DIVISION ONE
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RUTH A. WILLINGHAM, CLERK
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,	)	No. 1 CA-CR 11-0184
	)	
Appellee,	)	DEPARTMENT A
	)	
v.	)	**MEMORANDUM DECISION**
	)	(Not for Publication -
RANDALL MARK KORELC,	)	Rule 111, Rules of the
	)	Arizona Supreme Court)
Appellant.	)	

Appeal from the Superior Court in Maricopa County

Cause No. CR2007-172851-001SE

The Honorable Connie Contes, Judge

AFFIRMED

Thomas C. Horne, Arizona Attorney General — Phoenix
By Kent E. Cattani, Chief Counsel
Criminal Appeals/Capital Litigation Section
and Joseph T. Maziarz, Section Chief Counsel
Criminal Appeals/Capital Litigation Section
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Attorneys for Appellee

James J. Haas, Maricopa County Public Defender — Phoenix
By Terry J. Reid, Deputy Public Defender
Attorneys for Appellant

N O R R I S, Judge

¶1 Randall Mark Korelc timely appeals his conviction and sentence for second degree murder. Korelc argues the superior

court should not have admitted other acts evidence, precluded him from introducing medical testimony about the victim, and denied his motion to suppress the statements he made to police. As we explain, we disagree with each argument and affirm his conviction and sentence.

FACTS AND PROCEDURAL BACKGROUND[1]

¶2 In November 2007, Korelc was living in an apartment with R.G., his girlfriend. Late in the afternoon on November 9, 2007, Korelc drove to the home of his son, C.K., and told him R.G. had "shot herself" and "was dead." Korelc told C.K. she had picked up his gun, pointed it at him, then "turned the gun on herself." When he arrived at C.K.'s home, Korelc had in his hand his pistol, which police later confirmed through ballistics testing fired the shot that killed R.G. Korelc told C.K. he had taken the gun out of R.G.'s hand and left the apartment. C.K. then asked his brother to call the police while he drove Korelc to the apartment.

¶3 A police sergeant who arrived at the apartment testified it was "orderly" and he did not see "any signs of a struggle." When police entered the apartment, they found R.G. dead, sitting on a couch in the living room, with one leg up on

[1]We view the facts in the light most favorable to sustaining the jury's verdict and resolve all reasonable inferences against Korelc. *State v. Guerra*, 161 Ariz. 289, 293, 778 F.2d 1185, 1189 (1989).

the couch and one foot on the floor. R.G. had a single gunshot wound to the right side of her jaw, which the medical examiner testified "would kill somebody instantly." He further testified the crime scene photos "led [him] to believe . . . [R.G.] did not move [after she was shot], which goes along with having been shot through the cervical spine and resulting in paralysis." And, the medical examiner and a detective both testified the position of the body, the location and type of wound, and the lack of gunshot residue on the body all negated the possibility of suicide.

¶4 In speaking with police after returning to the apartment, Korelc initially told them R.G. shot herself. When detectives interviewed Korelc later that evening, however, he said he had taken the gun from R.G. and admitted he was holding it four to five feet away from her when it went off.

¶5 A grand jury charged Korelc with second degree murder, a class 1 dangerous felony and domestic violence offense. A grand jury separately charged Korelc with two counts of aggravated assault and one count of armed robbery against I.F. arising out of two incidents, one occurring two days before R.G.'s death, and the other the day of her death. The superior court severed one of the assault counts from the other two counts, and separate juries acquitted Korelc on all three charges ("separate trials"). Subsequently, as discussed below,

Korelc moved to preclude the State from introducing other acts evidence from the separate trials and to suppress the statements he made to police. The superior court denied both motions, and the jury found Korelc guilty of second degree murder.

DISCUSSION

I. Admission of Other Acts Evidence

¶6 Korelc argues the superior court should not have allowed the State to introduce the other acts evidence that was the subject of the charges in the separate trials. He contends the superior court should have precluded this evidence under Arizona Rule of Evidence ("Rule") 404(b). We disagree. *State v. Lehr*, 227 Ariz. 140, 147, ¶ 19, 254 P.3d 379, 386 (2011) (appellate court reviews superior court's admission of other acts evidence for abuse of discretion).

¶7 Rule 404(b)[2] prohibits the admission of evidence of other acts "to prove the character of a person in order to show action in conformity therewith" but allows admitting such evidence "for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or

[2]Various amendments to the Arizona Rules of Evidence became effective January 1, 2012. The amendments to the Rules cited in this decision were "intended to be stylistic only" and not intended to "change any result in any ruling on evidence admissibility." Ariz. R. Evid. 402-404, Comments to 2012 Amendment. We quote the Arizona Rules as they existed at time the superior court made the rulings Korelc challenges on appeal.

absence of mistake or accident." Other acts evidence is admissible if it is admitted for a proper purpose, relevant, not unfairly prejudicial under Rule 403, and if the court gives "an appropriate limiting instruction upon request." *State v. Nordstrom*, 200 Ariz. 229, 248, ¶ 54, 25 P.3d 717, 736 (2001) (citations omitted), *abrogated on other grounds by State v. Ferrero*, 229 Ariz. 239, 243, ¶ 20, 274 P.3d 509, 513 (2012). In addition, the State must prove by clear and convincing evidence the other acts occurred and the defendant committed the acts. *State v. Terrazas*, 189 Ariz. 580, 584, 944 P.2d 1194, 1198 (1997) (citations omitted).

¶8 At trial, the State introduced other acts evidence through the testimony of I.F., a member of a local church where Korelc helped set up the church for rehearsals. I.F., who was in his late 70's, paid Korelc for helping at the church. According to I.F., two days before R.G.'s death, he went to Korelc's apartment and when he arrived, he saw Korelc and R.G. outside yelling at each other. Korelc was waiving his pistol, and R.G. was screaming at him to put it away. When R.G. told Korelc he might hurt someone, Korelc put the gun in her face and said, "[o]ne word more out of you, Bitch, and it's bang bang." When I.F. asked Korelc to put the gun down, he pointed the gun at I.F. and said, "[y]ou're next." After I.F. persuaded Korelc to sit down, he left without calling the police.

¶9 I.F. also testified that at approximately four o'clock in the afternoon on the day of R.G.'s death, Korelc telephoned him and told him he owed him money and he was coming over to get it. A short time later, Korelc and R.G. arrived at I.F.'s house in a car. When I.F. went out to greet them, Korelc pointed his pistol at him and demanded money. R.G. became upset and started screaming at Korelc. Although I.F. did not believe he owed Korelc any money, he nevertheless gave him $100 "because he said if I didn't, [he was] going to blow my head off." I.F. attempted to convince R.G. to get out of the car, but she refused stating, "No. No. No. He'll be all right. I'll clean him up. He'll be all right. He'll be all right." Korelc and R.G. then left. The following day, after hearing about R.G.'s death, I.F. called the police to report he had information that might be relevant to her death.

¶10 Korelc first argues the superior court should have precluded this other acts evidence because the State failed to prove by clear and convincing evidence he committed these other acts. We disagree. Although Korelc was acquitted of the charges brought against him based on these other acts, "an acquittal in a criminal case does not preclude the Government from relitigating an issue when it is presented in a subsequent action governed by a lower standard of proof." *Dowling v. United States*, 493 U.S. 342, 349, 110 S. Ct. 668, 672, 107 L.

Ed. 2d 708 (1990); *accord State v. Yonkman*, 229 Ariz. 291, 296-97, ¶¶ 18-21, 274 P.3d 1225, 1230-31 (App. 2012). Evidence is clear and convincing if it persuades the trier of fact "the truth of the contention is highly probable," *State v. Roque*, 213 Ariz. 193, 215, ¶ 75, 141 P.3d 368, 390 (2006) (quotations and citations omitted), and a victim's testimony can be sufficient to demonstrate by clear and convincing evidence an incident occurred. *State v. Vega*, 228 Ariz. 24, 29 n.4, ¶ 19, 262 P.3d 628, 633 n.4 (App. 2011) (citation omitted).

¶11 Further, contrary to Korelc's argument, I.F.'s testimony was not "incredible" because he had testified that although frightened with death multiple times he had not called police to report the threats or attempted to alert a nearby police officer during one of the incidents. Based on our review of the record, I.F.'s testimony was not so incredible that no reasonable person could believe it. *See State v. Williams*, 111 Ariz. 175, 177–78, 526 P.2d 714, 716–17 (1974) (citation omitted) (uncorroborated testimony by victim sufficient to establish proof beyond a reasonable doubt unless account "is physically impossible or so incredible that no reasonable person could believe it").

¶12 Korelc also argues the superior court should have precluded the other acts evidence because the State did not offer it for a proper purpose under Rule 404(b). We disagree.

The incident two days before R.G.'s death involved Korelc threatening to shoot R.G. Evidence of prior threats or assaults by a defendant against a murder victim is properly admissible to show "motive and intent." *State v. Gulbrandson*, 184 Ariz. 46, 61, 906 P.2d 579, 594 (1995); *see also State v. Wood*, 180 Ariz. 53, 62, 881 P.2d 1158, 1167 (1994) ("Defendant's prior physical abuse of and threats against [victim] were relevant to show his state of mind and thus were properly admitted under Rule 404(b).").

¶13 The second incident, which occurred within two hours of R.G.'s death, was likewise admissible to show Korelc's state of mind at the time of the murder and to rebut his claim of accident. *See State v. Chaney*, 141 Ariz. 295, 309-10, 686 P.2d 1265, 1279-80 (1984) (evidence of other bad acts admissible because "jury was entitled to know under what conditions [defendant] was operating" at time of alleged offense); *United States v. Hillsberg*, 812 F.2d 328, 334 (7th Cir. 1987) (evidence of prior gun use on day of murder admissible because defendant's "erratic behavior on the day was germane in determining his state of mind at the time of the fatal shooting"); *State v. Kelley*, 664 A.2d 708, 710-11 (Vt. 1995) (citations omitted) (acts involving third parties that occurred just hours before murder had "great probative value," provided "the context in which the shooting took place," and were "probative of

defendant's state of mind just prior to the shooting"); *Sturgis v. State*, 932 P.2d 199, 201-03 (Wyo. 1997) (evidence defendant threatened another person two days prior to shooting victim relevant to rebut defendant's claim of accident and show intent).

¶14 Finally, Korelc argues the superior court should have precluded the other acts evidence because it was unfairly prejudicial under Rule 403. Evidence is unfairly prejudicial when it has "an undue tendency to suggest a decision on an improper basis, such as emotion, sympathy, or horror." *Gulbrandson*, 184 Ariz. at 61, 906 P.2d at 594 (citation omitted). Here, the other acts evidence was clearly relevant to the critical issue of Korelc's state of mind at the time of the shooting and to his "accident" defense. Further, the superior court instructed the jury on the proper limited use of this evidence at the conclusion of Korelc's cross-examination of I.F. and again in the final instructions. Under these circumstances and because our supreme court has held "absent some evidence to the contrary," we presume the jury followed the instructions, *State v. Newell*, 178 Ariz. 116, 127, 871 P.2d 237, 248 (1994), the superior court did not abuse its discretion in admitting the other acts evidence over Korelc's Rule 403 objection. "Rule 403 weighing is best left to the trial court and, absent an abuse of

discretion, will not be disturbed on appeal." *State v. Spencer*, 176 Ariz. 36, 41, 859 P.2d 146, 151 (1993).[3]

II. Preclusion of Medical Testimony

¶15 Korelc argues the superior court violated his right to present a complete defense by precluding him from calling two doctors to testify regarding R.G.'s medical records. "Although a defendant has a fundamental constitutional right to . . . present a defense, the right is limited to the presentation of matters admissible under ordinary evidentiary rules, including relevance." *State v. Dickens*, 187 Ariz. 1, 14, 926 P.2d 468, 481 (1996) (citation omitted), *abrogated on other grounds by Ferrero*, 229 Ariz. at 243, ¶ 20, 274 P.3d at 513. *See also Chambers v. Mississippi*, 410 U.S. 284, 302, 93 S. Ct. 1038, 1049, 35 L. Ed. 2d 297 (1973) ("[T]he accused . . . must comply with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence."). As we explain, the superior court did

[3]In asserting the other acts evidence was unfairly prejudicial, Korelc argues this evidence could have only confused the jury because the superior court permitted I.F. to testify on re-direct about matters he had not been allowed to testify to in the separate trials. Specifically, in the separate trials the court prevented him from explaining why R.G. had not been called as a witness, and why he had delayed calling police. We disagree with Korelc because the purpose of this testimony was to rebut the inference the acquittals in the separate trials demonstrated the other acts had not actually occurred.

not abuse its discretion in precluding this testimony. *State v. Rutledge*, 205 Ariz. 7, 10, ¶ 15, 66 P.3d 50, 53 (2003) (citation omitted) (appellate court reviews rulings on relevance and admissibility of evidence for abuse of discretion).

¶16 Before trial, Korelc moved for disclosure of R.G.'s medical records, including records of Dr. S., asserting the records might contain exculpatory evidence that would support his "accident" defense and show R.G. was "acting irrationally" the day of the shooting and "had not taken prescribed medications for mental health issues as well as seizure issues." Over the State's opposition, and after the superior court agreed to review the records *in camera* and continue the trial (then scheduled for April 12, 2010), it provided copies of the records to the parties on May 11, 2010 without deciding whether the records were relevant or admissible.

¶17 On August 10, 2010, Korelc moved for disclosure of R.G.'s medical records from Dr. W., stating that after reviewing Dr. S.'s records he had learned Dr. W. had also seen R.G. He again asserted the records might support his defense R.G.'s shooting was an accident. Because as of the date of Korelc's motion the court had scheduled trial for September 8, 2010, it denied his motion as insufficient and untimely.

¶18 Subsequently, the superior court rescheduled trial for November 9, 2010. On October 26, 2010, the court reconsidered

Korelc's request for Dr. W.'s medical records and ordered defense counsel to prepare an order for production of the records for *in camera* review. Due in part to delay in submitting the order to the superior court, the court did not receive the records until the morning of trial. During a pretrial conference held the day before -- on November 8, 2010 -- the court and counsel discussed the situation, and the court stated it would affirm the next day's trial date unless the parties had a "different proposal." The court explained it did not want to cancel the trial date based on speculation the records might contain relevant information, but stated it would continue the trial if the records were significant. Korelc did not object to the court's approach.

¶19 On November 9, 2010, before jury selection, the superior court advised the parties it had received Dr. W.'s records and had not found anything "likely to be relevant." Nevertheless, "out of an abundance of caution" and "to have [its] assessment be transparent," the court provided copies of the records to the parties "because [it] granted the defense a right to access the victim's medical records under a very broad concept of materiality." The court also granted Korelc's request to begin jury selection later in the day so counsel could review the records.

¶20 After the recess, the State moved to preclude testimony from R.G.'s doctors, arguing their testimony would not be "even remotely pertinent" to the case, because neither doctor had treated R.G. for "any sort of mental disturbances or mental disorders." In response, Korelc moved to continue the trial so he could interview Dr. W. and have an expert review Dr. W.'s notes. In support of the motion, defense counsel argued:

> I point out just a month before being treated, the victim was reporting seizures, full jerking seizures with smaller seizures going on. If those seizures can be caused -- and because they're generalized, we don't know for sure, but it's certainly a possibility, and it runs to the defense that when these two individuals, my client and the victim, got in an argument that particular day, that could have triggered a seizure. That could have triggered the fight over the gun with the gun accidentally discharging. So, therefore, it does run straight to the defenses.

Defense counsel also noted R.G. was on medication, including seizure medication, with the amounts being adjusted because of side effects, and stated, "it would be nice to be able to now interview Dr. [W.] and find out exactly what these things even mean."

¶21 When asked by the superior court to clarify how the doctors' testimony would be relevant, defense counsel stated he could not do so until he hired an expert to review the records and "make a determination." To that, the State noted all of Dr.

W.'s records, except for two pages, were in the records previously provided by Dr. S. and given to defense counsel months earlier, and further argued the records failed to support Korelc's defense. The superior court denied Korelc's motion to continue and granted the State's motion to preclude the doctors' testimony, stating the parties had received sufficient notice of the contents of the medical records and Dr. W.'s records did not add anything significantly new to those previously disclosed.

