FILED BY CLERK
JUL 22 2011
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. TAMARA V. MAXWELL, Appellant.	)	2 CA-CR 2010-0089 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20082607

Honorable John S. Leonardo, Judge

AFFIRMED

Thomas C. Horne, Arizona Attorney General
By Kent E. Cattani and Kathryn A. Damstra
Tucson
Attorneys for Appellee

Robert J. Hirsh, Pima County Public Defender
By Lisa M. Hise
Tucson
Attorneys for Appellant

K E L L Y, Judge.

¶1 Appellant Tamara Maxwell appeals her conviction and sentence for second-degree murder. She argues the trial court erred in denying her motions to suppress her statements to police detectives and to continue the trial, and in precluding certain evidence related to the victim's state of mind and prior acts of violence. Because we conclude there was no error, we affirm Maxwell's conviction and sentence.

Background

¶2 We review the evidence in the light most favorable to sustaining a conviction and resolve all reasonable inferences against Maxwell. *State v. Manzanedo*, 210 Ariz. 292, ¶ 3, 110 P.3d 1026, 1027 (App. 2005). Around midnight on July 3, 2008, Maxwell and her girlfriend were visiting R. at her home. K., whom Maxwell had never seen before that night, and K.'s boyfriend Julian Garcia were staying overnight at R.'s house.

¶3 While Maxwell and her girlfriend were there, R. woke K. and Garcia and asked them to move to a different bedroom. A few minutes later, apparently angry about R.'s request, K. "appeared in the hallway to the kitchen" and began arguing with R., who was in the living room. During this argument, K. moved toward R. "aggressively and put her hands on [R.'s] shoulders and neck area." Shortly thereafter, Maxwell, who had been sitting nearby, pulled out a firearm she had been carrying and shot K. R. testified that Maxwell had fired the first shot into K.'s back and fired four or five other shots after K. turned and began approaching Maxwell. K. "died as a result of [the] multiple gunshot wounds," including one to her "left upper back shoulder area."

¶4 After K. had fallen to the ground, Maxwell, her girlfriend, and R. left the apartment, with Maxwell driving. R. claimed to have left with Maxwell because she threatened her with the gun. According to R., Maxwell had told her to say "that there was a home invasion [and] two men came in the house." Maxwell drove the three in R.'s car to a friend's house, and R. drove back to her house alone.

¶5 Garcia, who had been awakened by the gunshots, found K. on the floor bleeding, but still alive, and called 9-1-1. When R. returned, police officers already had arrived. R. initially said there had been a home invasion but later told them Maxwell had shot K., stating "[K.] could have killed [her] if [Maxwell] was not there," and that she had been helped by "God's angel."

¶6 On July 3, Maxwell was arrested and questioned regarding K.'s death. Her cousin, who had been with her at the time of her arrest, voluntarily went to the police station for questioning and was released before Maxwell's interview began. After she received *Miranda*[1] warnings, Maxwell said, "[m]y cousin he had to leave . . . am I going to jail?" When she persisted with this question, one detective said:

> Well that decision hasn't been made yet, what we're doing right now is just like we spoke to him, his information panned out and he was being honest with us so he, he was able to go. Now you know right now we're just wanting to find out some information that your name has been brought up, okay.

After Maxwell said "Okay," they continued the interrogation. Soon after, Maxwell told the detectives she had returned a call from a police detective the previous day concerning

[1]*Miranda v. Arizona*, 384 U.S. 436 (1966).

an incident in which an individual named Joey had claimed she shot him ("Joey incident").

¶7 The detectives then referred to an incident involving injuries that had occurred the previous night. When Maxwell asked if they were talking about Joey, the detectives said they were not, but they agreed to start there because that was Maxwell's preference. Maxwell then denied having been present when Joey was shot, claiming she had been in a hotel room all evening. When the detectives changed the subject to the shooting of K., Maxwell said she had been at R.'s house the previous night but had left and had not seen anything. Eventually, she confessed to shooting both Joey[2] and K. but said she had been acting out of fear for R.'s and her own safety when she shot K.

