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INCLUDING THE

NEW ARIZONA RULES OF EVIDENCE

EFFECTIVE JANUARY 1, 2012

AND THE

PREFATORY COMMENT AND COMMENTS TO THE 2012, 2014, AND 2015 AMENDMENTS

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MARICOPA COUNTY

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The 2012 amendments to the Arizona Rules of Evidence make three different kinds of changes:

(1) The Arizona rules have generally been restyled so that they correspond to the Federal Rules of Evidence as restyled. These "restyling" changes are not meant to change the admissibility of evidence.

(2) In several instances, the Arizona rules have also been amended to "conform" to the federal rules, and these changes may alter the way in which evidence is admitted (see, e.g., Rule 702).

(3) In some instances, the Arizona rules either retain language that is distinct from the federal rules (see, e.g., Rule 404), or deliberately depart from the language of the federal rules (see, e.g., Rule 412).

The Court has generally adopted the federal rules as restyled, with the following exceptions:

Rule 103(d) (Fundamental Error);
Rule 302 (Applying State Law to Presumptions in Civil Cases);
Rule 404(Character and Other Acts Evidence);
Rule 408(a)(2) (Criminal Use Exception);
Rule 611(b) (Scope of Cross-Examination);
Rule 706(c) (Compensation for Expert Testimony);
Rule 801(d)(1)(A) (Prior Inconsistent Statements as Non-Hearsay);
Rule 803(25) (Former testimony in a non-criminal action or proceeding);
Rule 804(b)(1) (Former Testimony in a Criminal Case).

The restyling is intended to make the rules more easily understood and to make style and terminology consistent throughout the rules and with the restyled Federal Rules. Restyling changes are intended to be stylistic only, and not intended to change any ruling on the admissibility of evidence.

The Court has adopted conforming changes to the following rules:

Rule 103 (Rulings on Evidence);
Rule 201 (Judicial Notice);
Rule 301 (Presumptions);
Rule 407 (Subsequent Remedial Measures);
Rule 410 (Plea Discussions);
Rule 412 (Sex-Offense Cases: The Victim's Sexual Behavior or Predisposition);
Rule 413 (Similar Crimes in Sexual-Assault Cases);
Rule 414 (Similar Crimes in Child-Molestation Cases);
Rule 415 (Similar Acts in Civil Cases Involving Sexual Assault or Child Molestation);
Rule 606 (Juror's Competency as a Witness);
Rule 608 (Character Evidence);
Rule 609 (Impeachment by Criminal Conviction);
Rule 611 (Mode of Presenting Evidence);
Rule 615 (Excluding Witnesses);
Rule 701 (Opinion Testimony by Lay Witnesses);
Rule 702 (Testimony by Expert Witnesses);
Rule 704(b) (Opinion on an Ultimate Issue—Exception);
Rule 706 (Court Appointed Experts);
Rule 801(d)(2) (Definitions That Apply to This Article; Exclusions from Hearsay);
Rule 803(6)(A) (Hearsay Exceptions Regardless of Unavailability);
Rule 803(6)(D) (Hearsay Exceptions Regardless of Unavailability);
Rule 803(24) (Hearsay Exceptions Regardless of Unavailability);
Rule 804 (b)(1), (b)(3) and (b)(7) (Hearsay Exceptions When Declarant Unavailable);
Rule 807 (Residual Exception).

Conforming changes that are not merely restyling, as well as deliberate departures from the language of the federal rules, are noted at the outset of the comment to the corresponding Arizona rule.

Where the language of an Arizona rule parallels that of a federal rule, federal court decisions interpreting the federal rule are persuasive but not binding with respect to interpreting the Arizona rule.

COMMENT TO 2014 AMENDMENT TO RULE 803(10)

Rule 803(10) has been amended to incorporate, with minor variations, a "notice-and-demand" procedure that was approved in *Melendez-Diaz v. Massachusetts,* 557 U.S. 305 (2009). This amendment is not intended to alter any otherwise applicable disclosure requirements.

COMMENT TO 2015 AMENDMENT TO RULE 801(D)(1)(B)

Rule 801(d)(1)(B), as originally adopted, provided for substantive use of certain prior consistent statements of a witness subject to cross-examination. As the federal Advisory Committee on Evidence Rules noted, "[t]he prior statement is consistent with the testimony given on the stand, and, if the opposite party wishes to open the door for its admission in evidence, no sound reason is apparent why it should not be received generally."

Though the original Rule 801(d)(1)(B) provided for substantive use of certain prior consistent statements, the scope of that rule was limited. The rule covered only those consistent statements that were offered to rebut charges of recent fabrication or improper motive or influence. The rule did not, for example, provide for substantive admissibility of consistent statements that are probative to explain what otherwise appears to be an inconsistency in the witness's testimony. Nor did it cover consistent statements that would be probative to rebut a charge of faulty memory.

The amendment retains the requirement set forth in *Tome v. United States,* 513 U.S. 150 (1995): that under Rule 801(d)(1)(B), a consistent statement offered to rebut a charge of recent fabrication or improper influence or motive must have been made before the alleged fabrication or improper inference or motive arose. The intent of the amendment is to extend substantive effect to consistent statements that rebut other attacks on a witness—such as the charges of inconsistency or faulty memory.

The amendment does not change the traditional and well-accepted limits on bringing prior consistent statements before the factfinder for credibility purposes. It does not allow impermissible bolstering of a witness. As before, prior consistent statements under the amendment may be brought before the factfinder only if they properly rehabilitate a witness whose credibility has been attacked. As before, to be admissible for rehabilitation, a prior consistent statement must satisfy the strictures of Rule 403. As before, the trial court has ample discretion to exclude prior consistent statements that are cumulative accounts of an event.

COMMENT TO 2015 AMENDMENT TO RULE 803(6)

The rule has been amended to clarify that if the proponent has established the stated requirements of the exception—regular business with regularly kept record, source with personal knowledge, record made timely, and foundation testimony or certification—then the burden is on the opponent to show that the source of information or the method or circumstances of preparation indicate a lack of trustworthiness. It is appropriate to impose this burden on opponent, as the basic admissibility requirements are sufficient to establish a presumption that the record is reliable.

The opponent, in meeting its burden, is not necessarily required to introduce affirmative evidence of untrustworthiness. For example, the opponent might argue that a record was prepared in anticipation of litigation and is favorable to the preparing party without needing to introduce evidence on the point. A determination of untrustworthiness necessarily depends on the circumstances.

COMMENT TO 2015 AMENDMENT TO RULE 803(7)

The rule has been amended to clarify that if the proponent has established the stated requirements of the exception—set forth in Rule 803(6)—then the burden is on the opponent to show that the possible source of the information or other circumstances indicate a lack of trustworthiness. The amendment maintains consistency with the amendment to the trustworthiness clause of Rule 803(6).

COMMENT TO 2015 AMENDMENT TO RULE 803(8)

The rule has been amended to clarify that if the proponent has established that the record meets the stated requirements of the exception—prepared by a public office and setting out information as specified in the rule—then the burden is on the opponent to show that the source of information or other circumstances indicate a lack of trustworthiness. Public records have justifiably carried a presumption of reliability. The amendment maintains consistency with the amendment to the trustworthiness clause of Rule 803(6).

April 1, 2020

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 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.

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

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).

April 1, 2020

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

102.010 Procedural rules govern procedural matters and do not create substantive rights.

State v. Buonafede, 168 Ariz. 444, 814 P.2d 1381 (1991) (court held that Rule 609(c) governs procedure if some other jurisdiction has issued certificate of rehabilitation, but it does not give Arizona courts power to grant certificate of rehabilitation).

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

State v. Hansen, 215 Ariz. 287, 160 P.3d 166, ¶ 7 (2007).

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

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 for 2012 Amendments to Rule 702 stated changes are "not intended to supplant traditional jury determinations of credibility"); ¶¶ *19–28 vac'd,* 237 Ariz. 226, 349 P.3d 200, ¶ 23 (2015).

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.").

102.017 The 2012 amendments were intended to change the effect of the certain rules in the prior version.

102.019 When an Arizona evidentiary rule mirrors the corresponding federal rule, Arizona courts look to federal law for guidance, and although the federal courts' interpretation of the Federal Rules of Evidence does not control the interpretation of Arizona's evidentiary rules, federal precedent is particularly persuasive given that Arizona courts have expressly sought to conform Arizona's evidentiary rules to the federal rules.

State v. Winegardner, 243 Ariz. 482, 413 P.3d 683, ¶¶ 8, 23 (2018) (court follows federal courts' interpretation, and holds that shoplifting does not necessarily involve dishonest act or false statement for purposes of Rule 609(a)(2) and therefore is not automatically admissible under that rule).

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.), 237 Ariz. 226, 349 P.3d 200, ¶ 9 (2015) ("Because Rule 702 mirrors its federal counterpart, we may look to the federal rule and its intrepertation for guidance.").

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).

Sandretto v. Payson Health. Mgmt., 234 Ariz. 351, 322 P.3d 168, ¶ 11 (Ct. App. 2014) (cites Prefatory Comment to 2012 Amendments).

Glazer v. State, 234 Ariz. 305, 321 P.3d 470, ¶ 27 (Ct. App. 2014) (court states federal decisions are persuasive but not binding, and federal advisory committee notes provide guidance); ¶¶ *9–25 vac'd,* 237 Ariz. 160, 347 P.3d 1141, ¶ 36 (2015).

State ex rel. Montgomery v. Miller (Madrid), 234 Ariz. 289, 321 P.3d 454, ¶ 18 (Ct. App. 2014) (cites *Bernstein (Herman et al.)*).

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).

April 1, 2020

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) —Preserving a Claim of Error.

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).

State v. Alvarez, 228 Ariz. 579, 269 P.3d 1203, ¶ 11 (Ct. App. 2012) (during opening statement, defendant's attorney discussed possible third-party culpability and state objected; after opening statements, state again objected, and trial court precluded that evidence; because state could have objected to admission of evidence of third-party culpability during trial, state was not required to filed written objection 20 days prior to trial, and trial court did not abuse discretion in considering state's objection made after trial had started).

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. 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).

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).

103.a.020 To preserve for appeal the question of **admission** of evidence, a party must make a timely objection that states the specific ground (unless it was apparent from the context); 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 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).

State v. Granados, 235 Ariz. 321, 332 P.3d 68, ¶¶ 19–21 (Ct. App. 2014) (prior to defendant's testimony, trial court admonished him to listen to question asked and answer only that question; during testimony, prosecutor objected to defendant's persistent practice of giving answers that were non-responsive and beyond scope of question; court held grounds of objection were clear from context).

Henricks v. Arizona DES, 229 Ariz. 47, 270 P.3d 874, ¶ 20 (Ct. App. 2012) (because Henricks failed to object to admission of handwritten documents at administrative hearing, she did not preserve her right to challenge ruling on appeal).

State v. Alvarez, 228 Ariz. 579, 269 P.3d 1203, ¶ 16 n.3 (Ct. App. 2012) (court rejected defendant's contention that he should be excused from objecting to award of restitution because he was "surprised" when trial court ordered restitution; court follows rule that party must make timely and specific objection).

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 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 hit 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, 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; 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 Failure to object to an offer of evidence is a waiver of any ground of complaint against its admission.

State v. Charo, 156 Ariz. 561, 562, 754 P.2d 288, 289 (1988) (defendant raised number of evidentiary issues for first time on appeal; court held defendant waived these issues, noting evidence admitted without objections becomes competent evidence for all purposes).

State v. McDaniel, 136 Ariz. 188, 196, 665 P.2d 70, 78 (1983) (defendant did not object to admission of gun found in apartment where victim was beaten).

103.a.026 In a criminal case, hearsay evidence admitted without objection becomes competent evidence for all purposes unless its admission amounts to fundamental error.

State v. McGann, 132 Ariz. 296, 299, 645 P.2d 811, 814 (1982) (admission of credit card receipts was fundamental error).

State v. Ingram, 239 Ariz. 228, 368 P.3d 936, ¶ 23 n.6 (Ct. App. 2016) (officer testified personnel at U.S. Marshals Service said defendant was possibly armed with .40 caliber pistol; although this appeared to be hearsay, defendant objected on basis of "foundation" and not "hearsay").

State v. Hernandez, 167 Ariz. 236, 240, 805 P.2d 1057, 1061 (Ct. App. 1990) (admission of paramedic's testimony that captain said it looked like child abuse case was not fundamental error).

103.a.027 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. Foshay, 239 Ariz. 271, 370 P.3d 618, ¶¶ 15–25 (Ct. App. 2016) (when expert witness testified about testing report prepared by another expert, defendant objected on basis that report was cumulative, and when state offered interactive CD, defendant objected that it was not relevant; court held this did not preserve defendant's hearsay objection on appeal and that defendant had failed to establish because differences in witness's testimony and statements in report would not have made practical difference to jurors).

State v. Butler, 230 Ariz. 465, 286 P.3d 1074, ¶¶ 19–25 (Ct. App. 2012) (defendant objected to admission of property receipt for "Nike shoe box containing a large amount of U.S. currency" under Rules 401, 403, and 404(b); because defendant did not object on either hearsay or Confrontation Clause grounds, court reviewed for fundamental error only; court concluded there was substantial circumstantial evidence of defendant's guilt, thus defendant failed to establish prejudice).

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 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 showing that the Park had a 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; de-

fendant 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. 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. 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 battered woman syndrome 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. Malone, 245 Ariz. 103, 425 P.3d 592, ¶¶ 23–24 (Ct. App. 2018) (defendant contended trial court erred in precluding him from asking hypothetical questions; because record did not show what hypothetical questions defendant would have asked, nor what expert would have said in response, court could not say trial court abused its discretion).

Sandretto v. Payson Health. Mgmt., 234 Ariz. 351, 322 P.3d 168, ¶¶ 25–27 (Ct. App. 2014) (defendant contended trial court erred under Rule 403 in precluding evidence of plaintiff's prior medical conditions; court noted trial court did admit much evidence of plaintiff's prior medical conditions, and because defendant did not list which specific items of evidence trial court should have admitted or analyze why probative value of those items of evidence was not outweighed by danger of unfair prejudice, court did not consider defendant's argument on appeal).

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).

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.095 A trial court should not preclude an expert's testimony without allowing the party to make an offer of proof.

State v. Carlson, 237 Ariz. 381, 351 P.3d 1079, ¶ 24 (2015) (defendant filed memorandum describing expert's testimony; when trial court disallowed that testimony, defendant asked to supplement offer of proof, but trial court denied request; court stated that supplemental offer would have aided its evaluation of trial court's decision, but was able to resolve issue on record presented).

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.160 Once the trial court has ruled against a party on an objection or offer of proof, the party may change its strategy 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, 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.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 said he was accomplice to assault; in interview for presentence report, defendant denied participating in assault; 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.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 question, or asks the trial court to take some action, or 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. 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, 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, of images of female [genitalia]"; court held defendant invited any error in admission of testimony about female genitalia).

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 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, ¶¶ 39–41 (2003) (trial court precluded 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 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 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. Granados, 235 Ariz. 321, 332 P.3d 68, ¶¶ 32–34 (Ct. App. 2014) (prosecutor asked officer how victim appeared and behaved during interview, method of interview, and general intake process; on cross-examination, defendant's attorney asked officer about specific statement victim had made; court held prosecutor properly asked on rebuttal about victim's other statements that clarified previous answers).

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 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 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).

State v. Tovar, 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).

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

State v. Escalante-Orozco, 241 Ariz. 254, 386 P.3d 798, ¶¶ 82–83 (2017) (because defendant used evidence that he was a "flirt" to argue that his "flirtations" with victim caused victim's boyfriend to be jealous of her and kill her, defendant could not claim he was prejudiced by that evidence).

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), *vac'd in part,* 236 Ariz. 410, 341 P.3d 452, ¶ 25 (2014).

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), *vac'd in part,* 236 Ariz. 410, 341 P.3d 452, ¶ 25 (2014).

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 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 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 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.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. Cañez, 202 Ariz. 133, 42 P.3d 564, ¶ 51 (2002) (court upheld trial court's admission of defendant's statement).

State v. LaGrand, 153 Ariz. 21, 29, 734 P.2d 563, 571 (1987) (court upheld trial court's exclusion of hearsay statement).

City of Phoenix v. Geyler, 144 Ariz. 323, 330, 697 P.2d 1073, 1080 (1985) (civil condemnation).

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).

State v. Chavez, 225 Ariz. 442, 239 P.3d 761, ¶ 5 (Ct. App. 2010) (court upheld trial court's admission of out-of-court text messages).

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 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 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 that defendant said during assault: "If it were up to me, you would be dead right now"; court held statement had no relevance, thus it was error to admit it, 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 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 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 enlarged photograph of victim when alive was not relevant and there was danger that 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 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 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 against probative value, 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; 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 charged with sexual acts 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. 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 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 testified that defendant had 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).

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).

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 it; because no showing beyond a reasonable doubt 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).

Varco Inc. v. UNS Electronics, Inc., 242 Ariz. 166, 393 P.3d 946, ¶¶ 2–25 (Ct. App. 2017) (in litigation over fire that destroyed plaintiff's warehouse, trial court granted plaintiff's motion to preclude evidence that cigarette butt was found near where fire originated, and evidence that plaintiff did not have property insurance; because defendant's attorney repeatedly raised these issues in front of jurors, plaintiff was prejudiced, thus trial court properly granted plaintiff's motion for 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).

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. 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, 456–47, 930 P.2d 518, 533–34 (Ct. App. 1996) (defendant had thoroughly attacked witness's credibility; any error in excluding 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 charged with 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 testimony from expert witness about suggestive interview techniques was admissible and that trial court erred in precluding this evidence; 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).

103.a.290 Arizona does not follow the cumulative error doctrine except in cases alleging prosecutorial misconduct.

State v. Parker, 231 Ariz. 391, 296 P.3d 54, ¶ 81 (2013) (defendant contended cumulative effect of evidentiary errors constituted reversible error; court noted it had rejected cumulative error doctrine and decline to revisit its longstanding precedent).

State v. Ellison, 213 Ariz. 116, 140 P.3d 899, ¶ 59 (2006) (defendant contended death penalty warranted cumulative error doctrine; court noted it usually did not subscribe to the cumulative error doctrine and stated none of defendant's claims independently proved prejudicial error).

State v. Moody, 208 Ariz. 424, 94 P.3d 1119, ¶ 145 n.11 (2004) (defendant contended cumulative effect of prosecutor's errors warranted reversal of conviction; because defendant developed no argument on that point, court considered it waived).

State v. Hughes, 193 Ariz. 72, 969 P.2d 1184, ¶ 25 (1998) (court applied cumulative error doctrine to claim of prosecutorial misconduct).

State v. White, 168 Ariz. 500, 508, 815 P.2d 869, 877 (1991) (court noted it had expressly rejected cumulative error doctrine).

State v. Roscoe, 184 Ariz. 484, 910 P.2d 635 (1996) ("[S]omething that is not prejudicial error in and of itself does not become error when coupled with something else that is not prejudicial error.").

State v. Fish, 222 Ariz. 109, 213 P.3d 258, ¶ 6 n.5 (Ct. App. 2009) (notes cumulative error doctrine applies only in cases involving prosecutorial misconduct).

Paragraph (b) —Not Needing To Renew an Objection or Offer of Proof.

103.b.010 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 that evidence during trial).

103.b.020 If a party has made a motion in limine or an objection to a certain type of evidence, but the trial court has not ruled, the motion in limine or objection does not preserve the objection, and the party must object at trial to preserve the objection on appeal.

State v. Garcia-Quintana, 234 Ariz. 267, 321 P.3d 432, ¶¶ 4–6 (Ct. App. 2014) (defendant asked trial court to preclude evidence of usual practices of drug dealers and whether defendant fit drug courier profile; trial court reserved ruling until trial, saying it would rule on question-by-question basis; defendant did not object at trial, but claimed on appeal evidence was inadmissible drug courier evidence; because defendant did not object at trial, court reviewed for fundamental error only).

103.b.030 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 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).

Paragraph (c) — Court's Statement About the Ruling; Directing an Offer of Proof.

103.c.005 The court may make any statement about the character or form of the evidence, the objection made, and the ruling, and may direct an offer of proof be made in question-and-answer form.

103.c.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 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, to extent trial court's ruling was ambiguous, it was incumbent on plaintiff to seek to clarify record).

Sandretto v. Payson Health. Mgmt., 234 Ariz. 351, 322 P.3d 168, ¶¶ 25–27 (Ct. App. 2014) (defendant contended trial court erred under Rule 403 in precluding evidence of plaintiff's prior medical conditions and erred in not making findings about factors it considered in its Rule 403 balancing; court noted trial court did admit much evidence of plaintiff's prior medical conditions, and because defendant did not list which specific items of evidence trial court should have admitted or analyze why probative value of those items of evidence was not outweighed by danger of unfair prejudice, court did not consider defendant's argument on appeal).

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 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, how evidence was used, and how evidence may have prejudiced plaintiff; court therefore presumed record supported trial court's rulings).

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 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.c.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.c.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.c.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).

Paragraph (d) — Preventing the Jury from Hearing Inadmissible Evidence.

103.d.010 The court must conduct a jury trial to the extent practicable so that inadmissible evidence is not suggested to the jurors by any means.

103.d.020 Although Arizona law does not explicitly prohibit speaking objections, Rule 103(d) provides that, to the extent practicable, the court must conduct a jury trial so that inadmissible evidence is not suggested to the jurors by any means.

State v. Lynch, 238 Ariz. 84, 357 P.3d 119, ¶¶ 16–17 (2015) (defendant did not identify, and court did not find, any inadmissible evidence state incorporated into its speaking objections; further, defendant did not object at trial and failed to demonstrate fundamental error).

Paragraph (e) — Taking Notice of Fundamental Error.

103.e.010 A court may take notice of an error affecting a fundamental right, even if the claim of error was not properly preserved.

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. Cañez, 202 Ariz. 133, 42 P.3d 564, ¶ 51 (2002) (court upheld trial court's admission of defendant's statement).

State v. LaGrand, 153 Ariz. 21, 29, 734 P.2d 563, 571 (1987) (court upheld trial court's exclusion of hearsay statement).

