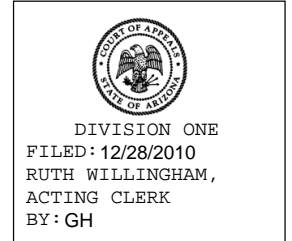


NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED  
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.  
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);  
Ariz. R. Crim. P. 31.24

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION ONE



STATE OF ARIZONA, ) 1 CA-CR 09-0311  
)  
Appellee, ) DEPARTMENT E  
)  
v. ) **MEMORANDUM DECISION**  
)  
) (Not for Publication -  
JESSICA RENAE RIGGINS, ) Rule 111, Rules of the  
) Arizona Supreme Court)  
Appellant. )  
)  
)

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Appeal from the Superior Court in Coconino County

Cause No. CR 2007-0837

The Honorable Danna D. Hendrix, Judge

**AFFIRMED**

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Terry Goddard, Attorney General Phoenix  
by Kent E. Cattani, Chief Counsel,  
Criminal Appeals/Capital Litigation Section  
and Julie A. Done, Assistant Attorney General  
Attorneys for Appellee

Law Office of David Goldberg Ft. Collins, CO  
by David Goldberg  
Attorney for Appellant

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H A L L, Judge

¶1 Jessica Renae Riggins appeals her convictions for first-degree murder and three counts of theft on the grounds the trial court abused its discretion and deprived her of a fair trial in evidentiary rulings surrounding her self-defense claim as a victim of domestic violence, and fundamentally erred in denying her a *Willits*<sup>1</sup> instruction. For the reasons that follow, we find no reversible error and affirm.

¶2 Riggins was indicted on first-degree murder and related counts arising from the discovery by police of the body of her husband, dead in the master bedroom of his home from a gunshot wound to the back. The evidence at trial, viewed in the light most favorable to sustaining the conviction,<sup>2</sup> demonstrated that Riggins had purchased the murder weapon three days before the shooting, shortly before the couple's final divorce hearing. Riggins' relatives testified that she had told them a week or two before the final divorce hearing that her husband had \$30,000, and she intended to obtain all or part of that money. Riggins stayed at her husband's house in Flagstaff several days before the final hearing, after spending the previous eight months separated from him and living and traveling out of state. The night before the shooting, she spent the night at another

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<sup>1</sup> *State v. Willits*, 96 Ariz. 184, 191, 393 P.2d 274, 279 (1964).

<sup>2</sup> *State v. Moody*, 208 Ariz. 424, 435 n.1, 94 P.3d 1119, 1130 n.1 (2004).

man's house, watching movies, eating pizza, and drinking. She spent the day of the shooting at Oak Creek Canyon. She returned to her husband's house that night, however.

¶13 That night, she shot her husband in the back with the handgun that she had purchased a few days earlier. Immediately after she shot her husband, Riggins took her mother-in-law's car and drove to California to a former sister-in-law's house. The former sister-in-law testified that Riggins told her that she had "shot him," and that she had taken the gun to the desert and burnt it. Riggins told her "she needed to cut her hair and dye her hair and she needed some clothes and she wanted a beer," and asked to light a fire in the fireplace to burn the clothes she was wearing. She overheard Riggins asking her daughter if "they drug the lake," because she had something in her purse that she wanted to get rid of.

¶14 Riggins' former sister-in-law testified that Riggins tried to give her "a credit card that she said had \$30,000 on it," and she asked that it be used to take care of her daughters. She also testified that Riggins told her that she wanted to wait to turn herself into police until after the media had played up the abusive nature of the relationship. This witness testified that the only injury she saw on Riggins was a scab towards the middle of her upper lip, which appeared to be a few days old. One of Riggins' former husbands and a son also

testified at trial that she confirmed to them when they met her in a nearby park that she had killed her husband.

¶15 Police apprehended Riggins returning from Mexico in her mother-in-law's car a week after the shooting. In her purse, she had the victim's driver's license, two credit cards, a debit card belonging to him, a business check card belonging to him, and two of his bank statements.

¶16 In her defense, Riggins testified that the night of the shooting her husband had taken her to the bedroom and choked her and beaten her, splitting her lip. Later, she found him sitting on the couch in the living room with her gun. "He had that look, the way he stares." After a while, she testified, he said, "[w]e're going to bed," and he put the gun on top of the TV center and left the living room. She took the gun and ran to get her purse, and she found him standing in the hallway to the master bedroom. He said, "[Y]ou're [f-ing] dead." When he shut the light off, she pulled the trigger and shot him. She testified that she had purchased the handgun at her husband's suggestion because she traveled alone frequently with her young daughters.

¶17 She described more than fifteen incidents of domestic violence by the victim, beginning shortly after they started dating in 2001, and continuing up to the night of his murder. She described in detail the beating that resulted in his first

conviction for domestic violence in 2003, the year before they married, and an assault with a knife that resulted in his second conviction in 2005. Both the State and the defendant called experts to testify on types of domestic violence, the coping mechanisms a victim of domestic violence might adopt, and the patterns the victims might recognize as presaging violence.

¶18 The jury convicted Riggins of the charged crimes of first-degree murder, theft of means of transportation and two counts of theft of a credit card. The jury found several aggravating circumstances with respect to the theft convictions. The court sentenced Riggins to a life term with possibility of parole after twenty-five years on the murder conviction, and concurrent sentences on the theft convictions, the longest of which was seven years. Riggins filed a timely notice of appeal.