¶8 Maxwell was charged with first-degree murder for the death of K., and kidnapping and aggravated assault of R. On June 2, 2009, the trial court set the case for trial on December 8. On November 24, 2009, Maxwell requested a continuance, which the court denied, but because of a scheduling conflict, the trial was postponed until December 15, 2009. Following the trial, the jury found Maxwell guilty of the lesser included charge of second-degree murder for the death of K., and not guilty of the charges related to R. This appeal followed.

[2]Maxwell pled guilty to one count of aggravated assault of Joey.

Discussion

I. Voluntariness

¶9 Maxwell asserts the trial court erred in denying her motion to suppress statements she made to detectives following her arrest. She argues her confession was involuntary because she gave it in reliance on the detectives' implied promise she would not go to jail if she cooperated. In Arizona, confessions are presumed to be involuntary. *State v. Thomas*, 148 Ariz. 225, 227, 714 P.2d 395, 397 (1986). The state has the burden to establish by a preponderance of the evidence "that [a] confession was freely and voluntarily given." *Id.* In reviewing the trial court's decision on suppression, we consider only "the evidence presented at the suppression hearing," *State v. Moore*, 183 Ariz. 183, 186, 901 P.2d 1213, 1216 (App. 1995), and review the facts in the light most favorable to sustaining the ruling, *State v. Hyde*, 186 Ariz. 252, 265, 921 P.2d 655, 668 (1996). We will not disturb the trial court's determination that a confession was voluntary "absent clear and manifest error." *See State v. Poyson*, 198 Ariz. 70, ¶ 10, 7 P.3d 79, 84 (2000).

¶10 We review the trial court's factual findings for abuse of discretion, but consider de novo whether a constitutional violation occurred. *State v. Davolt*, 207 Ariz. 191, ¶ 21, 84 P.3d 456, 467 (2004). In determining whether a confession is voluntary, we "look to the totality of the circumstances surrounding the giving of the confession." *State v. Newell*, 212 Ariz. 389, ¶ 39, 132 P.3d 833, 843 (2006), *quoting State v. Montes*, 136 Ariz. 491, 496, 667 P.2d 191, 196 (1983). "Then [we] must determine whether, given the totality of the circumstances, the defendant's will was overborne." *Id.*

¶11 Here, the trial court found "the detectives implied that [Maxwell] would . . . be released if she provided truthful information" and that this constituted an impermissible implied promise.[3] "[A] direct or implied promise, however slight, will render a confession involuntary when it was relied upon by the defendant in making a confession." *Id.* ¶ 44. But the court found that although the detectives had made an impermissible promise, Maxwell had not confessed in reliance on that promise because she had "voluntarily" called the police station prior to the interrogation and had made statements such as, "I want you guys to know everything that happened." The court determined that these facts established "by a preponderance of the evidence that defendant gave her confession" because she wanted the police to relieve her from further involvement in the investigation, not in reliance on the implied promise, and it therefore denied Maxwell's motion to suppress her confession.

¶12 Maxwell asserts the trial court erred because her statements about wanting to cooperate could have concerned only the Joey incident, and her call to the police could have been for reasons other than the desire to cooperate.[4] Because it appears Maxwell thought she had been arrested in connection with the Joey incident, and her comments regarding her desire to cooperate may have been limited to this incident, we agree the trial court erred insofar as its conclusion was based only on those facts. Nevertheless, looking at the totality of the circumstances, we conclude the state presented sufficient

[3]We do not address this issue because the state does not contest the trial court's finding that the detectives made an implied promise to Maxwell.

[4]The trial court's ruling does not address or mention the incident involving Joey.

evidence to establish that Maxwell's confession about her involvement in K.'s death was voluntary. *See State v. Cañez*, 202 Ariz. 133, ¶ 51, 42 P.3d 564, 582 (2002) ("we are obliged to uphold the trial court's ruling if legally correct for any reason").

¶13 In making a voluntariness determination, we consider: "1) the environment of the interrogation; 2) whether *Miranda* warnings were given; 3) the duration of the interrogation; and 4) whether there was impermissible police questioning."[5] *State v. Blakley*, 204 Ariz. 429, ¶ 27, 65 P.3d 77, 84 (2003). To find a statement involuntary, the trial court must find that "the defendant's will was overborne," considering the totality of the circumstances. *Newell*, 212 Ariz. 389, ¶ 39, 132 P.3d at 843. There must be "both coercive police behavior and a causal relation between the coercive behavior and the defendant's overborne will." *State v. Boggs*, 218 Ariz. 325, ¶ 44, 185 P.3d 111, 122 (2008).

