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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



DIVISION ONE
FILED: 07/24/2012
RUTH A. WILLINGHAM,
CLERK
BY: sls

STATE OF ARIZONA,) 1 CA-CR 10-0721
) 1 CA-CR 11-0116
 Appellee,) (Consolidated)
)
 v.) DEPARTMENT D
)
 BRYAN MATTHEW GILLIAM,) **MEMORANDUM DECISION**
)
 Appellant.) (Not for Publication -
) Rule 111, Rules of the
) Arizona Supreme Court)
)

Appeal from the Superior Court in Maricopa County

Cause No. CR2007-175000-002 DT

The Honorable John Ditsworth, Judge
The Honorable Margaret Mahoney, Judge
The Honorable Joseph Kreamer, Judge

AFFIRMED

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G O U L D, Judge

¶1 Bryan Matthew Gilliam appeals his convictions for second degree murder, aggravated assault and two counts of endangerment. Gilliam argues the trial court erred when it denied his motion to dismiss the indictment; when it admitted evidence of Gilliam's reputation, other acts committed by Gilliam and his prior felony convictions; when it denied his motion for mistrial and when it denied his post-trial motions for judgment of acquittal and new trial. Gilliam further argues the evidence was insufficient to support his convictions. For the reasons that follow, we affirm Gilliam's convictions.

I. Factual and Procedural History

¶2 The State alleged Decedent shot and wounded Gilliam in response to Decedent's daughter's screams for help as Gilliam attacked her in the driveway of their home. Decedent's daughter was Gilliam's wife. Gilliam returned fire and killed Decedent. The State charged Gilliam with second degree murder of his father-in-law, aggravated assault of his wife ("Wife"), endangerment of both Wife and one of their sons and misconduct involving weapons. Gilliam pleaded guilty to misconduct involving weapons but claimed his actions were otherwise legally justified. A jury found Gilliam guilty of the remaining offenses as charged. The trial court sentenced Gilliam to an aggregate term of forty-three years' imprisonment and Gilliam

now appeals.¹ We have jurisdiction pursuant to Article 6, Section 9 of the Arizona Constitution, and Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A) (2003), 13-4031 (2010) and 13-4033 (2010).

II. The Denial of the Motion to Dismiss the Indictment

¶3 As the first issue on appeal, Gilliam argues the trial court erred when it denied his motion to dismiss the indictment. Gilliam argued the indictment was based in part on the perjured testimony of a detective. *See United States v. Basurto*, 497 F.2d 781, 785 (9th Cir. 1974) ("[T]he Due Process Clause of the Fifth Amendment is violated when a defendant has to stand trial on an indictment which the government knows is based partially on perjured testimony, when the perjured testimony is material, and when jeopardy has not attached."). The trial court held an evidentiary hearing over portions of six days, after which the court found the motion to dismiss was untimely pursuant to Arizona Rule of Criminal Procedure 12.9(b). Rule 12.9(b) provides that a defendant must challenge a grand jury proceeding no later than twenty-five days after the certified transcript of the grand jury proceeding is filed or twenty-five days after the arraignment, whichever is later. Ariz. R. Crim. P. 12.9(b).

¹ As Arizona Rule of Criminal Procedure 32 is the only avenue by which a defendant may challenge a conviction after a guilty plea, Gilliam raises no issues regarding his conviction and sentence for misconduct involving weapons. *See* Ariz. R. Crim. P. 32.1.

Gilliam does not contest he did not file his motion to dismiss within these time limits. Even though the trial court found the motion was untimely, however, the court also addressed the merits of the motion and held that the detective did not mislead the grand jury.

¶4 On appeal, the State argues we may not consider the issue because Gilliam did not file a timely motion pursuant to Rule 12.9. See *State v. Merolle*, 227 Ariz. 51, 53-54, ¶¶ 9-15, 251 P.3d 430, 432-433 (App. 2011) (stating that Rule 12.9 is the only procedural method for challenging grand jury proceedings in Arizona, and the failure to file a timely motion waives the right to challenge the proceedings). Gilliam argues, however, that a claim based on material perjury, as identified in *Basurto*, is exempt from the timeliness provisions of Rule 12.9(b).