#### **CLAIMED EVIDENTIARY ERRORS**

¶19 Riggins argues that the court misinterpreted the governing law and evidentiary rules when the court 1) precluded her experts from testifying that she was a battered woman and was reasonably in fear of her life when she shot her husband; 2) limited evidence on past incidents of domestic violence involving her husband; 3) precluded evidence from her daughters and a friend who knew of the violence; 4) admitted evidence of hearsay statements made by her husband shortly before his death; 5) admitted evidence of her sexual relations with two other men

in the weeks or months before the murder; and 6) admitted evidence on what she had told a former husband seven years before the murder that she would do if she were ever wanted by police. She also argues that the court deprived her of her due process right to present a complete defense by precluding her expert from testifying that she was a battered woman and was reasonably in fear of her life when she shot her husband.

¶10 We review rulings on the admissibility of evidence for abuse of discretion. *State v. Ellison*, 213 Ariz. 116, 129, ¶ 42, 140 P.3d 899, 912 (2006). We review constitutional and legal issues de novo. *See id.*; *State v. Wright*, 214 Ariz. 540, 542, ¶ 5, 155 P.3d 1064, 1066 (App. 2007). Because Riggins raises her constitutional due process claim for the first time on appeal, we review this claim for fundamental error only. *See State v. Henderson*, 210 Ariz. 561, 567, ¶ 19, 115 P.3d 601, 607 (2005). On fundamental error review, Riggins bears the burden of establishing error, that the error was fundamental, and that the error caused her prejudice. *Id.* at 568, ¶¶ 22-23, 115 P.3d at 608.

#### **Expert Testimony**

¶11 Riggins first argues that the court misinterpreted the statute governing her self-defense claim and the evidentiary rules and denied her constitutional due process right to present a complete defense when it precluded her experts from testifying

that she was a battered woman and that she was reasonably in fear of her life when she shot her husband.

¶12 The background on this issue is as follows. Before trial, Riggins initially identified, in addition to her claim of self-defense, a separate defense of "battered spouse." The State in turn filed a motion to preclude the defense of "battered woman syndrome," or use of the term at trial, on the ground that, as a subcategory of post-traumatic stress syndrome, it is "properly classified as a 'diminished capacity' defense" not recognized under Arizona law, citing *State v. Mott*, 187 Ariz. 536, 931 P.2d 1046 (1997). The State additionally argued that Arizona Revised Statutes (A.R.S.) section 13-415 (2010), the statute providing that a self-defense claim made by a victim of domestic violence may be considered from a reasonable victim's perspective, "does not allow introduction of psychological evidence that a defendant is suffering from battered woman syndrome."

¶13 Before argument on the State's motion to preclude, Riggins withdrew the separate defense of "battered spouse," acknowledging that it was not a separately recognized defense under Arizona law. Riggins continued to claim self-defense, however, as a victim of domestic violence crimes perpetrated by her husband. In the context of this latter defense, Riggins asked that her experts, Dr. Dan Cady and Dr. Kathleen Ferraro,

be allowed generally to explain the behavior patterns of a battered woman to the jury, and asked the court at that point not to impose any limitations on their testimony. In their reports, the defense experts, relying in large part on Riggins' statements to them, concluded that Riggins suffered from psychological conditions arising from a history of abuse extending to childhood. In response, the State argued that the conclusions were in the nature of an opinion that she had diminished capacity short of insanity, inadmissible at trial under settled law.

¶14 Following an extensive oral argument, the court noted as an initial matter that Riggins had withdrawn battered woman syndrome as a defense, and "[d]efendant agrees that there is no mental defect known as 'Battered Woman Syndrome.'"<sup>3</sup> The court ruled that because Riggins was not raising an insanity defense, *Mott* precluded the introduction of evidence of "Battered Woman

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<sup>3</sup> For this statement, the court cited Dr. Ferraro's report, in which Dr. Ferraro stated at the start: "There is no mental defect known as 'battered woman syndrome' that is recognized in the scientific literature or listed in the DSM-IV." Dr. Ferraro further noted that the term is inadequate to characterize the reactions or behaviors of battered women, because people who are abused do not conform to a single psychological profile. She concluded, however, that in light of Riggins' history of abandonment by her family of origin and abuse by a former husband as well as the current husband, a "special reasonableness" applied to her conduct, and accordingly, the night of the shooting, "her perception of danger was reasonable from her point of view." Riggins' argument on appeal that "[b]attered [w]omen [s]yndrome is a scientifically accepted condition" thus is contrary to her own expert's opinion.



Syndrome" to negate specific intent, reasoning that "Arizona does not allow evidence of a defendant's mental disorder short of insanity either as an affirmative defense or to negate the *mens rea* element of a crime." The court ruled, however, that:

[T]he experts, and non-experts, may testify to general pertinent and continuing traits of defendant's character under Rule 404(a)(1), provided the trait is pertinent to dispute the charges against her, and the experts do not give an opinion concerning the defendant's state of mind at the time of the crime. See, *State v. Christensen*, 129 Ariz. 32 (1981), and *State v. Ortiz*, 158 Ariz. 528 (1988).

¶15 The court additionally found that expert testimony on "the state of mind of a reasonable person who has been the victim of domestic violence is not the type of evidence within the common understanding . . . of most jurors," and accordingly ruled that:

[T]he experts may testify to the general behavioral characteristics of victims of domestic violence because expert testimony may help the jury understand defendant's behaviors, and aid them in evaluating her credibility. See *State v. Moran*, 151 Ariz. 378, 728 P.2d 248 (1986).

The court limited the expert testimony, however, as follows:

[T]he experts may not give an opinion as to their belief regarding guilt or innocence. They may not testify, directly or indirectly, as to their opinion of the accuracy, reliability or credibility of any witness, including defendant. Specifically, they may not testify whether they believe defendant was the victim of domestic violence or whether the defendant was reacting reasonably because this is an implicit validation of the defendant's credibility should she testify. See *State v. Lindsey*, 149 Ariz. 472 (1986). Finally, the experts may not use the term "Battered

Woman Syndrome" as it is not a recognized mental defect and the term has been rejected by the scientific community.

