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AUG 22 2013

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

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| THE STATE OF ARIZONA,<br><br>Appellee,<br><br>v.<br><br>ROCCO COLAVITO PESQUEIRA,<br><br>Appellant. | ) | 2 CA-CR 2011-0198<br>DEPARTMENT A<br><br>MEMORANDUM DECISION<br>Not for Publication<br>Rule 111, Rules of<br>the Supreme Court |

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20103778001

Honorable Teresa Godoy, Judge Pro Tempore

AFFIRMED IN PART; VACATED IN PART

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M I L L E R, Judge.

**¶1** Rocco Pesqueira was convicted after a jury trial on two counts of aggravated assault and one count of simple assault. Pesqueira appeals from his

convictions and sentences, and claims the trial court erred with respect to certain evidentiary rulings and pretrial motions and by permitting a state's witness, Pesqueira's mother, to testify in jail attire. Finding no error, we affirm the convictions and sentences but vacate the criminal restitution order (CRO).

## Factual and Procedural Background

**¶2** We view the evidence in the light most favorable to sustaining the jury's verdict. *State v. Haight-Gyuro*, 218 Ariz. 356, ¶ 2, 186 P.3d 33, 34 (App. 2008). In October 2010, Pesqueira accompanied codefendant Renea Tebo to the home of her former boyfriend, B.R., to collect Tebo's property. When B.R. answered the door, a physical altercation began between Tebo, B.R., and Pesqueira. During the scuffle, Pesqueira stabbed B.R. in the heart.

**¶3** Pesqueira was charged by information with aggravated assault with a deadly weapon, aggravated assault involving serious physical injury, aggravated assault after entering a private home, burglary in the first degree, and attempted first degree murder. The jury found Pesqueira guilty of two counts of aggravated assault and a count of simple assault. He was sentenced to concurrent prison terms, the longest of which was five years. Pesqueira timely appealed his convictions and sentences.

## Discussion

### I. Statements Made After Pesqueira Requested Counsel

**¶4** Pesqueira first contends the trial court erred in denying his motion to suppress statements made during a police interview. Pesqueira argues, as he did below,

that the statements should have been suppressed because they were made after he had requested counsel in violation of *Miranda v. Arizona*, 384 U.S. 436 (1966), and they were involuntary, as his consent to continue with the interview arose from a threat to detain him. When reviewing a trial court's denial of a motion to suppress, we consider only the evidence presented at the suppression hearing and view it in the light most favorable to sustaining the court's ruling. *State v. Gay*, 214 Ariz. 214, ¶ 4, 150 P.3d 787, 790 (App. 2007). We review the court's decision to admit a defendant's statement "for abuse of discretion if it involves a discretionary issue, but review constitutional issues and purely legal issues de novo." *State v. Booker*, 212 Ariz. 502, ¶ 10, 135 P.3d 57, 59 (App. 2006).

A. *Miranda Claim*

**¶5** In *Miranda*, the Supreme Court established certain procedural safeguards to protect against compelled self-incrimination "'that require police to advise criminal suspects of their rights under the Fifth and Fourteenth Amendments before commencing custodial interrogation.'" *Florida v. Powell*, 559 U.S. 50, 59 (2010), *quoting Duckworth v. Eagan*, 492 U.S. 195, 201 (1989). The right to the presence of an attorney is one of the four now-familiar warnings required under *Miranda*. *Id.* at 59-60. When a criminal suspect invokes his right to counsel, all questioning must cease until an attorney is present. *Edwards v. Arizona*, 451 U.S. 477, 481-82 (1981). "However, if the suspect reinitiates contact with the police, he waives his rights and questioning can continue." *State v. Smith*, 193 Ariz. 452, ¶ 22, 974 P.2d 431, 437 (1999). In *Oregon v. Bradshaw*, 462 U.S. 1039, 1045-46 (1983), the Supreme Court held that the defendant's question, "Well, what is

going to happen to me now?" demonstrated "a desire for a generalized discussion about the investigation." Thus, the defendant in *Bradshaw* initiated further contact with the police after invoking his right to a lawyer. *Id.*; *see also State v. Burns*, 142 Ariz. 531, 535, 691 P.2d 297, 301 (1984) (holding that defendant reinitiated contact when he said, "Well, I want to tell you what happened.").

