daubert* factors, and because the 2012 amendment to Rule 702 of the Arizona Rules of Evidence adopted the text of the federal rule, the Arizona rule similarly does not codify the *Daubert* factors.

State v. Bernstein (Herman et al.), 234 Ariz. 89, 317 P.3d 630, ¶¶ 12–13 (Ct. App. 2014) (opinion notes *Daubert* factors are discussed in context of Rule 702(c)).

702.c.020 The factors identified in *Daubert* may or may not be pertinent in assessing reliability, depending on the nature of the issue, the expert's particular expertise, and the subject of the expert's testimony, thus the nature of the inquiry under Rule 702 must be tied to the facts of the particular case.

State v. Bernstein (Herman et al.), 234 Ariz. 89, 317 P.3d 630, ¶ 12 (Ct. App. 2014) (opinion notes *Daubert* factors are discussed in context of Rule 702(c)).

Arizona State Hospital v. Klein, 231 Ariz. 467, 296 P.3d 1003, ¶¶ 25–32 (Ct. App. 2013) (court held trial court did not abuse discretion in ordering hearing to determine whether expert witness was qualified to testify in discharge proceeding under A.R.S. § 36–3714).

702.c.030 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.

State v. Salazar-Mercado, 232 Ariz. 256, 304 P.3d 543, ¶ 18 (Ct. App. 2013) (court states Rule 702 was "not intended to prevent expert testimony based on experience," and *Daubert* does not require trial court to evaluate all expert testimony for known or potential rates of error, and is instead flexible and thus trial court should rely on rate of error factor only to extent it is relevant).

702.c.040 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.

State v. Miller, 234 Ariz. 31, 316 P.3d 1219, ¶¶ 29–31 (2013) (because trial ended in September 2011, *Frye* standard was still in effect, thus not need to use *Daubert* analysis).

702.c.080 Principles and theory underlying DNA matching and match criteria are generally accepted in the scientific community, and are therefore admissible.

State v. Benson, 232 Ariz. 452, 307 P.3d 19, ¶¶ 18–20 (2013) (analyst could not establish DNA profile for anal swab, but DNA profile from breast swab matched defendant's DNA profile; when crime lab retested anal swab several months later with newer technology, analyst was able to match profile taken from that swab with defendant's profile; defendant moved to preclude evidence of second test based on his expert's testimony that no scientifically validated explanation justified different results; court held state's analysis did not rely on

novel scientific theories or processes for second analysis for anal swabs, thus conclusions were not governed by *Frye* and were governed instead by Rules 403, 702, and 703; whether analysts offered viable explanations for different results obtained in each test was properly for jurors to decide).

Rule 702(d). Testimony by Expert Witnesses — Reliably applied principles and methods.

702.d.010 A witness who is qualified as an expert may testify in the form of an opinion or otherwise if the expert has reliably applied the principles and methods to the facts of the case.

State v. Bernstein (Herman et al.), 234 Ariz. 89, 317 P.3d 630, ¶¶ 19–27 (Ct. App. 2014) (evidence showed gas chromatograph properly analyzed sample from each defendant; court held record showed state established by preponderance of evidence that criminalist reliably applied the principles and methods to the facts of the case; fact that gas chromatograph did not properly analyzed samples from other defendants did not affect application of principles and methods to sample from each defendant).

Nash v. Nash, 232 Ariz. 473, 307 P.3d 40, ¶ 21 & n.7 (Ct. App. 2013) (in trial held before adoption of 2012 amendments, because there were numerous analytical flaws leading to expert witness's opinions, trial court did not abuse discretion in declining to accept those opinions, finding they were neither reliable nor correct).

State v. Salazar-Mercado, 232 Ariz. 256, 304 P.3d 543, ¶¶ 5–11 (Ct. App. 2013) (court notes federal rule codified "reliability" test from *Daubert* and *Kumho Tire*; holds language is not clear and unambiguous, thus interpretation is necessary).

702.d.020 The requirement that an expert reliably apply the principles and methods to the facts of the case does not mean that an expert must apply those principles and methods to the specific facts that exist in the case, it means instead that, if the expert applies the principles and methods to the facts of a case, the expert must do so reliably, thus this rule does not preclude a "cold" expert from testifying about principles and methods without applying those principles and methods to the facts of the case.

State v. Salazar-Mercado, 232 Ariz. 256, 304 P.3d 543, ¶¶ 11–14 (Ct. App. 2013) (court rejected defendant's contention that trial court abused discretion in allowing Dr. Wendy Dutton to testify about general characteristics of child victims of sexual abuse without applying that testimony to facts of case).

702.d.030 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 experts from opposing side contends deficiencies in procedure are sufficiently serious, claimed deficiencies go to weight of the evidence of the procedure; trial court should not *per se* exclude evidence, and should instead admit evidence, subject to the usual cross-examine and presentation of contrary evidence, with jurors to determine the weight of the evidence.

