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

STATE OF ARIZONA,	)	1 CA-CR 06-0697
	)	
Appellee,	)	DEPARTMENT E
	)	
v.	)	**MEMORANDUM DECISION**
	)	
BRENT HENRY WEIDMAN,	)	
	)	
Appellant.	)	
	)	

Appeal from the Superior Court in Yuma County

Cause No. S1400CR200201238

The Honorable Andrew W. Gould, Judge

AFFIRMED

Terry Goddard, Attorney General — Phoenix
by Kent E. Cattani, Chief Counsel
Criminal Appeals/Capital Litigation Section
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Attorneys for Appellee

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Attorneys for Appellant

W E I S B E R G, Judge

¶1 Brent Henry Weidman ("Defendant") appeals his convictions for two counts of negligent homicide and two counts

of endangerment and from the sentences imposed. For reasons that follow, we affirm.

PROCEDURAL HISTORY

¶2 The convictions arose from an incident that occurred on October 24, 2001 at a sewage collection and treatment facility owned and operated by Far West Water and Sewer, Inc., an Arizona corporation ("Far West"). Defendant was the president and chief executive officer of Far West. A Far West employee, James Gamble, and a Santec Corporation ("Santec") employee, Gary Lanser, died in an underground tank after they were overcome by hydrogen sulfide gas. Another Far West employee, Nathan Garrett, suffered severe injuries when he attempted to rescue Gamble from the tank. Other Far West and Santec employees were involved in rescue attempts, but none was injured to a significant degree.[1]

¶3 Defendant was indicted for two counts of manslaughter for the deaths of Gamble and Lanser, four counts of endangerment as to Gamble, Garrett and two Santec employees and one count of aggravated assault as to Garrett. Far West, one of its forepersons, Connie Charles, and Santec Corporation were also indicted for the same or similar charges. Santec pled guilty to one count of violating a safety standard or regulation which

[1]The facts of the case are set out more fully in the discussion below.

caused the death of Lanser. Santec was placed on probation for two years and fined $30,000. Charles pled guilty to two counts of endangerment as to Gamble and Garrett and was placed on probation for one year.

¶4 The trial court granted the State's motion to sever the trials of Far West and Defendant. Far West was acquitted of both counts of manslaughter, but found guilty of one count of the lesser-included offense of negligent homicide for the death of Gamble. Far West was also found guilty of two counts of endangerment as to Gamble and Garrett, one count of aggravated assault as to Garrett and one count of violating a safety standard or regulation that caused Gamble's death.

¶5 In a later trial, Defendant was acquitted of all counts of manslaughter and aggravated assault. The jury found him guilty of two counts of the lesser-included offense of negligent homicide for the deaths of Gamble and Lanser and two counts of endangerment as to Gamble and Garrett.[2] Defendant was placed on two concurrent terms of forty-eight months' probation for the counts involving Gamble and two concurrent terms of thirty-six months' probation for the counts involving Lanser and Garrett. The terms of probation for the counts involving Lanser and Garrett were ordered to be served consecutively to the

[2]The trial court granted a motion for judgment of acquittal on the two counts of endangerment as to the Santec employees.

counts involving Gamble, resulting in an aggregate term of seven years' probation. The court also ordered Defendant to pay a fine of $50,000 and restitution to various victims in the amount of $145,737.82.

¶6 We have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(1) (2003), 13-4031 (2010), and 13-4033 (A) (2010).

DISCUSSION

¶7 Defendant presents the following arguments on appeal:

1. The trial court created new criminal law in violation of A.R.S. § 13-103(A) by ruling that failure to discharge the common law duty to provide a safe workplace can give rise to potential criminal liability as well as to potential civil liability;

2. Defendant cannot be prosecuted for offenses under general criminal laws because such prosecution is preempted by 29 U.S.C. § 653(B)(4);

3. Even if Defendant can be prosecuted under general criminal laws, A.R.S. § 23-418(E) provides the exclusive criminal sanction;

4. Defendant cannot be held criminally liable for Lanser's death as a matter of law;

5. There was insufficient evidence to support Defendant's convictions;

6. The trial court erred when it admitted evidence of prior drug use by Charles;

7. The trial court erred when it admitted the testimony of Lloyd Stanton; and

8. The trial court erred when it awarded restitution to a representative of two victims.

Statutory Background and Violations of Federal and State Law

¶8 In 1970, Congress enacted the Occupational Safety and Health Act ("OSHA"). *See* 29 U.S.C. §§ 651 to -678. The purpose of OSHA was "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources." 29 U.S.C. § 651(b). Congress authorized the states to adopt standards that substantially complied with OSHA. 29 U.S.C. § 667(b).

¶9 The Arizona legislature enacted the Arizona Occupational Safety and Health Act. A.R.S. §§ 23-401 to -433 (1995) ("AOSHA"). It created a division of occupational health and safety within the Arizona Industrial Commission to recommend and enforce safety standards. *See* A.R.S. §§ 23-406, -407, -410. Arizona adopted the OSHA health and safety standards as published in 29 C.F.R. § 1910. *See* Ariz. Admin. Code R20-5-602.

¶10 Under A.R.S. § 23-403(A) (1995), "[e]ach employer shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or likely to cause death or serious physical harm to his employees" ("the statutory duty"). Employers who knowingly violate the requirements of A.R.S. § 23-403(A) or other AOSHA safety standards may be subject to criminal penalties under A.R.S. § 23-418(E). Section 23-418(E)(1995) provides in part

that “[a]ny employer who knowingly violates the requirements of § 23-403 or any standard or regulation adopted pursuant to § 23-410 or 23-414 or any provision of this article and that violation causes death to an employee is guilty of a class 6 felony . . . .”

¶11 Under A.R.S. § 13-305, enterprises can be held criminally liable. An enterprise includes a corporation. A.R.S. § 13-105(15)(2001). Section 13-305 provides in relevant part:

> A. [A]n enterprise commits an offense if:
>
> 1. The conduct constituting the offense consists of a failure to discharge a specific duty imposed by law; or
>
> 2. The conduct undertaken in behalf of the enterprise and constituting the offense is engaged in, authorized, solicited, commanded or recklessly tolerated by the directors of the enterprise in any manner or by a high managerial agent acting within the scope of employment.