¶5 We review the decision of whether to dismiss an indictment for abuse of discretion. *State v. Pecard*, 196 Ariz. 371, 376, ¶ 24, 998 P.2d 453, 458 (App. 1999). “[W]ith one exception, all challenges to a grand jury’s findings of probable cause must be made by motion followed by special action before trial; they are not reviewable on appeal.” *State v. Moody*, 208 Ariz. 424, 439, ¶ 31, 94 P.3d 1119, 1134 (2004). The one exception is “when a defendant has had to stand trial on an indictment which the government knew was based partially on

perjured, material testimony.” *Id.* (quoting *State v. Gortarez*, 141 Ariz. 254, 258, 686 P.2d 1224, 1228 (1984)).² Appellate review of such a claim is limited to the determination of whether the indictment was based on perjured, material testimony. *Moody*, 208 Ariz. at 440, ¶ 31, 94 P.3d at 1135.

¶6 The trial court did not abuse its discretion when it denied the motion to dismiss the indictment. While no Arizona case has expressly addressed whether a defendant must file a motion to dismiss an indictment based on perjured testimony within the time limits found in Rule 12.9(b), we need not decide that issue. There is nothing in the record to suggest the trial court abused its discretion when it ruled on the merits of the motion and found no perjury. First, it was for the trial court to determine the credibility of the detective's testimony at the evidentiary hearing and his explanations for why he testified as he did during the grand jury proceedings. See *State v. Cid*, 181 Ariz. 496, 500, 892 P.2d 216, 220 (App. 1995). Second, there is nothing in the record to suggest the detective made a sworn statement about a material issue that he believed to be false. See A.R.S. § 13-2702(A)(1) (2009) and *Moody*, 208 Ariz. at 440,

² The trial court relied upon *State v. West*, 173 Ariz. 602, 607, 845 P.2d 1097, 1102 (App. 1993), for the proposition that a defendant must bring even a claim of perjurious grand jury testimony within the time limits of Rule 12.9. *West*, however, held flatly that such a claim was not an appealable issue and failed to recognize the material perjury exception recognized years earlier by the 9th Circuit in *Basurto* and our own Supreme Court in *Gortarez*.

¶ 31, 94 P.3d at 1135 (both defining "perjury"). In his opening brief, Gilliam does not identify a single allegedly perjurious statement made by the detective in either the grand jury proceedings or the evidentiary hearing, let alone a perjurious statement about a material issue, and our review of the record reveals none.³ While the evidence considered by the grand jury may have contained some discrepancies or contradictions, and some of the evidence may have lent itself to different but equally reasonable interpretations, the trial court did not abuse its discretion when it found there was no evidence of perjury.

III. Admission of Evidence of Other Acts and Reputation

¶ 17 The parties filed numerous pretrial pleadings in which they sought to admit or exclude a great deal of evidence of other acts. After hearing testimony from ten witnesses during an evidentiary hearing that lasted several days, a judge who did not preside at trial made detailed rulings regarding the admissibility of the evidence the parties sought to admit or preclude. The trial court chose to honor those prior rulings. In accordance with those prior rulings, the trial court admitted evidence of numerous other acts and of Gilliam's reputation. On

³ We decline Gilliam's request that we simply review the motions he filed below and rule on those motions de novo.

appeal, Gilliam complains the trial court erred when it admitted the following categories of evidence through eight witnesses:

- Gilliam had a reputation for violence and aggression;
- Gilliam committed prior acts of domestic violence against Wife and/or otherwise abused Wife and Decedent was aware of this;
- Gilliam assaulted and injured Decedent on more than one occasion and bragged about it;
- Gilliam threatened Decedent and wished he was dead;
- Decedent carried a gun because he feared Gilliam would kill him;
- Gilliam regularly carried a handgun; and
- Gilliam threatened to shoot two other people in the past.