¶14 Maxwell does not allege, and the record does not suggest, the interrogation's environment or duration were inherently coercive or that the detectives asked impermissible questions. Maxwell received *Miranda* warnings and intelligently and knowingly waived her rights. "[She] answered questions freely and did not ask for an attorney or attempt to terminate the interview." *State v. Scott*, 177 Ariz. 131, 137, 865 P.2d 792, 798 (1993).

---

[5]Additional factors affecting the defendant's cognitive ability, such as age and intellect, also may be considered. *State v. Blakley*, 204 Ariz. 429, ¶ 31, 65 P.3d 77, 85 (2003); *State v. Jimenez*, 165 Ariz. 444, 449, 799 P.2d 785, 790 (1990). But because the central determination is whether the police activity was coercive such elements are relevant only to the extent "police knew or should have known about them." *Blakley*, 204 Ariz. 429, ¶ 31, 65 P.3d at 85.

¶15 Assuming the detective's statements constituted an impermissible promise, we conclude that because there was no causal relationship between the promise and Maxwell's confession, the trial court reached the right result even if the reasons it gave applied only to the Joey incident. *See State v. Saiers*, 196 Ariz. 20, ¶ 15, 992 P.2d 612, 616 (App. 1999) (we "'affirm the trial court when it reaches the correct result even though it does so for the wrong reasons'"), *quoting State v. Oakley*, 180 Ariz. 34, 36, 881 P.2d 366, 368 (App. 1994). Importantly, after hearing the impermissible promise, Maxwell did not confess, but rather denied any wrongdoing in regard to both the Joey incident and the shooting of K. *See Newell*, 212 Ariz. 389, ¶ 46, 132 P.3d at 844 (continued denials after improper promise demonstrate voluntariness of later statements). Despite her repeated assertions that she was "cooperating," Maxwell was evasive and misleading about the Joey incident until confronted with evidence related to K. And it was not until the detectives told Maxwell that witnesses were reporting she had shot K. and that the detectives wanted to "giv[e her] an opportunity to . . . explain what happened"—suggesting her actions might have been in self-defense or defense of others—that she confessed to the shootings. Further, even after she had confessed to shooting K., Maxwell lied to the detectives about what she had done with the gun she had used.[6]

¶16 In addition, the length of time between the implied promise and Maxwell's eventual confession undermines any argument that the implied promise prompted the

[6]Maxwell first claimed she had thrown the gun out the window but later admitted hiding it in a bag of dog food in her car's trunk. The detectives later obtained a search warrant and retrieved the gun from the trunk.

confession. *Cf. State v. Strayhand*, 184 Ariz. 571, 581, 911 P.2d 577, 587 (App. 1995) ("coercive pressures . . . dispelled . . . if there was a break in the stream of events sufficient to insulate the confession from the effect of everything that preceded it"). Even after detectives made the implied promise, Maxwell continued to assert she "[did]n't know nothing about nobody being hurt" for nearly forty minutes. In fact, after the detectives confronted her with the statements by witnesses who had been at R.'s house and asked her "to please explain what happened" there, Maxwell first started with "the whole Joey situation" and confessed to shooting Joey before she confessed to shooting K.

¶17 Because we conclude Maxwell did not rely on the detectives' implied promise when she eventually confessed to shooting K., we find no error in the trial court's ruling that Maxwell's confession was voluntary.

II. Motion to Continue

¶18 Maxwell next claims "[t]he trial court abused its discretion in denying [her] motion to continue" because "she was willing to waive time and [she] had a legitimate need for additional time to prepare." We review a trial court's denial of a motion to continue for an abuse of discretion. *State v. Barreras*, 181 Ariz. 516, 520, 892 P.2d 852, 856 (1995). "An abuse of discretion is discretion manifestly unreasonable, or exercised on untenable grounds or for untenable reasons." *State v. Sandoval*, 175 Ariz. 343, 347, 857 P.2d 395, 399 (App. 1993).[7] We find no such abuse here.