¶16 At trial, Riggins elected not to have Dr. Cady testify that Riggins displayed certain character traits, including impulsiveness, to avoid having the State call Dr. Steven E. Pitt, D.O., in rebuttal to critique Dr. Cady's methods of evaluation and to testify as to his own opinions based on his psychiatric evaluation of Riggins.

¶17 Riggins offered the testimony of sociologist Dr. Ferraro, however, regarding strategies developed by victims to minimize violence, traumatic bonding that develops between the victim and the abuser, the tendency of victims not to report domestic violence, the victim's recognition of cues from the abuser as signaling pending violence, and the high risk of violence associated with the victim leaving the relationship. Dr. Ferraro agreed with defense counsel that "[i]n order to fully understand a victim's response to violence, you would have to try to see the world through her eyes."

¶18 The State offered the testimony of psychologist Dr. Daniel Dutton regarding his research on domestic violence, including bilateral domestic violence, which treatment programs were most successful, risk factors for increased domestic violence, and cues that the victim would recognize as presaging violent behavior, and he agreed with defense counsel that it

made sense that a battered person might overreact to a perceived threat of violence from her abuser.

¶19 The court's limitation on the experts' testimony, to the extent that it precluded the experts from testifying that she was a battered woman, and that she feared for her life at the time she shot and killed her husband, was in accordance with the governing law and not error. Use of deadly physical force is considered justified under Arizona law "[w]hen and to the degree a reasonable person would believe that deadly physical force is immediately necessary to protect . . . against the other's use or attempted use of unlawful deadly physical force." A.R.S. § 13-405(A)(2) (Supp. 2010). A.R.S. § 13-415 provides that a self-defense claim by a victim of domestic violence is considered from the perspective of a reasonable victim of these crimes:

If there have been past acts of domestic violence as defined in § 13-3601, subsection A against the defendant by the victim, the state of mind of a reasonable person under §§ 13-404, 13-405 and 13-406 shall be determined from the perspective of a reasonable person who has been a victim of those past acts of domestic violence.

The statute does not describe a subjective standard, *i.e.*, whether Riggins herself believed that deadly physical force was immediately necessary at the time that she shot her husband, but rather whether a reasonable person who had been the victim of "those past acts of domestic violence" would have so believed.

See A.R.S. §§ 13-405(A)(2), -415; *State v. Vogel*, 207 Ariz. 280, 286 n.4, ¶ 28, 85 P.3d 497, 503 n.4 (App. 2004) (noting that A.R.S. § 13-415 is simply “a limited statutory codification of Arizona case law holding that prior acts of violence . . . are generally admissible as evidence of defendant’s state of mind if the defendant either personally observed the acts or was aware of the acts before the homicide”).

¶20 Moreover, under established Arizona case law, experts are prohibited from testifying that a person’s claims that she has suffered abuse are credible. See *Moran*, 151 Ariz. at 386, 728 P.2d at 256 (holding that trial court abused its discretion in admitting expert testimony “that the victim’s behavior was consistent with the abuse having occurred”); see also *State v. Tucker*, 165 Ariz. 340, 350, 798 P.2d 1349, 1359 (App. 1990) (holding that trial court abused its discretion in admitting expert testimony as to believability of the victim). We find no abuse of discretion in the court’s finding that an expert’s opinion that Riggins was in fact a “battered woman” would have implicitly validated Riggins’ testimony that she had been abused, and thus would have constituted a comment on her credibility, and should therefore be precluded.<sup>4</sup>

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<sup>4</sup> We also note that, in any event, Riggins was given broad leeway in detailing the prior incidents of domestic violence by her husband, two of which resulted in his conviction. The experts were allowed to testify on the patterns of behavior to

¶21 Nor do we find any abuse of discretion in the court's ruling precluding the experts from offering their opinion that the defendant was deathly afraid and acting reasonably from her perspective at the time of the shooting. It is long settled under Arizona law that it is permissible for an expert to testify on a defendant's general character traits when they are pertinent, but that a defendant's state of mind at the time of the crime is an issue that can be resolved without expert assistance. See *Christensen*, 129 Ariz. at 35-36, 628 P.2d at 583-84; *Ortiz*, 158 Ariz. at 533, 764 P.2d at 18.

¶22 Our supreme court has specifically held in a self-defense case that it was not an abuse of discretion to preclude the expert from offering his opinion on whether defendant was acting out of fear at the time, because whether defendant was fearful at the time "depends upon which version of the facts the jury chose to believe." *State v. Dickey*, 125 Ariz. 163, 169, 608 P.2d 302, 308 (1980). Just as in *Dickey*, the defendant in this case testified that she was in fear of her life when she shot her husband. If the jury believed her testimony that her husband had beat her badly the night she shot him, and that she was deathly afraid that he was going to beat her again and get

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which such abuse is known to give rise. In short, the jury had ample evidence from which to find that Riggins was a battered woman, without the experts actually labeling her as such. See *Moran*, 151 Ariz. at 386, 728 P.2d at 256.

control of the gun, the jury would not have needed expert testimony to decide that she was deathly afraid, or whether, from her perspective, her fear was reasonable. See Ariz. R. Evid. 702. Accordingly, we find no abuse of discretion in the court's preclusion of expert testimony that she was deathly afraid and acting reasonably from her perspective at the time of the shooting.