**¶6** The transcript of Pesqueira's pretrial interview, admitted at the suppression hearing, reflects that before questioning he expressly waived his *Miranda* rights. Several minutes into the interview, Pesqueira invoked his right to counsel, stating in response to a question that he "[didn't] really want to say much else" and "want[ed] to talk to an attorney." As a result of Pesqueira's invocation, one of the interviewing officers indicated that he'd "fully respect [Pesqueira's] rights" and would "get out of the room." Pesqueira responded by asking, ". . . but what happens to me then?" The interviewing officer indicated that he still had unanswered questions but if Pesqueira wanted an attorney the interview was "done," whereupon Pesqueira then asked, "Can I go?" The officer told Pesqueira that he was "not free to go right now," which prompted the following exchange:

> A. [Pesqueira] I can answer . . . .
>
> Q. You can?
> A. Yeah.
>
> Q. So you still want to talk?
> A. Yeah.

Q. Okay. Give me one second? Okay. Because you said you wanted an attorney, we're done in here okay. So just sit tight.
A. Well, I can answer questions.

Q. Well, you've already said those words.
A. I didn't say I wanted an attorney.

Q. Okay.
Q. [Other interviewing officer] What did you say then?

A. I said I think I need an attorney. I was just thinking out loud. I don't know. I will answer your questions.

Q. Okay, well. Give me, give me one second. I want to take a few minutes and then we'll be right back, okay.
A. Okay.

**¶7** The interviewing officers subsequently left the room and returned several minutes later with a third officer, who reread Pesqueira his *Miranda* rights. Pesqueira once again waived his rights and confirmed that he was not requesting an attorney. The officers gave Pesqueira numerous opportunities to stand by his initial request to end the interview and obtain counsel. Pesqueira confirmed that he wished to waive his *Miranda* rights and continue answering questions.

**¶8** Pesqueira argues that he unambiguously invoked his right to counsel and only after continued badgering by detectives did he agree to continue the interview. We disagree. Pesqueira initiated further contact with the officers after invoking his right to a lawyer and therefore questioning could continue. *See Smith*, 193 Ariz. 452, ¶ 22, 974 P.2d at 437. Here, as in *Bradshaw*, Pesqueira's question, ". . . but what happens to me then?" evidenced a "desire for a generalized discussion about the investigation." 462 U.S.

at 1045. Moreover, the interviewing officers gave Pesqueira several minutes to think about his options after he initiated further contact. He was then again advised of his rights, explicitly waived those rights, and expressed a desire to continue with the interview. Contrary to his argument, the record reflects that the officers scrupulously honored Pesqueira's initial invocation of the right to counsel before resuming questioning.

B. *Voluntariness of Pesqueira's Statement to Police*

**¶9** Pesqueira further contends that his statements to the police were not voluntary because they were based on a belief that he would be released if he answered more questions. We review a trial court's ruling on a motion to suppress for an abuse of discretion and we will not disturb the court's determination of the voluntariness of a defendant's statements absent clear and manifest error. *See State v. Navarro*, 201 Ariz. 292, ¶ 12, 34 P.3d 971, 974 (App. 2001).

**¶10** A defendant's statement to police is admissible if it is voluntary and not obtained by coercion or improper inducement. *Haynes v. Washington*, 373 U.S. 503, 513 (1963). "In assessing voluntariness, we consider the totality of circumstances to determine whether the statements were or were not the product of a 'rational intellect and a free will.'" *State v. Hoskins*, 199 Ariz. 127, ¶ 28, 14 P.3d 997, 1007 (2000), *quoting Mincey v. Arizona*, 437 U.S. 385, 398 (1978); *see also Colorado v. Connelly*, 479 U.S. 157, 167 (1986) ("[C]oercive police activity is a necessary predicate to the finding that a confession is not 'voluntary' within the meaning of the Due Process Clause of the Fourteenth Amendment.").