[7]Maxwell urges us to apply the factors set forth in *State v. Aragon* in reviewing the trial court's ruling. 221 Ariz. 88, ¶ 5, 210 P.3d 1259, 1261 (App. 2009). But, as the state points out, these factors apply to the specific issue of whether the denial of a motion to continue, founded on the Sixth Amendment right to counsel of choice, constitutes an

¶19 Although the trial date was set in June, Maxwell did not file her motion seeking a thirty-day continuance until November 24. As grounds for the continuance, Maxwell's counsel listed the cases that had occupied his time since the last status conference, as well as the demands on his co-counsel's time.[8] The following day, Maxwell filed supplemental authority in support of the motion to continue in which she cited our decision in *State v. Aragon*, 221 Ariz. 88, 210 P.3d 1259 (App. 2009), specified she was willing to waive her right to a speedy trial under Rule 8, Ariz. R. Crim. P., and asserted she had not previously requested a continuance.

¶20 Rule 8.5(b), Ariz. R. Crim. P., provides, "[a] continuance of any trial date shall be granted only upon a showing that extraordinary circumstances exist and that delay is indispensable to the interests of justice." In finding Maxwell had not made such a showing, the court explained "trial should have commenced no later than August 18, 2009," but "[n]onetheless . . . the court set the . . . trial date[] nearly four months beyond the Rule 8 time frame to afford counsel sufficient time to prepare." The court also noted counsel had had "over sixteen months to prepare for the[] trial[]" and although "the workload of defense counsel is considerable, it is not atypical."

¶21 Maxwell argues her "right[] to present a complete defense . . . outweighed the trial court's concern that she had already been given enough time to prepare the case." We disagree. Maxwell based her request for a continuance on her assertion that counsel

---

abuse of discretion. *Id.* ¶ 9. As Maxwell's request for a continuance was not premised on her right to counsel of choice, we decline to apply the factors listed in *Aragon*.

[8]Co-counsel for Maxwell filed a notice of appearance on August 12, 2009.

still needed to do additional investigation, including interviews of "at least thirteen more people" and an examination of the shooting scene. Maxwell does not explain why counsel could not have performed these tasks during the sixteen months before trial began, or during the one-week continuance granted by the court. Moreover, as the court explained in its ruling, counsel was ordered to complete all witness interviews by October 28, 2009, and that deadline had passed without Maxwell requesting an extension. Further, as the court noted, Maxwell's first request for a continuance was filed approximately two weeks before trial despite the matter having been scheduled nearly six months before. *Cf. State v. Sullivan*, 130 Ariz. 213, 216, 635 P.2d 501, 504 (1981) (no abuse of discretion where defendant failed to exercise due diligence in preparing for trial).

¶22 The trial court is in the best "position to determine whether there are 'extraordinary circumstances' warranting a continuance and whether 'delay is indispensible to the interests of justice.'" *State v. Hein*, 138 Ariz. 360, 368, 674 P.2d 1358, 1366 (1983), *quoting* Ariz. R. Crim. P. 8.5(b). Based on the foregoing, we cannot say the court abused its discretion in denying the motion to continue. *State v. Garcia-Contreras*, 191 Ariz. 144, ¶ 21, 953 P.2d 536, 541 (1998).

III. Exclusion of Evidence

a. Text messages

¶23 Maxwell challenges the trial court's preclusion of certain text messages sent between K. and her boyfriend, Garcia, on the day preceding K.'s death. We review the court's exclusion of evidence for an abuse of discretion. *State v. Ruggiero*, 211 Ariz.

262, ¶ 15, 120 P.3d 690, 693 (App. 2005). "An abuse of discretion occurs only when 'the reasons given by the court for its action are clearly untenable, legally incorrect, or amount to a denial of justice.'" *State v. Gomez*, 211 Ariz. 111, ¶ 12, 118 P.3d 626, 629 (App. 2005), *quoting State v. Chapple*, 135 Ariz. 281, 297 n.18, 660 P.2d 1208, 1224 n.18 (1983).