¶23 We are not persuaded by Riggins' argument that because our supreme court in *Mott* did not specifically disallow such testimony, see *Mott*, 187 Ariz. at 540 n.3, 931 P.2d at 1050 n.3, and other Arizona courts have allowed it, we should find an abuse of discretion in the court's limitations on the experts' testimony in this case. As an example of one court that allowed such testimony, Riggins cites *Vogel*, 207 Ariz. at 282, ¶¶ 15-16, 85 P.3d at 499, in which the facts show that an expert testified that defendant suffered from post-traumatic stress syndrome and reasonably believed she was in fear of her life at the time she killed her husband. Although the trial court allowed such testimony in *Vogel*, as evidenced by the factual recitation, there was no indication that the expert testimony was challenged below, and we did not address its admissibility in our opinion. See generally *id.* We decline to find an abuse of discretion in this case based on either *Mott* or *Vogel*.

¶124 Riggins claims for the first time on appeal that her constitutional due process right to present a defense was violated by the trial court's ruling preventing her from presenting expert testimony that she was a battered woman who, from her perspective, reasonably feared for her life at the time of the shooting. The constitutional rights to due process and confrontation guarantee a criminal defendant "a meaningful opportunity to present a complete defense." *Crane v. Kentucky*, 476 U.S. 683, 690 (1986) (citation omitted). These rights, however, are not without limits. "A defendant's right to present relevant evidence is not unlimited, but rather is subject to reasonable restrictions," which include application of reasonable evidentiary rules. *United States v. Scheffer*, 523 U.S. 303, 308 (1998).

¶125 We are not persuaded that the trial court committed any constitutional error, let alone fundamental error, in declining to admit the proffered expert testimony. Riggins cites no Arizona or United States Supreme Court authority for the proposition that the right to present a justification defense includes the right to present expert testimony that the defendant suffered from "battered woman syndrome." More importantly, although Riggins chose not to do so, the trial court's ruling permitted her to present expert testimony on Riggins' pertinent character traits and behavioral tendencies,

which presumably would have included Dr. Cady's opinion that she suffered from the personality traits of over-controlled hostility coupled with a lack of impulse control at the time of the crime. See *Christensen*, 129 Ariz. at 35-36, 628 P.2d at 583-84 (ruling that it would be "inconsistent with fundamental justice" to prevent defendant from offering evidence that he had the character trait of acting without reflection but prohibiting expert testimony "as to whether a defendant was or was not acting reflectively at the time of a killing"); see also *Clark v. Arizona*, 548 U.S. 735, 737 (2006) (holding that Arizona Supreme Court's decision in *Mott*, which rejected defendant's claim that she had a due process right to present evidence of battered woman syndrome to negate *mens rea*, did not violate due process).

¶126 Nor has Riggins demonstrated that she was prejudiced by the trial court's limitations on her expert's testimony. Riggins had ample opportunity to present her defense that she was a victim of her husband's violent abuse, and that her conduct in shooting him, viewed from the perspective of a reasonable domestic violence victim, constituted self-defense. She testified extensively on the prior incidents of domestic violence, on the cues her husband exhibited before he would beat her, and on the violence that she suffered at his hands shortly before she shot him and the violence she anticipated at the time



of the shooting. She testified that she was terrorized by his conduct the night of the shooting, and she fled not knowing where she was going because she was afraid he would come after her. Her expert testified that victims of domestic violence react in a variety of ways to the abuse, and it is important to view their conduct from their perspective. And, as mentioned above, Riggins chose as a matter of trial strategy not to call her psychologist expert to testify that she suffered from over-controlled hostility and impulsivity. Nor did Riggins ask Dr. Ferraro about any character traits that she observed Riggins exhibiting. On this record, we are not persuaded that the court fundamentally erred in limiting the expert testimony, or that any such error prejudiced Riggins.

#### **Evidence of Past Incidents of Domestic Violence**

¶127 Riggins next argues that the court abused its discretion by limiting the evidence on the past incidents of domestic violence involving her husband. Before ruling on the admissibility of this evidence, the court heard extensive testimony from Riggins for the limited purpose of having her identify and describe the incidents alluded to in her pretrial motion to admit prior acts of domestic violence allegedly perpetrated by her husband. "Arizona courts have long held that a murder defendant who defends on the basis of justification should be permitted to introduce evidence of specific acts of

violence by the deceased if the defendant either observed the acts himself or was informed of the acts before the homicide." *State v. Taylor*, 169 Ariz. 121, 124, 817 P.2d 488, 491 (1991). "The purpose of such evidence is to show that the defendant was justifiably apprehensive of the decedent and knew that the decedent had a violent disposition." *Id.* As with all evidence, however, admissibility is subject to exclusion under the rules of evidence, and specifically Arizona Rules of Evidence (Rule) 403, "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." We review the court's rulings on the admissibility of evidence for an abuse of discretion. *Ellison*, 213 Ariz. at 129, ¶ 42, 140 P.3d at 912.

#### **Category A Evidence**

¶128 Riggins argues first that the trial court abused its discretion in precluding her from testifying that her husband and a friend, Brent, had previously told her that her husband had been involved in domestic violence incidents with other women, incidents the parties grouped together in "Category A." We find no such abuse of discretion.

¶129 The court found that the testimony Riggins would offer about the friend's statements to her revealed that the friend

"knew about some 'instances' that happened in Lake Havasu, but defendant doesn't remember what they were." The court reasoned that "[t]he fact that [the friend] knew about an 'incident' is not relevant if defendant doesn't remember what it is. Further, the prejudicial effect of this evidence outweighs the probative value of the statements." We find no abuse of discretion in the court's findings, which are supported by the record, or its ruling that the prejudicial effect of this vague evidence outweighed any relevance.

¶30 The trial court also ruled that the statements her husband allegedly had made to her regarding his involvement in violent incidents with other women were inadmissible. Riggins had described four such incidents: 1) in 2002, when he told her that when he and a waitress had dated, they did a lot of drugs, he "beat her up a few times," and they "just boxed all of the time;" 2) in California, he "was really high and beat the shit out of" a "crack head" named Penny; 3) in California, another girl and he got into a fight, but she had only "vague details on that one;" and 4) a time at his mother's house, there was a big fight involving a woman and another man. She testified on cross-examination that she did not know if the first two incidents resulted in the woman suffering any injuries. As to the third incident, she testified on cross-examination that her husband said he slapped the woman. With respect to the fourth incident,

she testified on cross-examination that she did not know if there was any physical contact between her husband and the woman.

¶31 The trial court reasoned that the statements were only relevant to her reasonable apprehension if they were true, which weighed against their admissibility. It further found that "[t]heir effect on defendant is secondary, especially considering defendant's apparently vague recollection of Mr. Riggins' statements." The court also expressed doubt that a limiting instruction would be effective to prevent the jury from concluding that if the victim had committed domestic violence against other women, "he probably did that to defendant." Finally, the court concluded:

Considering the lack of specificity and suppositions defendant used to relate the statements, the lack or absence of corroborating evidence, and the fact that the defendant will have the opportunity to testify to acts for which she has personal knowledge, the Court finds that the prejudicial effect of the statements made by Mr. Riggins outweighs the probative value.

Whether the violent incidents involving other women that her husband related to her did in fact occur was peripheral and only marginally relevant to whether Riggins in fact believed they were true, and thus was in fear of her husband. *See Taylor*, 169 Ariz. at 124, 817 P.2d at 491. We also find the absence of corroborating evidence an inappropriate factor in analyzing the admissibility, in light of the fact that the evidence is viewed

from a reasonable person in Riggins' shoes. See *id.* We cannot say that the trial court abused its discretion, however, in finding that the statements Riggins recalled lacked specificity, that she only vaguely recalled the details, her recollections included suppositions about what had happened, and thus that her husband's report of the these incidents was of limited probative value with respect to her fear of her husband the night of the shooting. Nor can we say on this record that the court abused its discretion in concluding that the prejudicial effect of the statements outweighed any probative value.

#### **Alleged Child Abuse**

¶32 Riggins next argues that the court abused its discretion in precluding evidence regarding her husband's alleged acts of violence towards the children on the ground it was not relevant. Riggins initially argued that evidence of her husband's alleged abuse of her children was relevant to her state of mind and claim of self-defense. At oral argument on the motion to preclude such evidence, however, Riggins implicitly conceded that she had found no evidence of such abuse, offered no argument that she, Riggins, was actually aware of any such abuse, and said she was not intending to offer any such evidence unless the State introduced testimony that her husband was a good father.

¶133 The court found that there was some evidence that child abuse "could have happened," in the form of testimony from one daughter that "she had heard about it," and from the other daughter denying it. Assuming the child abuse occurred, however, she ruled that it was "just not relevant to . . . any issue . . . in the case at this point," and its prejudicial value would outweigh any probative value. On this record, in light of Riggins' implicit concession she had no evidence of any such abuse and had no intention of offering such evidence except for impeachment purposes, we find no abuse of discretion in the court's ruling precluding such evidence at that point.

#### **Category B Evidence**

¶134 Riggins next argues that the court abused its discretion in limiting the evidence on the two incidents of domestic violence for which her husband was convicted to the "facts used to establish the basis of the change of plea," the so-called Category B evidence. Riggins argues that the court precluded her from introducing testimony from "police, probation officers and other proffered witnesses and photographs that would have corroborated exactly what" her husband did to her during two incidents of domestic violence for which he was convicted. Riggins maintains that "[b]y so sanitizing two extremely violent incidents that were in the forefront of [Riggins'] mind at the time she was forced to shoot her husband,

the court excluded highly relevant exculpatory evidence that gave the jurors an inadequate factual basis to determine whether she was justified."

¶35 With respect to this issue, the court ruled that Riggins could testify on the incidents, or introduce as evidence the factual basis of the changes of plea and the convictions, but that the police reports themselves were inadmissible as consisting of hearsay. The court did not rule, as Riggins claims, "that the evidence would be limited to the 'facts used to establish the basis of the change of plea' and any further evidence 'would be cumulative and no longer relevant.'" It ruled instead:

If defendant testifies, she may testify to any fact within the parameters set out in Category C. If defendant does testify about the incident, Mr. Riggins' conviction and the facts used to establish the basis for the change of plea would be cumulative and no longer relevant.

During trial, however, the court allowed the probation officers to testify that the victim had been convicted of the specific domestic violence offenses, in addition to Riggins' testimony to the incidents themselves. We cannot say that the court abused its discretion in these rulings.

¶36 The court additionally ruled, however:

The photographs may not be admitted in defendant's case-in-chief. They do not help the jury determine any fact at issue because Mr. Riggins pled to the charge. Further, their probative value does not

outweigh their prejudicial effect.

In his pretrial motion, Riggins recited a summary of the police reports arising from these incidents. The summary reveals that two days after the first incident, a police officer "observed that her eyes were puffy, swollen and bruised. He also noticed a bruise on her left bicep that resembled four fingers, as well as other bruises. There was still redness around her neck, and a three-inch scratch on her shoulder blade." The summary of the police report from the second incident did not reveal any observations by the officer of injuries, but noted that Riggins' daughter heard a fight between Riggins and her husband "and saw her mother come out with a cut above her eye and a scratch on her cheek." The record does not show that Riggins sought to have the officer testify as to his observations of her injuries at the time or proffered any photographs of her injuries for admission at trial. It is Riggins' responsibility to ensure that any document necessary to her argument is in the record on appeal. *State v. Kerr*, 142 Ariz. 426, 430, 690 P.2d 145, 149 (App. 1984). Although we would think the photographs would be highly probative on the issue of the severity of the spousal abuse, we are unable to review whether the court abused its discretion in excluding photographs that are not part of the record on appeal. See *State v. Towery*, 186 Ariz. 168, 179, 920 P.2d 290, 301 (1996) ("When an objection to the introduction of



evidence has been sustained, an offer of proof showing the evidence's relevance and admissibility is ordinarily required to assert error on appeal." ).