On appeal, Gilliam argues this evidence was unfairly prejudicial and constituted nothing more than "character assassination" and an attempt to portray him as a "monster."⁴

¶8 "The trial court has considerable discretion in determining the relevance and admissibility of evidence, and we will not disturb its ruling absent a clear abuse of that discretion." *State v. Amaya-Ruiz*, 166 Ariz. 152, 167, 800 P.2d 1260, 1275 (1990). In reviewing an exercise of discretion, "[T]he question is not whether the judges of this court would have made an original like ruling, but whether a judicial mind, in view of the law and circumstances, could have made the ruling

⁴ We address only the evidence Gilliam identifies in his opening brief.

without exceeding the bounds of reason. We cannot substitute our discretion for that of the trial judge." *Assoc. Indem. Corp. v. Warner*, 143 Ariz. 567, 571, 694 P.2d 1181, 1185 (1985) (quoting *Davis v. Davis*, 78 Ariz. 174, 179, 277 P.2d 261, 265 (1954) (Windes, J., specially concurring)).

A. Reputation for Violence and Aggression

¶9 While the ruling court did not address this specific evidence in its pretrial ruling, the ruling court did hold evidence of other acts was admissible pursuant to both Arizona Rules of Evidence 404(a) and 405(b) to rebut evidence of Gilliam's character for peacefulness and as evidence that Gilliam was not free from fault in provoking the incident - an essential element of self-defense. See A.R.S. § 13-404(B)(3) (2009).⁵ Gilliam objected only once to the admission of reputation evidence during trial, but failed to identify any ground other than "I'm looking at [the ruling court's] order," which, again, did not actually address this evidence. The trial court denied the objection, later explaining that it admitted the reputation evidence because it was consistent with the prior rulings, and because Gilliam raised justification in his opening statement.

⁵ Once Gilliam raised the justification defenses, the State bore the burden to prove beyond a reasonable doubt that Gilliam did not act with justification. See A.R.S. § 13-205 (2009).

¶10 We find no abuse of discretion. The reputation evidence was admissible pursuant to Rules 404(a)(1) and 405(a) as evidence of a pertinent character trait offered to rebut the justification defenses.⁶ While Gilliam argues he had not yet offered any evidence regarding his character or the justification defenses at the time the court admitted the evidence, Gilliam placed the issue of whether he provoked the incident before the jury when he claimed in his opening statement that he shot Decedent to defend himself and to defend his nearby son, and when he argued that he withdrew from the altercation with Wife before Decedent shot him. Further, the order in which evidence is admitted at trial is left to the discretion of the trial court. *State v. Tuell*, 112 Ariz. 340, 347, 541 P.2d 1142, 1149 (1975).

B. Prior Acts of Domestic Violence and/or Abuse against Wife

¶11 Regarding the prior acts of domestic violence against Wife, the ruling court held this evidence was admissible pursuant to Rules 404(a) and (b) and 405. The court held the evidence was admissible to explain Wife's inconsistent statements to law enforcement officers about the incident. The court further held the prior incidents of which Decedent was aware were admissible to show Decedent's mental state and why he may have believed it necessary to shoot Gilliam in the defense

⁶ In his argument, Gilliam mistakenly references Rule 404(a)(2), which deals with the character of the victim.

of Wife. Finally, the ruling court held the evidence was admissible to rebut the justification defenses.

¶12 We find no abuse of discretion. The incidents of domestic violence against Wife were admissible to explain why Wife feared Gilliam and in turn gave inconsistent statements about the incident to law enforcement officials. See *State v. Torres*, 27 Ariz. App. 556, 559, 556 P.2d 1159, 1162 (1976). Second, as with the reputation evidence, this evidence was relevant to rebut Gilliam's justification defenses and his claim that he was without fault in provoking the incident. Third, we have recognized "the importance of admitting evidence which could 'throw light on the question of aggression, or upon the conduct or motives of the parties at the time of the affray[]" in cases such as this. *State v. Fish*, 222 Ariz. 109, 122-123, ¶ 42, 213 P.3d 258, 271-272 (App. 2009) (quoting *Mendez v. State*, 27 Ariz. 82, 86, 229 P. 1032, 1033 (1924) (citing 2 Wigmore, *Evidence* § 248)). The prior incidents of domestic violence known to Decedent were relevant to show why Decedent may have believed it necessary to take the course he did and whether he acted lawfully when he did so. See *State v. Connor*, 215 Ariz. 553, 563, ¶¶ 33-34, 161 P.3d 596, 606 (App. 2007) (evidence of other acts is relevant to show the victim's state of mind).

