

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

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THE STATE OF ARIZONA,  
*Appellee,*

*v.*

ROBERT MICHAEL VERDUGO II,  
*Appellant.*

No. 2 CA-CR 2016-0028  
Filed April 27, 2017

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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NOT FOR PUBLICATION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 Gila County  
No. S0400CR201400446  
The Honorable Jason R. Holmberg, Judge

**AFFIRMED**

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COUNSEL

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MEMORANDUM DECISION

Judge Miller authored the decision of the Court, in which Presiding Judge Staring and Judge Espinosa concurred.

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M I L L E R, Judge:

¶1 In this appeal from his conviction for manslaughter, Robert Verdugo II contends the trial court abused its discretion in admitting certain photographs into evidence. Finding no error, we affirm.

¶2 We view the facts and all reasonable inferences therefrom in the light most favorable to sustaining the convictions. *State v. Riley*, 196 Ariz. 40, ¶ 2, 992 P.2d 1135, 1137 (App. 1999). In September 2010, the victim, S.J., arrived at the house in which Verdugo, Verdugo's fiancé and her sister, D.W., lived. When S.J. was knocking at the door, Verdugo went out to see who was there. S.J. had dated D.W. in high school, but she had only seen him once since. D.W. told Verdugo to tell S.J. to leave, and when he went outside there was an altercation, during which Verdugo stabbed S.J., killing him. Verdugo did not sustain any visible injuries except for a reddened ear. After a jury trial, Verdugo was convicted of manslaughter, and the trial court imposed an enhanced, aggravated sentence of twenty-one years' imprisonment.

¶3 On appeal, Verdugo argues the trial court "erred by admitting photographs of [his] tattoos and of the victim 'in-life.'" "We review the trial court's admission of photographic evidence for abuse of discretion." *State v. Villalobos*, 225 Ariz. 74, ¶ 21, 235 P.3d 227, 233 (2010).

¶4 Before trial, Verdugo objected to several photographs the state intended to offer in evidence. The first was a full-length photograph of Verdugo facing forward with his arms spread at the crime scene; tattoos of two guns were visible on Verdugo's abdomen.

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He argued the photograph was prejudicial because the tattoos made him “appear to be a gang member, which he was not.” The second, another photograph from the scene, also showed the tattoos partially visible above the waistband of his pants. The state argued the photographs of Verdugo at the scene were relevant, in view of his justification defense, to show that he had not sustained any injuries. The state indicated it would not make any mention of the tattoos or argument based upon them. The trial court concluded the probative value of the photographs outweighed any prejudice and denied the motion as to the photographs of Verdugo.

¶5 Verdugo argues on appeal that these photographs were irrelevant to the charge of manslaughter or his defense of self-defense. He contends they “portray[ed] him as a gang member” and were not relevant to self-defense because he had only claimed to have received injuries to his head. We disagree.

¶6 First, no evidence showed that the gun tattoos had any particular gang significance of which jurors would be aware, nor did the state argue they had any such significance.<sup>1</sup>

¶7 Second, photographs of tattoos may be admitted if the probative value outweighs the prejudice, as the trial court here found. *See State v. Sanchez*, 130 Ariz. 295, 300, 635 P.2d 1217, 1222 (App. 1981). Whether S.J. had injured Verdugo during their altercation was plainly relevant to Verdugo’s claim of self-defense. *See* A.R.S. §§ 13-404, 13-405, Ariz. R. Evid. 401. We cannot say the court clearly abused its discretion in finding the photographs’ probative value outweighed any possible prejudice. *State v. Clark*, 126 Ariz. 428, 434, 616 P.2d 888, 894 (1980) (“The weighing and balancing under Rule 403[, Ariz. R. Evid.,] is within the discretion of the trial court and will not be disturbed on appeal unless it has been clearly abused.”).

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<sup>1</sup> On appeal Verdugo also argues a photograph of a sword tattoo on his back was admitted and was “not probative of any contested issue.” But the sword tattoo appears to have belonged to the victim, not Verdugo. We therefore do not address any argument on this point.

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¶8 Verdugo further objected to the admission of two photographs of S.J., one taken during the autopsy and another of the victim when he was alive, on the grounds of relevance. He contended that any such photographs were irrelevant because the defense was not “questioning identity and/or not questioning that he is deceased.” The state argued, however, that the photographs were needed for identification, a point on which it was not willing to stipulate. Although the court denied the motion as to both photographs, the autopsy photograph was never admitted.

¶9 According to Verdugo, the “in life” photograph of the victim was “not probative of any contested issue” and “tended to impermissibly inflame the passions of the jury.” But our supreme court has determined that “in life” photographs may be admitted and has directed “the trial court in each instance to exercise sound discretion in balancing probative value against the risk of unfair prejudice.” *State v. Doerr*, 193 Ariz. 56, ¶ 32, 969 P.2d 1168, 1176 (1998); *accord* Ariz. R. Evid. 403.

¶10 In this case, as described above, the state sought to admit a photograph of the victim for identification. As the state points out on appeal, it is required to “carry its burden of proof on uncontested issues as well as contested ones.” *State v. Cañez*, 202 Ariz. 133, ¶ 66, 42 P.3d 564, 585 (2002), *abrogated on other grounds by State v. Valenzuela*, 239 Ariz. 299, n.1, 371 P.3d 627, 631 n.1 (2016). And the photograph of the victim admitted merely shows the victim’s face and does not include any particularly sympathetic subject matter or activities. Again, we cannot say the court abused its discretion in finding the photograph’s probative value outweighed any prejudicial effect. *Clark*, 126 Ariz. at 434, 616 P.2d at 894.

¶11 We affirm Verdugo’s conviction and sentence.