City of Phoenix v. Geyler, 144 Ariz. 323, 330, 697 P.2d 1073, 1080 (1985) (civil condemnation).

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).

State v. Chavez, 225 Ariz. 442, 239 P.3d 761, ¶ 5 (Ct. App. 2010) (court upheld trial court's admission of out-of-court text messages).

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.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. Prince, 160 Ariz. 268, 274, 772 P.2d 1121, 1127 (1989) ("Absent clear abuse of discretion we will uphold the trial court's decisions on questions of the admissibility of evidence.").

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. 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. 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. 2014) (whether statement is prior inconsistent statement under **Rule 801(d)(1)(A)**).

State v. Granados, 235 Ariz. 321, 332 P.3d 68, ¶ 31 (Ct. App. 2014) (whether statement is admissible to rebut express or implied charge of recent fabrication under **Rule 801(d)(1)(B)**).

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)**).

104.a.013 Admissibility is for determination by the judge unassisted by the jurors; credibility and weight are for determination by the jurors unassisted by the judge.

State v. Bernstein (Herman et al.), 237 Ariz. 226, 349 P.3d 200, ¶ 11 (2015) (court noted comment to Rule 702 for 2012 Amendments stated "[t]he trial court's gatekeeping function is not intended to replace the adversary system" and "[c]ross-examination, presentment of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence.").

State v. Lehr, 201 Ariz. 509, 38 P.3d 1172, 29 (2002).

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. Lietzau,* 246 Ariz. 380, 439 P.3d 839, ¶ 13 (Ct. App. 2019) (because trial court declined to hear state's probation department witness, there was no testimony about arresting officer's motivation in searching defendant's phone; because motions filed with trial court contained transcribed interview of surveillance officer, court could consider that hearsay in determining whether trial court abused discretion in granting defendant's motion to suppress).

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.065 Hearsay is generally admissible at a suppression hearing.

* *State v. Lietzau,* 246 Ariz. 380, 439 P.3d 839, ¶ 13 (Ct. App. 2019) (because trial court declined to hear state's probation department witness, there was no testimony about arresting officer's motivation in searching defendant's phone; because motions filed with trial court contained transcribed interview of surveillance officer, court could consider that hearsay in determining whether trial court abused discretion in granting defendant's motion to suppress).

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. Wassenaar, 215 Ariz. 565, 161 P.2d 608, ¶ 11 (Ct. App. 2007) (trial court did not abuse discretion in designating case as complex).

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 (b) — Relevance that depends on a fact.

104.b.010 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, and the court may admit the proposed evidence on the condition that the proof will be introduced later.

Felipe v. Theme Tech Corp., 235 Ariz. 520, 334 P.3d 210, ¶¶ 26–30 (Ct. App. 2014) (court concluded plaintiffs did not present sufficient evidence from which jurors could conclude defendant driver was using cell phone, thus trial court did not abuse discretion in not allowing plaintiffs' expert to testify about effects of cell phone usage).

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) (judge at consolidation 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 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).

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, 421, 956 P.2d 1240, 1243 (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).

105.055 If the trial court admits profile evidence (evidence tending to show a defendant possesses one or more of an informal compilation of characteristics or an abstract of characteristics typically displayed by persons engaged in a particular kind of activity) in order to explain a victim's seemingly inconsistent behavior and aid jurors in evaluating the victim's credibility, the defendant is entitled to a limiting instruction that the jurors are not to consider the evidence as substantive proof of the defendant's guilt.

State v. Haskie, 242 Ariz. 582, 399 P.3d 657, ¶ 26 (2017) (victim gave written statement to police stating defendant had beaten and strangled her; prior to trial, victim denied that defendant had assaulted her; state's expert witness on domestic violence testified as "cold" expert; court stated a defendant is entitled to limiting instruction, although this did not seem to be issue raised by defendant).

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).

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

106.005 A "recorded statement" may include electronic recordings, such as a cell-phone video.

State v. Steinle (Moran), 239 Ariz. 415, 372 P.3d 939, ¶ 8 (2016) (witness used cell phone to record fight, cropped first 4½ minutes of recording, and saved remaining 31 seconds; court held trial court erred in ordering that, because full copy was not available, it would not admit cropped video).

106.007 Rule 106 is a rule of inclusion, not a rule of exclusion.

State v. Steinle (Moran), 239 Ariz. 415, 372 P.3d 939, ¶ 10 (2016) (witness used cell phone to record fight, cropped first 4½ minutes of recording, and saved remaining 31 seconds; court held trial court erred in ordering that, because full copy was not available, it would not admit cropped video).

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. Steinle (Moran), 239 Ariz. 415, 372 P.3d 939, ¶ 12 (2016) (witness used cell phone to record fight, cropped first 4½ minutes of recording, and saved remaining 31 seconds; court noted state was not involved in recording or editing video, and because there were no additional portions to admit, Rule 106 did not apply, so trial court erred in ordering that it would not admit cropped video because full copy was not available).

State v. Burns, 237 Ariz. 1, 344 P.3d 303, ¶ 71 (2015) (defendant contended trial court should have admitted his statements to police that he had consensual sex with victim; because state did not introduce any writings or recorded statements about defendant and victim having non-consensual sex, defendant's statements were not necessary to qualify, explain, or place in context portion of statement 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, or if the portion of the statement that the party wants admitted is not relevant, the trial court should not admit the requested portion.

* *State v. Champagne,* 247 Ariz. 116, 447 P.3d 297, ¶¶ 42–46 (2019) (defendant was convicted of first-degree murder, second-degree murder, kidnapping, and abandonment or concealment of bodies; although trial court correctly excluded defendant's March 19 statement, defendant sought to introduce portion of that statement wherein he said "he didn't think they had a death penalty case on him" to rebut his March 4 statement that if police found the bodies "he would face the death penalty because of his criminal past"; court held statement defendant sought to introduce was not needed (1) to complete statement already introduced, (2) to avoid introduced statement from being taken out of context, or (3) to prevent juror confusion; rather, it was separate statement from entirely separate conversation that occurred on separate date, and that fact that defendant made contradictory statements 15 days apart did not somehow make those two statements one continuous utterance; thus trial court properly ruled that Rule 106 did not apply; further, court held trial court acted within its discretion in precluding defendant's March 19 statement under Rule 403).

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).

State v. Buccheri-Bianca, 233 Ariz. 324, 312 P.3d 123, ¶¶ 34–35 (Ct. App. 2013) (social worker said to defendant, "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).

State v. Pina-Barajas, 244 Ariz. 106, 418 P.3d 473, ¶¶ 11–13 (Ct. App. 2018) (defendant was prohibited possessor and claimed he needed gun for protection; court noted that statements defendant sought to admit did not show either imminent threat or lack of legal alternatives and thus did not establish necessity defense, so trial court did not err in precluding their admission).

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, 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 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, 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 "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 the remainder of letter must also be admissible, it appears no longer to be good law.)

April 1, 2020

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 the Clerk's Office).

State v. Damper, 223 Ariz. 572, 225 P.3d 1148, ¶ 12 & n.3 (Ct. App. 2010) (victim's friend received text message from victim saying: "Can you come over; me and [defendant] are fighting and I have no gas"; defendant contended text message was "testimonial"; court said whether text message was testimonial or non-testimonial depended 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.

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 surrounding area are within territory of Navajo Nation and within Coconino County).

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. Sanders, 245 Ariz. 113, 425 P.3d 1056, ¶¶ 33–38 (2018) (defendant claimed he was deprived of jury of 12 qualified jurors because Juror 19, who was later empaneled as presiding juror, was convicted felon and therefore ineligible to serve on jury; court took judicial notice of Juror 19's superior court records of his criminal case, which showed he was discharged from probation in 2008 and paid his restitution in full, thus by operation of law, his civil right to serve as juror was restored in 2008, well before defendant's 2014 trial).

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. Lee (L.N.), 236 Ariz. 377, 340 P.3d 1085, ¶ 10 n.6 (Ct. App. 2014) (superior court could take judicial notice of its own files to determine whether juvenile's prior adjudications were for offenses that would have been felonies, and thus appellate court could do so likewise).

State v. Rojers, 216 Ariz. 555, 169 P.3d 651, ¶¶ 24–33 & 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.

State v. Lee (L.N.), 236 Ariz. 377, 340 P.3d 1085, ¶ 10 n.6 (Ct. App. 2014) (superior court could take judicial notice of its own files to determine whether juvenile's prior adjudications were for offenses that would have been felonies, and thus appellate court could do so likewise).

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).

Arizona DCS v. Breene, 235 Ariz. 300, 332 P.3d 47, ¶ 3 n.4 (Ct. App. 2014) (in special action from trial court's ruling in severance proceeding allowing parents to call their children as witnesses and cross-examine them about statements contained in reports, appellate court took judicial notice of memorandum decision affirming finding children were dependent).

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.135 An appellate court may not take judicial notice of its own records and the records of other courts in order to supply an element of the charged offense.

State v. Rhome, 235 Ariz. 459, 333 P.3d 786, ¶¶ 8–12 (Ct. App. 2014) (for offense of failure to appear for felony offense, court held it was question of fact for jurors to determine whether underlying offense was felony offense, and because state presented no evidence underlying offense was felony offense, there was not sufficient evidence to support conviction; court further held it could not take judicial notice of fact that underlying offense was felony offense because that was element of offense state had to prove; court therefore vacated conviction).

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 (d) — Time of taking notice.

201.d.010 Because a court may take judicial notice at any stage of the proceeding, an 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. Lee (L.N.), 236 Ariz. 377, 340 P.3d 1085, ¶ 10 n.6 (Ct. App. 2014) (superior court could take judicial notice of its own files to determine whether juvenile's prior adjudications were for offenses that would have been felonies, and thus appellate court could do so likewise).

Arizona DCS v. Breene, 235 Ariz. 300, 332 P.3d 47, ¶ 3 n.4 (Ct. App. 2014) (in special action from trial court's ruling in severance proceeding allowing parents to call their children as witnesses and cross-examine them about statements contained in reports, appellate court took judicial notice of memorandum decision affirming finding of dependency).

State v. Rojers, 216 Ariz. 555, 169 P.3d 651, ¶¶ 24–33 & 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).

201.d.020 An appellate court may not take judicial notice of its own records and the records of other courts in order to supply an element of the charged offense.

State v. Rhome, 235 Ariz. 459, 333 P.3d 786, ¶¶ 8–12 (Ct. App. 2014) (for offense of failure to appear for felony offense, court held it was question of fact for jurors to determine whether underlying offense was felony offense, and because state presented no evidence underlying offense was felony offense, there was not sufficient evidence to support conviction; court further held it could not take judicial notice of fact that underlying offense was felony offense because that was element of offense state had to prove; court therefore vacated conviction).

Paragraph (f) —Instructing the Jurors.

201.f.010 In a civil case, the court must instruct jurors to accept the noticed fact as conclusive; in a criminal case, the court must instruct the jurors they may or may not accept the noticed fact as conclusive.

State v. Rhome, 235 Ariz. 459, 333 P.3d 786, ¶¶ 8–12 & n.1 (Ct. App. 2014) (because jurors must determine whether evidence presented supported each element of offense, and because jurors in criminal case do not have to accept judicially noticed fact as conclusive, for appellate court to take judicial notice of fact that is element of offense would usurp jurors fact-finding role).

April 1, 2020

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. Applicability of 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 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 standing behind her truck and killed when it shifted from idle into reverse; plaintiff sued defendant on basis of strict product liability (information defect) and negligence (failure to warn); jurors found for plaintiff; court held 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 wife and 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.

344.010 There is a strong presumption that a duly appointed or elected judicial officer is mentally competent.

State v. McCall, 160 Ariz. 119, 770 P.2d 1165 (1989) (trial judge underwent brain surgery 2 days after resentencing, and died 2 weeks later).

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) (at resentencing for first-degree murder, 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).

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 disciplinary judge, judge presided 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).

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).

Cardoso v. Soldo, 230 Ariz. 614, 277 P.3d 811, ¶ 19 (Ct. App. 2012) (plaintiff-appellant failed to make necessary showing).

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).

Pavlik 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).

Desert Palm Surg. Grp. v. Petta, 236 Ariz. 568, 343 P.3d 438, ¶¶ 31–33 (Ct. App. 2015) (trial court instructed jurors on qualified privilege for defendant's statements to medical and dental boards, and on absolute privilege for defendant's statements to government officials).

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 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 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, when legislature enacted A.R.S. § 28–1594 (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).

360.085 When the legislature chooses different language within a statutory scheme, it is presumed those distinctions are meaningful and evidence an intent to give different meaning and consequence to the alternative language.

State v. Harm, 236 Ariz. 402, 340 P.3d 1110, ¶¶ 15–20 (Ct. App. 2015) (jurors found defendant guilty of threatening or intimidating and not guilty of assisting criminal street gang by committing felony offense, but in the aggravation phase found state proved beyond reasonable doubt defendant committed threatening or intimidating with intent to promote or further assist any criminal conduct by criminal street gang; court held that, because crime of assisting criminal street gang under A.R.S. § 13–2321(B) and enhancement of the sentence under A.R.S. § 13–714 for offense committed with intent to promote, further, or assist criminal street gang have different elements, if defendant has been acquitted of charge of assisting criminal street gang, double jeopardy does not preclude enhancement of sentence for offense committed with intent to promote, further, or assist criminal street gang, thus double jeopardy did not preclude enhancement of sentence).

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).

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).

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.

380.010 There is a strong legal presumption that all property acquired during marriage is community property, except for property acquired by gift, devise, or descent, and that presumption applies even though title is taken in the name of only one spouse.

In re Foster v. Foster, 240 Ariz. 99, 376 P.3d 702, ¶¶ 7–13 (Ct. App. 2016) (trial court did not abuse discretion in determining husband failed to establish that he inherited certain guns from his brother).

380.025 There is no presumption of a gift once a petition for dissolution is filed.

Bobrow v. Bobrow, 241 Ariz. 592, 391 P.3d 646, ¶¶ 1–20 (Ct. App. 2017) (premarital agreement provided wife would not receive spousal maintenance; after wife filed petition for dissolution, husband voluntarily made monthly loan payments on wife's vehicle and marital residence where both remained living; court held trial court erred by finding husband's post-petition payment of community expenses constituted gift and remanded to allow trial court to determine offset to which husband was entitled).

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).

PRESUMPTIONS

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; spouse alleging abnormal or excessive expenditures has 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 account; trial court concluded husband 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).

380.080 "Acquired" as used in A.R.S. § 25–211(A) was not meant to apply to compensation for an injury to the person that arises from the violation of the right of personal security, which right a spouse brings to the marriage; accordingly, compensation for an injury to a spouse's personal well-being belongs to that spouse as separate property, and the spouse seeking to overcome a presumption of asset characterization has the burden of establishing the character of the property by clear and convincing evidence.

* *In re Hefner,* 248 Ariz. 54, 456 P.3d 20, ¶¶ 5–12 (Ct. App. 2019) (court held trial court erred by treating husband's personal-injury damages related to two automobile accidents as community property, and remanded to allow wife to establish amount, if any, to which community was entitled).

380.090 The general rule is that property acquired by a spouse after service of a petition for dissolution that results in a dissolution is that spouse's separate property, except for property received as a result of an enforceable contractual right, such as property acquired as a result of services rendered during the marriage.

* *In re DeFrancisco,* 248 Ariz. 23, 455 P.3d 722, ¶¶ 4–12 (Ct. App. 2019) (husband was long-time employee of Houston Astros baseball organization and in 2017 was manager of Astros' AAA minor league affiliate team; on June 23, 2017, husband served petition for dissolution on wife; after Astros won World Series in October 2017, team paid husband bonus of $28,151.26; court concluded this was not enforceable contractual right or property acquired as result of services rendered during marriage, thus trial court did not err in determining this was husband's separate property).

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).

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).

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).

398. Warrants.

398.010 Search warrants are presumed to be valid.

State ex rel. Collins v. Superior Court (Metz), 129 Ariz. 156, 158–59, 629 P.2d 992, 994–95 (1981) (first page of search warrant affidavit, which was signed 8/15/1980, alleged crimes occurred on 7/29/1980, while third page contained victim's statement, given on 8/14/1980, that crimes occurred "on or about 8/29/1980"; court agreed date of 8/29/1980 was clearly erroneous (being 2 weeks after officer prepared affidavit); court held "8/29/1980" was typographical error and that trial court's suppression of evidence based on that typographical error was abuse of discretion).

State v. White, 145 Ariz. 422, 427, 701 P.2d 1230, 1235 (Ct. App. 1985) (search warrant was based on affidavit containing facts obtained from aerial observation of rural property; warrant did not describe bus/house where defendant lived because it was hidden by trees; affidavit otherwise accurately described location of property and another building located there, and properly described items to be seized; court held defendant failed to satisfy his burden of proving warrant was invalid).

April 1, 2020

ARTICLE 4. RELEVANCY AND ITS LIMITS

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).

Ryan v. Napier, 245 Ariz. 54, 425 P.3d 230, ¶¶ 47–52 (2018) (plaintiff sued sheriff's department for injuries caused when officers used K–9 to apprehend him; trial court allowed expert to testify about United States Supreme Court case of *Graham v. Connor,* which set forth three-part test for reasonableness in context of Fourth Amendment excessive-force claim; court held expert oversteps by testifying that *Graham* governs application of justification defense, but stated that, if expert reasonably relied on factors discussed in *Graham* in forming opinion of officer's conduct, expert could explain factors to jurors, but should not state that "*Graham* factors" originated in Supreme Court opinion).

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 bought vehicle new in October 2008 for $23,296; 3 months later, vehicle was 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) (homeowners sued Lennar 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 responsibili-

ties 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 held 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 no doctor-patient relationship existed between plaintiff and defendant; defendant opined that plaintiff's condition was stable and 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-re-

lated 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 into ditch; side and rear windows shattered and plaintiff was ejected; plaintiff asserted seat belt buckle was defective and unlatched improperly; plaintiff contended trial court erred by granting GM's motion in limine to preclude evidence 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 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 fact "of consequence" in this case was whether inertial forces acting on plaintiff's truck as it bounced through ditch caused JDC buckle to unlatch prior to 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 after defendant's 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 claim that 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 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; 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 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).

Ryan v. Napier, 245 Ariz. 54, 425 P.3d 230, ¶¶ 47–52 (2018) (plaintiff sued sheriff's department for injuries caused when officers used K–9 to apprehend him; trial court allowed expert to testify about United States Supreme Court case of *Graham v. Connor,* which set forth three-part test for reasonableness in context of Fourth Amendment excessive-force claim; court held expert oversteps by testifying that *Graham* governs application of justification defense, but stated that, if expert reasonably relied on factors discussed in *Graham* in forming opinion of officer's conduct, expert could explain factors to jurors, but should not state that "*Graham* factors" originated in Supreme Court opinion).

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 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 10/08 for $23,296; in 12/08, 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, ¶¶ 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 defying 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).

In re MH 2008–002596, 223 Ariz. 32, 219 P.3d 242, ¶¶ 12–16 (Ct. App. 2009) (appellant sought relief from order 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 held 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 no doctor-patient relationship existed between plaintiff and defendant; defendant opined plaintiff's condition was stable and 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 into ditch; side and rear windows shattered and plaintiff was ejected; plaintiff asserted seat belt buckle was defective and unlatched improperly; plaintiff contended trial court erred by granting GM's motion in limine to preclude evidence 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 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 fact "of consequence" in this case was whether inertial forces acting on plaintiff's truck as it bounced through ditch caused JDC buckle to unlatch prior to 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) (after collision with plaintiff's vehicle, 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 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.021 Under former evidence theory, evidence was material if it addressed an issue in the case, and was relevant if it tended to establish the proposition for which it was offered; these two concepts are now covered by relevancy under the modern rules of evidence.

Hawkins v. Allstate Ins. Co., 152 Ariz. 490, 733 P.2d 1073 (1987) (court disagreed with conclusion of court of appeals that testimony was erroneously admitted because it was irrelevant, and noted in footnote that modern rules of evidence capture concepts of relevancy and materiality under term "relevance").

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 non-party's intoxication was not relevant in claim of strict liability in automobile accident case; court held such evidence was admissible).

401.civ.225 When property is sold at a trustee's sale, the lender is entitled to a deficiency judgment for the amount owed less either the fair market value or the sale price at the trustee's sale, whichever is higher, but the credit bid for the property is not admissible as evidence of value because it does not reflect a sale after reasonable exposure in the market under conditions requisite to a fair sale.

Midfirst Bank v. Chase, 230 Ariz. 366, 284 P.3d 877, ¶¶ 6–xx (Ct. App. 2012) (because only evidence of value lender presented was credit bid at trustee's sale, lender did not establish fair market value of property and thus trial court erred in granting lender's motion for summary judgment).

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 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. Goudeau, 239 Ariz. 421, 372 P.3d 945, ¶¶ 150–55 (2016) (defendant contended trial court erred in admitting autopsy photograph; court held photograph was relevant because "the fact and cause of death are always relevant in a murder prosecution"; court held photograph also helped to corroborate medical examiner's explanation of victim's injuries).

State v. Burns, 237 Ariz. 1, 344 P.3d 303, ¶¶ 46–47 (2015) (victim had GHB (date-rape drug) in liver; because when talking on telephone to sister, victim sounded confused and disoriented (which are side effects of ingested GHB), evidence was relevant; whether GHB could have occurred naturally or from someone giving her dose of drug was relevant to whether sexual intercourse was forced or consensual; that GHB might have been present naturally went to weight and not admissibility).

State v. Burns, 237 Ariz. 1, 344 P.3d 303, ¶¶ 49–51 (2015) (defendant's former fiancée testified on direct about her general feelings (of fear) toward defendant; after defendant attempted on cross-examination to establish former fiancée had recently fabricated that testimony, her testimony on rebuttal that defendant threatened to kill her and that she planned to remove all guns from house was admissible to rebut claim of recent fabrication and was thus relevant).