C. Prior Acts of Violence and Threats against Decedent

¶13 Regarding the prior acts of violence against Decedent, the ruling court held this evidence was admissible pursuant to Rule 404(b) as evidence of Decedent's fear of Gilliam, as evidence of why he may have believed it necessary to shoot Gilliam and as evidence of whether Decedent acted lawfully when he did so. As with the other acts addressed above, the ruling court found evidence of prior acts of violence against Decedent was also admissible to rebut the justification defenses.⁷

¶14 We find no abuse of discretion. Again, evidence of other acts is relevant to show the victim's state of mind. *Connor*, 215 Ariz. at 563, ¶¶ 33-34, 161 P.3d at 606. While not relied upon by the ruling court, we note that prior acts of violence against Decedent were also admissible as evidence of Gilliam's malice, intent and motive. See *State v. Williams*, 183 Ariz. 368, 377, 904 P.2d 437, 446 (1995); *State v. Denny*, 27 Ariz. App. 354, 359, 555 P.2d 111, 116 (App. 1976). Finally, as with the other evidence, this evidence was admissible to rebut Gilliam's claims of justification and the claim that he was without fault in provoking the incident.

⁷ While the ruling court initially held the evidence was also admissible pursuant to A.R.S. § 13-415 (justification; domestic violence), the court later modified this ruling and withdrew this ground.

D. Evidence that Gilliam Threatened Decedent and Wished Decedent were Dead

¶15 Regarding Gilliam's threats against Decedent and his wish that Decedent were dead, the ruling court held this evidence was admissible to show Gilliam's motive and to establish Decedent's state of mind. For the reasons stated above in regard to the prior acts of violence against Decedent, the trial court did not abuse its discretion when it admitted this evidence. The evidence was admissible as evidence of Gilliam's motive and intent and to rebut the justification defenses. The evidence was also admissible as evidence of Decedent's state of mind and to explain why he may have believed it necessary to shoot Gilliam to protect Wife.

E. Evidence that Decedent Feared Gilliam and Carried a Gun Because of this Fear

¶16 The ruling court held generally that Decedent's statements regarding his fear of Gilliam were admissible pursuant to Rules 803(3) (then existing mental or emotional condition) and 404(b) to show Decedent's state of mind. We find no abuse of discretion because, for the reasons stated above, Decedent's state of mind was relevant. *Connor*, 215 Ariz. at 563, ¶¶ 33-34, 161 P.3d at 606.

F. Gilliam's Prior Possession and Threatened Use of a Firearm

¶17 Regarding evidence of Gilliam's prior possession or threatened use of a firearm, the ruling court held this evidence

was admissible pursuant to Rules of Evidence 404(b), 405 and 406. The court held the evidence was relevant to explain why Wife gave contradictory stories to police; to rebut the justification defenses and Gilliam's claim that he was without fault in provoking the incident; and as evidence of Decedent's state of mind and whether he acted lawfully. The court further held the evidence was admissible pursuant to Rule 406 as evidence of habit.⁸

¶18 We find no abuse of discretion. Again, evidence which explains why a witness made inconsistent statements to law enforcement officials is admissible. See *Torres*, 27 Ariz. App. at 559, 556 P.2d at 1162. As with all the evidence addressed above, the evidence was admissible to rebut the justification defenses and Gilliam's claim he did not provoke the incident. Finally, the evidence was relevant to show Decedent's state of mind and whether he acted lawfully. Regarding evidence of habit, several witnesses testified Gilliam carried a gun routinely and/or that he had a gun every time or the majority of the time they saw him. The trial court did not abuse its discretion when it also admitted this evidence as evidence of habit.

