

COMMITTEE ON THE IMPACT OF DOMESTIC VIOLENCE AND THE COURTS

Tuesday, February 10, 2015 – 10:00 a.m.

Arizona State Courts Building, 1501 W. Washington – Conference Room 119 A/B

Conference Call: 602-452-3288 Access Code: 1881#

[WebEx Link](#) [CIDVC Home Page](#)

AGENDA

- 10:00 a.m. Call to Order/ Welcome and Introductions *Honorable Wendy Million
Tucson City Court*
- * Pg. 3 Approval of Minutes – November 18, 2014
 Formal Action/Request
- * Pg. 7 10:05 a.m. Domestic Violence and Order of Protection *Anthony Coulson, ACJC Consultant*
Process for NICS Reporting of *Marc Peoples, ACJC Program Manager*
Prohibited Possessors *for Arizona NICS Reporting*
- * Pg. 9 10:50 a.m. MAG Protocol Evaluation Project: Informational Video *Amy St. Peter, MAG*
on Orders of Protection for Law Enforcement *Chief Steven Campbell*
- * Pg. 11 11:15 a.m. Legislative Update *Amy Love, AOC*
- * Pg. 13 11:30 a.m. Rule 28 Petitions—ARPOP *Kay Radwanski, AOC*
- * Pg. 27 11:40 a.m. ◆Case Law Update – *Judge Million*
Michaelson v. Garr, 323 P. 3d 1193 (Ct. App. 1 2014) *Kay Radwanski, AOC*
State v. Ketchner, 339 P.3d 645 (Ariz. S.Ct. 2014)
◆Bench Briefing Update
- * Pg. 39 11:50 a.m. Introduction - Strategic Planning *Judge Million*
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- Noon Lunch
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- 1:00 p.m. Brainstorming Session – Strategic Planning *Judge Million*
- 1:45 p.m. Announcements/Call to the Public *Judge Million*
- Adjournment *Judge Million*
- Next Meeting: May 12, 2015 - 10:00 a.m.
Arizona State Courts Building, Conference Room 119 A/B

Remaining 2015 Meeting Dates: May 12, September 15, November 17

All times are approximate. The Chair reserves the right to set the order of the agenda. For any item on the agenda, the Committee may vote to go into executive session as permitted by Arizona Code of Judicial Administration § 1-202. Please contact Kay L. Radwanski, staff to the Committee on the Impact of Domestic Violence and the Courts, at (602) 452-3360, with any questions concerning this agenda. Persons with a disability may request a reasonable accommodation, such as auxiliary aids or materials in alternative formats, by contacting Julie Graber at (602) 452-3250. Requests should be made as early as possible to allow time to arrange for the accommodation.

**COMMITTEE ON THE IMPACT OF
DOMESTIC VIOLENCE AND THE COURTS**
Draft Minutes
November 18, 2014
Arizona State Courts Building
Conference Room 119A/B
1501 W. Washington Street, Phoenix, AZ 85007

Present: Judge Wendy Million (acting chair), Cmdr. Arthur W. Askew, Judge Keith D. Barth, Judge Carol Scott Berry, Carla F. Boatner, Joi Davenport, Gloria E. Full, V. Michele Gamez, Dorothy Hastings, Judge Statia D. Hendrix, Patricia Madsen, Dana Martinez, Leah Meyers, Judge Wyatt J. Palmer, Shannon Rich, Rebecca Strickland, Judge Patricia A. Trebesch

Telephonic: Lynn Fazz, Marla Randall, Maureen Schat

Absent/Excused: Judge Emmet Ronan (chair), Ellen R. Brown, Chief Steven W. Campbell, Anna Harper-Guerrero, Capt. Jeffrey Newnum, Asst. Chief Sandra Renteria, Tracey J. Wilkinson

Presenters/Guests: Cmdr. Kathleen Checchi (Maricopa County Sheriff's Office), Diane Culin, Aleshia Fessel, Will Gaona, Ana Jabkowski, Kathy Sekardi (AOC), Jennifer Renee Werner (Maricopa County Sheriff's Office)

AOC Committee Staff: Kay Radwanski, Julie Graber

I. REGULAR BUSINESS

A. Welcome and Opening Remarks

The November 18, 2014, meeting of the Committee on the Impact of Domestic Violence and the Courts (CIDVC) was called to order at 10:04 a.m. by Judge Wendy Million, acting chair. Judge Million welcomed members and announced that Judge Emmet Ronan, current chair, is retiring. Members will forward a card to Judge Ronan to acknowledge his service on CIDVC.

