

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED  
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.  
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



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FILED: 01/20/2011  
RUTH WILLINGHAM,  
ACTING CLERK  
BY: GH

STATE OF ARIZONA, ) 1 CA-CR 10-0055  
)  
Appellee, ) DEPARTMENT D  
)  
v. ) **MEMORANDUM DECISION**  
) (Not for Publication - Rule  
NANCY STEVENS, ) 111, Rules of the Arizona  
) Supreme Court)  
Appellant. )  
)

Appeal from the Superior Court in Maricopa County

Cause No. CR 2009-030313-001 SE

The Honorable Barbara L. Spencer, Judge Pro Tempore

**AFFIRMED**

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

James J. Haas, Maricopa County Public Defender Phoenix  
By Eleanor S. Terpstra, Deputy Public Defender  
Attorneys for Appellant

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**N O R R I S**, Judge

¶1 Nancy Stevens timely appeals from the superior court's ruling that her lack of criminal history and contact with law enforcement was inadmissible as evidence of her law-abiding

character. Because such evidence constitutes the absence of specific instances of misconduct, rather than proper character evidence through opinion or reputation testimony, we affirm.

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

¶12 On April 28, 2008, Stevens rushed to the location of a car crash involving her granddaughter. Anxious to get to the scene, Stevens interfered with Sergeant K., the police officer directing traffic, and a struggle ensued.<sup>2</sup>

¶13 A grand jury indicted Stevens on two counts of aggravated assault and one count of resisting arrest. At trial, Stevens's counsel asked Sergeant K. whether she had run a criminal records check on Stevens, knew that Stevens had never had contact with police, and knew that Stevens had never been in trouble with the law. Sergeant K. testified she had not run a check, was not aware of Stevens's prior contacts with law enforcement, and Stevens's criminal history -- or lack thereof -- did not matter to her. The prosecutor did not object to these questions and answers.

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<sup>1</sup>We view the facts in the light most favorable to sustaining the jury's verdict and resolve all inferences against Stevens. *State v. Guerra*, 161 Ariz. 289, 293, 778 P.2d 1185, 1189 (1989).

<sup>2</sup>Sergeant K. and three bystanders testified Stevens was the aggressor and made physical contact with Sergeant K., but Stevens testified Sergeant K. made the first contact with her.

¶14 The next day, the prosecutor advised the superior court the questions Stevens's counsel had asked Sergeant K. were irrelevant. Stevens's counsel asserted the questions showed good character, which is always relevant for a criminal defendant. The court stated the questions were irrelevant and the prosecutor should have objected. Stevens's counsel responded: "I'll prepare something, because I'm definitely going to go there with the defendant, if I can."

¶15 On the next and final day of trial, Stevens's counsel told the court he would have Stevens vouch for her own character by testifying "that she's never been in any trouble before with the law, never been arrested, basically n[e]ver had any police contact." The court responded that not having contact with police is not a character trait, leading to this discussion:

MR. NERMYR [Stevens's counsel]: A character trait would be nonviolent. Nonviolence would be a character trait, correct?

THE COURT: I suppose aggressiveness or --

MR. NERMYR: Peaceful.

THE COURT: The peaceful character, how is it relevant whether she was arrested or not? The question is, is she going to testify or is somebody else going to testify that she's never beat anybody up, hit anybody, shot anybody?

MR. NERMYR: Sure.

THE COURT: That's the character trait, not whether she's been arrested, charged or

convicted of a crime. I'm not sure it's the same thing. She could testify to a trait for peacefulness. State can be heard, but I don't think you have any way to object to that.

MS. BRADY [prosecutor]: Right.

MR. NERMYR: I'll go by it that way, Your Honor.

THE COURT: Okay. If you do it that way, I think you can certainly ask it.

MR. NERMYR: Thank you.

¶16 Stevens testified that day, but her counsel did not ask her any questions about her character, her criminal history, or her contacts with police. Her counsel also did not call any witnesses to testify about her character. The jury subsequently found Stevens guilty of one count of aggravated assault and one count of resisting arrest. We have jurisdiction over this appeal pursuant to Arizona Revised Statutes section 13-4033(A)(1) (2010).