⁸ While the court found the evidence was admissible for additional reasons, those other reasons were no longer viable by the time of trial.

G. Gilliam's Threats to Shoot Two Witnesses

¶19 Gilliam further argues the trial court erred when it admitted evidence that Gilliam threatened to shoot two witnesses sometime before the incident. The ruling court did not address this evidence in the pretrial ruling. Gilliam first argues the trial court erred when it admitted evidence that Gilliam threatened to shoot and kill witness "TW" for calling the police after she observed some of the prior incidents of domestic violence Gilliam committed against Wife.⁹ We find no error because the trial court sustained Gilliam's objection to this testimony and Gilliam does not argue on appeal that the court should have taken any further action.

¶20 Gilliam further argues the trial court erred when it admitted evidence that Gilliam pulled his gun and threatened to shoot and kill witness "DK" after Gilliam came home and found DK sitting in the living room with Wife. The only objection Gilliam raised below was foundation, an issue he does not present on appeal. "[A]n objection to the admission of evidence on one ground will not preserve issues relating to the admission of that evidence on other grounds." *State v. Hamilton*, 177 Ariz. 403, 408, 868 P.2d 986, 991 (App. 1993). Therefore, we review only for fundamental error. See *State v. Gendron*, 168 Ariz. 153, 154, 812 P.2d 626, 627 (1991). We find no

⁹ We use initials to protect the identity of the witnesses.

fundamental error. The State sought to admit this testimony to show the effect Gilliam's threat against DK had on Decedent when DK told Decedent about the threat later that day. The evidence was admissible to show Decedent's state of mind.

¶21 Finally, the ruling court held that "the significant probative value" of all of the other act and reputation evidence addressed above was not substantially outweighed by the danger of unfair prejudice, misleading the jury, confusion of the issues or any other consideration identified in Arizona Rule of Evidence 403. Our review of the record shows the ruling court did not abuse its discretion when it made this determination. We also note that the trial court gave three separate instructions which limited the jury's consideration of the evidence of Gilliam's character and reputation, its consideration of the evidence of his habits, as well as its consideration of the other act evidence in general. "[A]bsent some evidence to the contrary, we presume that the jury read and followed the relevant instruction[s]." *State v. Ramirez*, 178 Ariz. 116, 127, 871 P.2d 237, 248 (1994); see also *State v. Dunlap*, 187 Ariz. 441, 461, 930 P.2d 518, 538 (App. 1996).

IV. Impeachment with Arizona Rule of Evidence 806

¶22 During his cross-examination of Wife, Gilliam introduced evidence that when Decedent first arrived at the scene, he asked what was going on. Gilliam further introduced

evidence that he replied with something to the effect of, "Come get your daughter and get her out of here." The trial court held that "come get your daughter and get her out of here" constituted hearsay that was admissible pursuant to Rule 803(3) as evidence of a then-existing mental, emotional or physical condition. The court further ruled, however, that the State could impeach the statement with Gilliam's prior felony convictions pursuant to Arizona Rule of Evidence 806 and, in turn, Rule 609. Rule 806 provides in relevant part that when a hearsay statement is admitted into evidence, the credibility of the declarant may be attacked by any evidence which would be admissible for that purpose if the declarant testified at trial. Ariz. R. Evid. 806. Gilliam argued that while the statement was admissible, it was not hearsay because it was not offered to prove the truth of the matter asserted and, therefore, could not be impeached pursuant to Rule 806. The trial court ultimately allowed the State to introduce evidence that Gilliam had a prior felony conviction in 2004 and another in 2010, but without any further detail. We review the admission of prior felony convictions for impeachment purposes for abuse of discretion. *State v. Green*, 200 Ariz. 496, 498, ¶ 7, 29 P.3d 271, 273 (2001).