¶22 On this record, the superior court did not abuse its discretion in precluding the doctors' testimony. *See* Ariz. R. Evid. 402 ("Evidence which is not relevant is not admissible."). Defense counsel could only speculate that R.G.'s medical records and history would be relevant to Korelc's defense -- at best, he only suggested a possibility that, after further review of the records by an expert, R.G.'s medical history might be relevant. *See State v. Machado*, 224 Ariz. 343, 357 n.11, ¶ 33, 230 P.3d 1158, 1172 n.11 (App. 2010) (quotation and citation omitted) (defendant not entitled to "throw strands of speculation on the wall and see if any of them will stick").

III. Voluntariness

¶23 Finally, Korelc argues his statements to the police were involuntary and, thus, the superior court should not have allowed the State to impeach him with those statements when he testified at trial. We disagree.

¶24 Only voluntary statements made to law enforcement are admissible at trial. *State v. Ellison*, 213 Ariz. 116, 127, ¶ 30, 140 P.3d 899, 910 (2006) (citations omitted). And, in Arizona, confessions and incriminating statements made to police are presumed involuntary and the State bears the burden of showing by a preponderance of the evidence the statements were voluntary. The critical question is whether the "defendant's will was overborne." *State v. Newell*, 212 Ariz. 389, 399, ¶ 39, 132 P.3d 833, 843 (2006) (citation omitted). To decide this question, a court must examine the totality of the circumstances surrounding the giving of the statements. *Id*. These circumstances include the environment of the interrogation; whether *Miranda* warnings were given; the duration of the interrogation; and whether there was impermissible police questioning. *State v. Blakely*, 204 Ariz. 429, 436, ¶ 27, 65 P.3d 77, 84 (2003) (citation omitted). Additionally, there must be a "causal relation between the coercive behavior and the defendant's overborne will." *State v. Boggs*, 218 Ariz. 325, 336, ¶ 44, 185 P.3d 111, 122 (2008) (citation omitted). We

review a superior court's determination of voluntariness for clear and manifest error, which is shorthand for abuse of discretion. *State v. Jones*, 203 Ariz. 1, 5, ¶ 8, 49 P.3d 273, 277 (2002) (citation omitted); *see also Newell*, 212 Ariz. at 396, 396 n.6, ¶ 22, 132 P.3d at 840, 840 n.6 (citations omitted). Under this standard of review we will not second guess a superior court's factual determinations; however, to the extent its ultimate ruling is a conclusion of law, our review is de novo. *Jones*, 203 Ariz. at 5, ¶ 8, 49 P.3d at 277 (quotation and citation omitted); *State v. Zamora*, 220 Ariz. 63, 67, ¶ 7, 202 P.3d 528, 532 (App. 2009) (citations omitted).

¶25 At the evidentiary hearing on Korelc's motion to suppress, the police officers who questioned him testified that Officer E.R. questioned Korelc initially and briefly at the apartment. Then, with Korelc's consent, two police detectives questioned him at a nearby senior center close to his apartment. One of the detectives testified that after police had tested Korelc for gunshot residue and impounded his clothes (giving him paper clothes to wear), Korelc was free to leave. Although the interview lasted almost six hours inclusive of breaks, Korelc was not handcuffed and police gave him opportunities to "get up, walk around, use the bathroom, [and] get water." The record reflects the detectives' questions were investigatory rather than accusatory in nature. The detectives were in the process

of making arrangements to drive Korelc home when another police officer, Detective J.N., arrived to question Korelc about certain inconsistencies between his statements to police and the physical evidence. Korelc was not under arrest, and all of the police officers who testified at the hearing denied making any promises or threats of any kind to Korelc during their questioning. *See Ellison*, 213 Ariz. at 127-28, ¶ 31, 140 P.3d at 910-11 (quotation and citation omitted) ("[A] prima facie case for admission of a confession is made when the officer testifies that the confession was obtained without threat, coercion or promises of immunity or a lesser penalty."). Transcripts of the police questioning of Korelc bear this out. And finally, the record fails to contain any evidence that Korelc's age, education, or intelligence made him susceptible to coercion.

¶26 Despite these circumstances, Korelc argues police coerced his statements because they failed to determine whether he had understood the *Miranda* warnings Officer E.R. had given him at the apartment, and then, at the senior center, failed to either make sure he had understood the warnings or re-*Mirandized* him and, instead, in violation of his *Miranda* rights, continued to question him after he "unambiguously" requested an attorney. Although *Miranda* and voluntariness are separate inquiries, *State v. Montes*, 136 Ariz. 491, 494, 667 P.2d 191, 194 (1983), and a

"voluntary confession obtained in violation of *Miranda* may be used to impeach a witness," *State v. Huerstel*, 206 Ariz. 93, 107, ¶ 61, 75 P.3d 698, 712 (2003), a *Miranda* violation is nevertheless relevant to whether a person's will has been overborne sufficiently to render a confession involuntary. When *Miranda* warnings are required but not given, that factor weighs against a finding of voluntariness. *State v. Pettit*, 194 Ariz. 192, 196, ¶¶ 17, 19, 979 P.2d 5, 9 (App. 1998) (citations omitted).

¶27 Here, although Officer E.R. testified he gave Korelc the *Miranda* warnings at the apartment in an overabundance of caution, the record does not reflect he was required to do so. This is because Korelc was not in custody. *Stansbury v. California*, 511 U.S. 318, 322-23, 114 S. Ct. 1526, 1528-29, 128 L. Ed. 2d 293 (1994) (quotations and citations omitted) (defendant in custody and entitled to *Miranda* warnings when formally arrested or when freedom of movement restrained to the degree associated with formal arrest; whether interrogation is custodial determined by objective circumstances of interrogation and not subjective views of either the interrogating officer or the person being questioned). And, although the record fails to demonstrate whether Korelc actually understood the *Miranda* warnings given to him by Officer E.R., he was not in custody when the two detectives questioned him at the senior center. As

discussed, their questioning was investigational, and indeed they were in the process of making arrangements to take Korelc home when Detective J.N. arrived. Further, the record does not reflect that in response to the two detectives' questions, Korelc made an "unambiguous" request for a lawyer which would have signaled to them that they should stop the interview. *See generally Davis v. United States*, 512 U.S. 452, 458-59, 114 S. Ct. 2350, 2354-55, 129 L. Ed. 2d 362 (1994) (after *Miranda* warnings, police must cease interrogation until counsel is present if defendant unambiguously requests counsel). At best, as borne out by the transcript of the interview, Korelc simply appears to have asked the two detectives to express an opinion as to what they would do if they were in his "shoes."[4]

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[4]The two detectives asked Korelc the following:

> Q1: Okay. What . . . hand did she grab it with? Do you remember?
>
> A: Oh fuck no. Everything happened so damn fast. I shouldn't even be telling you this without an attorney.
>
> Q1: Do you think you need an attorney?
>
> A: Well you -- with what's happening? Yeah.
>
> Q1: Okay.
>
> A: You think I don't? Wouldn't you?

¶28 To be sure, with the arrival of Detective J.N. to question Korelc about inconsistencies between his statements and the physical evidence, police had begun to suspect Korelc had shot R.G. but not in a struggle as he had described. But, their "focus" does not mean the questioning had become a custodial interrogation. *Id*. at 323-24; *State v. Cruz-Mata*, 138 Ariz. 370, 373, 674 P.2d 1368, 1371 (1983). But, even if we assume Detective J.N.'s arrival turned a non-custodial investigatory interview into a custodial interrogation and police should have then advised Korelc of his *Miranda* rights, the record fails to reflect Detective J.N. made any promises or threats to Korelc or his questions forced, intimidated, or coerced Korelc into explaining what had actually happened in the struggle with R.G. over the gun -- that he had wrestled the gun away from R.G.,

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Q1: I can't -- I don't know. I can't come up with a . . .

A: Would you?

Q1: Would I? I don't know. I'm not in your shoes. I can't answer that question. I don't know.

A: Okay. I just went, "Shit." And we just -- and she had just talked to her mom and everything. I'm just going . . .

Q1: Okay.

turned it towards her, and as he was stepping away from her, the gun discharged.

¶29 Reviewing the totality of the circumstances, we cannot say the superior court abused its discretion in finding Korelc's statements to police voluntary. Accordingly, the State was entitled to use those statements to impeach Korelc at trial.

CONCLUSION

¶30 For the foregoing reasons, we affirm Korelc's conviction and sentence.

_/s/___
PATRICIA K. NORRIS, Judge

CONCURRING:

_/s/___
ANN A. SCOTT TIMMER, Presiding Judge

_/s/___
DONN KESSLER, Judge