State v. Burns, 237 Ariz. 1, 344 P.3d 303, ¶¶ 54–55 (2015) (evidence of 16 telephone calls to fiancée wherein defendant asked about search for victim's body, whether his brother had cleaned out his (defendant's) vehicle, and whether fiancée would stay with him "no matter what" (by time of trial, fiancée was then former fiancée) relevant to show defendant was involved in victim's disappearance).

State v. Forde, 233 Ariz. 543, 315 P.3d 1200, ¶¶ 61–64 (2014) (police found silver ring belonging to victim in defendant's purse; 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 related to whether defendant was involved in home invasion and tended to make that 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. Cota, 229 Ariz. 136, 272 P.3d 1027, ¶¶ 45–47 (2012) (court stated, "[T]he fact and cause of death are always relevant in a murder prosecution"; court held photographs also helped to corroborate state's theory on timing of two deaths).

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 44 photographs showing corpses and autopsies was not relevant; state contended they related to whether defendant's killing of victim was cruel; court concluded photographs had some minimal relevancy to cruelty).

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 oncoming 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 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"; 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).

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 his mental state (whether he 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 charged with robbery at commercial store; after reviewing suspect descriptions and *modus operandi* of two other robberies at commercial 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).

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 him 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 alcohol in blood causes impairment, because § 28–1381(A)(2) makes it unlawful to drive when having an alcohol concentration of 0.08 or more (either blood or breath), testimony about breath-to-blood partition ratios is not relevant (material) to (A)(2) charge).

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 called friend and said "Vonnie" was at her apartment "so if anything happens to me you know who was here"; statement related to identity of person who murdered victim, and thus was relevant in materiality sense).

State v. Wooten, 193 Ariz. 357, 972 P.2d 993, ¶¶ 49, 61 (Ct. App. 1998) (defendant charged with killing Mustaf's 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. Goudeau, 239 Ariz. 421, 372 P.3d 945, ¶¶ 150–55 (2016) (defendant contended trial court erred in admitting autopsy photograph; court held photograph was relevant because "the fact and cause of death are always relevant in a murder prosecution"; court held photograph also helped to corroborate medical examiner's explanation of victim's injuries).

State v. Burns, 237 Ariz. 1, 344 P.3d 303, ¶¶ 46–47 (2015) (victim had GHB (date-rape drug) in liver; because when talking on telephone to sister, victim sounded confused and disoriented (which are side effects of ingested GHB), evidence was relevant; whether GHB could have occurred naturally or from someone giving her dose of drug was relevant to whether sexual intercourse was forced or consensual; that GHB might have been present naturally went to weight and not admissibility).

State v. Burns, 237 Ariz. 1, 344 P.3d 303, ¶¶ 49–51 (2015) (defendant's former fiancée testified on direct about her general feelings (of fear) toward defendant; after defendant attempted on cross-examination to establish former fiancée had recently fabricated that testimony, her testimony on rebuttal that defendant threatened to kill her and that she planned to remove all guns from house was admissible to rebut claim of recent fabrication and was thus relevant).

State v. Burns, 237 Ariz. 1, 344 P.3d 303, ¶¶ 54–55 (2015) (evidence of 16 telephone calls to fiancée wherein defendant asked about search for victim's body, whether his brother had cleaned out his (defendant's) vehicle, and whether fiancée would stay with him "no matter what" (by time of trial, fiancée was then former fiancée) relevant to show defendant was involved in victim's disappearance).

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. Cota, 229 Ariz. 136, 272 P.3d 1027, ¶¶ 45–47 (2012) (court stated, "[T]he fact and cause of death are always relevant in a murder prosecution"; court held photographs also helped to corroborate state's theory on timing of two deaths).

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 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).

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 showed defendant knew that manner in which he killed victim would cause her to suffer; 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 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 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).

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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 made existence of relationship more probable, thus letter was relevant).

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 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 v. Foshay, 239 Ariz. 271, 370 P.3d 618, ¶¶ 34–41 (Ct. App. 2016) (defendant contended autopsy toxicology report indicated presence of methamphetamine in victim and that victim had been previously involved in drug sales 2 years prior showed someone else might have had motive to kill victim; court held trial court correctly ruled this evidence was not relevant and that its prejudicial effect substantially outweighed any probative value).

State v. Buccheri-Bianca, 233 Ariz. 324, 312 P.3d 123, ¶¶ 31–33 (Ct. App. 2013) (while in jail, social worker said to defendant, "You're innocent until proven guilty," to which defendant stated, "I'm guilty"; court held 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).

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 charged with robbery at commercial store; after reviewing suspect descriptions and *modus operandi* of two other robberies at commercial 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).

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 abnor-

malities, ethanol in the mouth, regurgitation of alcoholic stomach contents, barometric pressure, and elevation 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 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. 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.021 Under former evidence theory, evidence was material if it addressed an issue in the case, and was relevant if it tended to establish the proposition for which it was offered; these two concepts are now covered by relevancy under the modern rules of evidence.

State v. Orantez, 183 Ariz. 218, 902 P.2d 824 (1995) (to obtain new trial based on newly-discovered evidence, defendant had to establish evidence was material, and court noted that question of materiality is now subsumed in relevance rule).

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 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 it related to whether defendant (1) was justifiably apprehensive for his own safety, and (2) 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) (if defense is fabrication, and if minor victim was of such tender years that jurors might infer 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, 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, and return to Phoenix August 6; based on images found in defendant's computer, he was charged with 18 counts of sexual exploitation of minor; at 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 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.035 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, 421, 956 P.2d 1240, 1243 (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).

401.cr.040 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) (in DUI trial, trial court abused discretion in ruling state's witnesses could not use such terms as "impairment," "field sobriety test," "sobriety," "tests," "pass/fail," or "marginal" when testifying about FSTs).

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).

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 admissible only if defendant can offer evidence of own physiology at time of breath 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, but 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. Bustamante, 229 Ariz. 256, 274 P.3d 526, ¶¶ 5–6 (Ct. App. 2012) (court considered circumstantial evidence to determine whether evidence was sufficient to show defendant's involvement in kidnapping).

State v. Musgrove, 223 Ariz. 164, 221 P.3d 43, ¶¶ 5–7 (Ct. App. 2009) (defendant's requested instruction implied 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 was 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 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 marihuana 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) (defendant charged with misconduct involving weapons (possession of firearm by prohibited possessor), which is person who has been convicted of felony and whose civil right to carry 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, 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 The Sixth Amendment right to present evidence does not give a defendant the right to present a defense in whatever manner and with whatever evidence the defendant's chooses, thus the exclusion of irrelevant evidence does not deny a defendant the Sixth Amendment right to present evidence.

State v. Carlson, 237 Ariz. 381, 351 P.3d 1079, ¶¶ 36–37 (2015) (trial court precluded defendant's expert from testifying about risk factors that would tend to make defendant confess falsely; because defendant never suggested his confession was caused by any mental disorder, personality disorder, or similar affliction, and because defendant's expert did not diagnose or treat defendant and thus had no knowledge whether defendant had such disorders or conditions, trial court did not abuse discretion in precluding that testimony).

State v. Davis, 205 Ariz. 174, 68 P.3d 127, ¶ 33 (Ct. App. 2003) (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 evidence 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; 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 charged with robbery at commercial store; after reviewing suspect descriptions and *modus operandi* of two other robberies at commercial 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).

401.cr.080 Evidence that a person did not say something (negative evidence) is relevant, but only if the proponent makes an adequate foundational showing that the person probably would have made a statement under the circumstances.

State v. VanWinkle, 229 Ariz. 233, 273 P.3d 1148, ¶ 7 (2012) (defendant shot victim; G. disarmed defendant and C. restrained him on second-floor balcony; police arrived and ordered C. to descent stairs; C. complied but exclaimed that defendant was shooter; defendant said nothing in response; defendant did not contend his silence was improperly admitted as tacit admission, but contended statement was admitted in violation of *Miranda*; court held admission of statement did not violate *Miranda,* but did violate Fifth Amendment right to remain silent; court held any error was harmless).

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 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 some person involved in violent drug scene might have killed victim because of drug involvement; trial court stated any connection between drug trade and murders was "reach"; court stated its review would have been easier if trial court had stated 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 excluded under Rule 403, 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 death of his girl-friend's 16-month-old daughter, Shelby; defendant sought 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; (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 (A-A) 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 A-A man robbed another bar while armed with handgun and sawed-off rifle; 5 days later, defendant and A-A man robbed another bar while armed with handgun and sawed-off rifle; defendant and codefendant (who was A-A) were charged with all three robberies; defendant sought to introduce evidence that (1) A-A 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 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 showed another person was involved in planning crimes and thus implicated that person, evidence did not exculpate defendant in planning and commission of crimes, thus trial court did not err in precluding that 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 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. Alvarez, 228 Ariz. 579, 269 P.3d 1203, ¶¶ 3–7 (Ct. App. 2012) (victim's home was burglarized, and water bottle with defendant's DNA was found in kitchen; defendant contended trial court erred in excluding evidence concerning R., who was landscaper: (1) R. was present in victim's back yard pursuant to schedule when victim left home prior to burglary, (2) R. had worked at victim's house on prior occasions and presumably knew she would not return soon; (3) R. was in victim's fenced back yard, which gave ready access to point of entry, back door of house; (4) R. never returned to victim's house in 4 years following burglary; and (5) R. had prior felony conviction for property crime; court held none of this evidence connected R. to burglary, thus trial court properly excluded that 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 precluded 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 For evidence of third-party culpability to be relevant, it must tend to create a reasonable doubt about the defendant's guilt; 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. Escalante-Orozco, 241 Ariz. 254, 386 P.3d 798, ¶¶ 68–69 (2017) (defendant sought to introduce testimony from witness that her husband (who was also victim's boyfriend) was mean drunk, resisted efforts to get help for alcoholism, lied about attending Alcoholics Anonymous, and hit her on two occasions, and that their relationship had deteriorated because of his drinking; because this testimony had nothing to do with relationship between husband and victim, it did not create reasonable doubt about defendant's guilt, thus trial court properly excluded it under Rule 401 and 403).

State v. Escalante-Orozco, 241 Ariz. 254, 386 P.3d 798, ¶¶ 73–75 (2017) (defendant sought to introduce police report that, night before victim was murdered, Hispanic man peeked through blinds in another apartment in victim's complex and threatened to kill woman inside; because defendant's theory was that victim's boyfriend had killed her, and nothing showed that Hispanic man who peeked through blinds was victim's boyfriend, this evidence did not create reasonable doubt about defendant's guilt, thus trial court properly excluded it under Rule 401 and 403).

State v. Goudeau, 239 Ariz. 421, 372 P.3d 945, ¶¶ 159–67 (2016) (defendant claimed trial court erred in precluding evidence of injuries to victim several days before she was killed; court held trial court could have reasonably found that evidence did not create reasonable doubt about defendant's guilt).

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. Foshay, 239 Ariz. 271, 370 P.3d 618, ¶¶ 34–41 (Ct. App. 2016) (defendant contended autopsy toxicology report indicated presence of methamphetamine in victim and that victim had been previously involved in drug sales 2 years prior showed someone else might have had motive to kill victim; court held trial court correctly ruled this evidence was not relevant and that its prejudicial effect substantially outweighed any probative value).

State v. Bigger, 227 Ariz. 196, 254 P.3d 1142, ¶¶ 40–43 (Ct. App. 2011) (defendant contended trial court erred 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 was 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. Escalante-Orozco, 241 Ariz. 254, 386 P.3d 798, ¶¶ 68–69 (2017) (defendant sought to introduce testimony from witness that her husband (who was also victim's boyfriend) was mean drunk, resisted efforts to get help for alcoholism, lied about attending Alcoholics Anonymous, and hit her on two occasions, and that their relationship had deteriorated because of his drinking; because this testimony had nothing to do with relationship between husband and victim, it did not create reasonable doubt about defendant's guilt, thus trial court properly excluded it under Rule 401 and 403).

State v. Escalante-Orozco, 241 Ariz. 254, 386 P.3d 798, ¶¶ 73–75 (2017) (defendant sought to introduce police report that, night before victim was murdered, Hispanic man peeked through blinds in another apartment in victim's complex and threatened to kill woman inside; because defendant's theory was that victim's boyfriend had killed her, and nothing showed that Hispanic man who peeked through blinds was victim's boyfriend, this evidence did not create reasonable doubt about defendant's guilt, thus trial court properly excluded it under Rule 401 and 403).

State v. Dann, 205 Ariz. 557, 74 P.3d 231, ¶¶ 30–36 (2003) (defendant sought to introduce evidence that some person involved in violent drug scene might have killed victim because of drug involvement; trial court stated any connection between drug trade and murders was "reach"; court stated its review would have been easier if trial court had stated 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 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, 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 jurors 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 privilege against self-incrimination in order to protect defendant, and 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), *vacated,* 230 Ariz. 387, 285 P.3d 308 (2012).

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 child was injured while in boyfriend's care; defendant sought 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).

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 kicked victim and then was asked to use chair to demonstrate; 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. Sanders, 245 Ariz. 113, 425 P.3d 1056, ¶¶ 51–55 (2018) (defendant was convicted of first-degree murder and child abuse; even though fact and cause of death were not at issue, court held photographs were relevant to show nature and location of fatal injuries, to help determine degree or atrociousness of crime, to corroborate state witnesses, to illustrate or explain testimony (medical examiner used all but one photograph to explain testimony), to corroborate state's theory of how and why homicide was committed, and to rebut defendant's claim that, because he only spanked victim with belt, it was unforeseeable that his actions would cause her death).

State v. Rushing, 243 Ariz. 212, 404 P.3d 240, ¶¶ 24–31 (2017) (in murder prosecution, medical examiner used autopsy photographs to explain victim's injuries and cause of death; court stated "[c]ause of death is always relevant" and that photographs were also relevant to show premeditation).

State v. Escalante-Orozco, 241 Ariz. 254, 386 P.3d 798, ¶¶ 83–87 (2017) (medical examiner used each of 19 autopsy photographs to explain different aspect of his testimony; detective used six crime scene photographs to show how victim was dragged into bathtub).

State v. Goudeau, 239 Ariz. 421, 372 P.3d 945, ¶¶ 150–58 (2016) (defendant contended trial court erred in admitting autopsy photograph; court held photograph was relevant because "the fact and cause of death are always relevant in a murder prosecution"; court held photograph also helped to corroborate medical examiner's explanation of victim's injuries; court rejected defendant's contention that state could have used other evidence to explain what photograph depicted).

State v. Burns, 237 Ariz. 1, 344 P.3d 303, ¶¶ 59–62 (2015) (photograph of victim in desert 3 weeks after murder in advanced state of decomposition with head severed by wild animals relevant and admissible because (1) photograph in any murder case is relevant to assist jurors in understanding issue because fact and cause of death are always relevant in murder prosecution, and (2) photograph showed where body was found and how it was hidden, and helped jurors understand expert testimony).

State v. Felix, 237 Ariz. 280, 349 P.3d 1117, ¶¶ 37–39 (Ct. App. 2015) (photographs of child's crib with bullet damage and stuffed gorilla with bullet hole in it relevant to charge of attempted murder and dangerous crime against children).

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 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 claimed 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) (photographs relevant because they provided information about time and manner of death or otherwise corroborated state's case).

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 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 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 them, 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) (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), *vac'd in part & aff'd in part,* 194 Ariz. 310, 982 P.2d 270 (1999).

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. Davolt, 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 it 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 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 them, 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 was willing to take polygraph test, and defendant sought to ask officers about their decision not to give 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 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. Tovar, 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).

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 showing "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, state called prosecutor who testified she had prosecuted defendant and he was convicted of four felony offenses; because defendant did not object, court reviewed for fundamental error only; court held some form of documentary evidence was required, thus agreed 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 DOC 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.

State v. Sanders, 245 Ariz. 113, 425 P.3d 1056, ¶¶ 61–64 (2018) (defendant claimed trial court violated his due process right to fair trial by denying his motion for mistrial after prosecutor asked several witnesses, "Do you have an independent recollection of this case," and they responded this was "the worst case of child abuse" they had ever seen; court held prosecutor's question about witnesses' independent recollections was relevant to establishing their credibility and ability to recall events accurately, and that any prejudice was remedied by trial court's curative instruction).

State v. Burns, 237 Ariz. 1, 344 P.3d 303, ¶¶ 101–04 (2015) (defendant's expert testified defendant could be safely managed in Arizona prison system; trial court properly allowed state to question witness about crimes and escapes from private prisons and Arizona State Prison).

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 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) (hearing defendant's actual words and demeanor would assist jurors in determining credibility, so 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 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. Trujillo, 245 Ariz. 414, 430 P.3d 379, ¶¶ 26–33 (Ct. App. 2018) (defendant was charged with sexual abuse he allegedly committed on 15-year-old at refugee facility; after defendant's supervisor testified about rules concerning interaction with children at facility, defendant sought to introduce evidence that supervisor was fired because "he signed off on a slip that allowed [someone] to drive a vehicle they weren't supposed to drive," but trial court precluded this evidence; court held relevancy of this evidence was tenuous at best because supervisor's testimony concerned rules workers were tasked with following when engaging with children, while supervisor was not terminated for violating those rules, and instead was fired for his failure to comply with policy regarding who was permitted to drive facility's vehicles; further, supervisor was fired 14 months after incident defendant was charged with committing).

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 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. Champagne,* 247 Ariz. 116, 447 P.3d 297, ¶¶ 47–54 (2019) (defendant contended trial court abused its discretion by refusing to permit him to confront and cross-examine witness about her mental illness diagnoses and drug usage, maintaining her diagnoses of bipolar disorder, post-traumatic stress disorder, and depression spoke to her mental state and her ability to perceive events accurately, as did fact she was not medicated for those disorders and was drinking alcohol and using methamphetamine before crimes occurred; court held trial court properly precluded defendant from asking whether prescription medication witness was taking during trial was mental health medication be-

cause defendant failed to present sufficient evidence suggesting connection between any medication and her ability to recall and observe matters to which she testified; further, trial court properly precluded evidence of witness's mental health diagnoses or her failure to take medication for those diagnoses because defendant failed to show witness's ability to observe and relate events surrounding murders was affected in any way by her mental health diagnoses or her failure to take medication for those diagnoses).

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 offered 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 at times other than when 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 impaired 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 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.

State v. Todd, 244 Ariz. 374, 418 P.3d 1147, ¶¶ 11–16 (Ct. App. 2018) (defendant claimed trial court erred by precluding her from impeaching witness with evidence of his pending charges, contending such evidence demonstrated motive to fabricate with hope that state would show him leniency by cooperating against defendant; court held pending charge was relevant to whether witness had motive to fabricate, thus jurors were entitled to know not only that witness was facing a charge, but also to hear directly from witness whether his testimony was animated by promise, hope, or expectation of leniency in his own case, thus trial court erred by entirely precluding defendant from impeaching witness with his potential motivations, but held, because reliable evidence corroborating witness's testimony predated his need for leniency, probative value of those charges was minimal, and any error in precluding this line of cross-examination was therefore harmless).

State v. Todd, 244 Ariz. 374, 418 P.3d 1147, ¶¶ 17–20 (Ct. App. 2018) (defendant claimed trial court erred by precluding her from impeaching witness with evidence of potential charges, contending such evidence demonstrated motive to fabricate with hope that state would show him leniency by cooperating against defendant; because witness admitted he was worried about being charged as prohibited possessor, he had potential motive to fabricate; jurors should have had opportunity to determine whether witness's fear of being charged motivated him to fabricate, thus defendant should have been allowed to cross-examine witness about that concern and whether it was motivating witness's testimony; however, given circumstances of this case, any error was harmless).

American Fam. Mut. Ins. v. Grant, 222 Ariz. 507, 217 P.3d 1212, ¶¶ 2–30 (Ct. App. 2009) (respondent made claim 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, dealings generally with petitioner and their law firm, approximate amount received for expert services, 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 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, 229 Ariz. 1, 270 P.3d 828, ¶¶ 28–29 (2011) (on cross-examination, defense mitigation expert testified he and wife earned about $200–300,000 annually from work on capital cases, 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) (defendant paid $2 million to expert witness's firm and thus expert witness had stake in litigation; plaintiff 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 it).

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).

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.

Best v. Miranda, 229 Ariz. 246, 274 P.3d 516, ¶ 11 (Ct. App. 2012) (plaintiff claimed he exercised option to purchase real property, and contended trial court erred in failing to consider evidence of parties' oral agreement of what would be sufficient to exercise option; court held evidence of any oral agreement would be inadmissible under statute of frauds).

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 throughout 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).

402.025 Failure to object to an offer of evidence is a waiver of any ground of complaint against its admission.

State v. Charo, 156 Ariz. 561, 562, 754 P.2d 288, 289 (1988) (defendant raised number of evidentiary issues for first time on appeal; court held defendant waived these issues, noting evidence admitted without objections becomes competent evidence for all purposes).

State v. McDaniel, 136 Ariz. 188, 196, 665 P.2d 70, 78 (1983) (defendant did not object to admission of gun found in apartment where victim was beaten).

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.

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

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).

April 1, 2020

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).

Stafford v. Burns, 241 Ariz. 474, 389 P.3d 76, ¶¶ 31–33 (Ct. App. 2017) (plaintiffs brought claims for medical malpractice and wrongful death after their son died of methadone overdose; plaintiffs contended evidence that post-mortem urine sample contained cocaine metabolites was unfairly prejudicial and thus trial court erred in admitting that evidence; court held trial court properly limited admissibility of that evidence and allowed plaintiffs to recall their toxicologist to address that issue on rebuttal, thus trial court did not abuse discretion in admitting that evidence).

Bogard v. Cannon & Wendt Elec. Co., 221 Ariz. 325, 212 P.3d 17, ¶¶ 32–37 (Ct. App. 2009) (court held 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 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.