¶23 We find no abuse of discretion. While Gilliam may not have offered the statement to prove the truth of the words

asserted, he offered the statement to prove the truth of what he argued he "clearly" communicated to Decedent by making the statement. Gilliam asserted in his opening statement that when he shouted for Decedent to come get Wife and get her out of there, he "expressed to [Decedent] he wanted nothing more to do with [Wife]." Gilliam further asserted that when he made this statement, he "clearly expressed his desire to end the conflict[.]" In closing, Gilliam argued that any reasonable person would have taken the statement to mean that he was withdrawing from the conflict and that he was asking Decedent to "help me take her from the scene, take her away." Gilliam also characterized the statement as evidence of "a clear unequivocal withdrawal" from the conflict. Under these circumstances, the trial court did not abuse its discretion when it held the statement constituted admissible hearsay that could be impeached pursuant to Rule 806. Finally, we note the trial court gave an instruction which limited the jury's consideration of Gilliam's prior convictions. Because there is no evidence in the record to conclude otherwise, we presume the jury followed the instructions. *Ramirez*, 178 Ariz. at 127, 871 P.2d at 248.

V. Denial of the Motion for Mistrial

¶24 Witness DK testified that Gilliam had once been in prison. The prosecutor immediately stopped DK and moved on to another question. Gilliam moved for a mistrial and the trial

court ultimately denied the motion. The court held the question posed did not invite the reference to prison and that the State could not have anticipated the reference. The court struck DK's reference to prison and instructed the jury to disregard it. The court further instructed the jury that the reference to prison could play no part in its deliberations.

¶25 Gilliam argues on appeal that the reference to prison was highly prejudicial and influenced the jury. While Gilliam further argues that he "disagrees" with the court's decision to give a curative instruction and thus draw more attention to the issue, the record shows Gilliam asked the court to give the curative instruction.

¶26 The trial court has broad discretion on motions for mistrial. The failure to grant a motion for mistrial is error only if it was a clear abuse of discretion. *State v. Murray*, 184 Ariz. 9, 35, 906 P.2d 542, 568 (1995). We will reverse the trial court's decision only if it is "palpably improper and clearly injurious." *Id.* (citing *State v. Walton*, 159 Ariz. 571, 581, 769 P.2d 1017, 1027 (1989)). This is because the trial judge is in the best position to determine whether a particular incident calls for a mistrial. The trial judge is aware of the atmosphere of the trial, the circumstances surrounding the incident, the manner in which any objectionable statement was made, and its possible effect on the jury and the trial. See

State v. Koch, 138 Ariz. 99, 101, 673 P.2d 297, 299 (1983);
State v. Brown, 195 Ariz. 206, 209, 986 P.2d 239, 242 (App.
1999).

¶27 We find no error. This was a single comment that occurred on day four of a fourteen-day jury trial that took place over the course of nearly five weeks. The trial court did not abuse its discretion when it determined that a mistrial was not warranted under these circumstances. Further, the court gave a curative instruction and we presume the jury followed that instruction.

VI. Sufficiency of the Evidence

¶28 Gilliam contends the evidence was insufficient to support his convictions. "Reversible error based on insufficiency of the evidence occurs only where there is a complete absence of probative facts to support the conviction." *State v. Soto-Fong*, 187 Ariz. 186, 200, 928 P.2d 610, 624 (1996) (citation omitted). "To set aside a jury verdict for insufficient evidence, it must clearly appear that under no hypothesis whatever is there sufficient evidence to support the conclusion reached by the jury." *State v. Arredondo*, 155 Ariz. 314, 316, 746 P.2d 484, 486 (1987) (citation omitted).

¶29 "We construe the evidence in the light most favorable to sustaining the verdict, and resolve all reasonable inferences against the defendant." *State v. Greene*, 192 Ariz. 431, 436,

¶ 12, 967 P.2d 106, 111 (1998) (citation omitted). In our review, we draw all reasonable inferences that support the verdict. *State v. Fulminante*, 193 Ariz. 485, 494, ¶ 27, 975 P.2d 75, 84 (1999). Further, we resolve any conflict in the evidence in favor of sustaining the verdict. *State v. Guerra*, 161 Ariz. 289, 293, 778 P.2d 1185, 1189 (1989). We do not weigh the evidence; however, that is the function of the jury. See *id.* "Because a jury is free to credit or discredit testimony, we cannot guess what they believed, nor can we determine what a reasonable jury should have believed." *State v. Bronson*, 204 Ariz. 321, 328, ¶ 34, 63 P.3d 1058, 1065 (App. 2003).