### **Category C Evidence**

¶137 She next argues that the court abused its discretion in "preclud[ing] any testimony relating [her husband's] actual statements during the various incidents," and completely precluding any testimony regarding three incidents in which he forced the gearshift into park while she was driving, and on one of those occasions, took away her car keys.<sup>5</sup> This evidence was included with Category C, "[a]cts allegedly committed by the victim against the defendant, but not reported."

¶138 As an initial matter, contrary to Riggins' argument on appeal, the court did not preclude all testimony regarding statements that Riggins attributed to her husband. Rather, the court ruled in pertinent part only that "defendant may not testify to hearsay statements unless the statement falls within a hearsay exception." The court did not abuse its discretion in so ruling.

¶139 Riggins also summarily argues that the court erred in precluding threats her husband made before his death. We can find only two instances in the testimony cited by Riggins in

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<sup>5</sup> During one of these incidents, he smashed her car window while she was in it. She testified to this aspect of the incident, however, without objection.

which the court sustained objections to Riggins' testimony regarding threats made by her husband, albeit in each case without citing its reasoning. In the first instance, defense counsel asked Riggins, "So what did you do? Did you file for an order of protection?" Riggins responded, "After he said he could kill me and nobody would know." The State objected on unspecified grounds, and before the court could rule, Riggins said, "I put it in the order of protection." The State again objected on unspecified grounds and moved to strike; Riggins counsel made no response. Without comment, the court sustained the objection and struck the testimony.<sup>6</sup> In the second instance, Riggins started to testify, "He told me I'm never going to --." The State objected on unspecified grounds, and defense counsel apologized, saying, "No. I'm sorry." The court accordingly struck the testimony. Without any argument on the record by defense counsel in the trial court, and only summary argument on appeal that the court's ruling was "clear error," we decline to find that the court abused its discretion or fundamentally erred in striking this testimony.

¶140 Riggins also summarily claims on appeal that the court erred in precluding evidence listed as "Category C item 26," described by the parties below as the "[t]hreatening text

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<sup>6</sup> The identical testimony is repeated, apparently in error, in a separate transcript later that day.

messages and phone calls . . . [a]fter moving to Tahoe." Riggins testified in the pretrial hearing that there were incidents of "arguing [and] yelling" over the phone, and "[h]e actually text messaged me he was going to murder me." She testified that she thought he might have sent this text to her in April, when she was living in Lake Tahoe, four months before she returned to Flagstaff and shot him. With respect to these threats, the court ruled:

The text messages from Mr. Riggins are hearsay. They are used to exculpate the accused. At this time, the Court finds that the trustworthiness of the messages is not clearly indicated by corroborating circumstances. This order may change if evidence of the text messages is obtained from the phone company.

¶41 The text message in which her husband threatened to murder her was offered, in part, not to prove the truth of the matter asserted, but, rather, to show that Riggins had reason to fear him. In the trial court, Riggins argued that the threat was admissible pursuant to A.R.S. § 13-415 as a past act of domestic violence and the prosecutor urged its exclusion pursuant to Rule 404(b) because Riggins could not prove by clear and convincing evidence that the threatening text message was ever made. Based on the trial court's ruling precluding Riggins from testifying regarding the text message, it appears that the court essentially adopted the State's argument that the admissibility of the statement was governed by Rule 404(b).

However, Rule 404(b) governs the admissibility of "other act" evidence, not statements. See *State v. Huerstel*, 206 Ariz. 93, 107-08, ¶¶ 66-69, 75 P.3d 698, 712-13 (2003) (explaining that Rule 404(b) applies to conduct and not statements). Therefore, the court's reliance on Rule 404(b) was misplaced. Because the message was offered to prove its effect on Riggins and not for the truth of the matter asserted, it was not hearsay and was admissible under Rule 402. See *State v. Hernandez*, 170 Ariz. 301, 306, 823 P.2d 1309, 1314 (App. 1991) ("Words offered to prove the effect on the hearer are admissible when they are offered to show their effect on one whose conduct is at issue."). But because Riggins failed to argue in the trial court that the text message was admissible as a non-hearsay statement, she has forfeited this specific argument on appeal. See *State v. Lopez*, 217 Ariz. 433, 434, ¶ 4, 175 P.3d 682, 683 (App. 2008) ("[A]n objection on one ground does not preserve the issue on another ground."). Moreover, on appeal, Riggins has not argued specifically why the preclusion of testimony regarding the text message was error. Therefore, to the extent not forfeited in the trial court, this issue has been abandoned on appeal. See *State v. Carver*, 160 Ariz. 167, 175, 771 P.2d 1382, 1390 (1989).

¶42 Even if Riggins had preserved in the trial court, and properly advanced on appeal, the argument that the court abused

its discretion by precluding Riggins from testifying regarding the text message, we would have concluded that any error was harmless beyond a reasonable doubt. "A reviewing court will affirm a conviction despite the error if it is harmless, that is, if the state, 'in light of all of the evidence,' can establish beyond a reasonable doubt that the error did not contribute to or affect the verdict." *State v. Valverde*, 220 Ariz. 582, 585, ¶ 11, 208 P.3d 233, 236 (2009) (citations omitted). "'The inquiry is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in this trial was surely unattributable to the error.'" *Id.* At trial, Riggins testified that she shot her husband right after he said "You're [f-ing] dead." This threat was obviously more probative to Riggins' state of mind the night of the shooting than the similar threat allegedly made in a text message several months previously. Given the extensive evidence that was admitted during trial regarding the victim's violent conduct toward her, including his convictions in 2003 and 2005 for acts involving domestic violence, we are convinced that any error that occurred when the court precluded testimony regarding the text message did not contribute to or affect the jury's first-degree murder verdict.