**¶11** Pesqueira contends that the interviewing officer implied he would be free to go if he answered more questions. However, as outlined above, the record reflects that Pesqueira's statements to police were voluntary and not the result of improper inducement. To the extent Pesqueira did believe that he would be free to go if he answered more questions, such a belief was not based on anything the police said or did. The officers informed Pesqueira unequivocally that he was not free to go; therefore, his willingness to continue the interview was not the result of police coercion.

**¶12** The trial court did not err in denying Pesqueira's motion to suppress his statement to police.

## II. Admissibility of Officers' Statements During Pesqueira's Pretrial Interview

**¶13** Pesqueira next argues the trial court erred in denying his motion to exclude the officers' opinions and accusations in the pretrial interview that Pesqueira was lying. We review a court's ruling on the admissibility of evidence for an abuse of discretion. *State v. Aguilar*, 209 Ariz. 40, ¶ 29, 97 P.3d 865, 874 (2004).

**¶14** Officers' questions during an interview are admissible not to prove the truth of the matter asserted but to give meaning and context to a defendant's responses. *State v. Huerstel*, 206 Ariz. 93, ¶ 65, 75 P.3d 698, 712 (2003); *State v. Miller*, 186 Ariz. 314, 322, 921 P.2d 1151, 1159 (1996) ("The statement, admitted to show its effect on [defendant] during his interrogation, was not offered for its substantive content and therefore was not hearsay."); *State v. Weigel*, 145 Ariz. 480, 481, 702 P.2d 709, 710 (App. 1985) ("The officer's statement is admitted not to prove the truth of what it asserts but to give meaning

to defendant's agreement."). In addition, statements by an officer accusing a defendant of lying are properly admitted when they are part of an interrogation technique and are not made for the purpose of giving opinion testimony at trial. *See State v. Boggs*, 218 Ariz. 325, ¶ 40, 185 P.3d 111, 121 (2008); *see also State v. Cordova*, 51 P.3d 449, 455 (Idaho App. 2002) (no abuse of discretion where officers' comments made during interrogations, indicating they believed defendant was lying, were admitted for the purpose of providing context to defendant's inculpatory answers).

**¶15** Before trial, Pesqueira filed a motion in limine seeking to exclude the officers' opinions of his credibility expressed during the interview. Pesqueira cited several examples of the officers accusing him of lying and argued their opinions about his credibility were not admissible under Rule 702, Ariz. R. Evid., which allows expert testimony only if the expert possesses "specialized knowledge" that "will assist the trier of fact to understand the evidence or to determine a fact in issue."[1] The trial court denied Pesqueira's motion in limine, finding that the accusations put Pesqueira's statements into context, and offered Pesqueira an opportunity to submit a limiting instruction about how the jury could consider the officers' statements.

**¶16** Pesqueira concedes that the police accusations of his lying were not inadmissible hearsay. Rather, he argues, as he did below, that the police statements were inadmissible opinion testimony. Because the police statements were not offered as the

[1]Arizona Rules of Evidence 611, 702, and 804 have since been revised. *See* Ariz. Sup. Ct. Order R-10-0035, at 27-28, 34-35, 48-51 (Sept. 8, 2011). We refer to the rule in effect at the time of trial.

truth of the matter asserted, they could not be characterized as improper expert opinion testimony about his veracity. *See Boggs*, 218 Ariz. 325, ¶¶ 40-41, 185 P.3d at 121. The statements "were part of an interrogation technique" and properly admitted merely for the purpose of placing Pesqueira's responses into context. *See id*. Thus, the trial court did not abuse its discretion in denying Pesqueira's motion in limine.