¶30 As noted above, Gilliam was married to Wife, the daughter of Decedent. The morning of the incident, Gilliam and Wife, who was nearly six months pregnant, argued at their home and Wife eventually left to "cool off." While she was gone, Wife called Decedent and told him she and Gilliam had argued. Wife and Decedent agreed they would meet back at her residence later, possibly to eat. After Wife returned home, she and Gilliam eventually engaged in the "worst" physical fight they had ever had, during which Gilliam struck Wife repeatedly, pulled her hair and choked her as they struggled over a bag Wife refused to surrender to Gilliam. After several disengagements and reengagements, the altercation eventually continued outside in the driveway of the home. Eventually, Gilliam knocked Wife

to her knees. While on the ground Wife held the bag underneath her, with Gilliam standing over and behind her, holding her down and trying to get the bag.

¶31 As Gilliam and Wife struggled in the driveway, Decedent arrived. Wife screamed for Decedent to help her. Wife testified that she screamed as loud as she could and did so in "intense fear." As Gilliam held Wife on the ground and attempted to get the bag, Decedent fired a handgun at Gilliam, ultimately shooting him twice. As Decedent fired, Wife ran to Decedent to try to stop him and actually made contact with him. Gilliam returned fire, firing nine shots, three of which struck Decedent. Decedent, who was fifty-nine years old, died at the scene of multiple gunshot wounds. As Gilliam fired at Decedent, Wife ran from Decedent and to Decedent's vehicle, fled the scene in that vehicle and drove to a nearby fire station.

¶32 A sheriff's deputy who responded to the scene within minutes found Decedent face down near the street. Gilliam, who was sitting on the driveway, leaning back against the left front tire of an Isuzu truck, told the deputy he had been shot. Gilliam further told the deputy that he and Wife were fighting, that Decedent approached and shot Gilliam twice, and that he returned fire as Decedent ran back towards the street. "C," Gilliam and Wife's son, was found unharmed in the cab of the Isuzu truck where Gilliam had placed him during the altercation.

A. Second Degree Murder

¶133 Gilliam argues the evidence was insufficient to support his conviction for second degree murder. Gilliam does not address any of the elements of second degree murder, nor the elements of any of his justification defenses, but simply argues the evidence and concludes that based on that evidence, "no reasonable juror could have convicted Appellant of this charge." The evidence cited above was more than sufficient to permit a reasonable jury to find beyond a reasonable doubt that Gilliam intentionally caused the death of Decedent as charged, and that the justification defenses of self-defense, defense of a third person and use of force in crime prevention were not available to him. See A.R.S. §§ 13-1104(A)(1)(2009) (intentional second degree murder); 13-404(2009) (self-defense); 13-406(2009) (defense of third persons) and 13-411(2009) (crime prevention).

B. Endangerment

¶134 As noted above, the jury found Gilliam guilty of endangerment of both Wife and his son, C, who was in the Isuzu truck at the time of the shooting. As charged and instructed in this case, a person commits endangerment if the person recklessly endangers another person with a substantial risk of imminent death. A.R.S. § 13-1201(A)(2009). Gilliam argues there was no evidence he acted recklessly in regard to either victim or that he endangered C.