Spooner v. City of Phoenix, 246 Ariz. 119, 435 P.3d 462, ¶¶ 5–6 (Ct. App. 2018) (detective testified before grand jurors, who indicted plaintiff for theft from vulnerable adult and unlawful use of power of attorney; state later dismissed those charges; plaintiff sued city and detective claiming constitutional violations, simple negligence, gross negligence, intentional infliction of emotional distress, and malicious arrest; plaintiff contended trial court erred by precluding her from using detective's grand jury testimony to impeach her credibility at trial; court did not reach general issue of admissibility of testimony, and instead held trial court did not abuse discretion in finding danger of unfair prejudice substantially outweighed 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 restaurant; court noted there was evidence 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 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; Meyer called plaintiff, and getting no response, went to her apartment and 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 found in favor of plaintiff on both counts; Meyer contended trial court erred in admitting evidence of prior altercation he had with co-workers at restaurant; court noted there was evidence 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, 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).

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 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.

Spooner v. City of Phoenix, 246 Ariz. 119, 435 P.3d 462, ¶¶ 5–6 (Ct. App. 2018) (detective testified before grand jurors, who indicted plaintiff for theft from vulnerable adult and unlawful use of power of attorney; state later dismissed those charges; plaintiff sued city and detective claiming constitutional violations, simple negligence, gross negligence, intentional infliction of emotional distress, and malicious arrest; plaintiff contended trial court erred by precluding her from using detective's grand jury testimony to impeach her credibility at trial; court did not reach general issue of admissibility of testimony, and instead held trial court did not abuse discretion in finding danger of confusing jurors substantially outweighed 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; 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.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 prehearing list; judge limited her to seven character witnesses; court stated permitting testimony of additional 57 witnesses on same topic would have been needlessly cumulative).

Felipe v. Theme Tech Corp., 235 Ariz. 520, 334 P.3d 210, ¶¶ 20–24 (Ct. App. 2014) (investigating officer described various accident reconstruction methods and his own opinions of speeds of vehicles based on his reconstruction, but his opinions differed from those of plaintiffs' independent expert, thus testimony was not cumulative).

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).

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; 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) (decedent died of thermal and inhalation injuries when decedent's vehicle burst into flames, 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. Burns, 237 Ariz. 1, 344 P.3d 303, ¶ 45 (2015) (victim and defendant met at gas station and went out on date; 3 weeks later, victim was found dead, and state charged defendant with kidnapping, sexual assault, and murder; in opening statement and closing argument, prosecutor stated this was victim's "first date"; defendant contended on appeal evidence that victim had not dated previously warranted a mistrial under Rule 403; because defendant failed to object on that ground at trial, court reviewed for fundamental error only; court held fact that victim's date with defendant was her first date helped place her actions in context and thus was probative, and held defendant failed to show evidence posed danger of unfair prejudice, thus court found no error, much less fundamental error).

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 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. Burns, 237 Ariz. 1, 344 P.3d 303, ¶ 45 (2015) (victim and defendant met at gas station and went out on date; almost 3 weeks later, victim was found dead, and state charged defendant with kidnapping, sexual assault, and murder; in opening statement and closing argument, prosecutor stated this was victim's "first date"; defendant contended on appeal evidence that victim had not dated previously warranted a mistrial under Rule 403; because defendant failed to object on that ground at trial, court reviewed for fundamental error only; court held fact that victim's date with defendant was victim's first date helped place victim's actions in context and thus was probative, and held defendant failed to show evidence posed danger of unfair prejudice, thus court found no error).

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. 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. Foshay, 239 Ariz. 271, 370 P.3d 618, ¶¶ 34–41 (Ct. App. 2016) (defendant contended autopsy toxicology report indicated presence of methamphetamine in victim and that victim had been previously involved in drug sales 2 years prior showed someone else might have had motive to kill victim; court held trial court correctly ruled this evidence was not relevant and that its prejudicial effect substantially outweighed any probative value).

State v. Ortiz, 238 Ariz. 329, 360 P.3d 125, ¶¶ 12–21 (Ct. App. 2015) (court concluded testimony of Dr. Wendy Dutton had probative value, and merely because she testified as "cold" witness did not mean her testimony was unfairly prejudicial).

State v. Cornman, 237 Ariz. 350, 351 P.3d 357, ¶¶ 23–25 (Ct. App. 2015) (defendant contended prosecutor's PowerPoint presentation was unfairly prejudicial because it contained pictures of large quantities of methamphetamine, while defendant's case only involved 1.3 grams; because state made clear to jurors that pictures were not from this case and were used for illustration only, trial court did not abuse discretion in allowing PowerPoint).

State ex rel. Montgomery v. Miller (Madrid), 234 Ariz. 289, 321 P.3d 454, ¶ 60 (Ct. App. 2014) (because expert's retrograde extrapolation methodology was reliable under Rule 702, there was no danger of unfair prejudice; trial court erred in precluding testimony under Rule 403).

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).

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) (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 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. Guarino, 238 Ariz. 437, 362 P.3d 484, ¶ 9 (2015) (evidence that makes defendant look bad may be prejudicial in eyes of jurors, but it is not necessarily unfairly so).

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

State v. Coghill, 216 Ariz. 578, 169 P.3d 942, ¶¶ 12–22 (Ct. App. 2007) (defendant charged with sexual exploitation of minor (child pornography on computer); defendant contended trial court abused discretion in admitting evidence he had downloaded adult pornography on computer; court held evidence showing defendant's ability, willingness, and opportunity to download other material from Internet was 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.022 A defendant's Sixth Amendment right to present evidence is limited to the presentation of matters admissible under ordinary evidentiary rules, thus exclusion of evidence because probative value is substantially outweighed by factors listed in Rule 403 does not violate defendant's constitutional right to present evidence.

State v. Hardy, 230 Ariz. 281, 283 P.3d 12, ¶¶ 46–51 (2012) (court held trial court did not abuse discretion in excluding defendant's personal history evidence during guilt phase).

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 victim was involved with drugs, thus some person in violent drug scene might have killed her; trial court stated any connection between drug trade and murders was "reach"; court stated review would have been easier if trial court had used applicable legal standard, but because trial court showed it understood need to determine relevance of evidence and thus used applicable legal standard, court held that, whether trial court concluded evidence was not relevant under Rule 401 or failed 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 had been with victim shortly before murder, both gave alibis that could not be corroborated, both knew substantial information about crime not 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. Escalante-Orozco, 241 Ariz. 254, 386 P.3d 798, ¶ 48 (2017) (merely because Y–STR profile would be found in 1 in 34 southwestern Hispanics did not have effect of causing jurors make decision based on emotion, sympathy, or horror).

State v. Escalante-Orozco, 241 Ariz. 254, 386 P.3d 798, ¶¶ 49–50 (2017) (trial court did not abuse discretion in allowing DNA expert to use words "included," "not excluded," and "match").

State v. Forde, 233 Ariz. 543, 315 P.3d 1200, ¶¶ 43–44 (2014) (defendant charged with murder during home invasion; evidence of defendant's previous plan to raid house admissible to show preparation and plan; trial court properly rejected Rule 403 argument because evidence did not suggest decision on improper basis, such as emotion, sympathy, or horror, or any undue prejudice).

State v. Hardy, 230 Ariz. 281, 283 P.3d 12, ¶ 40 (2012) (trial court could find evidence of defendant's slapping victim was more probative than prejudicial because defendant's motive and intent were significant issues at trial; further, trial court properly instructed jurors on limited use of this evidence).

State v. Boggs, 218 Ariz. 325, 185 P.3d 111, ¶¶ 67 (2008) (defendant claimed he suffered from mental issues, 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 his 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).

State v. Scott, 243 Ariz. 183, 403 P.3d 595, ¶ 17 (Ct. App. 2017) (defendant was charged with kidnapping; because defendant claimed sex was consensual, defendant placed his intent in issue; for defendant's past conviction for sexual assault, because of identical nature of victim's relationship with defendant and similar nature of crime, evidence of defendant's past conviction was relevant and not unfairly prejudicial, thus trial court properly admitted evidence of defendant's past conviction).

State v. Butler, 230 Ariz. 465, 286 P.3d 1074, ¶¶ 26–35 (Ct. App. 2012) (defendant was charged with conspiracy to possess or transport marijuana for sale; defendant objected to admission of property receipt from Georgia sheriff's department for "Nike shoe box containing a large amount of U.S. currency"; because receipt was dated less than 1 week before Arizona authorities found drugs and weapons, and cash in box in house where defendant was visiting, trial court reasonably concluded receipt directly proved alleged conspiracy or that transporting large amounts of cash was done contemporaneously with and directly facilitated charged conspiracy; additionally, receipt showed defendant had Florida address, and evidence for current chargers showed large amounts of marijuana were shipped to Florida; evidence was thus intrinsic; trial court did not abuse discretion in finding probative value was not substantially outweighed by danger of unfair prejudice).

State v. Damper, 223 Ariz. 572, 225 P.3d 1148, ¶¶ 20–22 (Ct. App. 2010) (defendant 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 [defendant] are fighting and I have no gas"; defendant claimed prejudicial effect outweighed probative value; court held no showing message would have caused jurors to decide case based on emotion, sympathy, or horror, and 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 evidence that is probative of defendant's guilt is prejudicial, but "unfair prejudice" is something different; because defendant argued only that 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 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 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).

State v. Inzunza, 234 Ariz. 78, 316 P.3d 1266, ¶¶ 16–22 (Ct. App. 2014) (because of victim's mental defects and because of way sexual assault was alleged to have happened 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).

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 victim was involved with drugs, thus some person in notoriously violent drug scene might have killed her; trial court stated any connection between drug trade and murders was "reach"; court stated review would have been easier if trial court had used applicable legal standard in its ruling, but because trial court showed it understood need to determine relevance of evidence and thus used 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 had been with victim shortly before murder, both gave alibis that could not be corroborated, both knew substantial information about crime not 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 beaten him; because that evidence would have supported defendant's explanation 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 victim was involved with drugs, thus some person in notoriously violent drug scene might have killed her; trial court stated any connection between drug trade and murders was "reach"; court stated review would have been easier if trial court had used applicable legal standard in its ruling, but because trial court showed it understood need to determine relevance of evidence and thus used 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 had been with victim shortly before murder, both gave alibis that could not be corroborated, both knew substantial information about crime not 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) (defendant indicted for sexual assault; state alleged defendant had prior conviction for sexual assault; court held 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. Sanders, 245 Ariz. 113, 425 P.3d 1056, ¶¶ 51–55 (2018) (defendant was convicted of first-degree murder and child abuse; even though photographs were graphic and disturbing, they were not so unduly gruesome to be inadmissible).

State v. Rushing, 243 Ariz. 212, 404 P.3d 240, ¶¶ 30–31 (2017) (in murder prosecution, medical examiner used autopsy photographs to explain victim's injuries and to testify about cause of death; court stated "[c]ause of death is always relevant" and that photographs were also relevant to show premeditation; court stated that, although photographs were graphic, trial court acted within its discretion by finding their probative value was not outweighed by any prejudicial effect).

State v. Escalante-Orozco, 241 Ariz. 254, 386 P.3d 798, ¶¶ 83–87 (2017) (medical examiner used each of 19 autopsy photographs to explain different aspect of his testimony; detective used six crime scene photographs to show how victim was dragged into bathtub; photographs were not unduly gruesome and were not needlessly cumulative).

State v. Burns, 237 Ariz. 1, 344 P.3d 303, ¶¶ 59–62 (2015) (photograph of victim found in desert in state of decomposition with head severed by wild animals relevant and thus admissible because (1) photograph in any murder case is relevant to assist jurors in understanding issue because fact and cause of death are always relevant in murder prosecution, and (2) in this case, photographs showed where body was found and how it was hidden, and helped jurors understand expert testimony).

State v. Felix, 237 Ariz. 280, 349 P.3d 1117, ¶¶ 37–39 (Ct. App. 2015) (photographs of child's crib with bullet damage and stuffed gorilla with bullet hole in it relevant to charge of attempted murder and dangerous crime against children; trial court reviewed photographs and engaged in proper balancing).

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 showing victim's hands, feet, and nude body from distance were not gruesome).

State v. Hampton, 213 Ariz. 167, 140 P.3d 950, ¶¶ 3, 16–20 (2006) (defendant was upset at victim because he had identified him to police; state's theory was 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, he went back into bedroom where victim's girlfriend was sleeping, and when she told him to get out, he shot her, killing her and her unborn child; defendant contended, 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 and multiple homicides aggravating circumstance; court again stated "[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, 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 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 them, 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 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 probative value was not outweighed by danger of unfair prejudice; because videotape 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 it 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. Goudeau, 239 Ariz. 421, 372 P.3d 945, ¶¶ 150–58 (2016) (defendant contended trial court erred in admitting autopsy photograph; court held photograph helped to corroborate medical examiner's explanation of victim's injuries; court rejected defendant's contention that state could have used other evidence to explain what photograph depicted; and court held photograph was not needless cumulative because it was only one that illustrated position of shooter).

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. Bocharski, 200 Ariz. 50, 22 P.3d 43, ¶¶ 21–25 (2001) (court stated photographs of victim's body were relevant, although noting, 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 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 them, 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) (at trial, defendant only objected generally to admission of photographs; defendant contended on appeal trial court abused discretion under Rule 403 ; 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 his EME tattoo based on relevance and foundation; on appeal, defendant claimed 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.125 A party who fails to request express findings concerning a Rule 403 determination waives any allegation on appeal that the trial court erred by not making such findings.

State v. Waller, 235 Ariz. 479, 333 P.3d 806, ¶ 40 (Ct. App. 2014) (trial court allowed defendant to impeach victim with 2003 conviction, but precluded impeachment with two 1980 convictions; because defendant never asked trial court to make balancing findings nor objected when trial court did not make specific findings, defendant waived any claim on appeal that trial court erred by not making findings; moreover, it was clear from record that attorneys argued probative value and prejudicial effect to trial court, and trial court considered those arguments).

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).

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.

(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. Rockwell, 161 Ariz. 5, 775 P.2d 1069 (1989) (defendant offered evidence that he bragged about committing crimes he did not commit to show his character trait of fabricating; state then permitted to offer evidence that defendant had bragged about committing crimes he in fact did commit).

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.020 If the defendant in a criminal prosecution has not presented evidence of his or her character, it is improper for the state to present evidence of the defendant's bad character.

State v. Holsinger, 124 Ariz. 18, 601 P.2d 1054 (1979) (prosecutor's question concerning defendant's "long criminal record" was error).

State v. Eisenlord, 137 Ariz. 385, 670 P.2d 1209 (Ct. App. 1983) (improper for prosecutor to argue to jurors that defendant's prior felony conviction showed predisposition to commit crime when prior convictions were admitted for impeachment purposes only).

State v. Ballantyne, 128 Ariz. 68, 623 P.2d 857 (Ct. App. 1981) (question about defendant's affiliation with "Hell's Angels" improper).

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).

404.a.1.cr.040 A defendant may offer "observation evidence" about behavioral tendencies to show he or she possessed a character trait of acting reflexively in response to stress, but may not offer opinion whether defendant was or was not acting reflectively at time of killing.

State v. Leteve, 237 Ariz. 516, 354 P.3d 393, ¶¶ 19–24 (2015) (after defendant's wife had filed for divorce, defendant shot and killed their two sons, age 1 and 5; because defendant's expert would have testified only that defendant had general character trait for impulsivity, and not that he acted impulsively at time of murders, trial court erred by excluding that evidence; trial court further erred in limiting defendant's parent's testimony to those events occurring night before and day of murders; court held error was harmless because evidence showed defendant (1) purchased weapon day wife filed for divorce, (2) sent messages to wife saying that "this will end badly," (3) sent letter that both he and child had signed, (4) shot each child in back of head through pillow or blanket, and (5) had to walk 100 feet after he shot one child in order to shoot other child).

State v. Rivera, 152 Ariz. 507, 514, 733 P.2d 1090, 1097 (1987) (defendant attempted to introduce evidence of his "panic reaction to stress").

State v. Christensen, 129 Ariz. 32, 35–36, 628 P.2d 580, 583–84 (1981) (error to exclude psychiatric testimony that defendant's actions in stressful situations are more reflexive than reflective).

State v. Jacobson, 244 Ariz. 187, 418 P.3d 960, ¶¶ 6–20 (Ct. App. 2017) (defendant shot live-in boyfriend while he was lying in bed; in severance proceedings, doctors diagnosed defendant with PTSD; for criminal proceedings, court held PTSD diagnosis was opinion testimony going to mental defect and its effect on cognitive or moral capacities on which sanity depends, and thus was not admissible, and disagreed with *Richter* court that such testimony was admissible as observation evidence).

State v. Richter, 243 Ariz. 131, 402 P.3d 1016, ¶¶ 20–21 (Ct. App. 2017) (defendant was convicted of kidnapping and child abuse; even assuming testimony by defendant and expert witness testimony about PTSD could have been construed as diminished-capacity evidence, which would be inadmissible to negate *mens rea* element, it was nevertheless admissible as observation evidence).

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, trustworthi-

ness, 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 is 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, 124, 817 P.2d 488, 491 (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, 149, 735 P.2d 757, 759 (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, 334, 897 P.2d 634, 636 (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, 449, 743 P.2d 956, 958 (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, 130, 685 P.2d 764, 767 (Ct. App. 1984) (proper to exclude evidence of victim's violent character when defendant did not know of victim's conduct).

State v. Zamora, 140 Ariz. 338, 340–41, 681 P.2d 921, 923–24 (Ct. App. 1984) (in prosecution for aggravated assault, defendant allowed to introduce only specific instances of victim's possession of gun about which defendant was aware; trial court properly excluded 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 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.

Cal X-tra v. W.V.S.V. Holdings, 229 Ariz. 377, 276 P.3d 11, ¶ 90 (Ct. App. 2012) (evidence of defendant Wolfswinkel's criminal convictions and civil judgments was relevant to show why plaintiffs did not want to deal with Wolfswinkel, why they instructed other defendant not to deal with Wolfswinkel, and why they claimed other defendant breached fiduciary duty in dealing with Wolfswinkel).

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.

Cal X-tra v. W.V.S.V. Holdings, 229 Ariz. 377, 276 P.3d 11, ¶¶ 91–92 (Ct. App. 2012) (although evidence of defendant Wolfswinkel's criminal convictions and civil judgments was relevant to show why plaintiffs did not want to deal with Wolfswinkel, why they instructed other defendant not to deal with Wolfswinkel, and why they claimed other defendant breached fiduciary duty in dealing with Wolfswinkel, presentation of evidence caused trial to be more about Wolfswinkel's past and alleged proclivity for corruption, and closing argument was more about punishing Wolfswinkel for his past acts, thus trial court did not abuse its discretion in granting new trial).

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**.

Stafford v. Burns, 241 Ariz. 474, 389 P.3d 76, ¶¶ 31–33 (Ct. App. 2017) (plaintiffs brought claims for medical malpractice and wrongful death after their son died of methadone overdose; plaintiffs contended defendant negligently caused death by wrongfully determining son was stable and discharging him prematurely; defendant presented evidence suggesting son ingested additional methadone after his discharge that ultimately caused his death; court held trial court did not abuse discretion in allowing evidence that postmortem urine sample contained metabolites concluding evidence was relevant to rebut testimony of plaintiffs' witnesses that son did not, or could not, or would not have sought out additional methadone after his discharge from emergency department).

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.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

NOTE: In 2012, Arizona Supreme Court adopted a more narrow definition of **"extrinsic evidence"** as follows: Evidence of an "other act" is **intrinsic** only if it (1) directly proves the charged offense, or (2) the other act is performed contemporaneously with and directly facilitates the commission of the charged offense. *State v. Ferrero,* 229 Ariz. 239, 274 P.3d 509, ¶ 20 (2012). Previously, in 1996 the Arizona Supreme Court had defined **"extrinsic evidence"** as follows: Evidence is **intrinsic** when (1) evidenced of the other act and evidenced of the crime charged are "inextricably intertwined," or (2) both acts are part of a "single criminal episode," or (3) the other acts were "necessary preliminaries" to the crime charged. *State v. Dickens,* 187 Ariz. 1, 18 n.7, 926 P.2d 468, 485 n.7 (1996), *accord, State v. Baldenegro,* 188 Ariz. 10, 15–16, 932 P.2d 275, 280–81 (Ct. App. 1996). In its 2012 decision in *Ferrero,* the Arizona Supreme Court specifically rejected the *Dickens* test as too broad and replaced it with that more narrow definition. Thus, for cases previously decided between 1996 and 2012, the evidence found to be extrinsic evidence may or may not qualify as intrinsic evidence under this new test. **This text has retained those older cases and the numbered paragraphs for reference and analytical purposes, but the practitioner should not cite those cases as authority to support a claim that certain evidence is intrinsic evidence.**

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. Ferrero, 229 Ariz. 239, 274 P.3d 509, ¶ 20 (2012) (court replaced the test adopted in 1996 and replaced it with this test).

State v. Ferrero, 229 Ariz. 239, 274 P.3d 509, ¶¶ 25–28 (2012) (defendant was charged with sexual conduct with minor; trial court admitted evidence that, on ride to defendant's house on night of first charged offense, defendant told victim to pull down his pants and underwear and expose himself, and threatened to leave victim on side of road if he did not comply; evidence further showed defendant and victim arrived at defendant's house, victim talked to defendant's mother and played computer games for at lease 30 minutes while defendant showered, victim then joined defendant in bed, at which time defendant completed first charged act; court held evidence of exposure in car did not meet narrow definition of intrinsic evidence because two acts were qualitatively different and constituted two separate instances of sexual abuse, and further held, because trial court allowed evidence of exposure in car to be offered to prove defendant's propensity to commit charged act, trial court erred in admitting that evidence without screening it under Rule 404(c)).

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).

State v. Butler, 230 Ariz. 465, 286 P.3d 1074, ¶¶ 26–32 (Ct. App. 2012) (defendant was charged with conspiracy to possess or transport marijuana for sale; defendant objected to admission of property receipt from Georgia sheriff's department for "Nike shoe box containing a large amount of U.S. currency"; because receipt was dated less than 1 week before Arizona authorities found drugs and weapons, and cash in box in house where defendant was visiting, trial court reasonably concluded receipt directly proved alleged conspiracy or that transporting large amounts of cash was done contemporaneously with and directly facilitated charged conspiracy; additionally, receipt showed defendant had Florida address, and evidence for current chargers showed large amounts of marijuana were shipped to Florida; evidence was thus intrinsic).