### III. State's Witness, Pesqueira's Mother, Testifying in Jail Uniform

**¶17** Pesqueira argues the trial court erred in denying his request to allow the state's witness, Pesqueira's mother T.M., to exchange her jail uniform for civilian clothing. Although a defendant cannot be compelled to testify in prison attire, *see State v. Garcia-Contreras*, 191 Ariz. 144, ¶ 8, 953 P.2d 536, 538 (1998), no Arizona decision has directly addressed whether permitting a state's witness to testify in a jail uniform is unduly prejudicial to the defendant. A majority of jurisdictions have held that an incarcerated defense witness should not be compelled to testify in prison clothing, fearing prejudice to the defendant by undermining the witness's credibility. *See Hightower v. State*, 154 P.3d 639, 642 (Nev. 2007) (compelling defense witness to testify in prison garb may taint fact-finding process; trial court's ruling reviewed for abuse of discretion); *State v. Artwell*, 832 A.2d 295, 301, 303 (N.J. 2003) (requiring defense witness to testify in prison clothing reversible error); *see also State v. Yates*, 381 A.2d 536, 537 (Conn. 1977) (finding no prejudicial error under circumstances where trial court compelled defense witnesses to testify in prison attire); *Mullins v. State*, 766 So.2d 1136, 1137 (Fla. Dist. Ct. App. 2000) (denying request to dress defense witness in civilian clothing harmless error).

Where a state's witness testifies in prison attire, however, many courts have concluded that no prejudice to the defendant results. *See People v. Walters*, 796 P.2d 13, 14 (Colo. App. 1990) (permitting a prosecution witness to appear in prison attire does not constitute prejudicial error); *People v. Sledge*, 416 N.E.2d 412, 417 (Ill. App. Ct. 1981) (finding defendant not prejudiced by fact codefendant's cousin wore jail clothing when called as witness by prosecution); *State v. Naples*, 114 N.E.2d 302, 304 (Ohio Ct. App. 1952) (state's calling of codefendant as witness, while dressed in jail attire and accompanied by uniformed deputy sheriff, did not constitute reversible error).

**¶18** In *Hightower*, the trial court denied defendant's request that his witness be permitted to testify in civilian clothing without considering the prejudice to defendant. 154 P.3d at 642. The Nevada Supreme Court determined, however, that a court must consider prejudice because "compelling an incarcerated witness to appear at trial in the garb of a prisoner may taint the fact-finding process." *Id.* Thus, the Court concluded a trial court, "absent unusual circumstances . . . should not compel incarcerated witnesses to appear at trial in the distinctive attire of a prisoner," and that a court's denial of a timely request would be reviewed for an abuse of discretion. *Id.* We agree with the Nevada Supreme Court's statement that prejudice to the defendant is critical for defense witnesses. However, prejudice to the state must also be considered, especially for its witnesses. Additionally, the court's administrative requirements must be considered. And the party proffering the witness bears the burden of making a timely request that the incarcerated witness be permitted to testify in civilian clothing, and the failure to make such a request

is deemed a waiver of the right. *Id.*; *see also* Ariz. R. Evid. 611(a) ("The court shall exercise reasonable control over the mode and order of interrogating witnesses . . . so as to . . . avoid needless consumption of time.").

**¶19** Here, the record indicates the state issued a subpoena for T.M. to appear and testify at trial, but she failed to appear on the specified day. The trial court issued a warrant for not appearing and found her in contempt of court. T.M. was taken into custody, and the following day, immediately before she was about to testify, Pesqueira requested that T.M. be allowed the opportunity to obtain a civilian shirt. The court denied the request, stating that "[t]here is not another shirt [available]" and that T.M.'s wearing jail attire wouldn't "prejudice anybody." Pesqueira made an alternative request that the witness be held in jail until clothing could be obtained.

**¶20** Pesqueira concedes that T.M. was called as the state's witness but argues that her relationship to Pesqueira coupled with the substance of her testimony transformed T.M. into a defense witness. The trial court characterized T.M. as the state's witness and found that no prejudice would result from her testifying in jail attire. Moreover, the jury was informed T.M. was in custody because she failed to comply with the state's subpoena.[2] Where the parties were aware that the witness was subpoenaed to testify the previous day, and the court determined another shirt was unavailable and obtaining another shirt would have delayed the trial, we find no prejudice resulting from the court's

[2]The prosecutor asked T.M. at the beginning of her direct examination, "You didn't want to testify here today, did you?" and "You were subpoenaed to be here yesterday, right . . . [a]nd you didn't [comply]?"

denial of Pesqueira's request to allow T.M. to wear a civilian shirt while testifying. *Cf. Hightower*, 154 P.3d at 641-42; *see also* Ariz. R. Evid. 611(a); *Naples*, 114 N.E.2d at 304; *Artwell*, 832 A.2d at 301-03.

## IV. Admissibility of Evidence Involving Past Violent Acts Experienced by Pesqueira

**¶21** Pesqueira next argues the trial court erred by granting the state's motion to preclude past acts of violence witnessed or experienced by Pesqueira. "We review the trial court's ruling on the admissibility of evidence for abuse of discretion." *Aguilar*, 209 Ariz. 40, ¶ 29, 97 P.3d at 874.

**¶22** Pesqueira intended to introduce evidence of two murders that had affected him in the past, asserting such evidence was relevant to his state of mind at the time of the offense. The first incident, observed by Pesqueira, involved his friend, who was run over by a truck and killed following a physical altercation with the driver. The second incident, which Pesqueira learned about after the fact, involved his cousin being stabbed to death during a physical altercation. The trial court granted the state's pretrial motion to preclude evidence of both incidents, ruling that the evidence was irrelevant and any probative value was outweighed by the risk of unfair prejudice.

**¶23** Pesqueira argues on appeal, as he did below, that the evidence of the unrelated crimes were admissible to establish both (1) his subjective belief that physical force was necessary to defend Tebo for purposes of establishing his crime prevention justification, and (2) that his beliefs and actions were otherwise objectively reasonable for purposes of all three of his justification defenses.

**¶24** Pesqueira presented three justification defenses: use of force in crime prevention, defense of a third person, and self-defense. The justification defense of crime prevention is codified in A.R.S. § 13-411, which at the time of the incident, provided:

> A. A person is justified in threatening or using both physical force and deadly physical force against another if and to the extent the person reasonably believes that physical force or deadly physical force is immediately necessary to prevent the other's commission of . . . aggravated assault under section 13-1204, subsection A, paragraphs 1 and 2.
>
> . . . .
>
> C. A person is presumed to be acting reasonably for the purposes of this section if the person is acting to prevent the commission of any of the offenses listed in subsection A of this section.

2006 Ariz. Sess. Laws, ch. 199, § 3.

**¶25** This court has interpreted § 13-411(A) and (C) together "to generate both a subjective and an objective component." *Korzep v. Superior Court*, 172 Ariz. 534, 540, 838 P.2d 1295, 1301 (App. 1991). Paragraph (A) requires an objective standard wherein the actor must reasonably have believed that force was necessary, a matter proven by the defendant. *Id.* "Paragraph (C) refers to the reasonableness of defendant's conduct in terms of the degree of force used." *Id.* If the defendant can produce sufficient evidence of his motive pursuant to § 13-411(C), he enjoys an initial presumption of acting reasonably. *Id.* The burden then shifts to the state to rebut that presumption beyond a reasonable doubt under subsection (A) by showing that the defendant's response was not

objectively reasonable. *Id.* In other words, the presumption in § 13-411(C) "is rebuttable and vanishes when the state provides contradictory evidence." *Id.* at 539.

**¶26** Pesqueira first contends he "had the right to present evidence that he [had] subjectively believed that an aggravated assault was taking place" and that his awareness of the two past incidents "was such evidence." This argument is inapposite. Pesqueira did, in fact, properly and sufficiently establish, by the facts of this case, his subjective belief that an aggravated assault was about to take place. There was testimony that B.R. attacked Tebo and that Pesqueira thought B.R. was going to kill Tebo. The fact that Pesqueira's brother-in-law and cousin were killed in the past had no relevance to his subjective belief formed in the specific circumstances surrounding his stabbing B.R.

**¶27** Pesqueira next asserts the fact that two of his family members had been murdered four months before the present offense was necessary evidence for the jury to determine whether Pesqueira's actions were objectively reasonable under the circumstances. The actions and motivations of the combatants in the two unrelated incidents had no bearing on the objective reasonableness of Pesqueira's actions and motivations in this case. While it is true that prior acts of violence by the victim are sometimes admissible, *see, e.g.*, *State v. Fish*, 222 Ariz. 109, ¶ 28, 213 P.3d 258, 267 (App. 2009), such evidence is typically offered to prove an objective fact (that the victim was the first aggressor). In contrast, Pesqueira sought to introduce unrelated, past experiences, involving neither the victim nor codefendant, to show his subjective state of

mind and, by extension, that his actions were objectively reasonable. Thus, the trial court did not abuse its discretion in precluding evidence of the past acts of violence.

## V. B.R.'s Assertion of His Fifth Amendment Privilege

**¶28** Pesqueira argues that the trial court erred by ruling that B.R. could invoke his right against self-incrimination because he did not have any material, non-privileged testimony to offer at trial. We review a court's decision to excuse a witness asserting the privilege against self-incrimination for an abuse of discretion. *State v. Mills*, 196 Ariz. 269, ¶ 31, 995 P.2d 705, 712 (App. 1999).

**¶29** B.R. gave sworn testimony at preliminary hearings that conflicted with statements he made during a defense interview. At a pretrial hearing, the trial court stated its belief that B.R. had incriminated himself and noted that B.R. had made prior inconsistent statements at the preliminary hearings. Noting that perjury would result if B.R. testified to anything other than what he previously had testified to under oath, and that the state could not offer immunity, the court appointed counsel to represent B.R. At a subsequent hearing on the issue, B.R. informed the court that he would invoke his Fifth Amendment rights. The court ruled that B.R. could refuse to answer any and all questions and that B.R. would not be required to invoke his Fifth Amendment privilege in front of the jury. Furthermore, because B.R. was unavailable, the court ruled that his preliminary hearing testimony and the defense interview along with other statements were admissible.

**¶30** Generally, a defendant has a right under the Sixth Amendment to compel the attendance of a witness whose testimony is "both material and favorable to the defense," but such a right is not absolute. *State v. McDaniel*, 136 Ariz. 188, 194, 665 P.2d 70, 76 (1983), *abrogated on other grounds by State v. Walton*, 159 Ariz. 571, 769 P.2d 1017 (1989). A defendant cannot "compel the witness to waive his Fifth Amendment privilege" against self-incrimination. *United States v. Trejo-Zambrano*, 582 F.2d 460, 464 (9th Cir. 1978). "If the witness validly asserts his Fifth Amendment privilege by showing 'a reasonable ground to apprehend danger to the witness from his being compelled to answer,' the defendant's right to compulsory process must yield to the witness's privilege not to incriminate himself." *Mills*, 196 Ariz. 269, ¶ 31, 995 P.2d at 712 (citation omitted). In addition, if the court determines after a hearing that a witness "could legitimately refuse to answer essentially all relevant questions, then that witness may be totally excused without violating an individual's Sixth Amendment right to compulsory process." *McDaniel*, 136 Ariz. at 194, 665 P.2d at 76.

**¶31** Pesqueira does not dispute that B.R. properly invoked his Fifth Amendment privilege against self-incrimination with respect to any statements he made during the preliminary hearings that conflicted with his statements in the defense interview. Rather, he argues only that the trial court abused its discretion "by granting [B.R.'s] assertion of Fifth Amendment privilege as to all statements rather than only to those where there was a conflict between his preliminary hearing testimony and his statements in [the] interview with defense counsel." We disagree.

**¶32** At a hearing on the issue, the trial court found that a direct conflict existed between B.R.'s preliminary-hearing and defense-interview testimony with respect to all statements directly bearing on Pesqueira's guilt or innocence. The two versions of events given by B.R. differed in every material respect. Accordingly, the court found that there were a number of "complicated and overlapping reasons" that practically anything B.R. said, beyond his name, could result in some sort of criminal liability. Thus, the court did not abuse its discretion in not permitting B.R. to be called for any purpose. *See McDaniel*, 136 Ariz. at 194, 665 P.2d at 76.

## VI. Admissibility of B.R.'s Preliminary-Hearing Statements

**¶33** Pesqueira argues that B.R.'s preliminary-hearing statements should have been precluded as inadmissible hearsay and that their admission otherwise violated his Sixth Amendment confrontation rights. Because Pesqueira raises this argument for the first time on appeal, we review solely for fundamental error. *State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607-08 (2005) (failure to object to alleged error in trial court results in forfeiture of review for all but fundamental error). "To prevail under this standard of review, a defendant must establish both that fundamental error exists and that the error in his case caused him prejudice." *Id.* ¶ 20.

**¶34** The Sixth Amendment to the United States Constitution guarantees the accused the right "to be confronted with the witnesses against him." Similarly, article II, § 24 of the Arizona Constitution provides the accused with the right "to meet the witnesses against him face to face." *Crawford v. Washington*, 541 U.S. 36, 68 (2004)

bars the admission of testimonial statements made by a witness not appearing at trial unless the witness is unavailable and the defendant had a prior opportunity for cross-examination. Pesqueira had an opportunity to cross-examine B.R. at the preliminary hearing and concedes that B.R. was unavailable at trial. Thus, the admission of B.R.'s prior testimony against him did not violate his confrontation clause rights. *See id.* ("Where testimonial evidence is at issue . . . the Sixth Amendment demands . . . unavailability and a prior opportunity for cross-examination.").

**¶35** But whether the admission of prior testimony violates the confrontation clause is a different inquiry than whether it violates the hearsay rules. *See State v. Bass*, 198 Ariz. 571, ¶ 35, 12 P.3d 796, 805 (2000). Rule 804(b)(1), Ariz. R. Evid., permits the admission of former testimony "in criminal actions or proceedings as provided in Rule 19.3(c), [Ariz. R. Crim. P.]" when the declarant is unavailable. A witness could be considered unavailable if "exempted by ruling of the court on the ground of privilege from testifying." Ariz. R. Evid. 804(a)(1). Rule 19.3(c), Ariz. R. Crim. P., further provides as follows:

> Statements made under oath by a party or witness during a previous judicial proceeding . . . shall be admissible in evidence if . . . [t]he party against whom the former testimony is offered was a party to the action or proceeding during which a statement was given and had the right and opportunity to cross-examine the declarant with an interest and motive similar to that which the party now has . . . and . . . [t]he declarant is unavailable as a witness, or is present and subject to cross-examination.

**¶36** Here, the trial court ruled that B.R.'s testimony during Pesqueira's preliminary hearing and Tebo's preliminary hearing were admissible. And, with respect to the admission of B.R.'s testimony during Pesqueira's preliminary hearing, Pesqueira concedes that B.R. was unavailable, but contends his cross-examination was inadequate because he did not "have the same opportunity motive to question [B.R.] at the preliminary hearing as he would have at trial." A party's motive in questioning a witness depends, in part, on the issues confronting a party at the time the witness testified. *See State v. Schad*, 129 Ariz. 557, 568-69, 633 P.2d 366, 377-78 (1981) (similar motive where line of questioning relevant at pretrial hearing also germane to issue at trial). Pesqueira never disputed that he stabbed B.R.; rather, the issue was whether Pesqueira's use of force was reasonable. Pesqueira further asserts that his motive at the preliminary hearing was "to shake [B.R.'s] testimony that he committed the offenses so that the magistrate would not find probable cause," but, as he concedes, justification can be considered in determining probable cause. *See Herrell v. Sargeant*, 189 Ariz. 627, 629-30, 944 P.2d 1241, 1243-44 (1997).