### DISCUSSION<sup>3</sup>

¶17 Criminal defendants can present evidence of their character for being law abiding. *State v. Sorensen*, 104 Ariz. 503, 506, 455 P.2d 981, 984 (1969) ("In a murder trial, the defense may put on character witnesses showing the defendant's

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<sup>3</sup>We review the admission or exclusion of testimony for an abuse of discretion. *State v. Carlos*, 199 Ariz. 273, 277, ¶ 10, 17 P.3d 118, 122 (App. 2001).

reputation . . . for being a law abiding citizen."); see *Michelson v. United States*, 335 U.S. 469, 483, 69 S. Ct. 213, 222, 93 L. Ed. 168 (1948) (character witnesses testified to defendant's reputation for being a law-abiding citizen in prosecution for bribery); *United States v. Angelini*, 678 F.2d 380, 382 (1st Cir. 1982) (error to exclude testimony of character witnesses who would testify to law-abiding character of defendant charged with narcotics distribution); *United States v. Hewitt*, 634 F.2d 277, 279 (5th Cir. 1981) (character evidence that defendant is law abiding is "always relevant").<sup>4</sup> "In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct." Ariz. R. Evid. 405(a).

¶18 In *State v. Williams*, the Arizona Supreme Court explained how to present evidence of law-abiding character. 107 Ariz. 262, 485 P.2d 832 (1971). In that case, the defense on

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<sup>4</sup>*Angelini* cites *Chung Sing v. United States*, 4 Ariz. 217, 36 P. 205 (1894), as contrary to its holding, stating *Chung Sing* has no "indication of a general common law rule against the admissibility of evidence of law-abidingness." 678 F.2d at 382. We agree. The holding of *Chung Sing* focuses on the character trait "involved in the charge" at issue and makes no definitive statement regarding the admissibility of evidence of law-abiding character. 4 Ariz. at 219-20, 36 P. at 206. *Hewitt* also cites *Chung Sing* as contrary to its holding but without analysis. 634 F.2d at 280 n.6.

cross-examination improperly asked a police officer if the officer had ever had any "legal altercations" with the defendant. *Id.* at 265, 485 P.2d at 835. "Whether the police officer had ever had any altercations with the defendant was not the proper way to establish the good character of the defendant. It is improper to attempt to elicit testimony regarding the want of specific acts of misconduct." *Id.* (citation omitted).

¶19 Here, Stevens sought to present evidence of her law-abiding character by admitting evidence that she had never been in trouble with the law, never been arrested, and never had police contact. This evidence represented the "want of specific acts of misconduct" *Williams* proscribes. The superior court properly prohibited such evidence<sup>5</sup> and directed Stevens to offer character evidence that did not rely on the absence of specific acts of misconduct. Stevens's counsel accepted this direction and said he would "go by it that way." The jury, however, never heard testimony as to whether Stevens was a law-abiding, nonviolent, or peaceful person because her counsel never asked

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<sup>5</sup>The State argues any possible error was harmless because the jury knew Stevens had never had any contact with police due to the cross-examination of Sergeant K. We disagree. Sergeant K. testified she never ran a criminal records check on Stevens and did not know whether Stevens had previously had contact with police. Sergeant K.'s lack of knowledge as to the matter did not and could not have proven to the jury that Stevens had never had contact with police.

her a character question<sup>6</sup> and never called any character witnesses.<sup>7</sup> Because the superior court did not prevent the admission of proper character evidence and only prevented the admission of improper specific-acts evidence, the court did not abuse its discretion.

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<sup>6</sup>In nearly every case in which the defendant offers evidence of good character, character witnesses testify as to the reputation of the defendant for a character trait or testify as to their opinion of the defendant's character for that trait. See, e.g., *State v. Rhodes*, 219 Ariz. 476, 487-79, ¶ 15, 200 P.3d 973, 977 (App. 2008). Here, Stevens apparently intended to testify on her own behalf that she was law abiding, peaceful, or nonviolent. While that may be unusual, we have found no case that holds it is improper. In fact, defendants do testify as to their own character when they make statements, sometimes inadvertently, that "open the door," thus allowing the prosecution to rebut with specific instances of misconduct. See Lori J. Henkel, Annotation, *Admissibility of Evidence of Pertinent Trait Under Rule 404(a) of the Uniform Rules of Evidence*, 56 A.L.R. 4th 402 (1987) ("Counsel should be aware that notwithstanding the defendant's intent not to place his or her character into issue, statements by the defendant . . . during cross-examination may constitute offers of a defendant's positive character trait, and thus open the door to the introduction of rebuttal evidence.").

<sup>7</sup>Stevens's counsel may have waived this entire issue by failing to attempt to elicit character evidence from Stevens or a character witness, but because we can decide the issue on the merits, we do so. See *Clemens v. Clark*, 101 Ariz. 413, 414, 420 P.2d 284, 285 (1966).

**CONCLUSION**

¶10 For the foregoing reasons, we affirm Stevens's convictions and sentences.

/s/

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PATRICIA K. NORRIS, Presiding Judge

CONCURRING:

/s/

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JOHN C. GEMMILL, Judge

/s/

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PATRICIA A. OROZCO, Judge