B. Approval of Minutes

The draft minutes from the September 9, 2014, meeting of the Committee on the Impact of Domestic Violence and the Courts were presented for approval.

Motion: To approve the September 9, 2014, meeting minutes, as presented. **Action:** Approve, **Moved by** Judge Patricia Trebesch, **Seconded by** V. Michele Gamez. Motion passed unanimously.

II. BUSINESS ITEMS AND POTENTIAL ACTION ITEMS

A. Maricopa County Sheriff's Office—Victims' Assistance and Notification Unit

Kathleen Checchi, commander of Maricopa County Sheriff's Office (MCSO) Victims' Assistance and Notification Unit (VANU), and Jennifer Renee Werner, MCSO, discussed the unit's history and recent growth, its mission to empower victims of crime, and its services available 24 hours a day, seven days a week by calling (602) 876-8276. The unit acts as a primary source of contact for victims by notifying them of the defendant's release conditions; providing current information regarding court dates and the

defendant's status; facilitating the process during the initial appearance; assisting with the service of Orders of Protection; and determining the appropriate agency or victim services to contact. In order to reach and assist more people, Ms. Checchi invited law enforcement, shelters and other victim services to share the unit's contact information with victims.

Ms. Werner noted that VANU's webpages on the [MCSO website](#) have contributed to the unit's growth by providing the public with an overview of useful resources and available victim services. She pointed out that victims may complete and submit the impact statement electronically and opt in to be notified of the defendant's release by contacting the unit. In addition, staff has been trained to serve Orders of Protection at the jail, which provides convenience and allows for the immediate availability of the information in their automated system whereas Orders of Protection served by process server or the sheriff can take several days or weeks to be processed. Other projects that are currently in the works include centralized repositories for Orders of Protection and for terms and conditions of releases.

B. ARPOP Workgroup – Draft

Kay Radwanski, AOC, presented the workgroup's second draft of the proposed revisions to the Arizona Rules of Protective Order Procedure (ARPOP), and sought CIDVC's approval and authority to finalize the ARPOP revisions and draft a Rule 28 petition outlining the changes and why they are necessary, which would be filed by January 10, 2015. Ms. Radwanski noted that the reorganization of the ARPOP rules is consistent with Goal 3 from Advancing Justice Together to restyle, simplify, and clarify the rules and make them more readable for self-represented litigants. She circulated the first draft of the proposed revisions to the Committee on Limited Jurisdiction Courts (LJC) on October 29, 2014, and to the Committee on Superior Court (COSC) on November 7, 2014, and reviewed the feedback and comments received for CIDVC's consideration.

Rule 2 – The workgroup did not adopt CIDVC's suggestion to add a reference to the Arizona Justice Court Rules of Civil Procedure because Rule 101(b), JCRCP, specifically excludes protective orders and injunctions against harassment.

Rule 3(b) – The workgroup incorporated CIDVC's recommendation to amend the definition for "*ex parte*" to "[...], without notice to or the presence of the other party." COSC commented that the definition of "*ex parte*" applies to a court *communication* rather than a court *procedure*. After consideration, the consensus of the committee was to leave the language as is to simplify the meaning for self-represented litigants.

Rule 36 – The workgroup incorporated a recommendation from the Advisory Committee on the Rules of Evidence to align the ARPOP with the Arizona Rules of Family Law Procedure (ARFLP) by adopting the same standard for admissible evidence.

Chief Campbell's suggestion to add a rule regarding electronic transfer of protective order to law enforcement for service was not adopted because ACJA § 1-503 already authorizes this. Chief Campbell supported this decision.

LJC suggested adding language regarding the scope of the petition pursuant to Savord v. Morton, 235 Ariz. 256, 330 P.3d 1013 (Ariz. Ct. App. 1 2014). In Savord, the Court of Appeals directed the court to either limit the scope of the hearing to the allegations of the petition or allow the plaintiff to amend the petition and postpone the hearing so the defendant can prepare a defense against the new allegations. Members considered adding a new rule, revising existing forms (e.g., General Petition, Defendant's Guide Sheet), or supplementing the training for new judges. The consensus of the committee was to review existing forms and determine where changes could be made and add a sentence to Rule 23(b) indicating that the plaintiff must list every act of domestic violence that is the basis for the requested petition.

LJC suggested creating a rule regarding situations where the name of the defendant is unknown (e.g., Plaintiff v. J. Doe). According to A.R.S. § 12-1809(C)(2), the petition must state "[t]he name and address, if known, of the defendant." Based on the rule of the last antecedent, only the address can be unknown. The consensus of the committee was not to adopt this recommendation.

COSC inquired whether the standard for issuance of an Injunction Against Harassment (IAH) outweighs the requirement that there must be a series of acts of harassment. Members considered adding a comment to the rule explaining a "series of acts" or addressing the issue in the judges' training. Rule 3 includes a new definition for harassment applicable to an IAH based on A.R.S. § 12-1809(S), and Rule 25(e)(1) specifies the findings required for the issuance of an IAH as "(A) [...] a series of acts of harassment [...]"; **or** "(B) [...] great or irreparable harm would result to the plaintiff [...]" based on A.R.S. § 12-1809(E). The consensus of the committee was to address the matter as a training issue.

Motion: To authorize the committee chair, or designee, to move forward with the agreed changes without further review and file a Rule 28 petition by January 10, 2015, asking the Supreme Court to adopt the recommended changes to the Arizona Rules of Protective Order Procedure, as discussed. **Action:** Approve, **Moved by** Judge Patricia Trebesch, **Seconded by** Judge Keith Barth. Motion passed unanimously.

C. Update: Domestic Violence Court, Tucson City Court

Judge Million, Tucson City Court, provided an update on the specialized domestic violence (DV) court that was established in 2013 after receiving a grant from the U.S. Department of Justice. Grant partners include the Tucson City Prosecutor's Office, the City of Tucson Public Defender's Office, Pima County Adult Protection Department, Emerge! Center Against Domestic Abuse, and the Community Outreach Program for the Deaf.

- A new educational program will start in the spring that targets the Deaf community and takes into account the additional barriers and the power and control wheel that applies specifically to Deaf victims.
- Additional funding is needed for training and for more attorneys. There are seven public defenders and 1½ prosecutors assigned to the DV court.

- Judge Million reviews all the cases in the DV court and keeps track of the number of convictions. Because there is only one line of communication and one person reviewing the cases, cases that should be prosecuted as felonies are not falling between the cracks.
- Although the caseload is overwhelming and there is a high degree of burnout, the project has resulted in improved and streamlined communication.
- Court advocates have played a positive role and victims feel like they are being heard.

D. Case Law Update – Courtney v. Courtney

Case Law Update – Courtney v. Courtney. Ms. Radwanski presented a synopsis of *Courtney v. Courtney*, an opinion from the Arizona Court of Appeals, Division I, issued in September 2014 that dealt with the authority of the superior court to amend an Order of Protection that was issued prior to the filing of the family court case. The appellate court granted relief to the petitioner and found that the superior court had the statutory authority to modify a protective order as if it had originally issued the order. The case will return to Maricopa County Superior Court to decide whether the mother met her burden of proof at the evidentiary hearing.

Bench Briefing Update. Ms. Radwanski reported that some users experienced access issues to Bench Briefing 1: Minors and Protective Orders, which have since been resolved. She also noted that the video has been well received, and the National Council of Juvenile and Family Court Judges (NCJFCJ) requested to view the video, which was made available to them with the notice that the video is copyright protected and cannot be republished without the permission of the Arizona Supreme Court. Bench Briefing 2: Family Law and Protective Orders is expected to be launched in early December.

III. OTHER BUSINESS

A. Good of the Order/Call to the Public

Leah Meyers announced the launching of a new state website (www.EndSexTrafficking.AZ.gov) to educate the public and combat sex trafficking in Arizona, and she distributed informational cards for members to pass out.

No members of the general public asked to speak during the Call to the Public.

B. Next Committee Meeting Date

February 10, 2015; 10:00 a.m. to 2:00 p.m.
 State Courts Building, Room 119A/B
 1501 W. Washington Street
 Phoenix, AZ 85007

The meeting adjourned at 11:20 a.m.

COMMITTEE ON THE IMPACT OF DOMESTIC VIOLENCE AND THE COURTS

Meeting Date: February 10, 2015	Type of Action Requested: <input type="checkbox"/> Formal Action/Request <input checked="" type="checkbox"/> Information Only <input type="checkbox"/> Other	Subject: CONDITIONS OF RELEASE, RELATIONSHIPS, AND ORDERS OF PROTECTION – A NICS REPORTING ANALYSIS
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From:

Arizona NICS Task Force

Presenter:

Anthony J. Coulson, NTH Consulting
Marc Peoples, Program Manager, Arizona Criminal Justice Commission

Description of Presentation:

Reporting of Conditions of Release that prohibit firearm possession to the NICS Index, establishing relationships under A.R.S. § 13-3601 at time of sentencing, and making Orders of Protection available to law enforcement.