¶143 Nor do we find that the court ruling regarding the incidents involving the car gearshift constituted an abuse of discretion. Riggins testified without objection that her husband broke her car window when she was in the car. The court ruled first, that Riggins had failed to show that these offenses constituted disorderly conduct under A.R.S. § 13-2904 (2010), and accordingly, that they qualified as domestic violence incidents pursuant to A.R.S. § 13-3601 (Supp. 2010) for purposes of A.R.S. § 13-415. We do not find the court's interpretation unreasonable. Nor are we persuaded by Riggins' argument on appeal that these incidents constituted endangerment under A.R.S. § 13-1201 (2010), and therefore qualified as domestic violence incidents. The court ruled, moreover:

This evidence is more appropriately classified as cumulative character evidence introduced to show that Mr. Riggins is not a nice person. The Court believes that the prejudicial effect of this evidence outweighs its probative value. Although the court will allow counsel to brief the issue, this act is not admissible unless the Court reverses this Order.

We find no abuse of discretion in the court's ruling on the "gearshift" incidents.

¶144 Finally, contrary to Riggins' argument on appeal, the court did not preclude Riggins from testifying to "her impressions during many of these incidents including cues from Rusty's behavior and facial expressions that preceded the violence as involving 'character evidence.'" The court ruled as

follows:

Defendant may testify to what she perceived. She may not testify to her beliefs or impressions, such as her belief that Mr. Riggins was using alcohol or drugs, that he was being a jerk, that he "flipped out" on holidays and birthdays, or that he was "tripping out." She may not testify that she would not "lie" for Mr. Riggins. All of this is character evidence offered to show that Mr. Riggins acted in conformity therewith, and not offered for a proper purpose. Further, the prejudicial effect of this type of evidence outweighs its probative value.

The court in fact overruled an objection during trial to Riggins' testimony on the cues that would signal her husband was about to get violent. This claim of error accordingly is without merit.

#### **Testimony of Children and Family Friend**

¶45 Riggins argues that the court abused its discretion in precluding Riggins' two children and one of her friends from testifying as to domestic violence incidents they knew about. Riggins argues that the friend was prepared to testify that she saw Riggins shortly after her husband beat her in 2002,<sup>7</sup> and that he admitted to her a couple weeks later that he had beat Riggins, saying "she deserved it." She also would have testified

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<sup>7</sup> In her opening brief, Riggins refers to this incident as having occurred in 2003, but the record reflects that it occurred in September 2002. Notably, Riggins' husband pled guilty to unlawful imprisonment, a class 6 felony, and assault, a class 1 misdemeanor, a domestic violence offense, following his arrest in this matter. The sentencing minute entry, which was admitted as an exhibit, reflects that the court found two aggravating circumstances: (1) the physical and emotional harm to Riggins; and (2) the husband's prior history.

that Riggins had her listen to a recorded telephone message from her husband in late 2003 or early 2004, in which he stated: "[I]f you think that beating was bad you should think about what I'm getting ready to do to you."

¶146 The trial court characterized as "possibly admissible" the friend's testimony that she "saw bruises on Ms. Riggins' arms, neck, and face, had lacerations on her face, and that she called the police" in 2002, but found the probative value of the testimony "slight" because it was anticipated that Riggins would testify to the underlying incident and that corroborating evidence regarding the her husband's convictions arising from that incident was already going to be admitted. Applying Rule 403, the court then voiced its concern that the jury would likely use such testimony in combination with the admission by her husband, notwithstanding any limiting instruction, as propensity evidence, that is, to "prove that his character is such that he would attack or be the first aggressor on August 5th of 2007." After noting that the incident occurred in 2002, the court concluded that the prejudicial impact of the testimony would "far outweigh[]" its probative value and precluded it.

¶147 As to the threatening message, the court found that it was only "minimally relevant" to Riggins' state of mind when she killed her husband in 2007 because it was only one of many incidents to which she was going to testify—some of which were



interceding—and occurred several years before: “I have a hard time believing that because he left a message in 2004, she was thinking of that message—or I think it’s not as likely that she was thinking of that particular message in August of 2007.” Although the court characterized admissibility as a “close question,” it ultimately precluded the evidence under Rule 403 on the ground that Ms. Riggins would also testify to that same voice message, and, in light of the fact that it was left more than three years before the murder, its minimal relevance to Riggins’ state of mind was outweighed by the unfair prejudice that the jury might use it as propensity evidence, and it would be cumulative. We cannot say that the trial court abused its discretion in these evidentiary rulings under the circumstances. See *State v. Kiper*, 181 Ariz. 62, 65, 887 P.2d 592, 595 (App. 1994) (“Because the trial court is best able to balance the probative value versus the prejudicial effect, it is afforded wide discretion in deciding the admissibility of such evidence.”).

¶48 Riggins additionally argues that the court abused its discretion in precluding Riggins’ daughters from testifying that they witnessed incidents when her husband beat her, and times that he “would ‘go crazy’ and get violent for no reason.” Riggins’ investigator had disclosed after the trial started that the older daughter had told him in an unrecorded interview that

she saw the victim attack her mother five or six times, "but with no details, dates, or locations." The investigator also reported that the younger daughter had told him that she could remember one such incident, but could not remember when or where. The court initially ruled that the daughters' testimony would be cumulative, but later explained that it had "misstated the basis" for its ruling and was revisiting it. It ultimately ruled that the testimony that one of the daughters offered that she "could not predict when he was going to go crazy" was "simply character evidence and is not admissible."

¶149 The court did not flatly preclude the daughters' testimony on the beatings they witnessed, but stated that it may have allowed the testimony if the daughters could pinpoint the dates of the incidents with more specificity, and the incidents they observed took place in the year or so before the shooting. The court noted on the record only that:

As we get closer and closer to August 5th of 2007, that evidence becomes more and more relevant. But again, it is difficult for me to say what the jury would do with this evidence.

Ms. Riggins will testify to it. If we have [the older daughter] also testifying to it, we run into the probability that the jury will not be able to use that evidence in the appropriate way, which is to help them determine what Ms. Riggins' state of mind [was.]

It's hard for me to say what the prejudicial versus the probative value is because I have no evidence as to when these occurred, whether they were early in the relationship. The relationship began sometime in 1999

and continued through September of 2006. I would certainly look at that evidence if it were closer to 2006, if we could pin it down some way. If it's closer to 1999, then the probative value and the danger of misuse by the jury becomes greater.

Under the circumstances, we find no abuse of discretion in the trial court's rulings on this proposed testimony.

#### **Statements of Husband Prior to Murder**

¶150 Riggins argues that the court abused its discretion in allowing three witnesses to testify that the victim told them days before the murder that he was getting divorced, told one of those persons that he was happy to be moving on, and another that he would be glad when it was over. The court found the statements admissible as an exception to the hearsay rules under Rule 803(3) as statements "of his then existing state of mind" relevant to "rebut defendant's argument that the victim was the first aggressor." We cannot say that the court abused its discretion in allowing these statements on this record.

#### **Riggins' Sexual Relations with Other Men**

¶151 Riggins argues that the court abused its discretion in admitting evidence that she had sexual relations with two other men not long before the shooting, while separated from the victim, as relevant to show "that she did not live in fear of her abusive husband." Relying on *State v. Andriano*, 215 Ariz. 497, 161 P.3d 540 (2007), the court ruled the evidence admissible. In *Andriano*, the court upheld the admission of

similar evidence because it was relevant to defendant's motive to kill her husband; that is, to be able to carry on affairs, and to rebut her claim that she was in fear of her abusive husband, as relevant to her claim of self-defense. *Id.* at 503-04, ¶¶ 24-31, 161 P.3d at 546-47. We find no abuse of discretion in this ruling.

#### **Riggins' Statement of Intent to Change Appearance**

¶52 Finally, Riggins argues the trial court abused its discretion in permitting her ex-husband to testify that she told him seven years prior to her husband's death that if she were ever wanted by police, she would dye her hair and change her clothing. Although Riggins objected to this testimony in a motion in limine, the court deferred ruling on it until trial. Riggins failed to renew her objection when the testimony was presented during trial. This issue is therefore forfeited and may not be raised on appeal. See Joseph M. Livermore, Robert Bartels & Ann Holt Hameroff, *Law of Evidence* § 103.3, at 9 n.6 (4th ed. 2000) ("When the court has deferred ruling on an objection, error cannot be asserted on appeal unless the evidence is re-offered and the court makes an actual ruling of exclusion.") (citing cases).<sup>8</sup>

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<sup>8</sup> To preserve the argument for further review by the Arizona Supreme Court, Riggins additionally asserts that the cumulative nature of the evidentiary errors deprived her of a fair trial. Because we have no authority to modify or disregard our supreme

### **WILLITS INSTRUCTION**

¶153 Riggins finally argues that the court fundamentally erred in failing to *sua sponte* give a *Willits* instruction for the State's failure to test the blood on the victim's hand and on a towel in the bathroom to determine whether the blood was hers, which would have supported her claim that he beat her before she shot him. The *Willits* instruction allows the jury to draw an inference from the State's destruction of material evidence that the lost or destroyed evidence would be unfavorable to the State. *State v. Fulminante*, 193 Ariz. 485, 503, ¶ 62, 975 P.2d 75, 93 (1999). A defendant is entitled to a *Willits* instruction upon proving that (1) the State failed to preserve accessible, material evidence that "might tend to exonerate him" and (2) there was "resulting prejudice." *Id.* The exonerating potential of the evidence must have been apparent at the time the State lost or destroyed it in order to warrant such an instruction. *State v. Davis*, 205 Ariz. 174, 180, ¶ 37, 68 P.3d 127, 133 (App. 2002).

¶154 Riggins testified at trial that she suffered a split lip in the beating by her husband earlier in the evening she shot him, and she used a dark towel in the bathroom to stop the

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court's rulings rejecting the doctrine of cumulative evidentiary error, we need not address this claim.

bleeding. The lead detective testified, however, that he had inspected the towels at the scene, and he did not see any blood on them. The medical examiner, moreover, testified that he had inspected the victim's hands after he cleaned them, and he saw no evidence of any cuts or bruising. The lead detective testified that he was present at the autopsy, and he also saw no evidence of cuts or bruising that might indicate the victim had used his hand to punch or hit someone in the mouth or the head. On this record, the evidence does not show that either the dark towel or the blood on the victim's hand had obvious exonerating potential at the time that police failed to preserve it. We therefore reject Riggins' argument that the court should have *sua sponte* provided a *Willits* instruction.

#### CONCLUSION

¶55 For the foregoing reasons, we affirm Riggins' convictions and sentences.

\_\_\_\_\_/s/\_\_\_\_\_  
PHILIP HALL, Presiding Judge

CONCURRING:

\_\_\_\_\_/s/\_\_\_\_\_  
SHELDON H. WEISBERG, Judge

\_\_\_\_\_/s/\_\_\_\_\_  
PETER B. SWANN, Judge