A.R.S. § 13-305(A)(1),(2)(2001). "'Agent' means any officer, director, employee of an enterprise or any other person who is authorized to act in behalf of the enterprise." A.R.S. § 13-305(B)(1)(2001). "'High managerial agent' means an officer of an enterprise or any other agent in a position of comparable authority with respect to the formulation of enterprise policy." A.R.S. § 13-305(B)(2). Defendant, as president and chief executive officer of Far West, was charged pursuant to A.R.S. §

13-306, which provides that "[a] person is criminally liable for conduct constituting an offense which such person performs or causes to be performed in the name of or in behalf of an enterprise to the same extent as if such conduct were performed in such person's own name or behalf." A.R.S. § 13-306 (2001).

¶12 Defendant filed a motion to dismiss the charges brought under the Arizona Criminal Code for manslaughter, aggravated assault and endangerment ("Title 13 offenses").[3] Assuming that its criminal liability was premised solely on a violation of the statutory duty to provide a safe workplace, Defendant argued that the OSHA provision set forth in 29 U.S.C. § 653(b)(4) ("the savings clause") preempted the State's prosecution under Title 13; and that A.R.S. § 23-418(E) provided the exclusive criminal sanction for a violation of that duty.

¶13 The trial court denied the motion to dismiss. The court found that Defendant had a common law duty as an employer to provide a safe workplace to his employees. *See Smith v. Gordon,* 6 Ariz. App. 168, 172, 430 P.2d 922, 926 (1967) (employer has a duty to "'furnish [an] employee a reasonably safe place in which to work and reasonably safe instrumentalities with which to do his work'" (citation omitted). Relying in part on *State v. Brown,* 129 Ariz. 347, 631

[3]Far West filed a separate motion to dismiss and the other defendants joined in the motions. The court denied the motions as to all defendants in a consolidated order.

P.2d 129 (App. 1981), the court found that criminal liability for omissions may be predicated upon the common law duty found outside the definition of the criminal offense itself. The court also ruled that OSHA did not preempt application of general criminal laws to Far West and that A.R.S. § 23-418(E) was not the exclusive criminal sanction available to the State for the failure to discharge that duty.

¶14 Defendant argues on appeal that by permitting criminal prosecution based upon a failure to discharge the common law duty, the trial court impermissibly created new law in violation of A.R.S. § 13-103(A), which abolished all common law offenses. He claims that failure to discharge the common law duty to provide a safe workplace only gives rise to potential civil liability, not potential criminal liability. He also claims that such prosecution is preempted by the OSHA savings clause and that A.R.S. § 23-418(E) provides the exclusive criminal sanction for failure to discharge either the common law or the statutory duty to provide a safe workplace.[4]

¶15 We review the decision to grant or deny a motion to dismiss for abuse of discretion. *State v. Pecard*, 196 Ariz.

[4]In his opening brief, Defendant states that the statutory duty under AOSHA is the "exact same duty to provide a safe workplace as the 'common law duty' . . . ." The jury was also instructed that it could consider violations of AOSHA as some evidence of whether Defendant was reckless, but that it must consider this evidence along with all other evidence presented in the case.

371, 376, ¶ 24, 998 P.2d 453, 458 (App. 1999). Matters of statutory construction and interpretation are questions of law that we review de novo. *State v. Nelson,* 208 Ariz. 5, 7, ¶ 7, 90 P.3d 206, 208 (App. 2004). The trial court did not err.

¶16 We have recently addressed all of these issues extensively and have resolved them against the arguments raised by Defendant. *See State v. Far West,* 579 Ariz. Adv. Rep. 28 (Ariz. App. Apr. 6, 2010). Specifically, we held that the trial court did not create new criminal law in violation of A.R.S. § 13-103(A) by permitting Defendant's criminal prosecution for Title 13 offenses. *See id* at 31-32, ¶¶ 26-30. We held that if the facts support it, as they do in this case, Defendant is subject to potential criminal liability as well as to potential civil liability for failure to discharge either the common law duty and/or the statutory duty to maintain a safe workplace. *See id* at 39-40, ¶¶ 104-108. We further held that the OSHA savings clause does not preempt such criminal prosecution and that A.R.S. § 23-418(E) does not provide the exclusive criminal sanction for failure to discharge such duties. *See id.* at 29-31 ¶¶ 14-25.

Defendant’s Liability for the Death of Lanser

¶17 Defendant next argues he cannot be convicted of negligent homicide of Lanser as a matter of law because he did not owe a legal duty to Lanser, an employee of Santec, rather than Far West. He reasons that because his criminal liability was based on omissions rather than affirmative acts, he cannot be held criminally liable for negligent homicide of a person to whom he owed no duty. Defendant raised this issue in a motion for judgment of acquittal and a motion for new trial. The trial court denied the motions, finding that Defendant could be held criminally liable for the negligent homicide of Lanser based on Defendant’s affirmative acts. The court also found that Defendant owed Lanser a non-delegable duty to provide a safe workplace because Lanser was a business invitee.

¶18 There was no error. We note that the "minimum requirement for criminal liability is the performance by a person of conduct which includes a voluntary act or the omission to perform a duty imposed by law.” A.R.S. § 13-201(2001). “Conduct” is “an act or omission and its accompanying mental state.” A.R.S. § 13-105(5) (2001). A corporation may be held criminally liable for acts and omissions pursuant to A.R.S. § 13-305(A), and a person may be held criminally liable pursuant to A.R.S. § 13-306 for conduct constituting an offense the person performs or causes to be performed in the name of or in

behalf of a corporation. As explained more fully below, there was considerable evidence regarding Defendant's affirmative acts in formulating and implementing practices, policies and procedures taken on behalf of Far West that formed the basis for the criminal negligence conviction. Thus, contrary to his assertion, Defendant's criminal liability was based on his conduct, which included both acts and omissions.

¶19 Further, Defendant's duty to Lanser arises for several reasons. First, as the State argues and as the trial court found, the owner of a business is under an affirmative duty to make the premises reasonably safe for use by invitees. *Tribe v. Shell Oil Co.*, 133 Ariz. 517, 519, 652 P.2d 1040, 1042 (1982). *See also Ft. Lowell-NSS Ltd. P'ship v. Kelly*, 166 Ariz. 96, 103-104, 800 P.2d 962, 969-970 (1990) (possessor of land has a non-delegable duty to his invitee to maintain premises in safe condition). Because an independent contractor and its employees are invitees, the owner or occupier of land owes a duty to an independent contractor and its employees to provide a reasonably safe place to work. *Robertson v. Sixpence Inns of Am., Inc.*, 163 Ariz. 539, 544, 789 P.2d 1040, 1045 (1990). Far West, as the owner/occupier of the premises, owed a duty to Santec's employees to provide a reasonably safe place to work. Defendant's argument that he owed no duty to Lanser as an invitee because he did not *personally* own or occupy the premises

is without merit. Under this reasoning, Defendant could not be held criminally liable for Gamble's death or Garrett's injuries because he did not personally employ them, a position even Defendant does not assert.

¶20 Second, it is well-established that a general contractor owes a duty to furnish a reasonably safe place to work to the employees of a subcontractor so long as the general contractor retains control over any part of the work. *See Lewis v. Riebe Enter., Inc.,* 170 Ariz. 384, 387-88, 825 P.2d 5, 8-9 (1992), and numerous cases cited therein. Third, under AOSHA, each employer at a work site has a duty to ensure that its conduct does not create hazards to any employees at the site, either the employer's own employees or the employees of another ("the multi-employer work site doctrine"). *Div. of Occupational Safety and Health of Indus. Comm'n of Arizona v. Westenburg Concrete Contractors, Inc.,* 193 Ariz. 260, 269, 972 P.2d 244, 253 (App. 1993) (as amended March 1999). *See also Ariz. Public Serv. v. Indus. Comm'n,* 178 Ariz. 341, 343, 873 P.2d 679, 681 (App. 1994) (under multi-employer work site doctrine, employer who controls and maintains a work area is responsible for hazards it creates, not only to its own employees, but to those of another who are exposed to the hazard.) Because Defendant had a legal duty to Lanser to maintain a safe workplace, we reject his argument.

Sufficiency of the Evidence

¶21 Defendant next argues there was insufficient evidence to sustain his convictions for negligent homicide and reckless endangerment. In particular, he claims that that the evidence failed to show he caused the deaths and injuries to the victims. He further alleges that even if the evidence was sufficient on this point, several events occurred before the incident that were intervening causes and served to relieve him of liability.

¶22 "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). "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). 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).

1. The Incident

¶23 Far West owned and operated several waste water treatment plants in Yuma, Arizona. Defendant, who has a master's degree in industrial engineering and a Ph.D in construction engineering, had been the president and chief operating officer for nine years. Rex Noll was the

superintendent and reported directly to Weidman. Charles was in charge of the sewer crew and was under Noll's supervision.

¶24 Prior to the incident, Far West acquired the Mesa Del Oro Plant and hired Santec to renovate equipment in an underground sewage tank called the Mesa Del Oro Tank ("the Tank"). The tank was approximately eleven feet long and eight feet high. The interior of the tank could only be accessed by descending down a ladder in a manhole approximately four feet wide. Two sewer lines fed into the Tank. The gravity line carried sewage downhill by gravitational force. The force main line carried sewage pumped by force main pumps from another tank or lift station, approximately one mile away.

¶25 On October 24, 2001, Far West and Santec began work on the Tank. The Far West crew included Gamble and Garrett with Charles supervising. The Santec crew included Lanser, Eric Andre and Shawn Hackbarth. After the force main pumps at the lift station were shut off, Gamble and Garrett pumped out the sewage from the surface and cleaned out the remaining sewage from inside the Tank. As part of this process, Gamble inserted a plug into the gravity line to stop the flow of sewage. After the Santec crew finished upgrading the Tank, it was ready for flows to resume entering it.

¶26 Charles wanted to turn the force main pumps on because she was concerned that the lift station was overflowing.

Although the testimony was conflicting on this point, and for reasons that are not clear from the record, Charles told Gamble to enter the Tank to pull out the gravity line plug once the tank was about half-full of sewage. Charles drove to the lift station, turned on the pumps, and sewage began flowing into the Tank. In a radio communication, Charles asked Gamble if the Tank was half-full and inquired with urgency, "[i]s the plug out? Is the plug out?" Gamble began to climb into the Tank to unplug the gravity line. When the lower part of his body was in the Tank, he passed out and fell into the sewage.

¶27 Garrett saw Gamble floating facedown in the Tank. In an effort to rescue him, Garrett tied a rope about around his waist, told Andre to hold it and climbed down a ladder into almost waist-deep sewage. Not able to get Gamble out of the Tank, Garrett tried to climb up the ladder, but passed out while tied to it before he reached the top. Lanser then climbed down the manhole in an attempt to rescue both Gamble and Garrett, passed out and fell into the Tank. At some point, Hackbarth radioed to Charles to turn off the pumps and call 911. Charles rushed back to the Tank and entered it in an effort to rescue Gamble, Garrett and Lanser. She, too, passed out, but eventually regained consciousness.

¶28 Emergency personnel arrived at the scene. A paramedic found Charles near the top of the ladder, but unable to get out.

With assistance, he pulled her to the surface. Garrett was tied to the ladder below Charles and unable to move. The paramedic put on self-contained breathing apparatus, attached himself to a tag line and went into the tank to rescue Garrett. With the help of others, he pulled Garrett out. The Yuma Fire Department's technical rescue team, with specialized training in entering such spaces, later recovered the bodies of Gamble and Lanser. Although Garrett survived, he suffered life-threatening respiratory distress syndrome and aspiration pneumonia and sustained injuries to his lungs and eyes.

¶29 Dr. Daniel Teitelbaum, a physician specializing in occupational medicine and toxicology, and an OSHA expert and consultant, concluded that Gamble and Lanser died from acute hydrogen sulfide poisoning that occurred in a confined space. The Yuma County medical examiner concluded that both were overcome by inhalation of sewage gas, but the immediate cause of death was asphyxia due to drowning.

2. Safety Standards for Confined Spaces

¶30 Several expert witnesses testified at trial about the hazards of the Far West work environment and the applicable safety standards. The director of quality assurance for a waste water treatment plant in Yuma testified that hydrogen sulfide gas forms readily in domestic sewage pipes. She indicated that when a sewer line is plugged, levels of hydrogen gas sulfide go

"off the chart" and when sewage is released after being confined, levels of the gas can quickly become lethal.

¶31 Dr. Verne Brown, an OSHA expert testified that sewer entry "is one of the most dangerous below-ground works processes there is." He indicated that under OSHA regulations, the Tank was a "permit-required confined space" ("permit-space").[5] As such, Far West was obligated to follow OSHA's strict and detailed regulations for permit-space entry that requires developing and implementing a written permit space program for regulating entry into and protecting employees from permit-space hazards. Actual entry into such confined space is controlled by a permit executed at the time of entry.

¶32 Before employees may enter such spaces, the employer must, among other things, (1) provide adequate training to entrants and entry supervisors to make them aware of the hazards of entry into the space and enable them to safely perform their duties; (2) certify in writing that the required training has

[5]A "confined space" is a space that "is large enough and so configured that an employee can bodily enter and perform assigned work [and] has limited or restricted means for entry or exist . . . and is not designed for continuous employee occupancy." A "permit-confined space" is a confined space if it has one or more of the following: "Contains or has a potential to contain a hazardous atmosphere; contains a material that has the potential for engulfing an entrant; has an internal configuration such that an entrant could be trapped or asphyxiated by inwardly converging walls or by a floor which slopes downward and tapers to a smaller cross-section; or contains any other recognized safety or health hazard." *See* 29 C.F.R. § 1910.146(b).

been provided; (3) identify and evaluate hazards prior to entry; (4) develop procedures and practices for safe permit space entry such as isolating permit space, eliminating or controlling atmospheric hazards and verifying that conditions in the space are acceptable for entry throughout the duration of the work; (5) test and monitor atmospheric hazards prior to and during entry; (6) provide equipment necessary for safe entry and rescue, including testing, monitoring, ventilating, communications, rescue and emergency equipment; (7) designate an authorized attendant to monitor the authorized entry into the space; (8) designate an entry supervisor responsible for determining if acceptable entry conditions are present, overseeing entry operations, and terminating entry; (9) consult and coordinate entry operations with third-party contractors, such as Santec; and (10) provide or designate qualified rescue and emergency services. *See generally* 29 C.F.R. 1910.146.

¶33 The waste water treatment manager for the City of Yuma testified concerning the city's confined space entry procedures implemented to comply with OSHA. Members of Yuma's confined space teams must have training in the hazards of toxic gases and in confined space procedures and equipment. When a confined space is a permit-space, the entry supervisor must institute required procedures, including deployment of a trained team to conduct the entry, use of a gas meter before entry, constant

communication between the entrant and the attendant, mandatory use of a harness attached to lift device and use of forced air ventilation and availability of self-contained breathing apparatus.

¶34 Dr. Teitelbaum testified that whenever employees are working in a confined space environment, there must be a written safety program that sets forth a "very specific set of requirements" for entry. He stated that if a person goes into a permit-space, he or she must know the dangers and risks associated with that environment, be trained to enter it and have "a way to get out" if something happens. He testified that entry into such space without meeting those requirements creates "a very high risk of being injured" [and] a "potential for death." He emphasized it is "critical that there be a written safety program, rather than casual communication of life and death matters."

3. Practices and Policies of Far West

¶35 Far West and Santec employees testified about the practices of Far West regarding confined spaces. Noll testified that Far West did not have a written permit-space entry program and did not execute permits. Training for confined space entry consisted of textbooks that Far West made available to employees.

¶36 Noll stated that sometime in 2000 or 2001, he and Weidman attended a seminar on permit-spaces. After they reviewed OSHA regulations, Defendant concluded that employees should not go into permit-spaces because "it takes way too much safety equipment and it's too dangerous." However, Noll and Defendant developed an unwritten policy that employees could go into "clean holes" that were cleared of sewage, plugged and tested with a gas meter. They were never allowed to go into "dirty holes." A dirty hole was a tank that was not cleared or sewage and had a potential for toxic gases to enter from a sewer line. According to Defendant and Noll, by cleaning a hole, it was not a permit-space.

¶37 Charles testified that after she became a supervisor in 1998, sewer crews entered underground tanks for cleaning and maintenance. She testified that no one at Far West provided safety training, told her about OSHA safety requirements for permit-spaces, advised her regarding equipment necessary to enter a tank, or told her to evaluate the tank for risks before entry.

¶38 She stated that Far West purchased its first portable gas meter in April of 2000, but she never learned how to use it and that one week before the incident, Defendant saw her working inside a lift station without a gas meter. Charles also testified that Defendant had previously observed sewer crews

enter underground tanks. On the day of the incident, Defendant knew the sewer crew intended to plug the gravity line in the Tank as he visited the site that morning to show Charles the location of the gravity feed lines.

¶39 Charles further testified she relied on technical advice from Gail Hackney, a certified waste water treatment operator, who worked on a grant from the Environmental Protection Agency providing assistance to Arizona communities on water and waste water problems. Gail Hackney stated she provided some operational advice to Charles, usually by telephone. She denied knowing Far West employees entered underground tanks and insisted that if she had known this, she would have "unloaded" on Charles, Noll and Defendant. The State also presented evidence that Defendant knew, shortly before the incident, that Charles had tested positive for drug use while working as the sewer crew supervisor.

¶40 Garrett testified that he entered tanks at least three times a week. He testified that Far West did not have safety meetings and he was never informed about the dangers of hydrogen sulfide. He said Far West gave him books to study for an examination to be certified as waste water treatment operator. However, Garrett did not know if the books contained information about hydrogen sulfide or permit-spaces because he "hadn't gotten to it."

¶41 Garrett further testified that when entering tanks, sewer crews sometimes used harnesses, but they were not connected to a tripod or a manlift at the top, that the crews had no equipment to unplug a gravity line from the surface of a tank and that he never saw Charles use a gas meter. Other Far West employees confirmed Far West's practices and procedures regarding entry into underground tanks. Both Andre and Hackbarth testified that none of the sewer crew used a gas meter or took other safety precautions before entering the Tank.

¶42 Far West's safety director for two years prior to the incident testified she had no background in safety and that Far West did not give her safety manuals or written safety policies. She attended two OSHA seminars and one confined space seminar, but did not recall talking to any employees about information she received.

¶43 Two months after the incident, Far West replaced its safety director. The new director, Lloyd Stanton, testified that Far West did not have a safety policy that complied with OSHA regulations for permit-spaces, did not have a proper safety program or rescue plan and had no records of any confined space entry permits, air testing results, or safety meetings. He determined that all of Far West's underground tanks were permit-spaces. Although unaware of the "clean-hole" policy, he stated that a permit-space could not be made safe under this procedure.

¶44 Dr. Brown opined that the causes of the incident were Far West's inadequate training of employees, failure to use air quality testing instruments, failure to coordinate with Santec, and the absence of rescue capability. Dr. Teitelbaum opined that the causes of the incident were Far West's "procedural breakdowns" and "lack of a safety program." He stated that if Charles had been properly trained, she would not have taken the actions she did. He testified it was "extremely improbable that anything would have happened had the proper procedures been followed" and "that this was an entirely preventable incident."[6]

4. Defendant's Criminal Conduct

¶45 We have previously held that Far West was criminally liable for Gamble and Lanser's deaths and Garrett's injuries. *See Far West,* 579 Ariz. Adv. Rep. at 36, ¶ 72. Defendant is

[6]The Arizona Division of Occupational Safety and Health investigated the incident and found multiple OSHA violations. During the investigation, Defendant admitted that Far West employees entered tanks four to five times per month, although he said they pumped and cleaned them before entry. He admitted that Far West did not have a permit-space program and "didn't have anything that the standard requires." When asked how Far West tested its tanks before entering, he stated it had a multi-gas meter, but "it had never been calibrated [and] nobody knew how to use it [and] it'd never been used." The Arizona Attorney General's Office initiated a criminal investigation. During an interview, Defendant admitted he knew what a permit-space was, but stated that no one at Far West had taken the time to create a permit-space program. He maintained that its employees did not enter confined spaces which required a permit because they could only enter a tank after it was cleaned and empty. He admitted that Far West did not have self-contained breathing apparatus and did not hold regular safety meetings.

criminally liable for conduct constituting an offense which he performed or caused to be performed in the name of or in behalf of Far West to the same extent as if such conduct were performed in his own name or behalf. A person commits negligent homicide if, with criminal negligence, the person causes the death of another person. A.R.S. § 13-1102(A)(1)(2001).

> "Criminal negligence" means, with respect to a result or to a circumstance described by a statute defining an offense, that a person fails to perceive a substantial and unjustifiable risk that the result will occur or that the circumstance exists. The risk must be of such nature and degree that the failure to perceive it constitutes a gross deviation from the standard of care that a reasonable person would observe in the situation.

A.R.S. § 13-105(9)(d)(2001).

¶46 A person commits endangerment by "recklessly endangering another person with a substantial risk of imminent death or physical injury." A.R.S. § 13-2101(A)(2001). "'Recklessly' means, with respect to a result or to a circumstance described by a statute defining an offense, that a person is aware of and consciously disregards a substantial and unjustifiable risk that the result will occur or that the circumstance exists. The risk must be of such nature and degree that disregard of such risk constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation." A.R.S. § 13-105(9)(c)(2001).

¶47 We hold that the evidence was sufficient to permit a jury to find beyond a reasonable doubt that Defendant caused the deaths of Gamble and Lanser through criminally negligent conduct and endangered Gamble and Garrett with a substantial risk of imminent death and/or physical injury through reckless conduct. Defendant was an industry professional. Defendant knew the hazards of working in a sewer treatment plant, including the dangers posed by the presence of toxic gases. He was aware of and understood the OSHA permit-space regulations and knew Far West was required to follow OSHA regulations. Such regulations required Far West to adopt a written permit-space program and develop procedures and practices for safe entry into permit-spaces. These included executing a permit; providing adequate training to employees; obtaining and using necessary equipment for entry, testing, and monitoring of confined spaces; establishing a rescue plan; providing rescue equipment and emergency services; and coordinating with third-party contractors. A jury could also reasonably find that despite his knowledge of the risks inherent in working in permit-spaces and the OSHA regulations for permit-space entry, Defendant consciously disregarded those risks by failing to comply with the requirements because doing so would require "too much safety equipment." Instead, in an attempt to circumvent OSHA safety regulations, Defendant devised a clean-hole policy permitting

Far West's employees to enter underground tanks. Such policy, however, did not make the tanks safe for entry.

¶48 Further, a jury could reasonably find that Defendant knew Far West employees were entering permit-spaces on a regular basis and knew that Far West and Santec employees would enter the Tank on the day of the incident. Nonetheless, Defendant directed them to do so without proper training, equipment, safety procedures or a rescue plan. Finally, a jury could reasonably find that Defendant was aware that Charles was not properly trained or qualified to oversee the sewer crew and further, that she had tested positive for drug use while on the job. There was sufficient evidence for a jury to reasonably fine that Defendant engaged in conduct, by his acts and omissions, with the applicable *mens rea* for purposes of imposing criminal negligence and endangerment. *See Far West,* 579 Ariz. Adv. Rep. at 39-40, ¶¶ 104-108 (discussing *mens rea*, substantial and unjustifiable risk, and gross deviation from standard of care or conduct for purposes of imposing criminal liability for criminal negligence and endangerment).

¶49 Defendant also argues there was insufficient evidence of causation. Under A.R.S. § 13-203(A) (2001), "Conduct is the cause of a result when both the following exist: (1) but for the conduct the result in question would not have occurred; and (2) the relationship between the conduct and result satisfies any

additional causal requirements imposed by the statute defining the offense." Proximate cause is shown "by demonstrating a natural and continuous sequence of events stemming from the defendant's act or omission, unbroken by any efficient intervening cause, that produces an injury, in whole or in part, and without which the injury would not have occurred." *Barrett v. Harris,* 207 Ariz. 374, 378, ¶ 11, 86 P.3d 954, 958 (App. 2004). "Proximate cause requires that the difference between the result intended by the defendant and the harm actually suffered by the victim 'is not so extraordinary that it would be unfair to hold the defendant responsible for the result.'" *State v. Marty,* 166 Ariz. 233, 237, 801 P.2d 468, 473 (App. 1990)(citation omitted). Thus, it is not necessary to show that a specific result or injury is foreseeable by a defendant in order to impose criminal liability.

¶50 There was ample evidence that the incident leading to Gamble's death and Garrett's injuries directly resulted from the unsafe practices and policies regarding permit-space entry adopted by Defendant on behalf of Far West. Dr. Verne Brown opined that the incident in which Gamble died and Garrett was injured was caused by deficiencies in those practices and policies. A jury could reasonably find that Defendant’s conduct caused the incident and that the incident was not so unforeseeable that it would be unfair to hold Defendant

criminally liable. The fact that Defendant could not foresee this precise result or injury is immaterial.

¶51 Defendant also argues that Charles' act in turning on the lift station pumps was a superseding cause. To be a superseding cause, the intervening conduct must be unforeseeable and, with the benefit of hindsight, abnormal or extraordinary. *State v. Bass*, 198 Ariz. 571, 576, ¶ 13, 12 P.3d 796, 801 (2000). The evidence showed that Charles had little or no knowledge or training regarding operations in permit-spaces or about the hazards of working in underground tanks. She lacked basic information about proper procedures and equipment necessary to enter such spaces. It was entirely foreseeable that Charles might do such a thing as turn on the pumps in the lift station without first ensuring that no one was in the Tank or would attempt to enter it. An expert testified that it was extremely improbable that Charles would have taken the action she did had she been properly trained. Because Charles' act was neither abnormal nor extraordinary, it was not a superseding cause.

Admission of Evidence of Charles' Drug Use

¶52 Defendant asserts the trial court erred when it admitted evidence of Charles' use of methamphetamines. He argues that the evidence was irrelevant and that any probative value was substantially outweighed by the danger of unfair

prejudice. *See* Ariz. R. Evid. 401, 402, 403. Defendant also argues the trial court erred when it denied his motion for mistrial based on admission of this evidence.

¶53 "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). We review the denial of a motion for mistrial for abuse of discretion. *State v. Murray*, 184 Ariz. 9, 35, 906 P.2d 542, 568 (1995).

¶54 Defendant filed a pretrial motion to preclude evidence of Charles' drug use when his case was still consolidated with that of Far West. The trial court granted the motion, but warned Defendant that if he "opened the door" with evidence regarding Defendant's "character trait" for ensuring workplace safety, the State would be allowed to introduce evidence of Charles' drug use; evidence that Defendant knew that Charles used methamphetamines, yet permitted her to continue to work as the foreperson of the sewer crew would then be relevant to rebut this assertion. Defense counsel agreed with the court, stating that "once I open the door to [Defendant's] reputation for safety, I think they can ask those particular questions." Defendant filed another motion to preclude evidence of Charles'

drug use in April 2006 after the cases were severed. The trial court granted the motion with the same caveat.

¶55 During trial, the issue first arose in another context when Defendant introduced testimony from a witness that Garrett had had told him that Charles tried to kill him. Charles also testified that Garrett accused her of trying to murder him. The State then sought to admit evidence of Charles' drug use in order to explain the context of Garrett's statements, some of which were made in the course of psychiatric treatment after the incident. The court noted it would be unfair to allow Defendant to introduce Garrett's statements regarding how Charles tried to murder him without also allowing evidence that the reason the statements were made was because Garrett believed Charles was using methamphetamine on the job, thereby seriously threatening the safety and lives of the crew. The court further noted that the complete statements introduced by Defendant included references to Charles' drug use.

¶56 The court cautioned defense counsel that if he introduced only portions of Garrett’s statements, "it's fair game to explain what [Garrett] thought, so, I guess . . . the ball's in your court on this one." The court further stated, "[i]f you want to go down this path and impeach this witness from his statements in here about [Charles] wanting to murder him, then I will permit the State to bring in the rest of that

statement. I think the rule of completion permits that, and so you have my ruling on that."

¶57 During Garrett's cross-examination, defense counsel asked Garrett if he had ever made the statement that Charles tried to kill him and Garrett answered that he had. Counsel also questioned Garrett about statements he made to a psychiatrist as part of his medical treatment after the incident and read into the record a portion of the psychiatrist's report stating Garrett told the psychiatrist he believed Charles tried to kill him.

¶58 The State then sought to introduce the other portions of Garrett's statements that referenced Charles' drug use. The court found Defendant opened the door to admission of this evidence and that under Rule 106, Arizona Rules of Evidence, the State could introduce the remainder of Garrett's statements regarding his belief that Charles used methamphetamines on the job.[7] The court noted that in an attempt to discredit him, by introducing only portions of Garrett's statements, Defendant portrayed Garrett, a significant witness for the State, as "some type of unbalanced individual" who "harbors a baseless hostility" towards Charles. The court found that these

[7]Rule 106 provides that "when a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it."

incomplete statements, when taken out of context, did not provide the jury with a fair and accurate understanding of Garrett's testimony.

¶59 The court also considered the issue of admitting evidence that Charles tested positive for methamphetamine in August 2001. The court found Defendant had introduced evidence that he was unaware of any problems with the sewer crew and did not know Charles may have been unfit to its foreperson. The court found it would be misleading to present this evidence to the jury without also informing it Defendant knew Charles had tested positive for methamphetamine approximately two months before the incident. The court determined that Defendant opened the door to admission of this evidence by repeatedly eliciting evidence that he believed Charles was qualified and competent to safely supervise the crew.

¶60 When Defendant continued cross-examining Garrett, he elicited more evidence of statements Garrett made to a psychiatrist in which Garrett stated Charles tried to murder him and other members of the sewer crew. Some of these statements, such as, "Connie killed [Gamble]. She's a meth head," included references to Garrett's belief that Charles used drugs. On redirect examination, the State elicited evidence of similar statements Garrett had made about Charles' drug use.

¶61 Defendant moved for mistrial, which the court denied. The court noted that when it originally precluded the admission of the evidence, the only alleged relevance of Charles' drug use was whether she was under the influence of drugs on the date of the incident. The court further noted that as the case had progressed, Defendant claimed he knew nothing about Charles' competency at the job site and believed she was doing a good job. Defendant had thus made Charles' drug use relevant to whether Defendant knew she may have been unfit to supervise the sewer crew as well as to explain Garrett's statements about Charles trying to kill him. In denying the motion, the court stated that:

> And so by emphasizing portions of Mr. Garrett's statement about how angry he was, and how crazy Connie Charles was, it in my mind did two things. It did take out of context why he was making those statements, which-—the reason why he made those statements at least in . . . some part was he believed she was using drugs on the sewage crew. Now, the importance of that is—-can't be underemphasized. Nathan Garrett is probably one of the most key witnesses in this case. He's the only surviving person who went in the tank. He has direct knowledge about what he saw and observed with Mr. Gamble and Ms. Charles on the date of the incident. And so to--to impeach him with those statements and not give the full context of what he--of why he made those statements clearly could lead the jury to place little or no emphasis on what he has to say. So when you have a material witness who is a very important witness to both sides of the case, you impeach his

> credibility with statements that are taken out of context. The context is he believed [Charles] to be high on methamphetamine.

¶62 Later, Garrett testified he believed Charles used drugs based on his observations of her at work and in social situations. The State also introduced evidence that Charles tested positive for methamphetamine approximately two months before the incident and that Defendant was aware of those positive test results.[8]

¶63 There was no error. Despite being warned that evidence of Charles' drug use could become admissible depending on his actions at trial, Defendant opened the door to the admission of the evidence when he introduced only portions of Garrett's statements and took those portions out of context. Defendant also made the evidence relevant to rebut his defense that as far as he knew, Charles's was a safe, competent foreperson and that he had no reason to believe otherwise.

¶64 When a defendant makes a tactical decision to introduce a portion of a statement that, standing alone, has the potential to mislead the jury, the trial court may admit other

[8]The trial court acknowledged that drug use may have been an issue that could have been addressed in voir dire. The court, noted, however, that the jury selection process took three days and all the jurors assured the court they could be fair and impartial. Therefore, Defendant was not denied a fair trial by his inability to address this issue during voir dire. The court also acknowledged that it might be necessary for Defendant to recall certain witnesses to address this issue, but Defendant did not do so.

portions of that statement. *State v. Prasertphong*, 210 Ariz. 496, 500-01, ¶¶ 18-22, 114 P.3d 828, 832-33 (2005). The other portions of the statement are admissible pursuant to Evidence Rule 106 so that the statement is complete and not otherwise misleading to the jury. *Id.* at 502, ¶ 24, 114 P.3d at 834. *See also State v. Dunlap,* 187 Ariz. 441, 454-55, 930 P.2d 518, 531-32 (App. 1986) (rule of completeness as set forth in Rule 106 requires introduction of excluded portions of writing to avoid misleading jury and to ensure a fair and impartial understanding of the writing). Further, whenever a party introduces part of a conversation, the other party may offer the whole conversation. *State v. Roberts*, 144 Ariz. 572, 576, 698 P.2d 1291, 1295 (App. 1985). That a trial court previously ruled evidence is inadmissible does not mean the evidence remains inadmissible throughout trial. Where a defendant opens the door to such evidence, previously inadmissible may become admissible. *State v. Martinez*, 127 Ariz. 444, 447, 622 P.2d 3, 6, (1980).

¶65 Further, the court gave a limiting instruction that informed the jury that any evidence of Charles' drug use may be considered only in regard to Defendant’s knowledge of her competency to supervise the sewer crew, that there was no evidence Charles was under the influence of drugs on the date of the incident or that drug use by anyone contributed to the incident. The jury was also instructed it must not consider

Charles' past drug use as evidence that she was under the influence of drugs on the date of the incident or use it to assume she was under the influence. This limiting instruction was given to the jury before and after evidence of Charles' drug use was admitted and as part of the final jury instructions. "Juries are presumed to follow their instructions." *Dunlap*, 187 Ariz. at 461, 930 P.2d at 538. The trial court did not abuse its discretion in admitting evidence of Charles' drug use or in denying the motion for mistrial on that basis.

Admission of Lloyd Stanton's Testimony

¶66 Defendant asserts the trial court erred when it admitted the testimony of Lloyd Stanton, Far West's then director of safety and security. Defendant filed a motion in limine in which he argued Stanton's testimony should be precluded because he was hired by Far West after the incident and lacked personal knowledge of any relevant facts relating to that event. *See* Ariz. R. Evid. 602 ("A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter."). Defendant also argued that Stanton's testimony constituted evidence of subsequent remedial measures and was inadmissible pursuant Evidence Rule 407 (unless offered for another purpose, "[w]hen, after an event, measures are taken, which if taken previously, would have made the event less likely

to occur, evidence of the subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event").

¶67 At the conclusion of the evidentiary hearing on the motion, during which Stanton testified, the trial court denied the motion to preclude Stanton's testimony, subject to foundational objections. The court precluded, however, all evidence of subsequent remedial measures recommended by Stanton and/or undertaken by Far West. The court found that Stanton's testimony was relevant to impeach the testimony of Noll and to rebut Far West's position that its underground tanks were not permit-spaces subject to OSHA, all of which was relevant to the issue of criminal recklessness. *See* Ariz. R. Evid. 401, 402. The court noted that although Stanton was hired after the incident, his knowledge was based on his own personal observations, investigation, assessment and review of facilities, equipment, documentation and other information and materials at Far West. The court further determined that the proffered testimony did not constitute evidence of subsequent remedial measures Stanton took on Far West's behalf.

¶68 At trial, Stanton testified in relevant part that he reviewed Far West's records in order to assist Far West in responding to a subpoena from the Arizona Attorney General. Stanton also surveyed and assessed the sewer facilities operated

by Far West in the context of OSHA regulations, including the Tank. Stanton determined that the Tank was a permit-space that could not have been reclassified to a non-permit space. He also investigated what safety equipment Far West had at the time of the incident. Based on his investigation, Stanton determined that Far West had no safety equipment or materials that adequately addressed OSHA regulations for permit-spaces. He also found that Far West had no written permit-space program, no permit-space permits, and no safety program that complied with OSHA regulations. He further found that Far West had no records to indicate that Far West had ever conducted tests of the atmosphere in underground tanks and no records to show that it had held any safety meetings.

¶69 We find no error in the admission of Stanton's testimony and agree with the trial court that it was relevant to the issues for which it was introduced. Despite Defendant's characterization of portions of Stanton's testimony, we find that only one of his statements might be construed as inadmissible evidence of subsequent remedial measures. During direct examination, Stanton testified that he was the director of safety and security for Far West. When asked what his duties included, he answered, "[e]stablishing a safety program . . . [and] some security issues to deal with." Defense counsel asked to approach the bench and an unrecorded conference was held.