¶24 Maxwell sought to introduce three text messages to establish K.'s state of mind the day before her death. The messages, sent over approximately a five-hour period, were: 1) from Garcia to K.: "I care about U 2 much that's y it not going 2 work 4 me," 2) from K. to Garcia: "baby please dnt leave me I want you here with me," and 3) from K. To Garcia: "please dnt make me pick between you." Maxwell claimed the messages were relevant to the "explosive argumentative interaction" between K. and R., who previously had been in a romantic relationship, because K. "[was] trying to decide whether she want[ed] to be with [Garcia] or [R.]" The trial court concluded the messages were hearsay, but were relevant to K.'s state of mind. *See* Ariz. R. Evid. 803(3) ("statement of the declarant's then existing state of mind" not excluded by hearsay rule). The court required defense counsel to introduce the content of the messages through Garcia's testimony, and instructed counsel, "You can show [the text] to him. Let him read it silently and see if it refreshes his memory. What he says is what you've got." The court also informed defense counsel that Garcia could not be impeached with the actual text messages by calling an investigator or other witness.

¶25 When counsel asked Garcia if he had received a text message from K. "along the lines of don't make me have to pick between the two," the trial court sustained

the state's objection. But it then allowed defense counsel to ask Garcia if he recalled receiving text messages from K. about "having trouble deciding whether she wanted to be with you or . . . [R.]" and her "concern . . . whether you two were going to stay together as a couple," or sending her a message saying that he "cared about her a lot and that this might not work" for him. Although Garcia did not remember any of these messages, counsel made no effort to refresh his recollection by showing them to him. Maxwell then filed a brief arguing the text messages were admissible evidence under Rules 803(3) and 801(c), Ariz. R. Evid. The trial court ruled the three messages Maxwell sought to introduce, presumably to impeach Garcia, were "not relevant to the extent that [they] could survive an analysis under [Rule] 403, [Ariz. R. Evid.]"[9]

¶26 The state argues "[t]he trial court properly excluded the text messages as cumulative." We agree the trial court appears to have viewed the evidence as needlessly cumulative, saying "I think the jury also already understands the tensions and the three way relationship as it existed." A trial court has discretion to exclude relevant evidence if it is cumulative. Ariz. R. Evid. 403; *State v. Machado*, 224 Ariz. 343, ¶ 48, 230 P.3d 1158, 1175 (App. 2010).

¶27 Cumulative evidence "augments or tends to establish a point already proved by other evidence." *State v. Kennedy*, 122 Ariz. 22, 26, 592 P.2d 1288, 1292 (App. 1979). Here, there was ample evidence K. was having relationship issues on the day the

[9]Rule 403 concerns evidence that is relevant but nonetheless excluded because "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."

text messages were exchanged. R. testified : 1) she and K. had lived together as a couple for a year before they broke up, 2) K. had wanted to get back together with her and was "stuck on [it,]" 3) she and K. had slept together the night before K.'s death, 4) K. had wanted both R. and Garcia, 5) R. had not returned home earlier because she and K. had argued about it, and 6) K. had been upset because R. had told her she did not love her. Garcia testified that: 1) he, K. and R. had slept together in one bed the night before the shooting, 2) K. had asked him about having sex in a threesome with R., and 3) he had heard R. say she wanted K. to break up with him. Because R.'s and Garcia's testimony provided ample evidence of K.'s state of mind as to her relationship problems on the day of her death, we cannot agree the court abused its discretion in concluding the text messages were cumulative under Rule 403. *See id.* at 26-27, 592 P.2d at 1292-93.

b. K.'s alleged gang affiliation

¶28 The state filed a motion seeking inter alia to preclude evidence of tattoos and "any gang references [or] affiliations of" K. Maxwell opposed the motion as to K.'s tattoos and alleged gang membership on the grounds "[it was] relevant to stimulating fear in [R.]" At a preliminary hearing, the trial court granted the state's motion to preclude evidence of K.'s gang affiliation and tattoos finding "unless . . . there is some issue as to whether or not she has a gang affiliation . . . it's not relevant . . . , especially during the [Rule] 403 balancing."

¶29 Additionally, at trial, Maxwell sought to introduce a statement made by K. to R. during their altercation. Maxwell asserted R. had told police that K. "sa[id] something about some crazy gangster Vista Bloods." The trial court initially excluded

the evidence, finding that the probative value of the statement did not "overcome the prejudice." But after reviewing the transcript of R.'s statement, the court reversed its ruling as to this statement, providing it had been made by K. in Maxwell's presence. Outside the presence of the jury, R. claimed she did not remember K. making the statement. Thereafter, the court ruled that Maxwell could impeach R. with a prior contrary statement she had made to police, but Maxwell did not do so.