¶35 The trial court instructed the jury that “‘Recklessly’ (reckless disregard) means that a defendant is aware of and consciously disregards a substantial and unjustifiable risk that conduct will result in death. The risk must be such that disregarding it is a gross deviation from what a reasonable person would do in the situation.” See A.R.S. § 13-105(10)(c)(2009) (“recklessly” defined). Whether by initiating the conflict with Wife that led to the two men shooting each other while Wife and C were in close proximity to or in the line of fire, by choosing to return fire while Wife and C were in close proximity, or through some other combination of Gilliam’s actions that day, the evidence was more than sufficient to permit a reasonable jury to find that Gilliam endangered both Wife and C, that his actions constituted a gross deviation from what a reasonable person would do in the situation, and that he consciously disregarded a substantial and unjustifiable risk that his conduct would cause the deaths of Wife and C.

C. Aggravated Assault

¶36 The jury convicted Gilliam of aggravated assault based on causing “temporary but substantial disfigurement” to Wife. See A.R.S. § 13-1204(A)(3)(2009). Gilliam argues the evidence was insufficient to support his conviction for aggravated assault because Wife did not suffer injuries that constituted “temporary but substantial disfigurement.”

¶37 The evidence admitted at trial showed that when Wife arrived at the fire station after she fled the scene, she arrived bleeding "a lot." She had multiple lacerations and cuts to her face, mouth, chin, hands, knuckles, feet and knees, a bloody nose, a cut lip, "severe" bruising to her face and a black eye. It appeared "like she had been in a pretty good fight." When she arrived at the hospital shortly thereafter, a doctor noted Wife also had bleeding in the white of her left eye as a result of a subconjunctival hemorrhage, and that her eyes were black and blue "like a raccoon[.]" Hours after the incident, Wife's "eyes were completely full of blood. She looked awful." Two days after the incident, Wife still had deep purple bruising to her face, her eyes were swollen and she looked "pretty beat up." Four days after the incident, Wife still had black and blue eyes, bruises on her chest, arms and face and swelling to her face. Two weeks after the incident, Wife still appeared to have been "beaten." It took weeks for the bruising and swelling to go down. The jury also viewed photographs of Wife's injuries.

¶38 "To disfigure is to mar the appearance of an object." *State v. Garcia*, 138 Ariz. 211, 214, 673 P.2d 955, 958 (App. 1983) (quoting *Moreno v. Indus. Comm'n*, 122 Ariz. 298, 299, 594 P.2d 552, 553 (App. 1979)). "Disfigurement" is "[t]hat which impairs or injures the beauty, symmetry or appearance of a

person or thing; that which renders unsightly, misshapen, or imperfect, or deforms in some manner." *Garcia*, 138 Ariz. at 214, 673 P.2d at 958 (quoting Black's Law Dictionary (4th ed. 1968)). The evidence was more than sufficient to permit a reasonable jury to find beyond a reasonable doubt that Gilliam caused temporary but substantial disfigurement to Wife.

VII. The Denial of the Motion for Judgment of Acquittal and Motion for New Trial

¶39 As the final issue on appeal, Gilliam argues the trial court erred when it denied his renewed motion for judgment of acquittal pursuant to Arizona Rule of Criminal Procedure 20 and when it denied his motion for new trial. Gilliam's entire argument consists of, "For all of the reasons set forth in those motions, the court improperly denied those motions. Therefore, the convictions in this case should be vacated and the case dismissed, or in the alternative, this Court should remand for a new trial."

¶40 "[O]pening briefs must present significant arguments, supported by authority, setting forth an appellant's position on the issues raised." *State v. Carver*, 160 Ariz. 167, 175, 771 P.2d 1382, 1390 (1989). The failure to argue a claim on appeal sufficiently constitutes abandonment and waiver of that claim. *See id.*; *State v. Bolton*, 182 Ariz. 290, 298, 896 P.2d 830, 838

(1995). Due to Gilliam's failure to properly brief and argue these two additional issues, we do not address them.¹⁰

VIII. Conclusion

¶41 Because we find no error, we affirm Gilliam's convictions and sentences.

/S/

ANDREW W. GOULD, Judge

CONCURRING:

/S/

JOHN C. GEMMILL, Presiding Judge

/S/

PETER B. SWANN, Judge

¹⁰ Because we have already found the evidence sufficient to support Gilliam's convictions, the renewed motion for judgment of acquittal is moot.