404.b.cr.020 If the other act is **intrinsic** and thus evidence of this other act is **intrinsic evidence,** this other act is not a separate crime, wrong, or act, thus **intrinsic evidence** is admissible without going through a Rule 404(b) or Rule 404(c) analysis.

State v. Ferrero, 229 Ariz. 239, 274 P.3d 509, ¶¶ 11, 22 (2012) (court stated evidence of intrinsic acts, including evidence of similar sex act committed with same child that is intrinsic, is not subject to Rule 404(c) screening).

404.b.cr.030 If the other act is **intrinsic** and thus evidence of this other act is **intrinsic evidence** and thus admissible without going through a Rule 404(b) or Rule 404(c) analysis, it may additionally be admissible for other relevant purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, or to show the defendant had a character trait giving rise to an aberrant sexual propensity to commit the offense charged.

State v. Ferrero, 229 Ariz. 239, 274 P.3d 509, ¶ 12 (2012) (court stated evidence of defendant's other sexual acts with same victim might also be admissible under Rule 404(b) or Rule 404(c)).

404.b.cr.040 If the other act is not **intrinsic** and thus evidence of this other act is not **intrinsic evidence,** the evidence may still be admissible under Rule 404(b) for other relevant purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, or admissible under Rule 404(c) to show the defendant had a character trait giving rise to an aberrant sexual propensity to commit the offense charged.

State v. Ferrero, 229 Ariz. 239, 274 P.3d 509, ¶¶ 12, 23–24 (2012) (court stated evidence of defendant's other sexual acts with same victim might be admissible under Rule 404(b) or Rule 404(c)).

Cases decided under the 1996 test for intrinsic evidence that no longer applies:

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 charged with first-degree murder of husband; trial court admitted as intrinsic evidence testimony defendant's 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 claimed trial court should not have admitted evidence he had stolen murder weapon from co-worker; 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. Coghill, 216 Ariz. 578, 169 P.3d 942, ¶¶ 25–26 (Ct. App. 2007) (defendant was charged with sexual exploitation of minor (child pornography on computer); defendant contended trial court erred in admitting evidence he downloaded adult pornography; court held (1) evidence of adult pornography not inextricably intertwined with evidence of child pornography, (2) possessing adult pornography and child pornography were not part of single criminal episode, and (3) possessing adult pornography was not necessary preliminary to possessing child pornography, thus possessing adult pornography 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; evidence of gang activity by other members of street gang was intrinsic evidence).

Cases decided under the 1996 test for intrinsic evidence that no longer applies:

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 single plan, thus crimes charged 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 phrase "common scheme or plan" as used in both Rule 404(b) and Rule 13.3(a)(3), Ariz. R. Crim. P., should be read in similar fashion and noted comment to Rule 13.3(a)(3) indicated 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 other act is part of common scheme or plan only if part of particular plan (overarching plan) of which charged crime is part; court concluded 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).

Cases decided under the 1996 test for intrinsic evidence that no longer applies:

State v. Vigil, 195 Ariz. 189, 986 P.2d 222, ¶¶ 23–25 (Ct. App. 1999) (no showing defendant had 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 committing DUI on suspended or invalid license is element of offense of aggravated DUI, defendant 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) (defendant charged 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 charged with aggravated domestic violence; defendant offered to stipulate to prior convictions to avoid having jurors receive that information; state rejected offer and trial court refused to force state to accept stipulation; court held 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).

Cases decided under the 1996 test for intrinsic evidence that no longer applies:

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 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 convicted of attempted murder, robbery, unlawful flight, and prohibited possession charges; when defendant was later 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 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 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).

Cases decided under the 1996 test for intrinsic evidence that no longer applies:

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 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 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).

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. 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).

Cases decided under the 1996 test for intrinsic evidence that no longer applies:

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 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.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.2d 579, 593 (1995) (court adopted reasoning of *Huddleston*).

State v. Atwood, 171 Ariz. 576, 638, 832 P.2d 593, 655 (1992) (court adopted reasoning of *Huddleston*).

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. Ferrero, 229 Ariz. 239, 274 P.3d 509, ¶¶ 12–13 (2012) (court stated evidence of defendant's other sexual acts with same victim might be admissible under Rules 404(b) or 404(c)).

State v. Lee, 191 Ariz. 542, 959 P.2d 799, ¶ 11 (1998) (drug courier profile evidence may be properly admitted at suppression hearing to determine reasonable suspicion for stop).

State v. Cornman, 237 Ariz. 350, 351 P.3d 357, ¶ 15 (Ct. App. 2015) (defendant contended trial court should have redacted from police station interview detective's statement that they had "buys" by confidential informant; court held this was not admitted to show defendant's propensities to act in certain was and thus was not Rule 404(b) material).

State v. Gonzalez, 229 Ariz. 550, 278 P.3d 328, ¶¶ 8–16 (Ct. App. 2012) (vehicle was driven by A-P and defendant was passenger; officer removed windshield of vehicle and found methamphetamine worth $112,500 hidden in area under windshield; defendant denied knowing drugs were in vehicle; trial court admitted testimony that drug-trafficking organizations have profit motive and do not typically entrust large amounts of drugs to "unknowing transporter" because they need to know person can be trusted and drugs are going to get to destination; court held this evidence was not admitted as drug courier profile evidence, but was instead properly admitted to counter defendant's contention he did not know drugs were in vehicle).

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. Burns, 237 Ariz. 1, 344 P.3d 303, ¶¶ 34–39 (2015) (state charged defendant with kidnapping, sexual assault, murder, and misconduct with weapons; because state had to prove defendant's prior felony convictions in order to prove misconduct with weapons, and because jurors would not have heard evidence of defendant's prior felony convictions if kidnapping, sexual assault, and murder charges had been tried separately, evidence of defendant's prior felony convictions was essentially impermissible character evidence, thus trial court abused discretion in not severing charges; court found error harmless, but took opportunity to advise that weapons misconduct charges should not be joined with other charges unless there is a factual nexus).

State v. Naranjo, 234 Ariz. 233, 321 P.3d 398, ¶¶ 63–64 (2014) (evidence of defendant's damaging back of police car and his threatening and profane remarks about female police officer and defendant's daughter had no relevance and merely depicted defendant as bad person, but defendant did not object, so court reviewed for fundamental error, and found none).

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, 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).

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; trial court properly precluded this testimony as character evidence for purpose of showing action in conformance with character).

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, ¶¶ 11–12, 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; 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).

404.b.cr.105 Profile evidence may be properly admitted at suppression hearing to determine reasonable suspicion for stop, but such evidence is not admissible on substantive issue of guilt; reasons for suspicions about defendants and probable cause to arrest are not issues for jurors to determine.

State v. Ketchner, 236 Ariz. 262, 339 P.3d 645, ¶¶ 13–19 (2014) (defendant was charged with murder and attempted murder; in order to educate jurors about domestic violence patterns and general characteristics exhibited by domestic violence victims and abusers, state presented testimony from sociologist who specialized in domestic violence issues; court agreed with defendant's contention that expert created "profile" of domestic abusers and held such evidence was not admissible).

State v. Lee, 191 Ariz. 542, 959 P.2d 799, ¶ 11 (1998) (drug courier profile evidence may be properly admitted at suppression hearing to determine reasonable suspicion for stop).

State v. Lee, 191 Ariz. 542, 959 P.2d 799, ¶¶ 11–12, 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. Garcia-Quintana, 234 Ariz. 267, 321 P.3d 432, ¶¶ 12–13 (Ct. App. 2014) (court held evidence of usual practices of drug dealers was not drug profile evidence, but was instead to explain complex organization in drug transportation, which was most likely beyond knowledge of average juror).

State v. Gonzalez, 229 Ariz. 550, 278 P.3d 328, ¶¶ 8–16 (Ct. App. 2012) (vehicle was driven by A-P and defendant was passenger; officer removed windshield of vehicle and found methamphetamine worth $112,500 hidden in area under windshield; defendant denied knowing drugs were in vehicle; trial court admitted testimony that drug-trafficking organizations have profit motive and do not typically entrust large amounts of drugs to "unknowing transporter" because they need to know person can be trusted and drugs are going to get to destination; court held this evidence was not admitted as drug courier profile evidence, but was instead properly admitted to counter defendant's contention he did not know drugs were in vehicle).

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 and caused him to stop defendant was not relevant, and because of prejudicial effect, was not admissible).

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 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 boys if they 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).

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. Cota, 229 Ariz. 136, 272 P.3d 1027, ¶ 11 (2012) (court held 8 days between murders and defendant's flight went to weight of evidence and not admissibility).

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 charged with public sexual indecency based on stopping car next to 14- and 15-year old victims and masturbating; 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 over 9 years prior to charged offense; court held trial court did not err 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 left somebody behind to report him and 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 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; 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 admissible if it is relevant to show **absence of mistake or accident**.

State v. Lee(I), 189 Ariz. 590, 599, 944 P.2d 1204, 1213 (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; because defendant claimed on two separate occasions he was forced to shoot victims because they attacked him, unlikeliness of this happening twice tended to show neither shooting was accidental).

State v. Ives, 187 Ariz. 102, 111, 927 P.2d 762, 771 (1996) (because defendant denied committing acts of child molestation rather than claiming he touched victims by accident, evidence of his other acts of similar conduct was not relevant).

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 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 defendant had threatened to kill himself many times before collision by driving into oncoming traffic).

404.b.cr.190 Extrinsic evidence of another crime, wrong, or act is admissible if it is relevant to show **consciousness of guilt**.

State v. Cota, 229 Ariz. 136, 272 P.3d 1027, ¶ 11 (2012) (defendant was charged with first-degree murder; court stated evidence of flight is admissible to show consciousness of guilt when defendant flees in manner that obviously invites suspicion or announces guilt; court held 8 days between murders and defendant's flight went to weight of evidence and not admissibility).

State v. Cota, 229 Ariz. 136, 272 P.3d 1027, ¶ 12 (2012) (defendant was charged with first-degree murder; defendant contended flight evidence was inadmissible because he may have been fleeing because he had violated probation and had drugs in car; court held evidence of flight is not *per se* inadmissible merely because person is wanted on another charge; court held circumstances justified inference defendant was fleeing from more serious crime).

State v. Garza, 216 Ariz. 56, 163 P.3d 1006, ¶¶ 38–39 (2007) (when asked why he was arrested, defendant said, "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 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 is admissible if it shows **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 admissible if it is relevant to show **identity**.

State v. Johnson, 212 Ariz. 425, 133 P.3d 735, ¶¶ 7–14 & n.5 (2006) (defendant and codefendant 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 crimes: both occurred in Tucson at end of 1992, each involved female victim, and knife or knives were used at some point; differences: one victim was 19-year-old college student and other was 35-year-old prostitute; court held evidence was not sufficient to establish identity, and state failed to make necessary showing for sexual propensity 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. Goudeau, 239 Ariz. 421, 372 P.3d 945, ¶¶ 54–67 (2016) (defendant contended trial court erred by denying his motion to sever and by permitting joinder of 82 counts charging 74 felonies; court noted same gun was used in several felonies and that DNA linked defendant to several of them; moreover, defendant's *modus operandi* was similar in various ways across the various crimes; further, trial court considered factual differences among the crimes; trial court thus did not err in joinder).

State v. Goudeau, 239 Ariz. 421, 372 P.3d 945, ¶¶ 96–102 (2016) (defendant contended trial court erred in admitting evidence that he had been previously convicted of kidnapping, sexual assault, sexual abuse, and aggravated assault on two sisters; defendant conceded his convictions established other acts and that they were relevant, but contended they were not sufficiently similar to crimes charged in this case; court held they were sufficiently similar to establish identity).

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.225 Evidence of how drug organizations operate may be admissible to show *modus operandi* of such organization and thus may be relevant, typically when a defendant was found with large quantities of drugs and asserts, in defense, no knowledge of the drugs.

State v. Escalante, 245 Ariz. 135, 425 P.3d 1078, ¶¶ 22–25 (2018) (because state did not allege defendant was transporting drugs as part of drug trafficking organization, and defendant (1) was not found with drugs on his person or in his vehicle and amount of drugs found was small, (2) did not assert lack of knowledge as defense, and (3) was not charged with drug conspiracy, officer's testimony could not be considered admissible *modus operandi* evidence; because defendant did not object, court reviewed for fundamental error, and found fundamental error and prejudice).

State v. Urrea, 242 Ariz. 518, 398 P.3d 584, ¶¶ 34–37 (Ct. App. 2017) (only issue was whether 61.8 grams of cocaine were for defendant's personal use or for sale).

State v. Garcia-Quintana, 234 Ariz. 267, 321 P.3d 432, ¶¶ 12–15 (Ct. App. 2014) (court held evidence of usual practices of drug dealers was not inadmissible drug profile evidence, but was instead to explain complex organization in drug transportation, which was most likely beyond knowledge of average juror; court stated expert witness may not give opinion comparing modus operandi of organization to particular defendant).

State v. Garcia-Quintana, 234 Ariz. 267, 321 P.3d 432, ¶¶ 16–27 (Ct. App. 2014) (court described testimony from various witnesses about drug trafficking activities and held such evidence was admissible because it served to educate jurors and did not compare the activities to defendant).

State v. Gonzalez, 229 Ariz. 550, 278 P.3d 328, ¶¶ 8–16 (Ct. App. 2012) (vehicle was driven by A-P and defendant was passenger; officer ultimately windshield of vehicle and found methamphetamine worth $112,500 hidden in area under windshield; defendant denied knowing drugs were in vehicle; trial court admitted testimony that drug-trafficking organizations have profit motive and do not typically entrust large amounts of drugs to "unknowing transporter" because they need to know person can be trusted and drugs are going to get to destination; court held this evidence was not admitted as drug courier profile evidence, but was instead properly admitted to counter defendant's contention he did not know drugs were in vehicle).

404.b.cr.230 Extrinsic evidence of another crime, wrong, or act is admissible if it 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. Leteve, 237 Ariz. 516, 354 P.3d 393, ¶¶ 11–17 (2015) (after defendant's wife had filed for divorce, defendant shot and killed their two sons, age 1 and 5; court held following evidence was admissible to show defendant's intent: defendant's (1) telling his wife about his extramarital affairs, (2) calling police in attempt to have wife removed from house, (3) threats to find where wife was living, (4) attempts to create problems where wife was working, (5) sending to wife's boyfriend sexually explicit video defendant and wife had made during marriage, (6) obtaining background checks on wife's boyfriend and boyfriend's ex-wife, and (7) substantial debt and little or no money; court rejected defendant's argument that these acts against wife should not have been admitted because she was not murder victim).

State v. VanWinkle, 230 Ariz. 387, 285 P.3d 308, ¶¶ 22–24 (2012) (defendant killed victim while they were inmates in Maricopa County jail; because defendant contended he acted in self-defense and thus was justified in killing victim, state was permitted to introduce evidence of other occasions when defendant attacked others in jail facility without justification).

State v. Hardy, 230 Ariz. 281, 283 P.3d 12, ¶¶ 32–39 (2012) (evidence of defendant's prior argument and slapping victim, and that he was searching for her, showed defendant's intent).

State v. Hardy, 230 Ariz. 281, 283 P.3d 12, ¶ 41 (2012) (evidence that defendant gave gun to someone and later retrieved it showed defendant intended to kill victims).

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 charged with murder of 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 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, 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. Scott, 243 Ariz. 183, 403 P.3d 595, ¶¶ 13–16 (Ct. App. 2017) (defendant was charged with kidnapping; because defendant claimed sex was consensual, defendant placed his intent in issue, thus trial court properly admitted evidence of defendant's past conviction for sexual assault).

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 defendant had threatened many times to kill himself by driving into oncoming traffic).

State v. Harrison, 195 Ariz. 28, 985 P.2d 513, ¶¶ 14–16 (Ct. App. 1998) (because defendant claimed he acted in self-defense in assaulting police officers, his statement 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.240 Extrinsic evidence of another crime, wrong, or act is admissible if it 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 charged with first-degree murder of 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 v. Jean, 239 Ariz. 495, 372 P.3d 1019, ¶¶ 4–10 (Ct. App. 2016) (officers stopped truck that owner was driving; defendant was in sleeper berth and claimed he was simply driver-in-training; search of truck revealed 2,140 pounds of marijuana; defendant contended trial court erred when it admitted 1999 incident when Missouri HP officer stopped truck, found three people in truck and defendant in sleeper berth, one of the others claimed to be driver-in-training, and 1774 pounds of marijuana was in truck; court held trial court did not err in admitting this other act evidence to show knowledge), *vac'd in part,* 243 Ariz. 331, 407 P.3d 524, ¶ 48 (2018) (vacating ¶¶ 11–20).

State ex rel. Montgomery v. Duncan (Fries), 228 Ariz. 514, 269 P.3d 690, ¶¶ 5–8 (Ct. App. 2011) (38-year-old defendant was charged with oral sexual intercourse with 15-year-old victim; trial court ruled defendant could cross-examine her about defendant's claim that she said she previously had oral sex with two other individuals; court held trial court erred in not balancing to determine whether there was due process or other constitutional violation that would occur if evidence were precluded and thus remanded for trial court to make that determination; court 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 old).

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

State v. Acuna Valenzuela, 245 Ariz. 197, 426 P.3d 1176, ¶¶ 7–14 (2018) (victim and defendant had previously been friends, but victim testified against him in criminal proceedings, for which defendant was convicted and sentenced to prison, and as result, "their relationship soured"; after defendant got out of prison, defendant saw victim, made negative comments to him, including "I did prison time for him," and shot and killed victim; court held evidence of defendant's prior conviction was admissible to show defendant's motive for killing victim; because jurors thus heard evidence of defendant's prior conviction, trial court did not err in severing misconduct with weapons charge from murder charge).

State v. Hulsey, 243 Ariz. 367, 408 P.3d 408, ¶¶ 38–46 (2018) (officers initiated routine traffic stop and arrested driver on outstanding warrant; officer asked defendant to exit vehicle; ultimately, one officer was shot and killed; court held evidence that defendant has used methamphetamine was relevant to explain defendant's reaction to officers' presence and his behavior that followed).

State v. Escalante-Orozco, 241 Ariz. 254, 386 P.3d 798, ¶¶ 76–78 (2017) (trial court admitted as other act evidence testimony from defendant's supervisor that, day before victim's murder, defendant was not speaking to victim in "normal tone," and that victim gave supervisor "funny look" that he interpreted as her requesting that he get defendant to leave, which he did, and that later that day, defendant seemed "agitated," "wasn't himself," and "kept looking up" at victim's apartment; court noted that, "where the existence of premeditation is in issue, evidence of previous quarrels or difficulties between the accused and the victim is admissible," and that this showed a motive for killing victim).

State v. Leteve, 237 Ariz. 516, 354 P.3d 393, ¶¶ 11–17 (2015) (after defendant's wife had filed for divorce, defendant shot and killed their two sons, age 1 and 5; court held following evidence was admissible to show defendant's motive: defendant's (1) telling his wife about his extramarital affairs, (2) calling police in attempt to have wife removed from house, (3) threats to find where wife was living, (4) attempts to create problems where wife was working, (5) sending to wife's boyfriend sexually explicit video defendant and wife had made during marriage, (6) obtaining background checks on wife's boyfriend and boyfriend's ex-wife, and (7) substantial debt and little or no money; court rejected defendant's argument that these acts against wife should not have been admitted because she was not murder victim).

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 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. 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 defendant had threatened many times to kill himself by driving into oncoming traffic).

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 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 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 admissible if it 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 admissible if it 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 admissible if it 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).

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.310 Extrinsic evidence of another crime, wrong, or act is admissible if it is relevant **to rebut areas opened** by the other party.

State v. Burns, 237 Ariz. 1, 344 P.3d 303, ¶¶ 49–52 (2015) (defendant's former fiancée testified on direct about her general feelings (of fear) toward defendant; after defendant attempted on cross-examination to establish former fiancée had recently fabricated that testimony, her testimony on rebuttal that defendant threatened to kill her and that she planned to remove all guns from house was admissible to rebut claim of recent fabrication and that she was not credible, and was thus relevant).

State v. VanWinkle, 230 Ariz. 387, 285 P.3d 308, ¶¶ 18–20 (2012) (defendant killed victim while inmates in Maricopa County jail; defendant testified "inmate rules" required prisoners to resolve disputes without involving jail staff; because defendant opened door to this area, state was allowed to cross-examine defendant about other situations when he chose not to follow prison facility rules).

State v. Hausner, 230 Ariz. 60, 280 P.3d 604, ¶¶ 70–71 (2012) (defendant testified Dieteman was bisexual but he was not, and sexually-themed text messages between them were meant to be humorous, and attempted to distance himself from Dieteman by characterizing their respective sexual orientations; court held trial court properly allowed state to cross-examine defendant about his sexuality and to have wife testify she had seen him kiss another man and once told her he thought he was gay).

State v. Hausner, 230 Ariz. 60, 280 P.3d 604, ¶¶ 72–74 (2012) (defendant testified he was not violent person, would never harm person or animal, and would never harm anything; court held trial court properly allowed Dieteman to testify he and defendant set palm tree on fire and slashed tires in casino parking lot; court held Dieteman's testimony he and defendant regularly shoplifted was not admissible to rebut defendant's assertion he was not violent person but was relevant to rebut defendant's assertion he magnanimously allowed Dieteman to live with him inasmuch as both were earning money stealing; court held any error was harmless).

State v. Hausner, 230 Ariz. 60, 280 P.3d 604, ¶¶ 75–76 (2012) (defendant testified he knew his brother stabbed person but he was not present, had never been present when his brother and Dieteman stabbed person, and had not met Dieteman until days after stabbing; trial court properly allowed Dieteman to testify he and defendant were present when Defendant's brother stabbed person).

State v. Hausner, 230 Ariz. 60, 280 P.3d 604, ¶¶ 77–78 (2012) (defendant said he thought murders were tragic and thought that way during entire trial; trial court properly allowed victim and mother of another victim to testify that defendant "had gestured to them by raising his middle finger").

State v. Hausner, 230 Ariz. 60, 280 P.3d 604, ¶¶ 79–80 (2012) (defendant said he was not violent person; trial court properly allowed defendant's ex-wife to testify that defendant held her at gunpoint in desert, chased her in car, caught her, and ripped her clothing).

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, it 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.320 Extrinsic evidence of another crime, wrong, or act is admissible if it is relevant **to rebut defendant's justification defense.**

State v. VanWinkle, 230 Ariz. 387, 285 P.3d 308, ¶¶ 22–24 (2012) (defendant killed victim while they were inmates in Maricopa County jail; because defendant contended he acted in self-defense and was thus justified in killing victim, state was permitted to introduce evidence of other occasions when defendant attacked others in jail facility without justification).

404.b.cr.330 Extrinsic evidence of another crime, wrong, or act is admissible if it is relevant when **sanity** or **mental state** is an issue.

State v. Naranjo, 234 Ariz. 233, 321 P.3d 398, ¶¶ 58–62 (2014) (because defendant was claiming he had mental defects, his prior statements that "he would fake a mental illness and get out" because "[i]t's happened before" were admissible).

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 was that shootings were intentional acts of racism while intoxicated; defendant pursued insanity defense; in assessing defendant's mental health, state's expert testified he considered defendant's 1983 conviction for attempted robbery; court noted evidence of prior conviction is generally admissible when insanity is issue, but this evidence had

only minimal probative value because there was no showing 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 admissible if it 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 and children's safety in apartment).

State v. Salamanca, 233 Ariz. 292, 311 P.3d 1105, ¶¶ 2–13 (Ct. App. 2013) (defendant was speeding and weaving; defendant lost control, fishtailed across five lanes into oncoming traffic, collided head-on with another vehicle, killing driver; witnesses quickly called 9-1-1; cell phone found 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 of being distracted and angry).

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 admissible if it 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 admissible if it 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 fact of prior conviction 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. Escalante-Orozco, 241 Ariz. 254, 386 P.3d 798, ¶¶ 76–78 (2017) (trial court admitted as other act evidence testimony from defendant's supervisor that, day before victim's murder, defendant was not speaking to victim in a "normal tone," and that victim gave supervisor "funny look" that he interpreted as her requesting that he get defendant to leave, which he did, and that later that day, defendant seemed "agitated," "wasn't himself," and "kept looking up" at victim's apartment; court held this evidence showed by clear and convincing evidence that defendant committed these other acts).

State v. Goudeau, 239 Ariz. 421, 372 P.3d 945, ¶¶ 96–102 (2016) (defendant contended trial court erred in admitting evidence that he had been previously convicted of kidnapping, sexual assault, sexual abuse, and aggravated assault on two sisters; defendant conceded his convictions established other acts and that they were relevant, but contended they were not sufficiently similar to crimes charged in this case; court held they were sufficiently similar to establish identity).

State v. Anthony, 218 Ariz. 439, 189 P.3d 366,¶¶ 33–37 & n.7 (2008) (defendant 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 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 there is clear and convincing proof both that other act was committed and that defendant committed it; court concluded there was not enough evidence for jurors to conclude by clear and convincing evidence that molestation of step-daughter occurred, and thus reversed conviction).

State v. Nordstrom, 200 Ariz. 229, 25 P.3d 717, ¶ 57 (2001) (to show defendant conspired with third person to commit separate robbery, state presented (1) testimony of third person, (2) evidence that details of place to be robbed were as defendant described, and (3) testimony that defendant and third person lived together at time of robbery; this established other act by clear and convincing evidence).

State v. Terrazas, 189 Ariz. 580, 944 P.2d 1194 (1997) (court rejected 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 jurors could conclude defendant (1) left her daughter with 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. Jean, 239 Ariz. 495, 372 P.3d 1019, ¶¶ 4–10 (Ct. App. 2016) (officers stopped truck that owner was driving; defendant was in sleeper berth and claimed he was simply driver-in-training; search of truck revealed 2,140 pounds of marijuana; defendant contended trial court erred when it admitted 1999 incident when Missouri HP officer stopped truck, found three people in truck and defendant in sleeper berth, one of the others claimed to be driver-in-training, and 1774 pounds of marijuana was in truck; court held trial court did not err in admitting this other act evidence to show knowledge), *vac'd in part,* 243 Ariz. 331, 407 P.3d 524, ¶ 48 (2018) (vacating ¶¶ 11–20).

State v. Smyers, 205 Ariz. 479, 73 P.3d 610, ¶¶ 6–8 (Ct. App. 2003) (defendant charged with furnishing harmful items to 11-year-old minor by showing her pictures of persons engaged in sexual intercourse; trial court ruled state could admit evidence that defendant had kissed victim on lips, tried to "French kiss" her, 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 trial court used clear and convincing standard, there was no indication it 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. 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).

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. Escalante-Orozco, 241 Ariz. 254, 386 P.3d 798, ¶¶ 76–81 (2017) (trial court admitted as other act evidence testimony from defendant's supervisor that, day before victim's murder, defendant was not speaking to victim in "normal tone," and that victim gave supervisor "funny look" that he interpreted as her requesting that he get defendant to leave, which he did, and that later that day, defendant seemed "agitated," "wasn't himself," and "kept looking up" at victim's apartment; court noted that, "where the existence of premeditation is in issue, evidence of previous quarrels or difficulties between the accused and the victim is admissible," and that this showed a motive for killing victim; court further held this evidence would not suggest decision based on improper basis, such as emotion, sympathy, or horror).

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. Gentry,* 247 Ariz. 381, 449 P.3d 707, ¶¶ 14–21 (Ct. App. 2019) (victim (M.R.) and defendant's step-daughter (Autumn) has son together; as result of altercation in June 2016, defendant shot and killed victim, and claimed self-defense and defense of third person (Autumn); defendant sought to introduce following evidence: (1) in August 2015, M.R. hit and damaged wall of defendant's freezer; (2) in August 2015, M.R. hit Autumn in face with table when she was pregnant; (3) in December 2015, M.R. pushed Autumn to ground when she was pregnant, causing her to go into early labor; (4) in March 2016, while M.R. was holding their baby, he attempted to kick Autumn, fell to the ground, and hit baby's head; and (5) on date of the offense, M.R. pushed Autumn, and their son had signs of physical abuse on his body; trial court allowed admission of these other acts, but precluded evidence that Autumn was pregnant in (2) and (3); court held trial court did not abuse discretion in precluding that evidence).

State v. Williams, 209 Ariz. 228, 99 P.3d 43, ¶¶ 22–23 (Ct. App. 2004) (defendant charged with public sexual indecency based on his stopping car next to 14- and 15-year old victims and masturbating; 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 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) (ballistic evidence showed shell casing found at later robbery was consistent with ammunition used in officer's gun, thus 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) (for 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 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, few hours before 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 state must prove each element of charges beyond reasonable doubt, and instructed jurors on each of 12 verdict forms and charges to which forms related; because defendant did not request more specific instruction, he waived any error).

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. VanWinkle, 230 Ariz. 387, 285 P.3d 308, ¶ 24 (2012) (defendant killed victim while they were inmates in Maricopa County jail; to rebut defendant's self-defense/justification defense, trial court admitted evidence of other occasions when defendant attacked others in jail facility without justification; defendant did not request limiting instruction).

State v. Lee(I), 189 Ariz. 590, 944 P.2d 1204 (1997) (trial court instructed jurors state must prove each element of charges beyond reasonable doubt, on each of 12 verdict forms and charges to which forms related; because defendant did not request 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; 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); *vac'd on other grounds,* 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.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 other act; court found any error harmless).

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 others, 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 other act evidence and requested mistrial; court held this testimony constituted error, but concluded that, in light of totality of evidence 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 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 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 (1)these were merely vague reference to unproved crimes and (2) 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 he 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 person had a character trait giving rise to an aberrant sexual propensity to commit the alleged sexual offense.

State v. Ferrero, 229 Ariz. 239, 274 P.3d 509, ¶¶ 12–13 (2012) (court stated evidence of defendant's other sexual acts with same victim might be admissible under Rules 404(b) or 404(c)).

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 This section allows admission of evidence of other crimes, wrongs, or acts, and makes no distinction between the admission of evidence of another crime, wrong, or act a person committed as a juvenile and one the person committed as an adult.

* *State v. Rose,* 246 Ariz. 480, 440 P.3d 999, ¶¶ 8–12 (Ct. App. 2019) (defendant was convicted of sexual conduct with minor that he committed when he was 36 to 38 years of age; defendant contended trial court erred in admitting evidence of his juvenile adjudication for child molestation; court held rule on its face did not preclude evidence of juvenile adjudication, and declined defendant's invitation for court to add to rule, by judicial fiat, additional restriction on admission of such other-acts evidence, namely, that no evidence of act committed when defendant was juvenile may be admitted).

404.c.cr.030 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.040 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 state-

ments 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.050 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. 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 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 allowed evidence of sexual acts by defendant against same victim and said it did not need to go through Rule 404(b) or (c) analysis; court held such analysis was necessary even when other acts were against same victim).

404.c.cr.060 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, 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).

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. Arner, 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.015 Before admitting evidence of another act in a sexual misconduct case, the trial court must determine, by clear and convincing evidence, that the defendant committed the other act.

State v. James, 242 Ariz. 126, 393 P.3d 467, ¶¶ 10–17 (Ct. App. 2017) (victim said defendant had molested her on occasions other than charged acts, and defendant had pled guilty to committing certain other sex acts against victim's mother; court held trial court did not err in admitting other act evidence).

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)).

State v. James, 242 Ariz. 126, 393 P.3d 467, ¶¶ 18–24 (Ct. App. 2017) (victim said defendant had molested her on other occasions, and defendant had pled guilty to committing certain other sex acts against victim's mother; court held that, "given the absence of a true factual dispute regarding the other acts, the trial court did not abuse its discretion in finding the clear-and-convincing-evidence standard satisfied, even in the absence of a pretrial hearing with live witness testimony").

404.c.1.A.cr.030 In determining whether the evidence is sufficient to permit the trier-of-fact to find that the defendant committed the other act, an evidentiary hearing is necessary only if a material factual dispute exists in the record that would necessitate the presentation of additional evidence.

State v. James, 242 Ariz. 126, 393 P.3d 467, ¶¶ 23–24 (Ct. App. 2017) (victim said defendant had molested her on other occasions, and defendant had pled guilty to committing certain other sex acts against victim's mother; because in confrontation call defendant admitted to licking and repeatedly touching victim and likewise admitted to criminal activity with victim's mother that had resulted in his conviction as sex offender, record supported both women's allegations, thus trial court did not err in not holding pre-trial hearing).

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. Benson, 232 Ariz. 452, 307 P.3d 19, ¶¶ 11–14 (2013) (court stated attacks did not have to align precisely to be cross-admissible; although there were some differences (one attack involved second assailant and 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 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).

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 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 three victims occurred within 3 months; although attack on another victim occurred 2¼ years before those attacks, time interval did not require trial court to find 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).

State v. Herrera, 232 Ariz. 536, 307 P.3d 103, ¶ 28 (Ct. App. 2013) (defendant charged with sexual conduct with minor: (1) having victim masturbate him, (2) placing 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 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 that victim).

State v. Arner, 195 Ariz. 394, 988 P.2d 1120, ¶¶ 2–5 (Ct. App. 1999) (defendant charged with molesting 10-year-old boy; at pretrial hearing, psychologist testified defendant's molestation of 11-year-old boy 3 years earlier was recent enough to have predictive value and would show defendant had 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 such testimony is no longer required under Rule 404(c)).

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) (expert testimony and other 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. 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 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).

State v. Dixon, 226 Ariz. 545, 250 P.3d 1174, ¶¶ 12–16 (2011) (defendant convicted of felony murder (sexual assault as predicate felony); trial court admitted evidence of defendant's prior conviction for sexual assault; because (1) defendant had been out of custody for only 1 year before charged offense, (2) defendant repeatedly intimated sex with victim was consensual, and (3) circumstances of prior sexual assault and charged offense were strikingly similar, trial court did not abuse discretion in finding probative value not substantially outweighed by danger of unfair prejudice).

State v. Arner, 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).

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).

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 motion to sever two counts alleging sexual conduct in March 1995 with 16 counts alleging sexual conduct with same minor in October 1996; count concluded evidence of 16 counts would have been admissible at separate trial on other two counts; because acts were against same victim, it 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. Arner, 195 Ariz. 394, 988 P.2d 1120, ¶¶ 10–11 (Ct. App. 1999) (defendant 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.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) (instructions: (1) jurors 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) jurors 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 charged crimes).

404.c.2.cr.030 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. Arner, 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.040 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. Arner, 195 Ariz. 394, 988 P.2d 1120, ¶ 13 (Ct. App. 1999) (defendant 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 not to 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 was 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).

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. Savard, 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 and 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 was not prejudicial).

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 re-direct 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 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 character for truthfulness in issue, state permitted to rebut 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).

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 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).

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 "Eastsiders" when defendant did not know of this gang, did not know victim was member of 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 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 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 officers had character trait of violent behavior in order to establish his defense of self-defense, and because failure to prove 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 when 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).

April 1, 2020

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).

Rasor v. Northwest Hosp. LLC, 239 Ariz. 546, 373 P.3d 563, ¶¶ 29–36 (Ct. App. 2016) (plaintiff contended ICU nurse provided deficient care in failing to take steps to minimize bed pressure and in failing to timely discover pressure ulcer; patient records of all ICU patients who had developed pressure ulcers in 4 years preceding plaintiff's injury could be relevant for discovery purposes based on plaintiff's contention that defendant's staff had habit or routine of not following hospital's repositioning procedures), *vac'd in part,* 242 Ariz. 582, 399 P.3d 657 (2017) (vacating ¶¶ 17–23).

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).

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 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 requiring prior knowledge of collision would upset underlying policy that rule was designed to implement because potential defendants would be reluctant to make safety changes for fear of being sued over unkown accidents 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).

Rule 408. Compromise and 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 This rule precludes use of a consent judgment to prove substantive facts to establish liability for a subsequent claim, and a consent judgment likewise may not be used for impeachment purposes under Rule 613.

Phillips v. O'Neil, 243 Ariz. 299, 407 P.3d 71, ¶¶ 9–25 (2017) (Arizona Attorney General sued Phillips for violations of Arizona Consumer Fraud Act, alleging he mailed deceptive advertisements to Arizona consumers; Phillips agreed to consent judgment, in which he waived his right to a trial, admitted his actions violated the CFA and a federal regulation, and agreed to pay restitution, attorney fees, and civil penalties; court held State Bar was precluded from introducing evidence of consent judgment in disciplinary proceedings pending against Phillips relating to same conduct).

408.020 Although evidence of an offer to compromise is not admissible to prove or disprove the validity or amount of a disputed claim or to impeach by a prior inconsistent statement or a contradiction, 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).

Murray v. Murray, 239 Ariz. 174, 367 P.3d 78, ¶¶ 14–16 (Ct. App. 2016) (in dispute over parenting time, mother offered father's out-of-court statements, not to support her claim, but instead to prove she and father had reached agreement, thus trial court erred in not considering those statements; court noted nothing in Rule 408 bars evidence offered to prove a settlement resolving a claim).

Henry v. Healthpartners of Southern Arizona, 203 Ariz. 393, 55 P.3d 87, ¶¶ 14–15 (Ct. App. 2002) (medical malpractice action filed against decedent's doctor, TMC/HSA, and center's radiologist; 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 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 evidence of settlement agreement and details was admissible to show potential bias of witnesses and to question whether defendant mitigated damages).

408.030 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 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 and A.R.S. § 12–1116(J) precluded admission of report).

408.040 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 ordering defendant doctor to disclose amounts paid in settlement of previous medical malpractice actions brought against him).

408.050 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).

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.

April 1, 2020

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 guilty plea, later withdrawn, or a nolo contendere or no contest plea, or an offer to plead guilty, nolo contendere, or no contest to the crime charged or another 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).

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 about possible guilty plea that would require defendant to testify truthfully, defendant signed document affirming that his earlier statements to police were truthful; when defendant denied truth of his statements to police, state impeached him with signed document and 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 minimum 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 A statement of fact form executed in order to participate in a TASC program, if not made within the context of a plea agreement discussion, is not a statement in connection with a plea agreement, and thus is not precluded by this rule.

State v. Gill, 242 Ariz. 1, 391 P.3d 1193, ¶¶ 9–14 (2017) (after state reduced possession of marijuana charges to misdemeanor and defendant rejected plea offer, parties agreed defendant would participate in TASC; when defendant failed to complete TASC program, state sought to admit statements defendant made in "statement of facts" form).

410.080 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).

410.090 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 mis-impression left by defendant that state was secreting information about co-defendant's credibility by inquiring into co-defendant's guilty plea).

April 1, 2020

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. Z.), 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 Z.; trial court ordered Zoltan to provide various items of information covering last 8 years; petitioner conceded that respondent may take Z'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 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 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).

April 1, 2020

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, 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).

State ex rel. Montgomery v. Duncan (Fries), 228 Ariz. 514, 269 P.3d 690, ¶¶ 5–8 (Ct. App. 2011) (38-year-old defendant was charged with having 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. 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 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 v. Inzunza, 234 Ariz. 78, 316 P.3d 1266, ¶¶ 18–21 (Ct. App. 2014) (because of victim's mental defects and because of way sexual assault was alleged to have happened 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).

State ex rel. Montgomery v. Duncan (Fries), 228 Ariz. 514, 269 P.3d 690, ¶¶ 5–8 (Ct. App. 2011) (38-year-old defendant was charged with having 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. 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).

RELEVANCY AND ITS LIMITS

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

State v. Burns, 237 Ariz. 1, 344 P.3d 303, ¶¶ 43–44 (2015) (victim and defendant met at gas station and went out on date; almost 3 weeks later, victim was found dead and state charged defendant with kidnapping, sexual assault, and murder; in opening statement and closing argument, prosecutor stated this was victim's "first date"; court held relationship between use of term "first date" in this case and sexual conduct was not so close that it fell within ambit of this statute).

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).

412.050 Evidence of specific instances of the victim's prior sexual conduct may be admitted only if the proponent of such evidence proves by clear and convincing evidence that (1) the evidence is relevant and is material to a fact in issue in the case, (2) the evidence is of false allegations of sexual misconduct made by the victim against others, and (3) the inflammatory or prejudicial nature of the evidence does not outweigh the probative value of the evidence.

State ex rel. Montgomery v. Padilla (Simcox), 238 Ariz. 560, 364 P.3d 479, ¶¶ 13–16 (Ct. App. 2015) (defendant sought to admit testimony of doctor who said victim reported that another person (N) had touched her inappropriately; court stated it was not clear whether trial court determined (1) evidence was relevant and is material to fact in issue in case, but stated it was clear that trial court never found (2) evidence was of false allegations of sexual misconduct made by victim against others or (3) inflammatory or prejudicial nature of evidence did not outweigh probative value of the evidence; court thus vacated trial court's ruling that evidence was admissible).

April 1, 2020

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).

Rule 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.

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

01. In General.

501.01.010 The privilege against self-incrimination applies only in a criminal proceeding or to testimony that could be used in a criminal proceeding; there is no equivalent privilege to refuse to testify to avoid civil liability.

Tracy v. Superior Ct., 168 Ariz. 23, 810 P.2d 1030 (1991) (Navajo Nation did not act improperly in attempting to obtain witness's testimony in criminal action against persons who had allegedly conspired to obtain money from tribe by selling tribal land at inflated price, even though Navajo Nation might be able to use witness's testimony against him in civil action to recover money).

501.01.020 When a discovery request made in a civil proceeding may tend to incriminate the party on whom the request is served, the party may invoke privilege against self-incrimination.

State v. Ott, 167 Ariz. 420, 808 P.2d 305 (Ct. App. 1990) (answering request for admissions in civil RICO action would violate defendant's privilege against self-incrimination).

501.01.030 A statute compelling a person to give testimony must provide immunity no less extensive than the privilege against self-incrimination, and must prohibit the prosecution from using the compelled testimony in any respect.

State v. Gertz, 186 Ariz. 38, 918 P.2d 1056 (Ct. App. 1995) (because state's attorney who represented BOMEX in license suspension proceedings against defendant gave transcripts of defendant's compelled testimony to prosecutor and was with prosecutor throughout trial, state failed to meet burden of showing prosecution was independent of compelled testimony).

501.01.040 Privileges are not based on constitutional mandate but, rather, by statute, rule, and common-law interpretation, and thus may vary from jurisdiction to jurisdiction.

Tracy v. Superior Ct., 168 Ariz. 23, 810 P.2d 1030 (1991) (fact that Navajo Nation might not recognize attorney-client privilege or accountant-client privilege was not an "undue hardship" that would prevent court from enforcing order of Navajo district court pursuant to Uniform Act to Secure Attendance of Witnesses).

City of Tucson v. Superior Ct. (Dolny), 167 Ariz. 513, 809 P.2d 428 (1991) (because no evidence exists that either Arizona courts or legislature have considered question whether there should be a privilege for communications considered in process of selecting a city magistrate, there is nothing to indicate that either have rejected such a concept).

Humana Hosp. Desert Valley v. Superior Ct. (Edison), 154 Ariz. 396, 742 P.2d 1382 (Ct. App. 1987) (A.R.S. § 36–445.01(A) & (B) created a privilege for medical peer review proceedings, and records and materials prepared in connection with proceedings).

02. Requirements for a Privilege.

501.02.010 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 v. Peltz, 242 Ariz. 23, 391 P.3d 1215, ¶¶ 21–27 (Ct. App. 2017) (defendant was in hospital room with door not completely closed and talking loud enough to be heard in hallway; officer was in hallway for proper purpose; court held defendant had no reasonable, objective expectation of privacy in his statements to medical personnel, and even if he had subjective expectation of privacy, it was not one that society would recognize as reasonable; court held this was true even in context of physician-patient privilege).

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).

501.02.020 The burden of showing the relationship, the confidential character of the communication, and other necessary facts is upon the party claiming the privilege, and the determination whether a privileged relationship exists is for the trial court, which must make this determination based upon the surrounding circumstances.