¶30 Maxwell also attempted to introduce photographs of K. that showed she had the word "blood" tattooed across her chest. Maxwell argued she should be able to present at least one of these photographs "to show [K.] was in fact associated with the Blood Vistas." The court denied the request finding "the probative value [of the evidence was] overcome by the danger of unfair prejudice . . . [a]nd confusion of issues."

¶31 We review a trial court's evidentiary rulings for abuse of discretion. *State v. Tucker*, 215 Ariz. 298, ¶ 46, 160 P.3d 177, 192 (2007). Evidence is relevant when it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable." Ariz. R. Evid. 401. Maxwell's defense was justification and defense of others and, under her theory of the case, R. was minimizing K.'s aggressiveness because she feared gang retaliation. When the defendant argues self-defense, evidence of the victim's gang membership is admissible under Rule 404(b), Ariz. R. Evid., "to show that the defendant was justifiably

apprehensive of the decedent and knew that the decedent had a violent disposition."[10] *See State v. Taylor*, 169 Ariz. 121, 124, 817 P.2d 488, 491 (1991); *State v. Zamora*, 140 Ariz. 338, 341, 681 P.2d 921, 924 (App. 1984).

¶32 But the trial court has discretion to exclude relevant evidence after conducting a Rule 403 balancing test. *Taylor*, 169 Ariz. at 125, 817 P.2d at 492. And here, the court indicated it had balanced the evidence under Rule 403 in precluding gang and tattoo evidence. The autopsy photographs of the victim that showed the "blood" tattoo were not included in the record on appeal. But the photograph admitted for the purpose of showing the victim's size also portrayed her nude body, face up, with a tattoo on her arm and part of a tattoo on her chest. And after Maxwell testified she "could see a tattoo on [K.]," she sought clarification from the court as to whether the tattoo "up here" was precluded. The court repeated its earlier ruling that it was irrelevant but told defense counsel that, "[i]f you get to the point with her when you are questioning her about her emotional state at the time and what caused her to be concerned, that may become relevant at that point." Despite the court's apparent openness to admission of the evidence under the proper circumstances, Maxwell did not testify she had been fearful of K. for any reason other than K.'s "trying to hit [her] with a vase." And as to the admission of gang evidence to prove R.'s fear of retaliation, the court allowed Maxwell to question R. about her fear of retaliation from "the victim's family."

[10]It does not appear that Maxwell specifically argued the evidence was admissible under Rule 404(b). However, the substance of her argument was that the evidence was admissible to show both she and R. were justifiably fearful of K.

¶33 Trial testimony revealed that K. was significantly larger than Maxwell, had a masculine build, weighed more than 200 pounds, looked like she was trying to physically fight R., and was "crazy" and aggressive when she approached her. This evidence supported Maxwell's argument that she was fearful of K. And, in direct contravention of the court's ruling precluding gang evidence, defense counsel read to R. her statement to police concerning her fear of retaliation in which she referred to K.'s father and brothers as "Bloods." Therefore, we conclude that the trial court acted within its discretion in limiting the presentation of gang evidence, because its probative value was outweighed by the danger of unfair prejudice.

c. K.'s specific past-acts of violence against R.

¶34 After R. testified, Maxwell sought to introduce testimony by R.'s mother that K. previously had committed violent acts against R. Maxwell stated that based on a previous interview with R.'s mother, she was hostile and would likely not testify that K. had a character trait for violence. Therefore, Maxwell sought permission to impeach R.'s mother with her previous statements that K. was "an evil person, a bad person, that she was assaultive." The trial court concluded that R.'s mother could be called to testify as to K.'s allegedly violent character, but to the extent R.'s mother did not so testify, she could not be "impeach[ed] on specific statements she made about specific incidents."