**¶37** The admission of B.R.'s testimony from Pesqueira's preliminary hearing did not violate the confrontation clause or the hearsay rules. B.R. was unavailable at trial. In addition, his previous statement was made in a judicial proceeding and Pesqueira had adequate opportunity to cross-examine him. Thus, we find no error, fundamental or otherwise, in the trial court's decision to admit B.R.'s preliminary-hearing statement.

**¶38** We next address whether the trial court erred in admitting B.R.'s testimony from Tebo's preliminary hearing. Pesqueira did not object to the admission of this evidence, nor did he request a limiting jury instruction regarding its use. The record appears to indicate Pesqueira was not present during Tebo's preliminary hearing. As such, Pesqueira was not a party to the proceeding and had no opportunity to cross-examine B.R. pursuant to Rule 19.3(c). Thus, the court erred in admitting the transcript from this hearing as evidence against Pesqueira. *See State v. Luzanilla*, 179 Ariz. 391, 398, 880 P.2d 611, 618 (1994) (former testimony inadmissible where defendant had no opportunity to cross-examine witness); Ariz. R. Evid. 804(b)(1).

**¶39** Assuming for the purpose of argument the error was fundamental, Pesqueira must also demonstrate how the error caused him prejudice. "To show prejudice, [Pesqueira] must show that a reasonable jury, absent any error in admitting the [evidence] could have reached a different result." *State v. Salazar*, 216 Ariz. 316, ¶ 12, 166 P.3d 107, 110 (App. 2007). B.R.'s testimony during both preliminary hearings was virtually identical, and Pesqueira does not point to any difference between the two transcripts. In light of the significant evidence against him and the duplicative nature of the testimony, Pesqueira has failed to show, absent the admission of Tebo's preliminary hearing transcript, that a reasonable jury could have reached a different result. *Salazar*, 216 Ariz. 316, ¶ 12, 166 P.3d at 110; *see also State v. Gallegos*, 178 Ariz. 1, 11, 870 P.2d 1097, 1107 (1994) (no prejudice where "[o]verwhelming evidence in the record support[ed] the jury's verdict.").

## VII. Criminal Restitution Order

**¶40** Although Pesqueira has not raised the issue on appeal, we find fundamental error associated with the CRO. *See* A.R.S. § 13-805.[3] In the sentencing minute entry, the trial court ordered that "all fines, fees, assessments and/or restitution are reduced to a Criminal Restitution Order, with no interest, penalties or collection fees to accrue while [Pesqueira] is in the Department of Corrections." The court's imposition of the CRO before the expiration of Pesqueira's sentence "'constitute[d] an illegal sentence, which is necessarily fundamental, reversible error.'" *State v. Lopez*, 231 Ariz. 561, ¶ 2, 298 P.3d 909, 910 (App. 2013), *quoting State v. Lewandowski*, 220 Ariz. 531, ¶ 15, 207 P.3d 784, 789 (App. 2009). This remains true even though the court ordered that the imposition of interest be delayed until after Pesqueira's release. *See id.* ¶ 5.

## Disposition

**¶41** For the foregoing reasons, we affirm Pesqueira's convictions and sentences and vacate the CRO.

/s/ Michael Miller
MICHAEL MILLER, Judge

CONCURRING:

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

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

[3]Section 13-805, A.R.S., has been amended three times since the date of the crime. *See* 2012 Ariz. Sess. Laws, ch. 269, § 1; 2011 Ariz. Sess. Laws, ch. 263, § 1 and ch. 99, § 4. We apply the version in effect at the time of the crimes. *See* 2005 Ariz. Sess. Laws. ch. 260, § 6. *State v. Lopez*, 231 Ariz. 561, n.1, 298 P.3d 909, 910 n.1 (App. 2013).