State v. Sands, 145 Ariz. 269, 700 P.2d 1369 (Ct. App. 1985) (trial court did not abuse discretion in determining that no privilege existed between defendant holding hostages and psychologist called in by police to negotiate with defendant).

G & S Invest. v. Belman, 145 Ariz. 258, 700 P.2d 1358 (Ct. App. 1984) (evidence showed decedent contacted and consulted witness not as attorney but as friend, thus privileged relationship did not exist).

03. Purpose of a Privilege.

501.03.010 Because the purpose of a privilege is to promote candor, it is necessary for the participants to know that the privilege exists when the communication is made and that it will protect the communication later, thus a qualified privilege is tantamount to no privilege at all.

Samaritan Found. v. Goodfarb, 176 Ariz. 497, 862 P.2d 870 (1993) (court rejected court of appeals' concept of qualified privilege for non-control group employees).

Blazek v. Superior Ct., 177 Ariz. 535, 869 P.2d 509 (Ct. App. 1994) (court rejected trial court's conclusion that marital privilege did not apply to statements made when marriage was "irretrievably broken" because this would make existence of privilege dependent on an assessment of condition of marriage made at a time after statements were made).

501.03.020 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).

04. Information Protected by a Privilege.

501.04.010 Privilege protects the substance of a conversation, but does not preclude evidence that a communication took place or evidence of the circumstances surrounding the conversation.

State v. Schaaf, 169 Ariz. 323, 819 P.2d 909 (1991) (trial court did not abuse discretion in allowing state to call as its witness a fingerprint expert hired by defendant, and to question witness about his analysis of certain evidence).

State v. Lamb, 142 Ariz. 463, 690 P.2d 764 (1984) (in motion to withdraw, defendant's attorney said he received exculpatory information about defendant from another client; trial court granted motion to withdraw; defendant filed motion to compel attorney to disclose name of other client).

State v. Adamson, 136 Ariz. 250, 665 P.2d 972 (1983) (state allowed to ask questions about fact of consultation, as well as dates, times, places, and means of consultation, but not allowed to ask whether attorney and defendant discussed certain subjects).

Granger v. Wisner, 134 Ariz. 377, 656 P.2d 1238 (1982) (fact that plaintiff had initially retained doctor and had been examined by him did not preclude defendant from calling doctor as an expert witness and asking him questions, as long as questions did not call for information he received as a result of confidential communications with plaintiff).

State v. Alexander, 108 Ariz. 556, 503 P.2d 777 (1972) (state permitted to call defendant's prior attorney as witness to establish that defendant had a prior conviction).

Ulibarri v. Superior Ct. (Gerstenberger), 184 Ariz. 382, 909 P.2d 449 (Ct. App. 1995) (plaintiff contended defendant psychiatrist had hypnotized her and subjected her to non-consensual sexual relations; dates of alleged acts were outside statute of limitations period, but plaintiff claimed hypnosis had prevented her from remembering acts until recently; defendant psychiatrist claimed plaintiff had told him at a time within statute of limitations period that she had consulted an attorney, who had advised her to sue defendant psychiatrist; court held that fact that plaintiff consulted attorney would not be privileged, but any conversation between them would be privileged, unless privilege had been waived), *rev. denied,* 186 Ariz. 419, 924 P.2d 109 (1996).

501.04.020 Privilege does not protect a communication that was disclosed to a third party or that a third party overheard.

State v. Beaty, 158 Ariz. 232, 762 P.2d 519 (1988) (because defendant made statements in presence of third parties, they were not protected by a privilege).

Brown v. Superior Ct., 137 Ariz. 327, 670 P.2d 725 (1983) (statements made by accountant to client as result of examining records of someone else).

State v. Huffman, 137 Ariz. 300, 670 P.2d 405 (Ct. App. 1983) (statute did not prohibit police officer from testifying about statements he heard defendant make to treating physician).

Longs Drug Stores v. Howe, 134 Ariz. 424, 657 P.2d 412 (1983) (statements made by insured to insurance investigator in preparation for litigation).

Granger v. Wisner, 134 Ariz. 377, 656 P.2d 1238 (1982) (information received from non-client source).

Ulibarri v. Superior Ct. (Gerstenberger), 184 Ariz. 382, 909 P.2d 449 (Ct. App. 1995) (because plaintiff allegedly told defendant psychiatrist she had consulted an attorney, and that attorney had advised her to sue defendant psychiatrist, court held that plaintiff had waived attorney-client privilege), *rev. denied,* 186 Ariz. 419, 924 P.2d 109 (1996).

05. Right to Information Protected by a Privilege.

501.05.010 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 charged with DUI and child abuse (having child in car); A.R.S. § 13–3620(G) provides all privileges (except attorney-client privilege) abrogated in any proceeding involving child abuse; 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) (applied privilege to preclude admission of testimony of doctor who saw defendant for independent medical examination).

501.05.020 The physician-patient privilege does not yield to the request of a criminal defendant for information merely because that information may be helpful to the defendant's defense; to be entitled to an *in camera* review of privileged records as a matter of due process, the defendant must establish a substantial probability that the protected records contain information critical to an element of the charge or defense, or that their unavailability would result in a fundamentally unfair trial.

State v. Towery, 186 Ariz. 168, 920 P.2d 290 (1996) (because jurors already knew extent of benefits witness would receive from his plea agreement, trial court did not abuse its discretion in precluding inquiry into communications between witness and his attorney about plea agreement).

* *R.S. v. Thompson (Vanders),* 247 Ariz. 575, 454 P.3d 1010, ¶¶ 9–28 (Ct. App. 2019) (defendant was charged with second-degree murder; on his request, trial court ordered hospital to disclose deceased victim's privileged mental health records for *in camera* review; court held that, because defendant did not establish substantial probability that protected records contained information critical to element of charge or defense, or that their unavailability would result in fundamentally unfair trial, trial court erred by granting *in camera* review of victim's privileged records).

State ex rel. Romley v. Superior Ct. (Roper), 172 Ariz. 232, 836 P.2d 445 (Ct. App. 1992) (defendant charged with aggravated assault against her husband claimed she acted in self-defense during one of his attacks; court ordered *in camera* inspection of victim's medical records and disclosure of any material essential to defendant's claim of self-defense and for impeachment of victim's ability to perceive, remember, and relate events).

501.05.030 Under the new civil rules, the *client* must disclose certain *facts,* and a client may not protect those facts from disclosure merely by communicating them to the attorney; the attorney-client privilege, however, precludes the attorney from disclosing those facts, except upon the consent of the client.

Samaritan Found. v. Goodfarb, 176 Ariz. 497, 862 P.2d 870 (1993) (court rejected plaintiff's argument that new civil rules would require attorney to disclose statements of employee-witnesses).

06. Accountant-Client.

501.06.010 The accountant-client privilege does not apply in a criminal prosecution.

State v. O'Brien, 123 Ariz. 578, 601 P.2d 341 (Ct. App. 1979) (statutory privileges strictly construed, and express language of statute precludes application to criminal proceedings).

07. Attorney-Client.

501.07.010 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).

501.07.020 The attorney-client privilege applies to communications between an attorney for a corporation, governmental entity, partnership, business association, or other similar entity or an employer, and any employee, agent, or member of the entity or employer, and protects communications about acts or omissions of or information from the employee, agent or member if the communication is either (1) for the purpose of providing legal advice to the entity, employer, employee, agent, or member, or (2) for the purpose of obtaining information in order to provide legal advice to the entity, employer, employee, agent, or member, but does not cover disclosure of facts.

Salvation Army v. Bryson, 229 Ariz. 204, 273 P.3d 656, ¶¶ 14–24 (Ct. App. 2012) (court held trial court abused discretion in ordering corporation to disclose summaries of interviews conducted by investigator employed by corporation's attorney with four of corporation's employees; on remand, trial court was to determine whether six of corporation's volunteers could be considered "agents" or "members" and thus whether their interviews would be privileged).

501.07.030 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 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).

501.07.040 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).

501.07.050 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).

501.07.060 The attorney-client privilege protects communications between a client and an attorney, and the attorney's secretary, stenographer, clerk, or paralegal, provided the paralegal is functioning for the attorney in receiving information from, or giving advice to, the client; when the paralegal is merely acting as an investigator, the information may not be privileged.

Smart Indus. v. Superior Ct., 179 Ariz. 141, 876 P.2d 1176 (Ct. App. 1994) (trial court would have authority to disqualify an attorney because attorney's firm hired a paralegal that had previously worked for a firm that represented opposing party in a lawsuit).

Samaritan Found. v. Superior Ct., 173 Ariz. 426, 844 P.2d 593 (Ct. App. 1992) (because paralegal was acting solely at direction of defendant's legal department in anticipation of litigation against defendant, statements from employee-witnesses were protected to same extent as if witnesses had made them to attorney), *vacated on other grounds,* 176 Ariz. 497, 862 P.2d 870 (1993).

501.07.070 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).

501.07.080 The attorney-client privilege protects communications between lawyer and client, it does not extend to facts that are not part of the communication, thus the fact that a client has consulted an attorney, the identity of the client, and the dates and number of visits to the attorney are not privileged.

State v. Lamb, 142 Ariz. 463, 690 P.2d 764 (1984) (in motion to withdraw, defendant's attorney said he received exculpatory information about defendant from another client; trial court granted motion to withdraw; defendant filed motion to compel attorney to disclose name of other client).

State v. Adamson, 136 Ariz. 250, 665 P.2d 972 (1983) (state permitted to ask questions about fact of consultation, as well as dates, times, places, and means of consultation, but was not allowed to ask whether attorney and defendant discussed certain subjects).

State v. Alexander, 108 Ariz. 556, 503 P.2d 777 (1972) (state permitted to call defendant's prior attorney as witness to establish that defendant had a prior conviction).

Ulibarri v. Superior Ct. (Gerstenberger), 184 Ariz. 382, 909 P.2d 449 (Ct. App. 1995) (plaintiff claimed defendant psychiatrist had hypnotized her and subjected her to non-consensual sexual relations; dates of alleged acts were outside statute of limitations period, but plaintiff claimed hypnosis had prevented her from remembering acts until recently; defendant psychiatrist claimed plaintiff had told him at a time within statute of limitations period she had consulted attorney, who had advised her to sue defendant psychiatrist; court held that fact that plaintiff consulted attorney would not be privileged, but any conversation between them would be privileged, unless privilege had been waived), *rev. denied,* 186 Ariz. 419, 924 P.2d 109 (1996).

501.07.090 There is no attorney-client privilege between a person and a lay representative, including a "jailhouse lawyer."

State v. Melendez, 168 Ariz. 275, 812 P.2d 1093 (Ct. App. 1991) (trial court erred in concluding that testimony by defendant's inmate representative was protected by attorney-client privilege), *vacated on other grounds,* 172 Ariz. 68, 834 P.2d 154 (1992).

State v. Rivera, 168 Ariz. 102, 811 P.2d 354 (Ct. App. 1990) (trial court did not err in refusing to suppress testimony of fellow inmate that defendant claimed was his jailhouse lawyer).

501.07.100 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).

501.07.110 Under the attorney-client privilege, unless the client consents, the attorney may not be required to disclose communications the client made to the attorney or advice the attorney gave to the client in the course of the professional employment, thus only the client may elect to waive the privilege, and the privilege survives even after the client's death.

Samaritan Found. v. Goodfarb, 176 Ariz. 497, 862 P.2d 870 (1993) (plaintiff sought to obtain statements employee-witnesses made to corporate counsel; court held that statements were not privileged).

State v. Cuffle, 171 Ariz. 49, 828 P.2d 773 (1992) (by claiming 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, 625 P.2d 320 (1981) (by claiming attorney provided ineffective assistance of counsel, defendant waived attorney-client privilege to extent necessary to resolve question).

State v. Macumber, 112 Ariz. 569, 544 P.2d 1084 (1976) (trial court properly precluded testimony of two attorneys who would have testified that their client had confessed to them that he had killed victim whom defendant was accused of killing).

501.07.120 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, 775–77 (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 no contest 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. Zuck, 134 Ariz. 509, 515–16, 658 P.2d 162, 168–69 (1982) (defendant contended trial counsel failed to communicate with him, failed to honor his request for speedy trial, and failed to prepare for trial adequately; court held defendant, by his attack on counsel's competency, waived the attorney-client privilege for contentions asserted).

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 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).

501.07.130 When a defendant contends a plea was involuntary because the trial court did not inform of certain matter, what the defendant's attorney told the defendant then becomes relevant, thus by making a claim of an involuntary plea, the defendant waives the attorney-client privilege.

State v. Cuffle, 171 Ariz. 49, 51–53, 828 P.2d 773, 775–77 (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 no contest 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. Lawonn, 113 Ariz. 113, 114, 547 P.2d 467, 468 (1976) (court held that, by raising on appeal issue of lack of knowledge of rights waived by guilty plea, defendant waived attorney-client privilege so that trial court could determine what defendant's attorney told defendant).

Waitkus v. Mauet, 157 Ariz. 339, 340, 757 P.2d 615, 616 (Ct. App. 1988) (by attacking competency of attorney, defendant waived attorney-client privilege; trial court exceeded authority in ordering defendant to disclose attorney's work product and trial preparation files).

08. Arizona Medical Board.

501.08.010 Information gathered in the course of an investigation by the Arizona State Board of Medical Examiners (BOMEX) is absolutely privileged under A.R.S. § 32–1451.01(C) and is therefore immune to discovery by civil litigants.

Arizona Bd. Medical Exam'rs v. Superior Ct., 186 Ariz. 360, 922 P.2d 924 (Ct. App. 1996) (in dissolution and child custody litigation, wife sought records from when BOMEX ordered husband examined by psychologist; court held these were absolutely privileged and thus not subject to discovery).

501.08.020 During the course of any investigation, if the Arizona Medical Board determines 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).

501.08.030 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 qualified privilege for one who provides information in good faith.

Desert Palm Surg. Grp. v. Petta, 236 Ariz. 568, 343 P.3d 438, ¶¶ 31–33 (Ct. App. 2015) (trial court instructed jurors on qualified privilege for defendant's statements to medical and dental boards; plaintiff presented evidence from which jurors could find defendant acted out of spite or to ruin plaintiffs' reputation or injure their business).

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).

09. Cleric/Priest-Penitent.

501.09.010 The cleric/priest-penitent privilege prohibits the disclosure of a confession made by a penitent to a cleric or priest acting in that 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).

Church of Jesus Christ of LDS v. Superior Ct. (Brown), 159 Ariz. 24, 764 P.2d 759 (Ct. App. 1988) (privilege belongs to penitent, not to clergy/priest; no separate privilege belonging to clergy/priest).

501.09.020 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 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).

501.09.030 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 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 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).

501.09.040 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 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).

501.09.050 A "clergyman" is not limited to an ordained clergy; instead, whether a person is a clergyman of an 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 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).

10. Clinical Social Worker. #10

501.10.010 A.R.S. § 32–3283(A) provides the confidential relationship between a licensed clinical social worker and the patient is the same as between an attorney and a client, and further provides the licensee shall not voluntarily or involuntarily divulge information received as a result of that relationship unless the patient waives the privilege in writing or in court testimony.

Abeyta v. Soos (Sierra Tucson, Inc. & Sonntag), 234 Ariz. 190, 319 P.3d 996, ¶¶ 8–10 (Ct. App. 2014) (Abeyta and Bruno were engaged in a long-time domestic relationship; Abeyta began counseling with Sonntag, and on Sonntag's advice, Bruno joined Abeyta in counseling; Sonntag told them all communications with one would be communicated to the other, and Sonntag kept only one chart; later on Sonntag's recommendation, Bruno checked into Sierra Tucson, and while there, injured his back, so sued Sierra Tucson and Sonntag; Abryta sought protective order to prevent disclosure of chart from joint counseling and to preclude questioning about chart when he was being deposed; court held Abeyta had not given written waiver of privilege, thus chart should not be disclosed).

Abeyta v. Soos (Sierra Tucson, Inc. & Sonntag), 234 Ariz. 190, 319 P.3d 996, ¶¶ 11–15 (Ct. App. 2014) (although Bruno may have waived his privilege by suing and placing his mental health at issue, that did not have effect of waiving Abeyta's privilege).

Abeyta v. Soos (Sierra Tucson, Inc. & Sonntag), 234 Ariz. 190, 319 P.3d 996, ¶ 16 (Ct. App. 2014) (even assuming Bruno could be considered third party to Abeyta's therapy, nothing in Abeyta's communications with Bruno suggests an to waive Abeyta's privilege).

11. Confidentiality Statute.

501.11.010 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 application for TRO, Commission included investigator's affidavit; court held inclusion of affidavit made public all information in affidavit; because affidavit stated that investigator had identified "at least 104 Mathon Fund investors," Commission must disclose names of those investors).

12. Corporate Litigation.

501.12.010 The litigation privilege protects communications made during litigation, but does not protect a course of conduct evidenced by a communication.

Tucson Airport Auth. v. Certain Underwriters, 186 Ariz. 45, 918 P.2d 1063 (Ct. App. 1996) (because bad faith claim was not based on communication, but instead on course of "wrongful and tortious" conduct evidence by actions and communications during litigation, litigation privilege would not apply).

501.12.020 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 documents in grand jury proceedings; court rejected argument that amendment to statute for civil cases should also apply in criminal cases).

501.12.030 When an employee at any level in a corporation makes a communication on behalf of the corporation to corporate counsel, the communication is privileged, and the privilege belongs to the corporation, not to the person making the communication.

Samaritan Found. v. Goodfarb, 176 Ariz. 497, 862 P.2d 870 (1993) (employees made statements to corporate counsel and investigator; court concluded they were not privileged).

501.12.040 When an employee is seeking legal advice in the employee's individual capacity, all communications initiated by the employee and made in confidence to the employer's counsel are privileged, and the privilege belongs to the employee.

Samaritan Found. v. Goodfarb, 176 Ariz. 497, 862 P.2d 870 (1993) (because none of employee-witnesses had perceived need for legal advice in their individual capacities, action of corporation in having these employees retain corporate counsel as their attorney did not create attorney-client relationship and make communications privileged).

501.12.050 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 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).

501.12.060 An expert retained to investigate and produce reports on technical aspects of specific litigation is a part of counsel's investigative staff, and the expert's opinions, theories, and conclusions are work product and thus not subject to disclosure.

State ex rel. Corbin v. Ybarra (Excel Indus.), 161 Ariz. 188, 777 P.2d 686 (1989) (report of testing done on soil on defendant's property was protected and not subject to disclosure).

501.12.070 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).

501.12.080 If the information sought is equally available to both sides, it receives the broadest protection; if the information sought is unavailable to one of the parties, the work product doctrine may not protect it, and the other party may obtain it by showing a substantial need for the material and that the party cannot obtain the material without undue hardship.

13. Dead Man's Statute.

501.13.010 A.R.S. § 12–2251 provides a party may not testify about a transaction with or a statement by a decedent unless the opposing party questions the party about such matters.

Troutman v. Valley Nat'l Bank, 170 Ariz. 513, 826 P.2d 810 (Ct. App. 1992) (because opposing party did not initiate discussion about decedent's statements, they were admissible only if they came under exceptions added by case law).

Bostwick v. Jasin, 170 Ariz. 15, 821 P.2d 282 (Ct. App. 1991) (because plaintiff asked defendant on cross-examination about transaction between defendant and her deceased mother, plaintiff waived any objection to defendant's testimony about her mother's statements).

501.13.020 The case law has provided that a trial court has discretion to allow a party to testify about a transaction with or a statement by a decedent, and the appellate court will uphold such a decision if there is independent corroborating evidence or if an injustice would result by the rejection of the testimony.

Troutman v. Valley Nat'l Bank, 170 Ariz. 513, 826 P.2d 810 (Ct. App. 1992) (because other evidence strengthened or confirmed that decedent made statement, trial court did not abuse its discretion in admitting testimony about decedent's statement).

501.13.030 The corroborating evidence is not limited to evidence that the statement was made by the decedent, but may also include evidence that either strengthens or confirms that the decedent made the statement or that the statement was true.

Troutman v. Valley Nat'l Bank, 170 Ariz. 513, 826 P.2d 810 (Ct. App. 1992) (because other evidence strengthened or confirmed that decedent made statement, trial court did not abuse its discretion in admitting testimony about decedent's statement).

501.13.040 A party seeking to preclude testimony about a transaction with or a statement by a decedent has the burden of proving that A.R.S. § 12–2251 applies; the party seeking to introduce the testimony then has the burden of convincing the trial court to admit the testimony by showing that independent corroborating evidence exists or that an injustice would result by the rejection of the testimony.

Troutman v. Valley Nat'l Bank, 170 Ariz. 513, 826 P.2d 810 (Ct. App. 1992) (defendant carried burden by showing person making statement was dead; trial court erred by not requiring plaintiff to show corroboration, but any error harmless because record showed sufficient corroboration).

14. Judicial Selection.

501.14.010 In the process of selecting a magistrate for the courts, because (1) a person who conveys information would expect it to be confidential, (2) confidentiality is essential to the full maintenance of the relationship between the selection committee and those giving information, (3) the community believes that this type of communication should be confidential, and (4) the injury caused by disclosure would be greater than the gain to a party in the litigation, communications submitted to the selection commission are privileged from disclosure in a civil action brought by one not selected as a magistrate.

City of Tucson v. Superior Ct. (Dolny), 167 Ariz. 513, 809 P.2d 428 (1991) (after commission decided not to reappoint city magistrate, she sued commission: trial court ordered commission to disclose date and time of each oral communication about former magistrate, name, address, and telephone number of each person communicating, and substance of each communication; all documents written about her to and by commission; all files maintained on her and all documents concerning her performance; and all documents concerning appointment of city magistrates within last 3 years; court concluded these matters were privileged and reversed trial court's order).

15. Legislative and Deliberative Process.

501.15.010 The legislative privilege, 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 legislative privilege applied to Arizona Independent Redistricting Commission).

501.15.020 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).

501.15.030 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).

16. Litigation.

501.16.010 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).

501.16.020 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).

17. Marital.

501.17.010 All marital communications are presumed confidential, and the burden to prove otherwise is on the person seeking to avoid application of the privilege.

