IN THE
# ARIZONA COURT OF APPEALS
DIVISION TWO

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THE STATE OF ARIZONA,
*Appellee*,

*v.*

ANTONIO DE JESUS MOLINA,
*Appellant*.

No. 2 CA-CR 2015-0026
Filed February 5, 2016

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THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
*See* Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Crim. P. 31.24.

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Appeal from the Superior Court in Cochise County
No. CR201300410
The Honorable James L. Conlogue, Judge

**AFFIRMED**

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COUNSEL

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**MEMORANDUM DECISION**

Chief Judge Eckerstrom authored the decision of the Court, in which Presiding Judge Vásquez and Judge Miller concurred.

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E C K E R S T R O M, Chief Judge:

**¶1** Antonio Molina challenges his conviction and sentence for first-degree murder. For the following reasons, we affirm.

## Factual and Procedural Background

**¶2** In July 2013, D.F. stepped outside to investigate loud noises coming from an apartment he was renting to a woman named M.M.[1] D.F. saw the victim, J.G., approach M.M.'s apartment and bang on the door. The door opened and a confrontation began between J.G. and Molina. During that confrontation, Molina stabbed J.G. J.G. "doubled over" and walked quickly away from the apartment. D.F., a paramedic, instructed his wife to call 9-1-1 and attempted to provide medical aid, but J.G. died before the ambulance arrived.

**¶3** At trial, Molina admitted stabbing J.G. but claimed he had acted in self-defense and in defense of M.M. The jury found him guilty of first-degree murder and the court sentenced him to "natural li[f]e without the possibility of release of any kind on any basis." This appeal followed.

## Hearsay

**¶4** Molina first challenges the admission of his statement that his girlfriend, M.M., asked him to kill J.G. This testimony was given by R.K., who claimed that Molina told him that M.M. had said it. Molina asserts, as he did at trial, that this was hearsay.

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[1]M.M. was Molina's girlfriend and the wife of the victim, J.G.

**¶5** This testimony constituted "hearsay within hearsay." *See* Ariz. R. Evid. 805. Such testimony is not admissible unless "each part of the combined statements conforms with an exception to the rule." *Id.* On the first level, Molina's statement to R.K. was not hearsay because it was a party admission. *See* Ariz. R. Evid. 801(d)(2)(A); *State v. Garza*, 216 Ariz. 56, ¶ 41, 163 P.3d 1006, 1016 (2007). On the second level, M.M.'s statement to Molina that she wanted him to kill the victim was not hearsay because it was not offered to prove the truth of the matter. *See* Ariz. R. Evid. 801(c)(2); *State v. Tucker*, 215 Ariz. 298, ¶ 61, 160 P.3d 177, 194 (2007). The issue was not whether M.M. wanted Molina to kill J.G., but whether Molina believed M.M. wanted him to kill J.G. *See State v. Hernandez*, 170 Ariz. 301, 306, 823 P.2d 1309, 1314 (App. 1991) ("Words offered to prove the effect on the hearer are admissible when they are offered to show their effect on one whose conduct is at issue."). Because each level of R.K.'s statement was admissible non-hearsay, the trial court did not err in admitting this statement.

**Disclosure of Other-Acts Evidence**

**¶6** Molina next claims the trial court erred when it denied his motion for new trial based on the admission of undisclosed other-acts evidence. Specifically, Molina challenges testimony that he once "stormed off the job" while working and that, while drinking, he "verbaliz[ed] hostile intentions."

**¶7** We will not disturb a trial court's decision on whether to impose sanctions for non-disclosure under Rule 15.1, Ariz. R. Crim. P., absent an abuse of discretion. *State v. Armstrong*, 208 Ariz. 345, ¶ 40, 93 P.3d 1061, 1069-70 (2004). "We will not find that a trial court has abused its discretion unless no reasonable judge would have reached the same result under the circumstances." *Id.* Furthermore, "'preclusion is rarely an appropriate sanction for a discovery violation.'" *State v. Naranjo*, 234 Ariz. 233, ¶ 30, 321 P.3d 398, 407 (2014), *quoting State v. Delgado*, 174 Ariz. 252, 257, 848 P.2d 337, 342 (1993) (alteration in *Naranjo* omitted).

**¶8** The purpose of Rule 15.1(b)(7), which requires the state to disclose "all prior acts of the defendant which the prosecutor intends to use to prove motive, intent, or knowledge," is to provide

the defense with notice of these acts and thereby avoid surprise at trial. *State v. Martinez-Villareal*, 145 Ariz. 441, 447, 702 P.2d 670, 676 (1985). Here, the state explained that, while it had not provided "formal 404(B) titled notice," it had actually disclosed the testimony at issue. Molina acknowledged that he "was aware of this information." Under these circumstances, Molina has failed to establish that the trial court abused its discretion by not excluding the challenged testimony as a sanction for the state's failure to disclose it.[2] Because the court did not err in excluding the testimony as a sanction for the state's disclosure violation, it likewise did not err in denying the motion for new trial on the same grounds.

**Burden Shifting**

**¶9** Molina's last contention is that the trial court erred in failing to sua sponte re-instruct the jury on the burden of proof after the state's closing argument. In his closing argument, the prosecutor noted that, although Molina had testified that J.G. was abusive towards M.M., Molina had not produced any witnesses that could corroborate this story. Molina claims this argument shifted the burden of proof, requiring Molina to prove the killing was not done in self-defense.

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[2]Contrary to the state's assertion, Molina did not open the door to evidence tending to show his own character for violence when he presented evidence that the victim had a character for violence. *See State v. Harrington*, 27 Ariz. App. 663, 666-67, 558 P.2d 28, 31-32 (1976); *compare* Fed. R. Evid. 404(a)(2)(B)(ii) (allowing prosecutor to introduce evidence of pertinent character trait of defendant when defendant has introduced evidence of same trait in victim), *with* Ariz. R. Evid. 404(a)(2) (only allowing introduction of evidence of pertinent character trait of victim). Nor has the state suggested any purpose for this evidence other than to demonstrate Molina's character for violence. *See* Ariz. R. Evid. 404(b). However, because Molina has only challenged the trial court's admission of this evidence based on the alleged disclosure violation, we do not address this ground for exclusion. *See State v. Bolton*, 182 Ariz. 290, 298, 896 P.2d 830, 838 (1995) ("Failure to argue a claim on appeal constitutes waiver of that claim.").

**¶10** The state, however, is entitled to "discuss[] a defendant's failure to produce evidence . . . so long as it does not constitute a comment on [the defendant's] silence." *State v. Lehr*, 201 Ariz. 509, ¶ 57, 38 P.3d 1172, 1185 (2002). Accordingly, we conclude the trial court was not required to re-instruct the jury as to the burden of proof.

## Disposition

**¶11** For the foregoing reasons, we affirm Molina's conviction and sentence.