State v. Bernstein (Herman et al.), 234 Ariz. 89, 317 P.3d 630, ¶ 28 (Ct. App. 2014) (court noted trial court's concern about "battle of the experts," but held that is part of procedure that must be resolved by jurors).

Rule 702(f). Testimony by Expert Witnesses — Statutes and Rules.

702.f.040 A.R.S. § 12–2604 does not violate the Anti-Abrogation clause of the Arizona Constitution, does not violate right of access to courts, equal protection, or prohibition against special laws, and is therefore constitutional.

Baker v. University Physicians Health., 231 Ariz. 379, 296 P.3d 42, ¶¶ 32–51 (2013) (defendant-physician was a board-certified specialist in pediatrics with a sub-specialty in pediatric hematology-oncology, and was treating 17-year-old patient for blood clots; patient then died from blood clots; plaintiff retained expert witness who was board certified in internal medicine with sub-specialties in oncology and hematology; trial court determined defendant-physician was treating patient within specialized area of pediatric hematology-oncology; court held trial court did not abuse discretion in determining plaintiff's retained expert witness was not qualified to give testimony in relevant area of treatment).

702.f.060 A.R.S. § 12–2604 applies in an action alleging medical malpractice, but it does not apply in a disciplinary proceeding against a doctor's medical license for unprofessional conduct under A.R.S. § 32–1401(27)(q).

Kahn v. Arizona Med. Bd., 232 Ariz. 17, 300 P.3d 552, ¶¶ 17–23 (Ct. App. 2013) (plaintiff M.D. was family practitioner, who was alleged to have failed to see his hospital patients on daily basis; at hearing before Administrative Law Judge, standard-of-care witness was M.D. who practiced internal medicine).

702.f.090 A.R.S. § 12–2604(A) requires a testifying expert specialize in the same specialty or claimed specialty as the treating physician only when the care or treatment at issue was within that specialty, and that includes both specialties and sub-specialties.

Baker v. University Physicians Health., 231 Ariz. 379, 296 P.3d 42, ¶¶ 11–14 (2013) (defendant-physician was a board-certified specialist in pediatrics with a sub-specialty in pediatric hematology-oncology, and was treating 17-year-old patient for blood clots; patient then died from blood clots; plaintiff retained expert witness who was board certified in internal medicine with sub-specialties in oncology and hematology; trial court determined defendant-physician was treating patient within specialized area of pediatric hematology-oncology; court held trial court did not abuse discretion in determining plaintiff's retained expert witness was not qualified to give testimony in relevant area of treatment).

702.f.100 Under A.R.S. § 12–2604, "specialty" refers to a limited area of medicine in which a physician is or may become certified, is not limited to the areas of medicine occupied by the 24 American Board of Medical Specialties member boards, and includes sub-specialties; whether relevant "specialty" is area of general certification or sub-specialty certification will depend on circumstances of particular case; "claimed specialty" refers to situations in which a physician purports to specialize in an area that is eligible for board certification, regardless of whether the physician in fact limits his or her practice to that area.

Baker v. University Physicians Health., 231 Ariz. 379, 296 P.3d 42, ¶¶ 15–26 (2013) (defendant-physician was a board-certified specialist in pediatrics with a sub-specialty in pediatric hematology-oncology, and was treating 17-year-old patient for blood clots; patient then died from blood clots; plaintiff retained expert witness who was board certified in internal medicine with sub-specialties in oncology and hematology; trial court determined defendant-physician was treating patient within specialized area of pediatric hematology-oncology; court held trial court did not abuse discretion in determining plaintiff's retained expert witness was not qualified to give testimony in relevant area of treatment).

702.f.110 In a case in which the treating physician is or claims to be a specialist requires a trial court to make several determinations: (1) The trial court must determine if the care or treatment at issue involves the identified specialty, which may include recognized subspecialties; (2) the trial court must then determine whether the treating physician is board certified, which may include recognized subspecialties; statute does not require testifying expert to have identical certifications as treating physician, but only that the expert be certified in the specialty at issue in the particular case.

Baker v. University Physicians Health., 231 Ariz. 379, 296 P.3d 42, ¶¶ 27–28 (2013) (court notes statute requires testifying expert to devote "majority" of his or her time in year immediately preceding occurrence to specialized area, and because physician cannot devote "majority" of time to more than one specialty, statute suggests only one relevant specialty need be matched).

Rule 703. Bases of an Expert's Opinion Testimony.

703.085 If the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the jurors only if their probative value in helping the jurors evaluate the opinion substantially outweighs their prejudicial effect.

Taylor-Bertling v. Foley, 233 Ariz. 394, 313 P.3d 537, ¶¶ 3–6 (Ct. App. 2013) (because "Life Safety Code" had not been adopted in Pima County, and because of potential for confusion and possibility jurors may give undue weight to testimony once they heard it was based on "Code," trial court concluded probative value did

not outweigh prejudicial effect; appellant's argument why that evidence should have been admitted essentially asked appellate court to re-weigh what trial court had done, which appellate court did not want to do).

