

NOTICE: NOT FOR OFFICIAL PUBLICATION.  
UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL  
AND MAY BE CITED ONLY AS AUTHORIZED BY RULE.

IN THE  
**ARIZONA COURT OF APPEALS**  
DIVISION ONE

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STATE OF ARIZONA, *Appellee*,

*v.*

MODESTO CORTES SERILLO, *Appellant*.

No. 1 CA-CR 18-0047  
FILED 1-15-2019

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Appeal from the Superior Court in Yuma County  
No. S1400CR201400470  
The Honorable Brandon S. Kinsey, Judge

**AFFIRMED**

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COUNSEL

Arizona Attorney General's Office, Phoenix  
By Jillian Francis  
*Counsel for Appellee*

Yuma County Public Defender's Office, Yuma  
By Eugene Marquez  
*Counsel for Appellant*

**MEMORANDUM DECISION**

Presiding Judge Paul J. McMurdie delivered the decision of the Court, in which Judge Randall M. Howe and Judge Jennifer B. Campbell joined.

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**M c M U R D I E**, Judge:

¶1 Modesto Cortes Serillo appeals his conviction and sentence for first-degree murder. He argues the superior court committed three reversible errors. First, the court failed to grant his request to instruct the jury on the lesser-included offense of manslaughter. Second, the court should have given the proffered jury instruction defining “heat of passion.” Third, the court erred by permitting testimony from the victim’s wife, who did not witness the murder. For the following reasons, we affirm.

**FACTS AND PROCEDURAL BACKGROUND<sup>1</sup>**

¶2 In November 2013, Serillo learned his wife was in a romantic relationship with the victim. In April 2014, he saw his wife eating lunch at a restaurant with the victim and Serillo confronted him. After chasing the victim with a knife, he shot him several times, killing him. He was convicted of first-degree murder and sentenced to life in prison.

¶3 Serillo timely appealed his conviction and sentence. 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)(1), 13-4031, and -4033(A)(1).

**DISCUSSION**

**A. The Superior Court Did Not Err by Denying Serillo’s Request for a Jury Instruction on Manslaughter.**

¶4 Before trial, Serillo requested the court instruct the jury on “manslaughter by sudden quarrel or heat of passion.” The court denied the instruction, finding the evidence did not support it. We review the denial

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<sup>1</sup> We view the facts in the light most favorable to sustaining the verdict. *State v. Payne*, 233 Ariz. 484, 509, ¶ 93 (2013).

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of a requested jury instruction for an abuse of discretion. *State v. Wall*, 212 Ariz. 1, 3, ¶ 12 (2006).

¶5 A jury instruction on a lesser-included offense is required when the evidence is “such that a jury could reasonably find that only the elements of a lesser offense have been proved.” *Wall*, 212 Ariz. at 3, ¶ 14. The relevant lesser offense in this case, manslaughter, requires evidence that the defendant committed murder “upon a sudden quarrel or heat of passion.” A.R.S. § 13-1103(A)(2). A defendant cannot be convicted of manslaughter under heat of passion if there is evidence of a sufficient “cooling-off period.” See *State v. Reffitt*, 145 Ariz. 452, 463 (1985) (affirming denial of manslaughter instruction based partially on sufficient cooling-off period of several hours); *State v. Watkins*, 126 Ariz. 293, 300-01 (1980) (affirming denial of manslaughter instruction based on cooling-off period).

¶6 Here, the presence of multiple “cooling-off” periods forecloses the possibility Serillo murdered the victim upon a sudden quarrel or heat of passion. Despite the victim’s involvement in an extramarital affair with his wife, Serillo learned about the affair approximately five months before the murder. Further, after the initial scuffle with the victim, Serillo left the encounter to retrieve his firearm, providing him with another sufficient cooling-off period. See *State v. Ortiz*, 158 Ariz. 528, 535 (1988) (finding a departure to retrieve a firearm as a sufficient cooling-off period). Based on the evidence presented, a jury could not have reasonably found that Serillo committed murder upon a sudden quarrel or heat of passion. The court did not abuse its discretion by denying the requested instruction.

**B. The Court Did Not Err by Denying the Proffered Jury Instruction Defining Heat of Passion.**

¶7 To convict someone of first-degree murder, the State must prove the person intentionally or knowingly caused the death of another person with premeditation. A.R.S. § 13-1105(A)(1). The court instructed the jury that “[a]n act is not done with premeditation if it is the instant effect of a sudden quarrel or heat of passion.” To further clarify “heat of passion,” Serillo requested the court provide the following instruction: “[a] state of violent or uncontrollable rage, the term [h]eat of [p]assion includes the emotional state of mind characterized by anger, rage, hatred, furious resentment, or terror.” The court denied the proffered instruction. Again, we review for an abuse of discretion. *Wall*, 212 Ariz. at 3, ¶ 12.

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¶8 Although a superior court should instruct “on any theory reasonably supported by evidence,” *State v. Doerr*, 193 Ariz. 56, 64, ¶ 35 (1998) (quoting *State v. LaGrand*, 152 Ariz. 483, 487 (1987)), we will only reverse if the instructions as given would have misled the jury, *Id.* at 65, ¶ 35. If the instructions adequately cover the law, no reversible error has occurred. *Id.*

¶9 In this case, the jury instructions adequately covered the relevant law. The court used the statutory language defining premeditation in its instructions. See A.R.S. § 13-1101(1). The instructions properly distinguished between first-degree and second-degree murder. We find no abuse of discretion.

**C. The Court Did Not Commit Reversible Error by Admitting Testimony from the Victim’s Wife.**

¶10 The victim’s wife—who did not witness the victim’s murder—testified that the victim assisted in paying bills and caring for their children. Serillo objected to her testimony as being irrelevant and overly prejudicial. The court overruled the objection. We review the admission of evidence for an abuse of discretion. *State v. Rose*, 231 Ariz. 500, 513, ¶ 59 (2013). If an abuse of discretion is harmless, we will affirm the conviction. See *State v. Valverde*, 220 Ariz. 582, 585, ¶ 11 (2009), *abrogated on other grounds by State v. Escalante*, 245 Ariz. 135, 140, ¶¶ 15–16 (2018). We determine the harmlessness of an error based on whether there is a reasonable probability that the verdict would have been different if the error had not been committed. *State v. Hoskins*, 199 Ariz. 127, 143, ¶ 57 (2000).

¶11 Here, even if we were to decide the admission was improper, there is no indication the verdict would have been different. Several witnesses saw Serillo shoot the victim and surveillance video confirmed the witnesses’ testimony. Further, the evidence demonstrates the murder was premeditated. Before the incident, Serillo threatened to shoot the victim. At the restaurant, he chased the victim with a steak knife. Serillo then interrupted the encounter to retrieve the gun he used in the shooting.

¶12 Serillo argues the wife’s testimony was presented solely to elicit juror sympathy, which could have ultimately affected the verdict. But the jury was instructed to not be swayed by sympathy. Presuming the jury followed its instructions, we find no reversible error. See *State v. Newell*, 212 Ariz. 389, 403, ¶ 68 (2006). Any error in the admission of the testimony is harmless beyond a reasonable doubt.

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**CONCLUSION**

¶13

Serillo's conviction and sentence are affirmed.



AMY M. WOOD • Clerk of the Court  
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