¶70 In its order denying the motion for new trial, however, the court stated that Defendant objected to this testimony, and the court sustained the objection. The court found that Stanton's response was an isolated statement and not intentionally elicited by the State. The court also found that the statement was cumulative to other, similar evidence presented by the State, and that its inadvertent admission did not deprive Defendant of a fair trial. The record supports the trial court's conclusion; to the extent Defendant claims the trial court abused its discretion in denying his motion for new trial on this basis, there was no error. *See Dunlap,* 187 Ariz. at 458, 930 P.2d at 535 (concluding that although statement by witness was erroneously admitted, new trial not warranted where statement was cumulative to other evidence presented by the state and did not affect the verdicts).

¶71 We also conclude that the trial court did not err in finding that although Stanton was hired after the incident, he could testify based on his own personal observations and investigation of Far West's facilities and records. That Stanton may have obtained some information from other employees of Far West went to the weight of his testimony regarding that information, not its admissibility. Defense counsel effectively cross-examined Stanton regarding what information he obtained from other employees rather than from his own personal

observations and investigation. The trial court did not abuse its discretion in admitting Stanton's testimony.

Restitution Award to Thrasher

¶72 Defendant argues the trial court erred when it awarded $25,268.80 in restitution to James Thrasher as the lawful representative of two victims. Gamble's mother, Borieo, lived in Nevada, was unable to work due to her son's death and could not attend some of the court proceedings. Gamble's sister, Christmann, lived in northern Idaho with her two small children and was also unable to attend a majority of the proceedings. Thrasher, who lived in Las Vegas, had been married to Borieo and was a stepparent to Gamble and Christmann. Borieo and Christmann made written requests asking Thrasher to assist them in this matter and Thrasher appeared on their behalf.[9]

¶73 Thrasher attended the arraignment, every pretrial hearing, all twenty-four days of trial, and the sentencing proceedings. Whenever Thrasher attended any court proceedings that the victims were unable to attend, he informed them of what occurred. Thrasher also paid many of the expenses the victims incurred when they did attend proceedings.

¶74 At the restitution hearing, Defendant argued that Thrasher could not be awarded restitution because he did not

[9]Defendant does not dispute that Borieo and Christmann are victims as defined in A.R.S. § 13-4401(19)(2001) or that they are entitled to restitution.

qualify as a lawful representative pursuant to A.R.S. §§ 13-4401(12) and 13-4403(A). The trial court found that Borieo and Christmann had designated Thrasher as their lawful representative, Borieo through a letter, and Christmann, through a formal authorization. The court also found that as a lawful representative under A.R.S. § 13-4403(A), Thrasher was entitled to restitution for expenses incurred for attending proceedings that Borieo and Christmann were physically unable to attend. The court awarded Thrasher $25,268.80 in restitution.

¶75 Restitution of the full economic loss to a victim is mandatory. *State v. Steffy*, 173 Ariz. 90, 93, 839 P.2d 1135, 1138 (App. 1992); *See* Ariz. Const. art 2, § 2.1(A)(8) (a crime victim has a constitutional right to receive restitution). When a defendant is convicted of an offense, the trial court must order the defendant to pay restitution in the full amount of the economic loss suffered by the victim. A.R.S. § 13-603(C) (2001). In making its determination, the court must consider all the economic losses of the victim. A.R.S. § 13-804(B) (2001). "'Economic loss' means any loss incurred by a person as a result of the commission of an offense. Economic loss includes lost interest, lost earnings and other losses which would not have been incurred but for the offense." A.R.S. § 13-105(14) (2001). Economic loss also includes travel, lodging and other related expenses incurred by a deceased victim's

immediate family to attend court proceedings. *State v. Madrid*, 207 Ariz. 296, 300, ¶¶ 10-13, 85 P.3d 1054, 1058 (App. 2004).

¶76 "The victim has the right to be present throughout all criminal proceedings at which the defendant has the right to be present." A.R.S. § 13-4420 (2001). "If a victim is physically or emotionally unable to exercise any right but is able to designate a lawful representative . . . the designated representative may exercise the same rights that the victim is entitled to exercise." A.R.S. § 13-4403(A) (2001). "Lawful representative" is defined as "a person who is designated by the victim or appointed by the court and who acts in the best interests of the victim." A.R.S. § 13-4401(12) (2001).

¶77 When interpreting the language of a statutory provision, we seek to determine the intent of the legislature; in doing so, we look primarily to the language of the statute and give effect to its terms in accordance with their commonly accepted meanings. *State v. Riggs,* 189 Ariz. 327, 333, 942 P.2d 1159, 1165 (1997). Statutes that address victims' rights "shall be liberally construed *to preserve* and protect the rights to which victims are entitled." *State ex rel. Romley v. Dairman*, 208 Ariz. 484, 489, ¶ 16, 95 P.3d 548, 553 (App. 2004) (quoting A.R.S. § 13-4418 (2001)).

¶78 The language of A.R.S. § 13-4403(A) is clear. A victim who is physically or emotionally unable to exercise any

right may designate a lawful representative to exercise the same rights the victim is entitled to exercise. The language of subsection A of the statute does not require that a victim who is "physically or emotionally unable to exercise a right" be incompetent, deceased, incapacitated, a minor or a vulnerable adult, as referenced in other subsections of A.R.S. § 13-4403 and as urged by Defendant.

¶79 Further, there is nothing in the language of A.R.S. § 13-4403(A) or in the definition of "lawful representative" that requires a victim's designation of a lawful representative to take any particular form or be accomplished through any particular means. The statute merely requires designation, and the victims clearly designated Thrasher as their representative. Finally, there is nothing in the language of A.R.S. § 13-4403(A) to indicate that the designation of a lawful representative is an "all or nothing" proposition. The fact that the victims were able to attend some proceedings and were awarded restitution themselves for attending those proceedings does not prevent them from designating a lawful representative to attend all other proceedings they had a right to attend, but were physically unable to attend.[10] Here, Thrasher was properly designated as the victims' lawful representative. He acted in their best

[10]The record indicates that Thrasher was not awarded restitution for attending any proceedings also attended by Borieo and/or Christmann.

interests by attending court proceedings when they could not do so and by keeping them informed of the progress of the case. The trial court did not abuse its discretion in awarding restitution to Thrasher as the victims' lawful representative.

CONCLUSION

¶80 Because we find no reversible error, we affirm Defendant's convictions and sentences and the award of restitution.

/s/_____
SHELDON H. WEISBERG, Judge

CONCURRING:

/s/_____
DONN KESSLER, Presiding Judge

/s/_____
LAWRENCE F. WINTHROP, Judge