Rule 706(a). Court Appointed Expert Witnesses — Appointment.

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.

Sanchez v. Gama, 233 Ariz. 125, 310 P.3d 1, ¶¶ 19–20 (Ct. App. 2013) (court held *Whitten (Martinez)* applies to physicians in civil litigation; court vacated trial court's order that defendant pay plaintiff's physician for all time spent at deposition, and ordered instead defendant would not have to pay physician for testimony relating to care and treatment of plaintiff, but to extent physician's deposition testimony was expert testimony, defendant must compensate physician accordingly).

ARTICLE 8. HEARSAY

Rule 801. Hearsay.

801.006 In order for an out-of-court statement to be considered "testimonial evidence," the declarant must have made the statement for the purpose of litigation or under circumstances the declarant would reasonably expect to be used prosecutorially.

State v. Medina, 232 Ariz. 391, 306 P.3d 48, ¶¶ 51–64 (2013) (Dr. B. conducted autopsy and prepared autopsy report, but did not testify at trial; Dr. K. was trial witness and testified about report's conclusions and used report and photographs of body to make various independent conclusions about death; because autopsy was conducted day after killing, which was before defendant became suspect, and report's purpose was not primarily to accuse specific individual, autopsy report was not testimonial, thus admission of autopsy report did not violate defendant's right of confrontation; court further held Dr. K.'s testimony did not violate defendant's right of confrontation).

State v. Parker, 231 Ariz. 391, 296 P.3d 54, ¶¶ 38–41 (2013) (even though bank's fraud investigator prepared report at request of police, fraud investigator prepared report by copying and pasting victims' credit card information from bank's database, thus report contained information bank regularly collected in database, and defendant was able to cross-examine fraud investigator, so report was not testimonial evidence).

State v. Parker, 231 Ariz. 391, 296 P.3d 54, ¶ 42 (2013) (victim prepared time sheets as part of routine business practice and not to aid police investigation, thus time sheets were not testimonial evidence).

State v. Vasquez, 233 Ariz. 302, 311 P.3d 1115, ¶¶ 10–15 (Ct. App. 2013) (defendant's brother (codefendant) granted interview to television station to "clear everything out," and therefore acknowledged testimonial intent and that he would reasonably expect statement to be used prosecutorially; because statement was testimonial, its admission violated defendant's right of confrontation).

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.

State v. Forde, 233 Ariz. 543, 315 P.3d 1200, ¶¶ 79–80 (2014) (defendant contended text message from codefendant to defendant that said "cops on scene, lay low" was hearsay; court held message was not admitted to prove truth of matter asserted, but instead to show codefendant was communicating concerns about police activity at victim's home to someone he thought would share his concerns, and thus was circumstantial evidence of defendant's involvement; because text message did not seek to establish or prove fact, it was not testimonial).

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.

State v. Joe, 234 Ariz. 26, 316 P.3d 615, ¶ 13 n.3 (Ct. App. 2014) (because victim testified and was subject to cross-examination, admission of her prior statement to detective did not violate confrontation clause).

Rule 801(c). 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. Forde, 233 Ariz. 543, 315 P.3d 1200, ¶¶ 77–78 (2014) (defendant contended text message from codefendant to defendant that said "cops on scene, lay low" was hearsay; court held message was not admitted to prove truth of matter asserted, but instead to show codefendant was communicating concerns about police activity at victim's home to someone he thought would share his concerns, and thus was circumstantial evidence of defendant's involvement).

Rule (d)(1)(A)—Statements that are not hearsay: Prior inconsistent statement by witness.

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. Payne, 233 Ariz. 484, 314 P.3d 1239, ¶¶ 46–50 (2013) (defendant sought to introduce codefendant's threats to "kill" children if defendant did not do something about their behavior; court held this was prior inconsistent statement, but trial court did not abuse discretion in precluding it under Rule 403).

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 and record suggests reasons for witness to be evasive; if the loss of memory is genuine, the prior statement is not inconsistent and therefore is not admissible under this rule.

State v. Joe, 234 Ariz. 26, 316 P.3d 615, ¶¶ 13–16 (Ct. App. 2014) (although victim said she could not remember about assault, upon further questioning, it appeared victim simply did not want to talk about assault, thus her statement that she "would rather not say" was inconsistent with her statement to detective, making statement to detective admissible as prior inconsistent statement).

801.d.1.A.090 In determining under Rule 403 whether to admit a prior inconsistent statement, the trial court should consider, *inter alia* the following *Allred* factors: (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. Hernandez, 232 Ariz. 313, 305 P.3d 378, ¶¶ 45–49 (2013) (prosecutor asked witness whether she remembered telling detective that defendant said, "[Victim #1] and [victim #2] weren't going to be bothering Sonia anymore," and witness said she did not remember making that statement; in rebuttal, detective testified witness did make that statement to him; court analyzed five *Allred* factors and concluded only (4) weighed