Blazek v. Superior Ct., 177 Ariz. 535, 869 P.2d 509 (Ct. App. 1994) (plaintiff and husband were married when statements were made; defendant had burden of proving statements were not privileged).

501.17.020 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).

501.17.030 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).

501.17.040 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).

501.17.050 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).

501.17.060 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).

501.17.070 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, or (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).

501.17.080 When a defendant commits a crime against his or her spouse and is charged for that crime, the crime exception to the anti-marital fact privilege allows the witness-spouse to testify about not only that charge, but also about any charges arising from the same unitary event.

Phoenix City Pros. v. Lowery, 245 Ariz. 424, 430 P.3d 884, ¶¶ 1, 10–18 (2018) (husband was concerned wife (defendant) had been drinking and might try to drive, so he parked couple's car behind couple's van to prevent wife from driving away; wife, intoxicated and undeterred by car blocking her way, backed van out, shoving car 15 feet down the driveway; when police arrived, wife was not in van; officer noted property damage to van and car; wife was charged with DUI and criminal damage (domestic violence); court held husband was victim of criminal damage charge, so anti-marital fact privilege did not apply for that charge, and because criminal damage and DUI charges arose out of unitary event, anti-marital fact privilege did not apply for that charge either).

18. Parent-Child.

501.18.010 There is no Arizona case law recognizing a parent-child testimonial privilege, and the weight of authority is against such a privilege.

Stewart v. Superior Ct., 163 Ariz. 227, 787 P.2d 126 (Ct. App. 1989) (state sought to interview children in child abuse case).

19. Peer Review.

501.19.010 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).

501.19.020 The confidentiality of peer review proceedings is essential to achieve complete investigation and review of medical care.

John C. Lincoln Hosp. v. Superior Ct. (Giordano), 159 Ariz. 456, 768 P.2d 188 (Ct. App. 1989) (peer review privilege applied to documents concerning (1) doctor's application for staff privileges, (2) doctor's application for a position in training program, (3) any investigation of doctor's work prior to his association with hospital, and (4) any investigation of doctor's work at hospital).

John C. Lincoln Hosp. v. Superior Ct. (Giordano), 159 Ariz. 456, 768 P.2d 188 (Ct. App. 1989) (peer review privilege applied to minutes of trauma/critical care committee).

John C. Lincoln Hosp. v. Superior Ct. (Giordano), 159 Ariz. 456, 768 P.2d 188 (Ct. App. 1989) (peer review privilege did not apply to quality assurance program incident report because this was prepared by hospital personnel in regular course of providing medical care).

Humana Hosp. v. Superior Ct. (Edison), 154 Ariz. 396, 742 P.2d 1382 (Ct. App. 1987) (peer review privilege applied to information obtained in review of doctors applying to be admitted to practice in hospital, as well as to information obtained in review of doctors already admitted to practice).

Humana Hosp. v. Superior Ct. (Edison), 154 Ariz. 396, 742 P.2d 1382 (Ct. App. 1987) (peer review privilege does not apply to personnel, administrative, and other hospital records that do not contain references to proceedings before medical investigative committees).

501.19.030 The peer review privilege does not protect basic factual information that would not reveal anything about the internal workings or deliberative process of peer review proceedings, such as the date and place of any peer review proceeding.

Yuma Regional Medical Ctr. v. Superior Ct., 175 Ariz. 72, 852 P.2d 1256 (Ct. App. 1993) (uniform interrogatory requesting date and place of peer review proceedings where conduct that resulted in subject malpractice action was discussed did not violate privilege).

John C. Lincoln Hosp. v. Superior Ct. (Giordano), 159 Ariz. 456, 768 P.2d 188 (Ct. App. 1989) (peer review privilege applied to documents concerning (1) doctor's application for staff privileges, (2) doctor's application for a position in training program, (3) any investigation of doctor's work prior to his association with hospital, and (4) any investigation of doctor's work at hospital).

501.19.040 The peer review privilege protects from disclosure the contents of written memoranda or minutes, but does not protect the fact that the memoranda or minutes were made.

Yuma Regional Medical Ctr. v. Superior Ct., 175 Ariz. 72, 852 P.2d 1256 (Ct. App. 1993) (uniform interrogatory asking whether any written memoranda or minutes were made for proceedings did not violate peer review privilege).

John C. Lincoln Hosp. v. Superior Ct. (Giordano), 159 Ariz. 456, 768 P.2d 188 (Ct. App. 1989) (peer review privilege applied to minutes of trauma/critical care committee).

501.19.050 The peer review privilege does not protect information obtained in the regular course of providing medical care or in the administration of the hospital.

John C. Lincoln Hosp. v. Superior Ct. (Giordano), 159 Ariz. 456, 768 P.2d 188 (Ct. App. 1989) (peer review privilege did not apply to quality assurance program incident report because this was prepared by hospital personnel in regular course of providing medical care).

Humana Hosp. v. Superior Ct. (Edison), 154 Ariz. 396, 742 P.2d 1382 (Ct. App. 1987) (peer review privilege does not apply to personnel, administrative, and other hospital records that do not contain references to proceedings before medical investigative committees).

501.19.060 The peer review privilege does not protect information or materials that originated outside the peer review process, but it does protect from disclosure what information or materials the peer review committee considered in the peer review proceedings.

Yuma Regional Medical Ctr. v. Superior Ct., 175 Ariz. 72, 852 P.2d 1256 (Ct. App. 1993) (because disclosing what articles or treatises committee members considered would reveal to an extent deliberative process of committee members, that information was privileged).

Humana Hosp. v. Superior Ct. (Edison), 154 Ariz. 396, 742 P.2d 1382 (Ct. App. 1987) (peer review privilege applies to information obtained in review of doctors applying to be admitted to practice in hospital, as well as to information obtained in review of doctors already admitted to practice).

501.19.070 The peer review privilege protects from disclosure the names of the persons who were present during the peer review proceedings.

Yuma Regional Medical Ctr. v. Superior Ct., 175 Ariz. 72, 852 P.2d 1256 (Ct. App. 1993) (uniform interrogatory requesting name of each person at peer review proceeding violated peer review privilege).

20. Physician-Patient.

501.20.010 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).

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).

501.20.020 The physician-patient privilege protects communications between a patient and a physician, and the records and results of tests conducted in connection with that treatment.

State v. Cocio, 147 Ariz. 277, 709 P.2d 1336 (1985) (disclosure of results of blood test showing amount of alcohol in blood violated privileged relationship).

State ex rel. Udall v. Superior Ct. (JV–95–036), 183 Ariz. 462, 904 P.2d 1286 (Ct. App. 1995) (mother charged with murder of newborn child claimed her medical records in connection with birth of child were protected by physician-patient privilege; court agreed that privilege protected medical records, but held that A.R.S. § 13–3620(F) abrogated that privilege).

State v. Elmore, 174 Ariz. 480, 851 P.2d 105 (Ct. App. 1992) (in probation revocation proceeding based on defendant's failure to complete drug treatment program, because none of evidence presented of defendant's conduct in program involved communications between defendant and a physician or a psychologist, privilege did not apply).

State v. Turrentine, 152 Ariz. 61, 730 P.2d 238 (Ct. App. 1986) (opinion stated only that witness was not a treating physician and thus privilege did not apply, but did not state what relationship was and why defendant made statements to physician).

In re MH 1717–1–85, 149 Ariz. 594, 721 P.2d 142 (Ct. App. 1986) (privilege does not apply when examination has been ordered as part of civil commitment under A.R.S. § 36–539).

In re MH 959–10–85, 149 Ariz. 7, 716 P.2d 68 (Ct. App. 1986) (to extent a patient's prior history becomes important as a part of evaluation under Title 36, history is not privileged).

State v. Ortiz, 144 Ariz. 582, 698 P.2d 1301 (Ct. App. 1985) (because defendant requested mental examination pursuant to ARIZ. R. CRIM. P. 26.5, privilege did not apply).

501.20.030 The physician-patient privilege protects communications between doctor and patient; it does not extend to facts 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).

501.20.040 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 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 those 24 patients had received, and because disclosing names of each of those individuals would result in plaintiff's knowing what medical treatment each named individual patient received, court held that disclosing names of each of these patients would violate physician-patient privilege).

501.20.045 Redacted non-party medical records may be subject to discovery if the records are relevant and certain precautions are taken to protect patient identities.

Rasor v. Northwest Hosp. LLC, 239 Ariz. 546, 373 P.3d 563, ¶¶ 25–29 (Ct. App. 2016) (plaintiff contended ICU nurse provided deficient care in failing to take steps to minimize bed pressure and in failing to timely discover pressure ulcer; trial court ordered defendant to produce patient records of all ICU patients who had developed pressure ulcers in 4 years preceding plaintiff's injury; court held trial court ensured sufficient privacy safeguards by ordering defendant to "redact any confiden-

tial patient information from the records produced"; accordingly, trial court's order did not violate physician-patient privilege), *vac'd in part,* 242 Ariz. 582, 399 P.3d 657 (2017) (vacating ¶¶ 17–23).

501.20.050 The general rule is that the physician-patient privilege belongs to the patient and survives even after the patient's death.

State v. Dumaine, 162 Ariz. 392, 783 P.2d 1184 (1989) (defendant was not prejudiced by with-holding deceased witness's medical records, thus court did not reach question whether physician-patient privilege survived witness's death).

501.20.060 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).

501.20.070 A physician or a hospital may disclose certain privileged records if the physician or hospital takes certain precautions.

Ziegler v. Superior Ct., 134 Ariz. 390, 656 P.2d 1251 (Ct. App. 1982) (court ordered disclosure of hospital records of 24 hospital patients not connected with litigation under these conditions: deletion of name, address, marital status, and occupation, and any other identifying in-formation from each file; after review by plaintiff, plaintiff would return files to trial court, where they would be kept under seal; attorneys would not attempt to identify patients or try to contact them; and parties would not communicate any information gained from these files except to experts employed by plaintiff to review and analyze information).

Hospital Corp. of Am. v. Superior Ct., 157 Ariz. 210, 755 P.2d 1198 (Ct. App. 1988) (juvenile court ordered hospital to disclose names and addresses of four minor patients who might have witnessed an assault committed in hospital; appellate court noted that trial court had discretion to preserve privacy of patients by eliminating identifying information from those parts of court's records that would be accessible to public).

501.20.080 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).

501.20.090 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).

501.20.100 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 injured victim; defendant moved to preclude introduction of victim's medical records and testimony about 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).

501.20.110 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; defendant assaulted victim and state charged him 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).

501.20.120 If a defendant raises a "guilty except insane" defense, the defendant waives the physician-patient privilege.

State v. Hegyi (Rasmussen), 240 Ariz. 252, 378 P.3d 428, ¶ 11 (Ct. App. 2016) (defendant hired psychologist, who questioned defendant's sanity; court then appointed another psychologist, who opined that defendant met guilty except insane criteria; defendant disclosed both reports to state, but redacted any statements defendant made to psychologist; state then moved to compel disclosure of defendant's redacted statements; court held defendant must provide un-redacted copies of both (1) report of his retained psychologist and (2) report of court-appointed psychologist), *vac'd in part,* 242 Ariz. 415, 396 P.3d 1095 (2017).

501.20.130 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).

21. Psychologist-Patient.

501.21.010 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).

501.21.020 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).

501.21.030 The patient holds the psychologist-patient privilege, thus only the patient may make an objection to a violation of that privilege.

D'Amico v. Structural I Co., 229 Ariz. 262, 274 P.3d 532, ¶¶ 6–10 (Ct. App. 2012) (SIC was family-owned company founded and operated by Mary Jo and Doug McLeod (McLeods), who were approaching retirement and seeing counselor Cottor (Cottor); Cottor suggested McLeods hire "bridge-CEO," and McLeods hired D'Amico for term of 5 years; after about 3 years, things did not go well and SIC fired D'Amico, who sued SIC; SIC contended trial court should have excluded privileged testimony by Cottor about her personal counseling sessions with McLeods; court held only McLeods held privilege and only they could assert it, and because McLeods were not parties to litigation, SIC had no standing to assert privilege, thus trial court did not err in admitting testimony).

501.21.040 When another state has requested patient records under the Uniform Act To Secure the Attendance of Witnesses from Without a State in Criminal Proceedings (A.R.S. § 13–1091 to –4096), the question whether those records are privileged is for the requesting state to resolve and not for the sending state to resolve.

Johnson v. O'Connor, 235 Ariz. 85, 327 P.3d 218, ¶¶ 22–38 (Ct. App. 2014) (court rejected Johnson's claim that Arizona trial court had to determine whether records were protected by psychologist-patient privilege, and held requesting state (Wisconsin) must make determination under its laws).

22. Reporter-Source.

501.22.010 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).

501.22.020 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).

501.22.030 In order to overcome the reporter-source privilege under the Media Subpoena Law, the moving party must submit an affidavit meeting six requirements: (1) it must list each item sought; (2) avow that affiant has attempted to obtain each item from all available sources; (3) identify the other sources from which the affiant tried to obtain the material; (4) avow that the information sought is relevant; (5) avow the information is not protected by a lawful privilege; and (6) avow the subpoena is not intended to interfere with the publication activities protected by the First Amendment.

Phoenix Newspapers v. Reinstein (Moran), 240 Ariz. 443, 381 P.3d 236, ¶¶ 3–28 (Ct. App. 2016) (defendant was charged with killing one priest and assaulting second priest; reporter published article about incident; defendant requested copy of any notes taken during interviews or meetings with surviving priest; court held affidavit accompanying subpoena duces tecum failed to satisfy two of those requirements: (1) affiant exhausted all other sources for the information; and (2) the information was not protected by any lawful privilege; trial court therefore erred in finding that defendant had overcome reporter's privilege).

23. Special Education Records.

501.23.010 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) (trial court properly exercised discretion in reviewing records *in camera* and allowing discovery of only certain documents).

501.23.020 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).

501.23.030 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: (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 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).

24. Transportation Safety Reports.

501.24.010 23 U.S.C. § 409 protects from discovery or admission in evidence reports, surveys, schedules, lists, and data, and all factual information incorporated into these, compiled for the purpose of identifying, evaluating, or planning the safety enhancement of potential accident sites, but it does not protect from discovery facts within the personal knowledge of a party, even if these facts were later incorporated in the materials protected by the statute.

Southern Pac. Transp. Co. v. Yarnell, 181 Ariz. 316, 890 P.2d 611 (1995) (plaintiff sought discovery of railroad crossings Arizona Corporation Commission had designated for improvement; court held that trial court properly allowed discovery, and remanded for evaluation of specific materials subject to discovery request).

501.24.020 The amendment to 23 U.S.C. § 409, which became effective in 1991, protecting matters from *discovery* applies to all proceedings after the effective date of the amendment.

Southern Pac. Transp. Co. v. Yarnell, 176 Ariz. 552, 863 P.2d 271 (Ct. App. 1993) (court rejected plaintiff's claim that amendment did not apply to data produced prior to effective date of amendment), *vacated,* 181 Ariz. 316, 890 P.2d 611 (1995).

25. Work Product.

501.25.010 Items prepared in anticipation of litigation that reflect an attorney's mental impressions are absolutely protected from discovery.

Accomazzo v. Kemp (Accomazzo), 234 Ariz. 169, 319 P.3d 231, ¶¶ 17–18 (Ct. App. 2014) (court held husband was precluded from questioning wife's attorney about wife's state of mind and knowledge during negotiation of prenuptial agreement).

501.25.020 The protection afforded an attorney by Rule 26(b)(3) does not pertain to privileged communications between attorney and client, and instead addresses the discovery of documents and other tangible things otherwise discoverable under Rule 26(b)(1) and prepared in anticipation of litigation or for trial; disclosure of this material is required only on a showing of substantial need and that the party is unable to obtain the substantial equivalent material by other means.

Salvation Army v. Bryson, 229 Ariz. 204, 273 P.3d 656, ¶¶ 10–13 (Ct. App. 2012) (court made statements about work-product privilege, but addressed issue under attorney-client privilege).

26. Waiver by Statute.

501.26.010 A party may waive a privilege as provided by statute.

Bain v. Superior Ct. (Mills), 148 Ariz. 331, 714 P.2d 824 (1986) (A.R.S. § 32–2085 provides that waiver of psychologist-patient privilege must be in writing or in court testimony; A.R.S. § 12–2236 provides that person who offers himself as witness and voluntarily testifies about confidential communications waives attorney-client and doctor-patient privileges).

State v. Hegyi (Rasmussen), 240 Ariz. 252, 378 P.3d 428, ¶ 11 (Ct. App. 2016) (A.R.S. § 13–3993 provides defendant waives physician-patient privilege by raising "guilty except insane" defense).

501.26.020 Because the legislature has created certain privileges by statute, the legislature by statute may limit those privileges and limit the extent of a waiver of those privileges.

* *State v. Zeitner,* 246 Ariz. 161, 436 P.3d 484, ¶¶ 18–23 (2019) (court held that, although there was no common-law exception to the physician-patient privilege for fraud, the legislature had created exception for AHCCCS fraud).

Grubaugh v. Blomo (Lawrence), 238 Ariz. 264, 359 P.3d 1008, ¶¶ 5–16 (Ct. App. 2015) (plaintiff brought legal malpractice claim against her former attorneys as result of dissolution agreement reached during mediation; court held mediation statute, A.R.S. § 12–2238(B), listed four specific instances when mediation privilege did not apply, thus trial court erred in ruling that implied waiver existed).

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).

501.26.030 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; this includes all forms of abuse of a child, not just involving physical injury to the child and includes the privilege for any person involved in the proceeding, not just the privilege for the child.

State v. Herrera, 203 Ariz. 131, 51 P.3d 353, ¶¶ 9–14 (Ct. App. 2002) (defendant was charged with child abuse from having child in car while DUI; defendant contended § 13–3623(F)(1) limited child abuse to instances when child suffered actual injury; court rejected defendant's contention, reasoning 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).

State ex rel. Udall v. Superior Ct. (JV–95–036), 183 Ariz. 462, 904 P.2d 1286 (Ct. App. 1995) (mother charged with murder her newborn child; court rejected mother's claim that statute abrogated only privilege with respect to physician's treatment of child, holding instead it also abrogated mother's physician-patient privilege, thus state was able to obtain mother's medical records in connection with her treatment as a result of giving birth to child).

27. Waiver by Conduct.

501.27.010 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 workers' compensation claims; court held trial court implicitly ruled state 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).

501.27.020 In determining whether a party through litigation has waived a privilege, Arizona has adopted an intermediate test, under which waiver exists when: (1) The assertion of the privilege was the result of some affirmative act, such as filing suit or raising an affirmative defense, by the asserting party; (2) through this affirmative act, the asserting party has put the protected information at issue by making it relevant to the case; and (3) application of the privilege would have denied the opposing party access to information vital to that party's case; Arizona has thus rejected the most restrictive test, which requires a showing that the party has either expressly waived the privilege or has impliedly waived it by directly injecting knowledge from a privileged source into the litigation, and the least restrictive test, which requires a showing that the party has asserted a claim, counter-claim, or affirmative defense that raises a matter to which otherwise privileged material is relevant; further, 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.

Empire West Title Agency v. Talamante (Dos Land Holdings L.L.C.), 234 Ariz. 497, 323 P.3d 1148, ¶¶ 1–16 (2014) (Dos sent Empire closing instruction letter (CIL) with attached legal description of property that included access easement that was essential for economic development of property and asked Empire to make sure conveyance documents used same legal description; contrary to instructions, legal description in conveyance documents prepared by Empire did not contain access easement; Dos sued Empire and alleged it reasonably believed easement description was in all documents used at closing; court held this statement did not waive attorney-client privilege).

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 ($1 million coverage), and Twin City (TwC) was excess coverage insurer ($9 million coverage); plaintiffs offered to settle wrongful death action for less than $1 million limit, but GS refused; TwC knew of 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, 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 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 infor-

mation 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).

Robert W. Baird & Co. v. Whitten, 244 Ariz. 121, 418 P.3d 894, ¶¶ 9–21 (Ct. App. 2017) (plaintiff brought legal malpractice action; court held plaintiff did not waive privilege because of anything it had done, and instead issue arose because defendant relied on contributory negligence defense; court further held plaintiff's communications were not necessary to decide whether defendant committed malpractice, and preservation of privilege did not deprive defendant of information vital to its defense).

Abeyta v. Soos (Sierra Tucson, Inc. & Sonntag), 234 Ariz. 190, 319 P.3d 996, ¶¶ 8–10 (Ct. App. 2014) (Gary Abeyta and Paul Bruno were engaged in a long-time domestic relationship; Abeyta began counseling with Sonntag, and on Sonntag's advice, Bruno joined Abeyta in counseling; Sonntag told them that all communications with one would be communicated to the other, and Sonntag kept only one chart; later on Sonntag's recommendation, Bruno checked into Sierra Tucson, and while there, injured his back, so he brought suit against Sierra Tucson and Sonntag; Abryta sought protective order to prevent disclosure of chart from joint counseling and to preclude questioning him about that chart when he was being deposed; court held Abeyta had not given written waiver of privilege, thus chart should not be disclosed).

Abeyta v. Soos (Sierra Tucson, Inc. & Sonntag), 234 Ariz. 190, 319 P.3d 996, ¶¶ 11–15 (Ct. App. 2014) (although Bruno may have waived his privilege by suing and placing his mental health at issue, that did not have effect of waiving Abeyta's privilege).

Abeyta v. Soos (Sierra Tucson, Inc. & Sonntag), 234 Ariz. 190, 319 P.3d 996, ¶ 16 (Ct. App. 2014) (even assuming Bruno could be considered third party to Abeyta's therapy, nothing in Abeyta's communications with Bruno suggests intent to waive Abeyta's privilege).

Accomazzo v. Kemp (Accomazzo), 234 Ariz. 169, 319 P.3d 231, ¶¶ 9–12 (Ct. App. 2014) (although wife alleged she was under duress when she signed the prenuptial agreement and that husband failed to disclose information, and questioned date on which prenuptial agreement was signed, wife has not used privileged communications in support of her position, thus wife did not wave attorney-client privilege, so trial court erred in ordering disclosure).

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).