¶35 "When [a] [d]efendant raises a justification defense, [s]he is entitled to offer at least some 'proof of the victim's reputation for violence.'" *State v. Connor*, 215 Ariz. 553, ¶ 13, 161 P.3d 596, 601-02 (App. 2007), *quoting Zamora*, 140 Ariz. at 341, 681 P.2d at 924. Specific acts of violence by the victim are generally admissible only "if

the defendant knew of them." *Zamora*, 140 Ariz. at 341, 681 P.2d at 924. Although character evidence is generally inadmissible to show that a person acted in conformity with that character, when the defendant raises self-defense in a homicide case, evidence of a victim's reputation for violence is admissible if the defendant knew about it before the murder. Ariz. R. Evid. 404(a)(2); *Taylor*, 169 Ariz. at 124, 817 P.2d at 491.

¶36 Evidence of a victim's character trait for violence may be introduced by testimony as to the victim's reputation or "'in the form of an opinion.'" *Connor*, 215 Ariz. 553, ¶ 18, 161 P.3d at 603, *quoting* Ariz. R. Evid. 405. Specific acts, however, may not used to establish the victim's character unless, "the victim's character is an 'essential element' of the defense." *State v. Williams*, 141 Ariz. 127, 130, 685 P.2d 764, 767 (App. 1984), *quoting* Ariz. R. Evid. 405(b). The trial court did not prevent Maxwell from calling R.'s mother for the purpose of eliciting her opinion testimony regarding K.'s character trait for violence. The court only ruled, properly, that Maxwell could not seek to introduce evidence of the victim's specific bad acts through R.'s mother's opinion testimony.[11]

¶37 On appeal, Maxwell also argues the trial court erred because our holding in *State v. Fish* permitted her to introduce evidence of K.'s prior acts of violence to support her version of events. 222 Ariz. 109, ¶ 49, 213 P.3d 258, 273 (App. 2009). In the trial

[11]R.'s mother did not testify. Had she done so, it might have been appropriate to impeach her with her prior inconsistent statements. Ariz. R. Evid. 607, 613; *see also State v. Rutledge*, 205 Ariz. 7, ¶¶ 14-24, 66 P.3d 50, 53-55 (2003) (noting inconsistencies between trial testimony and prior police interview). But because she did not testify, she made no inconsistent statements. *See State v. Littles*, 123 Ariz. 427, 430, 600 P.2d 40, 43 (App. 1979); *see also* Ariz. R. Evid. 608(b).

court, however, Maxwell argued only that the evidence was admissible to impeach R.'s mother, not to corroborate her allegation that K. had been the first aggressor. To preserve an issue on appeal "the defendant must make a sufficient argument to allow a trial court to rule on the issue." *State v. Kinney*, 225 Ariz. 550, ¶ 7, 241 P.3d 914, 918 (App. 2010). Because Maxwell did not properly frame this issue for the trial court, our review is limited to fundamental error. *Cf. State v. Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d 601, 607 (2005) (fundamental error applies "when a defendant fails to object to alleged trial error"). To warrant relief under this standard the defendant "must establish both that fundamental error exists and that the error in his case caused him prejudice." *Id.* ¶ 20. Here, Maxwell cannot establish error.

¶38 In *Fish*, we held that where "the single determinative issue was whether the Defendant's claim of self-defense was critical and there were no other eyewitnesses to the shooting . . . specific act evidence was relevant to corroborate[] Defendant's version of the events leading up to the shooting." 222 Ariz. 109, ¶ 41, 213 P.3d at 271. To the extent *Fish* creates a limited exception to the rule that opinion testimony cannot be used to introduce evidence of a victim's prior bad conduct, it is inapplicable to the present case. *See id.* ¶ 35 (reiterating "a defendant may not introduce evidence of specific acts unknown to the defendant at the time of the alleged crime to show that the victim was the initial aggressor"). Here, unlike in *Fish*, other witnesses could have testified whether K. was the first aggressor. *Id.* ¶ 41. That R. refuted Maxwell's version of events does not render the evidence admissible. *Cf. id.* (only defendant and decedent witnessed event).

Further, evidence that K. had committed prior acts of violence against R. was admitted through R.'s own testimony.

¶39 Therefore, we conclude the trial court correctly ruled that R.'s mother could not testify about K.'s prior specific acts of violence against R.

Disposition

¶40 Finding no error, we affirm Maxwell's conviction and sentence.

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge

CONCURRING:

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge