

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

STATE OF ARIZONA,)	1 CA-CR 02-0591
)	
Appellee,)	DEPARTMENT C
)	
v.)	O P I N I O N
)	
MAYRA ISABEL BARRAZA,)	Filed 1-11-05
)	
Appellant.)	
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Appeal from the Superior Court in Maricopa County

Cause No. CR 2001-007640

The Honorable Barry C. Schneider, Judge

CONVICTION AFFIRMED

Terry Goddard, Attorney General	Phoenix
By Randal M. Howe, Chief Counsel, Criminal Appeals Section	
and John L. Saccoman, Assistant Attorney General	
Attorneys for Appellee	
James J. Haas, Maricopa County Public Defender	Phoenix
By Terry J. Adams, Deputy Public Defender	
Attorneys for Appellant	

H A L L, Judge

¶1 Following a jury trial, Mayra Isabel Barraza was convicted of second-degree murder. Barraza claims that the trial court erred when it refused to instruct the jury on the "crime prevention" justification defense pursuant to Arizona Revised Statutes (A.R.S.) section 13-411 (2001). We conclude that § 13-411

may not be invoked by an invited guest who is charged with committing a crime against a resident of the home. Accordingly, we affirm the conviction.¹

FACTS AND PROCEDURAL HISTORY

¶2 Gregorio Espinoza, the victim, was found dead at his home on May 5, 2001. He had been stabbed about sixty times with a single-edged, sharp instrument and had bled to death. Barraza's name and address were written on a piece of paper in the victim's vehicle, leading the police to her. Physical evidence also linked her to the scene.

¶3 Barraza initially denied that she had been with the victim or that she was involved in his death. Instead, she claimed she had been with one of her friends at the time in question. After the friend would not verify the purported alibi and revealed to the police that Barraza had asked her to lie, Barraza changed her story. She admitted that she had been with the victim as a guest at his home on May 5, 2001, and that she had stabbed him, but claimed she had acted to prevent the victim from sexually assaulting her.

¶4 The police also learned from other friends of Barraza that one week before, while she and two friends watched a

¹ In a separate Memorandum Decision filed concurrently with this Opinion, see Ariz. R. Crim. P. 31.26, we vacate Barraza's aggravated sentence pursuant to *Blakely v. Washington*, ___ U.S. ___, 124 S.Ct. 2531 (2004), and remand for resentencing.

television show about a woman who robbed men by stabbing them, Barraza commented that she would like to "suck on [some man's] neck" and then "slice their throats and take their money." Insisting that she was not joking but meant what she said, Barraza then pulled out a knife she was carrying in her purse.

¶15 Barraza was indicted on one count of first-degree murder. Following trial to a jury, she was found guilty of the lesser-included offense of second-degree murder and was sentenced to an aggravated term of twenty-two years. Barraza timely appeals to this court. We have jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution, and A.R.S. §§ 12-120.21(A)(1) (2003), 13-4031 and -4033 (2001).

DISCUSSION

¶16 Barraza asked the trial court to instruct the jury on the right to use force in crime prevention as outlined in § 13-411.²

² Section 13-411 provides in pertinent part:

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 . . . sexual assault under § 13-1406

B. There is no duty to retreat before threatening or using deadly physical force justified by subsection A of this section.

C. A person is presumed to be acting reasonably for the purposes of this section if he is acting to prevent the commission of any

The trial court denied the request, commenting “[s]ince the defendant was not defending her residence, 411 doesn’t apply.”

¶7 The trial court did agree that Barraza was entitled to an instruction on self-defense pursuant to A.R.S. §§ 13-404 and -405 (2001), and instructed the jury in relevant part as follows:

A defendant is justified in using or threatening physical force in self-defense if the following two conditions existed:

1. A reasonable person in the defendant’s situation would have believed that physical force was immediately necessary to protect against another’s use or attempted use of unlawful physical force; and,
2. The defendant used or threatened no more physical force than would have appeared necessary to a reasonable person in the defendant’s situation.

A defendant may use deadly physical force in self-defense only to protect against another’s use or apparent attempted or threatened use of deadly physical force.

However, the trial court denied defense counsel’s request to “clarify” the instruction by adding additional language stating “[f]orcible rape is deadly physical force.” The net effect of the trial court’s rulings was that the jury was not required to find

of the offenses listed in subsection A of this section.

that Barraza was acting in self-defense even if it believed that she was attempting to repel the victim's sexual assault.³

¶8 We generally review a trial court's denial of a requested jury instruction for an abuse of discretion, *State v. Rosas-Hernandez*, 202 Ariz. 212, 220, ¶ 31, 42 P.3d 1177, 1185 (App. 2002), but review de novo whether the instructions given the jury properly state the law, *State v. Orendain*, 188 Ariz. 54, 56, 932 P.2d 1325, 1327 (1997).

¶9 Barraza contends that she stabbed the victim to prevent him from sexually assaulting her. Relying on her status as a guest in the victim's home, Barraza claims she was entitled to have the jury instructed on the justification defense of "crime prevention" set forth in § 13-411.

¶10 Our primary goal in construing a statute is to determine and give effect to the intent of the legislature. *State v. Korzep*, 165 Ariz. 490, 493, 799 P.2d 831, 834 (1990). To determine legislative intent, we consider the statute's context, the language used, the subject matter, the historical background, the statute's effects and consequences, and the statute's spirit and purpose.

³ An instruction pursuant to § 13-411 would have been more favorable to Barraza than that given by the trial court because she would have been presumed to have been acting reasonably in stabbing the victim if she reasonably believed that deadly physical force was immediately necessary to prevent the victim from sexually assaulting her. See § 13-411(C). For an explanation of the legal effect of the presumption, see *Korzep v. Superior Court (Ellsworth)*, 172 Ariz. 534, 838 P.2d 1295 (App. 1991).

Id. When the language of the statute is clear, we follow its direction without resorting to other methods of statutory interpretation. *Bilke v. State*, 206 Ariz. 462, 464, ¶ 11, 80 P.3d 269, 271 (2003). Statutes relating to the same subject or having the same general purpose, namely, statutes that are in *pari materia*, "should be read in connection with, or should be construed with other related statutes, as though they constituted one law." *State ex rel. Larson v. Farley*, 106 Ariz. 119, 122, 471 P.2d 731, 734 (1970). Additionally, we give words their usual and commonly understood meaning unless the legislature clearly intended a different meaning. *Korzep*, 165 Ariz. at 493, 799 P.2d at 834.

¶11 The scope of § 13-411 and its relationship to other justification statutes in Title 13, Chapter 4 has been a frequent topic on appeal. *See, e.g., State v. Taylor*, 169 Ariz. 121, 122, 817 P.2d 488, 489 (1991); *Korzep*, 165 Ariz. at 492, 799 P.2d at 833; *State v. Garfield*, 208 Ariz. 275, 277, ¶ 5, 92 P.3d 905, 907 (App. 2004); *State v. Hussain*, 189 Ariz. 336, 337, 942 P.2d 1168, 1169 (App. 1997); *State v. Thomason*, 162 Ariz. 363, 363, 783 P.2d 809, 809 (App. 1989). In these and other cases, Arizona's appellate courts have struggled with the tasks of construing § 13-411's apparent broad scope in light of the more narrow "Declaration

of policy" added by the Legislature in 1983⁴ and reconciling § 13-411 with overlapping justification statutes.

¶12 For example, from the inception of the crime prevention statute in the 1978 Arizona Criminal Code revision, one of the enumerated offenses in § 13-411(A) has been aggravated assault committed pursuant to A.R.S. § 13-1204(A)(1) ("caus[ing] serious physical injury") or (2) ("us[ing] a deadly weapon or dangerous instrument") (Supp. 2003). Although § 13-405 and other justification defenses in Chapter 4 that also took effect in 1978

⁴ The "Declaration of policy" provides in relevant part:

A. The legislature finds that homes of Arizona residents are being burglarized and violated at an alarming and unacceptable rate that is endangering the residents' safety, health and property, thereby depriving them of their safe and peaceful enjoyment of their homes.

B. It is the legislative intent to establish a policy by this law giving notice to all citizens, law enforcement personnel and the state courts that a person's home, its contents and the residents therein shall be totally respected and protected in Arizona, and that the law enforcement officials and courts shall apply this and all other applicable criminal laws relating to the protection of the home and its residents promptly and severely so as to restore the total sanctity of the home in Arizona.

1983 Ariz. Sess. Laws, ch. 255, § 1.

require an *immediate* threat to personal safety before a person may react by using deadly physical force, § 13-411 more permissively allows a person to use deadly physical force to prevent a non-imminent aggravated assault. See *Korzep*, 165 Ariz. at 493, 799 P.2d at 834 (citing *Thomason*, 162 Ariz. at 365, 783 P.2d at 811). In effect, if applied literally, § 13-411 would subsume other less permissive justification statutes including § 13-405.

¶13 *Thomason* was the first opinion to address the tension between § 13-411 and other justification statutes. *Thomason* was charged with first-degree murder after he went onto a business competitor's premises and shot the manager. *Thomason*, 162 Ariz. at 363, 783 P.2d at 809. At trial, he claimed that he was entitled to an instruction based on § 13-411 because he acted to prevent the victim and another employee from committing an aggravated assault on him. *Id.* at 364-65, 783 P.2d at 810-11. The trial court refused the request, instead instructing the jury pursuant to §§ 13-404 and -405. *Id.* at 365, 783 P.2d at 811. The jury convicted *Thomason* of second-degree murder. *Id.* at 363, 783 P.2d at 809. On appeal, *Thomason* contended that the trial court erred because the facts of his case "fit within § 13-411." *Id.* After explaining that § 13-411 seemingly "conflict[s]" and "overlap[s]" with other sections in Chapter 4, the court then harmonized the various justification statutes by relying on the legislative

declaration of policy to limit the application of § 13-411 to cases coming within the policy statement:

Accordingly, we restrict the application of § 13-411 to cases which would come within that policy statement. *That is, the defense is available only when a home, its contents, or the residents therein are being protected by the use or threatened use of physical force or deadly physical force against another.* Such a restriction ameliorates the overlap and conflict of § 13-411 with the other justification statutes and furthers the legislative objective.

Id. at 366, 783 P.2d at 812. (Emphasis added.)

¶14 Subsequent cases construing § 13-411 have adhered to the construction established in *Thomason* regarding the limited scope of § 13-411 while interpreting it to fulfill the legislative intent that *residents* be totally protected and respected. In *Korzep*, for example, the supreme court held that the use of the word "another" in § 13-411(A) ("A person is justified in threatening or using both physical force and deadly physical force against another") contemplates a situation in which a resident of a household uses force against *another* resident of the same household to prevent the commission of an enumerated crime. 165 Ariz. at 493-94, 799 P.2d at 834-35. One year later, in *Taylor*, the supreme court, while affirming that "[w]e continue to believe that 'the justification defense in § 13-411 applies only when a home, its contents, or its residents are being protected by the use of force against another,'" 169 Ariz. at 123, 817 P.2d at 490, held that a resident

need not wait until an intruder physically enters the home before taking action to prevent the commission of enumerated crimes. "All that is required for § 13-411 to apply is that a reasonable relationship exist between the criminal acts being prevented and the home, its contents, or its residents." *Id.* Several years later, in *Hussain*, 189 Ariz. at 339, 942 P.2d at 1171, this court held that "an occupied motel or hotel room is the equivalent of a 'home' for the purposes of the justification defense provided by A.R.S. section 13-411."

¶15 Recently, this court, eschewing an "overly restrictive" definition of "resident," held that a person visiting a resident who shot another guest was entitled to have the jury instructed on crime prevention pursuant to § 13-411. *Garfield*, 208 Ariz. at 279, ¶¶ 14-15, 92 P.3d at 909. In this case, Barraza seeks to expand the scope of § 13-411 beyond the facts in *Garfield* to encompass her assault on the *resident* of the home on the theory that she was preventing a sexual assault pursuant to A.R.S. § 13-1406 (2001), which is one of the enumerated crimes in the statute.

¶16 We decline to do so. Unlike *Garfield*, in which there was evidence that Garfield had remained at the home at the request of the resident to help prevent any violence between the victim and a third person, *id.* at 279, ¶ 14, 92 P.3d at 909, and was therefore acting on behalf of the resident, Barraza cannot plausibly claim that she was acting to protect the "total sanctity of the

[victim's] home." See Declaration of policy, 1983 Ariz. Sess. Laws, ch. 255, § 1.

¶17 Indeed, extending the more permissive § 13-411 in the manner urged by Barraza to permit a nonresident to attack a resident in his own home would result in a resident having less legal protection in his home than in public, an outcome that would frustrate rather than further the clearly expressed legislative intent that § 13-411 be applied so "that a person's home, its contents and the residents therein" are "totally respected and protected in Arizona." See *Thomason*, 162 Ariz. at 366, 783 P.2d at 812 (statutes should be construed "in light of their purpose"). Accordingly, we reject Barraza's claim that the jury should have been instructed pursuant to § 13-411.⁵

¶18 We now turn to Barraza's other contention, that the instruction on self-defense based on §§ 13-404 and -405 was

⁵ The declaration of policy is essentially a restatement of the legal maxim "A man's home is his castle." Under the so-called Castle Doctrine, "those who are unlawfully attacked in their homes have no duty to retreat, because their homes offer them the safety and security that retreat is intended to provide. They may lawfully stand ground instead and use deadly force if necessary to prevent imminent death or great bodily injury, or the commission of a forcible felony." Catherine L. Carpenter, *Of the Enemy Within, the Castle Doctrine, and Self-Defense*, 86 Marq. L. Rev. 653, 656-57 (2003) (citations omitted). The dissent would erase any differentiation whatsoever between resident and guest by extending the reach of § 13-411 to a nonresident acting *against* the resident, in effect promulgating a new maxim that "A man's home is his guest's castle." Such an expansive interpretation of § 13-411 is contrary to the legislative direction that the statute be interpreted to protect the sanctity of residents in their homes.

incorrect or insufficient. The State points out that Barraza's argument on appeal—that the instruction violated *State v. Grannis*, 183 Ariz. 52, 900 P.2d 1 (1995)—is not the argument Barraza made to the trial court that additional language should have been inserted telling the jury that “forcible rape is deadly physical force.” Therefore, the State argues that Barraza has both abandoned the argument she made in the trial court, see *State v. Nirrschel*, 155 Ariz. 206, 208, 745 P.2d 953, 955 (1987) (failure to provide argument on appeal constitutes abandonment and waiver of that issue), and waived her *Grannis* argument on appeal because she failed to make it in the trial court. See *State v. Goldston*, 126 Ariz. 171, 173, 613 P.2d 835, 837 (App. 1980) (defendant waived right to object to instruction on certain ground when he objected to the instruction on a different ground in trial court).

¶19 We agree with the State that the only argument Barraza raises on appeal regarding the insufficiency of the jury instruction is based on *Grannis*. In *Grannis*, 183 Ariz. at 61, 900 P.2d at 10, the trial court had instructed the jury that “[a] defendant may only use deadly physical force in self-defense to protect himself from another’s use or attempted use of deadly physical force.” On appeal, the supreme court found that the instruction misstated the law because it may have led the jury to believe that deadly force could be used only to protect against “actual deadly force” even though §§ 13-404 and -405 also allow

deadly force to protect against "reasonably apparent deadly force." *Id.* In comparison, the jury in this case was instructed that "[a] defendant may use deadly physical force in self-defense only to protect against another's use or *apparent* attempted or threatened use of deadly physical force." (Emphasis added.) Trial counsel, not surprisingly, did not raise a *Grannis* objection to this instruction. Therefore, we review only for fundamental error. See *State v. Bolton*, 182 Ariz. 290, 297, 896 P.2d 830, 837 (1995) (an issue not raised with the trial court is waived absent fundamental error). Fundamental error is error that goes to the foundation of a case or takes from the defendant a right essential to his defense. See *State v. King*, 158 Ariz. 419, 424, 763 P.2d 239, 244 (1988). This portion of the instruction complied with *Grannis* and did not constitute error, fundamental or otherwise.

¶20 Trial counsel did, however, specifically request that the jury be instructed in the context of the self-defense instruction that "[f]orcible rape is deadly physical force." Appellate counsel, however, does not argue that the trial court's denial of this request was error. Instead, he simply makes general references to trial counsel's request that "the court [] instruct the jury that [Barraza] could use deadly physical force under the circumstances of the case" and cites portions of the trial transcript. The remainder of that section of the brief is then devoted exclusively to Barraza's *Grannis* argument. Under similar

circumstances, we have previously stated that “[w]e disapprove of the method . . . of incorporating arguments at trial by reference in the brief on appeal” *State v. Rodgers*, 134 Ariz. 296, 302, 655 P.2d 1348, 1354 (App. 1982). See Ariz. R. Crim. P. 31.13(c)(1)(vi) (argument on appeal “shall contain the contentions of the appellant with respect to the issues presented, and the reasons therefor, with citations to the authorities, statutes and parts of the record relied on”). Therefore, we agree with the State that Barraza has abandoned this issue on appeal. See *Nirschel*, 155 Ariz. at 208, 745 P.2d at 955.

¶21 We may nonetheless reverse for fundamental error not presented by way of appeal that is “clearly apparent” from our review of the record. *State v. Stroud*, 207 Ariz. 476, 478, ¶ 5, 88 P.3d 190, 192 (App. 2004); *State v. Taylor*, 187 Ariz. 567, 571-72, 931 P.2d 1077, 1081-82 (App. 1996) (repeal of A.R.S. § 13-4035 does not require appellate courts “to ignore obvious fundamental error in a criminal proceeding”); see also *State v. Mann*, 188 Ariz. 220, 232 n.1, 934 P.2d 784, 796 n.1 (1997) (Martone, J., concurring) (“[I]f in the process of examining issues presented by way of appeal we stumble across fundamental error, then we have the discretion to address it.”). Here, the trial court’s self-defense instruction was an otherwise correct instruction pursuant to §§ 13-404 and -405 and its refusal to instruct the jury that a sexual

assault constitutes the *per se* use of "deadly physical force"⁶ did not deprive Barraza of a fair trial. See *People v. Heflin*, 456 N.W.2d 10, 22-24 (Mich. 1990) (finding no manifest injustice when trial judge did not specifically inform the jury that the defendant may use deadly force to resist a potential forcible rape, noting that under Michigan's statutory scheme "forcible criminal sexual conduct may arise from circumstances in which the victim never had an honest and reasonable belief that his life is in imminent danger or threat of serious bodily harm").⁷ Accordingly, we decline to address this issue.

⁶ "Deadly physical force" is "force which is used with the purpose of causing death or serious physical injury or in the manner of its use or intended use is capable of creating a substantial risk of causing death or serious physical injury." A.R.S. § 13-105(12) (2001).

⁷ The dissent states, *infra* ¶ 41, "[a]ccording to the state, there was no conduct by the victim that constituted deadly physical force and consequently provoked the use of deadly physical force by defendant." Although accurate, this statement is somewhat imprecise. Viewed in context, the State was asserting that the evidence did not support Barraza's claim that the victim attempted to sexually assault her, but that she was carrying out a preconceived plan to assault the victim.

CONCLUSION

¶22 We affirm Barraza's conviction.

PHILIP HALL, Presiding Judge

CONCURRING:

DONN KESSLER, Judge

B A R K E R, Judge, dissenting.

¶1 The purpose of the justification defense available under A.R.S. § 13-411 is "to restore the total sanctity of the home in Arizona." *State v. Taylor*, 169 Ariz. 121, 123, 817 P.2d 488, 490 (1991) (quoting Ariz. Sess. Laws 1983, Ch. 255, § 1). The "total sanctity of the home in Arizona" is not provided if § 13-411 is construed to *exclude* from protection those who are guests within one's home. This principle applies with even greater force here as the right at issue is the ability to defend oneself against a sexual assault. Accordingly, I respectfully dissent.

I.

A.

¶2 The point of departure for the construction of a statute is the language of the statute itself. *Zamora v. Reinstein*, 185 Ariz. 272, 275, 915 P.2d 1227, 1230 (1996) (stating that we "first

consider the statute's language"). The statute provides as follows:

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 . . . sexual assault under section 13-1406.

A.R.S. § 13-411. There is no limiting language in this statute that would allow a homeowner or resident to utilize deadly physical force to protect herself against sexual assault but forbid an invited guest within the home from doing the same.

¶13 As the majority correctly points out, we have held that the "justification defense in § 13-411 applies only when a home, its contents, or its residents are being protected by the use of force against another." *Taylor*, 169 Ariz. at 123, 817 P.2d at 490 (quotations and citations omitted). This is based upon the legislature's "declaration of policy." *Id.* In *Taylor* we made it clear that "[a]ll that is required for § 13-411 to apply is that a reasonable relationship exist between the criminal acts being prevented and the home, its contents, or its residents." *Id.* (emphasis added). Certainly, an invited guest bears a "reasonable relationship" to a home's "residents." *See id.* If we construe the statute to protect a home's "contents," such as a couch or a chair, it would seem terribly misplaced to not allow protection of the invited guest who is sitting upon it. Did the legislature

intend protection for property, but not for people, when providing for the "total sanctity of the home"?

¶14 The majority also claims that permitting invited guests to have the same protection under § 13-411 as the residents who invite them creates a situation in which a resident has less legal protection in his or her home than in public. This is not accurate. A resident has complete control over which persons to invite into his or her home. A resident has no such power in the public square. Thus, there is clearly greater power to protect oneself in one's home than in public. Once a guest is invited, however, a resident cannot attack the guest and deny that guest the protection that § 13-411 affords.

¶15 The majority errs by creating an exception to § 13-411 that excludes invitees from the protection this statute provides.

B.

¶16 Our supreme court has instructed that "[i]n arriving at the Legislature's intent, the effect and consequences of alternative constructions may be considered." *Dep't of Revenue v. S. Union Gas Co.*, 119 Ariz. 512, 514, 582 P.2d 158, 160 (1978); see also *Forino v. Ariz. Dep't of Transp.*, 191 Ariz. 77, 80, 952 P.2d 315, 318 (App. 1997) (same). The effect and consequence of the majority's interpretation of § 13-411, excluding invitees but including homeowners (or other types of residents), is shown by the following example.

¶17 Your eighteen-year-old daughter Mary is invited to a party at her friend John's home. Frank and George are also invited. At the party, Frank and George force John and Mary into a bedroom and sexually assault them. Under the majority's analysis, John could use deadly force to protect himself against a sexual assault (if immediately necessary) but Mary could not. This is so, on the majority's analysis, because John is a resident and Mary is an invitee. Neither the language of § 13-411, nor the policy that underlies it, supports this inconsistent application of the statute to John and Mary. Inconsistent applications of statutes are to be avoided. *Carter v. Indus. Comm'n*, 182 Ariz. 128, 131, 893 P.2d 1291, 1294 (1995) ("[W]e seek to avoid inconsistency in the application of the statute."); *Welch-Doden v. Roberts*, 202 Ariz. 201, 206, ¶ 22, 42 P.3d 1166, 1171 (App. 2002) ("In construing statutes, we have a duty to interpret them in a way that promotes consistency, harmony, and function."). Though the majority contends that defendant "cannot plausibly assert she is protecting the 'total sanctity of the home,'" *supra* ¶ 16, this hypothetical makes plain that the invited guest is doing precisely what the resident is doing. Is protecting against a sexual assault taking place *within* the home, of someone *invited* to be in the home, not protecting the "total sanctity of the home"? The statute provides for no distinction between invitees and residents in this regard.

¶18 The majority, however, also bases the exception it creates not on the status of defendant as an invitee, but on the fact that she was defending herself against a *resident*. This basis is also misplaced. In the example above, assume that instead of Frank and George (the two other invitees) sexually assaulting John and Mary, that Frank, George and John (the resident) *all* sexually assaulted Mary. If an invitee may claim the protection of § 13-411, but just not against a *resident*, then Mary may use deadly force against Frank and George, but not against John even though all three of them are perpetrating the same sexual assault against her. Again, this is an illogical effect and consequence of the majority's interpretation that is not supported by the statute or the pertinent cases.

¶19 The majority invokes the phrase that "A man's home is his castle" and argues that providing protection for invited guests against residents would turn the phrase into a "A man's home is his *guest's* castle." *Supra* ¶ 16 n.5. This rationale forgets that we are dealing here with an *invited* guest, not an intruder. A man simply cannot *invite* a woman into his home, sexually assault her, and expect that the woman will not be able to invoke the same protections within that home that he would be entitled to invoke. This turns a "castle" into a fortress for abuse. Such a result is directly contrary to the plain language of the statute.

¶10 When dealing with invited guests (as opposed to intruders) the concept embodied in the statute is better captured by the phrase "Mi casa es su casa."⁸ No resident is entitled to deprive a guest of the protections to which he or she is entitled because the offense which makes self defense necessary is being perpetrated by a *resident* as opposed to an intruder. See *State v. Korzep*, 165 Ariz. 490, 494, 799 P.2d 831, 835 (1990) (*Korzep I*) (providing for protection on behalf of one resident against another resident and holding that "'another'. . . as used in § 13-411, means a different or distinct person, and *includes a resident of the same household* as well as an intruder or invitee.")⁹ (emphasis added).

¶11 Thus, the "effect and consequences" of the majority's construction, *S. Union Gas Co.*, 119 Ariz. at 514, 582 P.2d at 160, also compels the conclusion that the construction they provide is in error. Construing the statute to provide protection to invited

⁸ "My home is your home."

⁹ The majority points to *State v. Garfield*, 208 Ariz. 275, 92 P.3d 905 (App. 2004) and distinguishes it from this case. *Supra* ¶¶ 15-16. *Garfield* is distinguishable on the facts. *Garfield* did not deal with a resident allegedly attacking an invitee, which is present here. The same principle in *Garfield*, however, is applicable here. The holding in *Garfield* provided for an invitee to come within § 13-411. The *Garfield* court recognized the Arizona Supreme Court admonition "caution[ing] us from being overly restrictive when interpreting the legislative intent behind the passage of § 13-411." *Id.* at 279, ¶ 14, 92 P.3d at 909 (citing *Korzep I*). Respectfully, the majority's (and the trial court's) interpretation is just such an "overly restrictive" interpretation.

guests, even if the offense requiring protection is perpetrated by a resident, is the only interpretation that avoids inconsistent and illogical effects and consequences.

C.

¶12 Another consideration in applying § 13-411 in this case is specific to the crime of sexual assault itself. Sexual assault, as defined under A.R.S. § 13-1406(A), is committed by "intentionally or knowingly engaging in sexual intercourse or oral sexual contact with any person without consent of such person." In enacting the justification defense in § 13-411 the legislature provided for the use of both physical force and deadly physical force if "immediately necessary to prevent" such an assault. Without the provision for deadly physical force if "immediately necessary to prevent" such an assault, one could not utilize deadly physical force to stop a perpetrator from sexually assaulting him or her unless the perpetrator also used deadly physical force to bring about the sexual assault. Even though many sexual assaults may be accompanied by deadly threats, this does not satisfy the legislative enactment that deadly physical force may be used in *all* such attacks if "immediately necessary to prevent" the attack.

¶13 We should construe a statute to uphold the legislative policy. *Achen-Gardner, Inc. v. Superior Court*, 173 Ariz. 48, 54, 839 P.2d 1093, 1099 (1992) (quoting *Tracy v. Superior Court*, 168 Ariz. 23, 31, 810 P.2d 1030, 1038 (1991) ("We also construe a

statute in a manner that 'will best serve the legislature's purposes, policies, and goals' apparent from the whole body of relevant law."). In this case, the legislature has placed great value on being able to protect oneself against sexual assault. There are policy reasons that support such a decision. As one partial collection on the federal level indicates:

"[The incidence of] rape rose four times as fast as the total national crime rate over the past 10 years." S. Rep. No. 101-545, at 30 (citing Federal Bureau of Investigation Uniform Crime Reports (1988)).

"According to one study, close to half a million girls now in high school will be raped before they graduate." S. Rep. No. 101-545, at 31 (citing R. Warshaw, *I Never Called it Rape* 117 (1988)).

"[One hundred twenty-five thousand] college women can expect to be raped during this – or any – year." S. Rep. No. 101-545, at 43 (citing testimony of Dr. Mary Koss before the Senate Judiciary Committee, Aug. 29, 1990).

"[T]hree-quarters of women never go to the movies alone after dark because of the fear of rape and nearly 50 percent do not use public transit alone after dark for the same reason." S. Rep. No. 102-197, p. 38 (1991) (citing M. Gordon & S. Riger, *The Female Fear* 15 (1989)).

United States v. Morrison, 529 U.S. 598, 633 (2000) (Souter, J., dissenting) (alterations in original). Because of the dramatic personal and societal consequences of sexual assaults, the court should protect the right the legislature granted to those who choose to defend themselves against such an attack by the use of

deadly physical force, if "immediately necessary to prevent" the attack. A.R.S. § 13-411.

¶14 The statutory policy to protect against sexual assaults is yet another reason to construe § 13-411 to protect a sexual assault victim who is a guest in a home. For this reason, and the other reasons above, it was error for the trial court to decline the § 13-411 instruction based on the legal theory that § 13-411 does not apply to invited guests in a home. The majority likewise errs in approving this failure to so instruct.

II.

A.

¶15 Jury instructions should be given if there is any evidence to support the instruction. *E.g., State v. Bolton*, 182 Ariz. 290, 309, 896 P.2d 830, 849 (1995) ("A party is entitled to an instruction on any theory of the case reasonably supported by the evidence."); *State v. Shumway*, 137 Ariz. 585, 588, 672 P.2d 929, 932 (1983) (same).

¶16 In this case, the jury heard evidence that defendant had been invited into the victim's home and that she stabbed the victim to defend herself from the victim's sexual assault upon her. According to defendant,¹⁰ the victim picked her up for a date and they went to his house first for him to shower and change clothes.

¹⁰ Defendant did not testify at trial. A videotape of defendant's statements to the police was played for the jury.

While there, the alleged sexual assault took place. According to her, she fought him off with a knife. Thus, it is clear that there was evidence to support the giving of an instruction based on § 13-411. It was error to refuse defendant's offered instruction.

B.

¶17 The next question is whether the error was harmless. Defendant, after all, stabbed her alleged assailant multiple times and made a prior incriminating statement. An "[e]rror is harmless if we can conclude beyond a reasonable doubt that it did not influence the verdict." *State v. Johnson*, 205 Ariz. 413, 421, ¶ 27, 72 P.3d 343, 351 (App. 2003) (quoting *State v. McKeon*, 201 Ariz. 571, 573, ¶ 9, 38 P.3d 1236, 1238 (App. 2002)). For the reasons below, I cannot so conclude in this case.

¶18 The failure to give the requested instruction provided the jury with the means of completely disregarding all of the self-defense evidence. This was defendant's entire case. In addition to defendant's statement that she stabbed and kept stabbing the victim because he was sexually assaulting her, the following evidence supported her case: the money that was urged as a motive for killing was not taken; the medical examiner testified that the stab wounds were consistent with being inflicted from the position of one who had a person on top of her (as in a sexual assault); the age of defendant (seventeen) and the nature of the alleged assault (a rape) in relation to her failure to report it to police; the

forced sexual assault by defendant of another woman within several months of this incident; and the fact that the victim was under the influence of alcohol and there was testimony that he became violent when under the influence of alcohol.

¶19 In this case the trial judge instructed the jury that "[a] defendant may use deadly physical force in self-defense *only* to protect against another's use or apparent attempted or threatened use of deadly physical force." (Emphasis added.) According to the state, there was no conduct by the victim that constituted deadly physical force and consequently provoked the use of deadly physical force by defendant.¹¹ Thus, the instruction given to the jury would not permit them to consider defendant's

¹¹ The majority takes issue with this statement as being "accurate" yet "somewhat imprecise." *Supra* n.7. It is hard to see the imprecision. The state made it abundantly clear in closing argument that under its view of the evidence "[defendant] was not attacked. [Defendant] is not a poor attack victim, the victim of this monster." Certainly, under this view, there is no argument that defendant was defending herself against the use of deadly physical force (or a sexual assault) by the alleged victim and thus entitled to invoke self-defense on the basis of the instruction given.

The problem, however, with basing an instruction on only one party's view of the evidence is that the law requires an instruction to be given "on *any theory* of the case *reasonably supported* by the evidence." *Bolton*, 182 Ariz. at 309, 896 P.2d at 849 (citation omitted) (emphasis added). Here, there was clearly evidence of a sexual assault. *Supra* ¶ 40. Defendant's case was premised on defending herself against an alleged sexual assault. To limit the victim of an alleged sexual assault to a defense based solely on deadly physical force, as contrasted with the sexual assault itself, guts the provisions of § 13-411 that expressly specify sexual assault as a qualifying crime. The instruction pursuant to § 13-411 should have been given.

self-defense evidence under this scenario. The trial judge also refused to instruct, under § 13-411, that "deadly physical force" could be used if "immediately necessary to prevent" a sexual assault. This instruction would have allowed the jury to consider the self-defense evidence even if the jury considered that the victim did *not* use deadly physical force on defendant.

¶20 Because (1) the flawed jury instruction gave the jury the means of completely disregarding all evidence in defense of her conduct, and (2) there was evidence in addition to her statements alone that supported her defense based on protecting herself against a sexual assault, I cannot say beyond a reasonable doubt that the failure to properly instruct on deadly physical force did not influence the jury's verdict. The error was not harmless.

¶21 Additionally, in the face of clear legal error on the key point in the case, we should err on the side of allowing a jury to consider the evidence under the appropriate legal standard. This is particularly so, as in this case, when the right not advised of goes to the important societal and individual interest in allowing a person to protect oneself, by deadly physical force if immediately necessary, from a sexual assault. The jury should be able to consider defendant's conduct in light of that law.

III.

¶22 The majority's exclusion of invitees from protection under § 13-411 is contrary to the plain language of the statute and

the purposes of the policy that underlie it. For the reasons above, I respectfully dissent.

DANIEL A. BARKER, Judge