Recommended Motion: Information only.

COMMITTEE ON THE IMPACT OF DOMESTIC VIOLENCE AND THE COURTS

Meeting Date: February 10, 2015	Type of Action Requested: <input type="checkbox"/> Formal Action/Request <input checked="" type="checkbox"/> Information Only <input type="checkbox"/> Other	Subject: Maricopa Association of Government's Informational Video on Orders of Protection for Law Enforcement
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From: Chief Steven Campbell

Presenter: Ms. Amy St. Peter, MAG Human Services and Special Projects Manager; Steven Campbell, Chief of Police-City of El Mirage

Discussion: Orders of Protection have continually been an important issue in domestic violence. In collaboration with the Governor's Office for Children, Youth and Families, MAG has produced the law enforcement training video, "Orders of Protection: A Tool For Safety," as part of our Protocol Evaluation Project.

Recommended Motion: Information only.

COMMITTEE ON THE IMPACT OF DOMESTIC VIOLENCE AND THE COURTS

Meeting Date: February 10, 2015	Type of Action Requested: <input type="checkbox"/> Formal Action/Request <input checked="" type="checkbox"/> Information Only <input type="checkbox"/> Other	Subject: Legislative Update
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From: Kay Radwanski

Presenter: Amy Love, AOC Legislative Liaison

Description of Presentation: Ms. Love will discuss bills of interest to CIDVC that have been introduced during the current legislative session.

Recommended Motion: Information only.

COMMITTEE ON THE IMPACT OF DOMESTIC VIOLENCE AND THE COURTS

Meeting Date: February 10, 2015	Type of Action Requested: <input type="checkbox"/> Formal Action/Request <input checked="" type="checkbox"/> Information Only <input type="checkbox"/> Other	Subject: Rule 28 Petitions-ARPOP
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From: Kay Radwanski

Presenter: Kay Radwanski

Description of Presentation: The petition (R-15-0010) to amend the Arizona Rules of Protective Order Procedure (ARPOP) has been filed and accepted for review. The public may comment on the petition until May 20, 2015. CIDVC will have until June 20, 2015, to file a response or an amended petition, or both, to any comments received. The Supreme Court will meet in late August or early September to review and decide on all rule petitions that have been filed

A second petition (R-15-0016) has been filed affecting ARPOP. The petitioner is requesting the repeal of current Rule 6(E)(4)(e)(2), which requires a judicial officer to ask a plaintiff for an Injunction Against Harassment about the defendant's access to and use of weapons. Comments on this petition also are due no later than May 20, 2015.

Recommended Motion: Information only.

Victoria Timm, Visiting Professor
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**IN THE SUPREME COURT
STATE OF ARIZONA**

<p>In the Matter of:</p> <p>PETITION TO REPEAL RULE 6(E)(4)(e)(2), ARIZONA RULES OF PROTECTIVE ORDER PROCEDURE</p>	<p>Supreme Court No. R-__ - _____</p> <p>Petition to Repeal Rule 6(E)(4)(e)(2), Arizona Rules of Protective Order Procedure (Emergency Action Requested)</p>
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Pursuant to Rule 28 of the Supreme Court, petitioner petitions this Court to summarily repeal Rule 6(E)(4)(e)(2) of the Arizona Rules of Protective Order Procedure on Fourth Amendment grounds in light of this Court's recent unanimous ruling in *State v. Serna*, 235 Ariz. 270, 331 P.3d 405 (2014).

This rule of procedure for *civil injunctions* tells judicial officers that they can seize property from defendants—specifically weapons or firearms—absent any suspicion of criminal activity. As such, this Rule patently violates the Fourth Amendment, as recently clarified by this Court in *Serna*.

Accordingly, pursuant to Rule 28(G) of the Arizona Supreme Court and

pursuant to the Ninth Circuit's Rule for Emergency Motions, petitioner requests emergency action to immediately repeal Rule 6(E)(4)(e)(2) since this Rule does violence, and will continue to do violence, to the Fourth Amendment.¹

¹ The Ninth Circuit grants Emergency Motions when a movant certifies that relief is needed to avoid irreparable harm. (FRAP 27.3) Further, the Ninth Circuit says "an alleged constitutional infringement will often alone constitute irreparable harm." *Assoc. Gen. Contractors v. Coal. For Econ. Equity*, 950 F.2d 1401, 1412 (9th Cir. 1991). This instant m

Moreover, the irreparable harm that can be caused by this Rule is not limited to the philosophical "harm" cited in free speech cases. This Rule deprives unfortunate defendants access to arms if needed to defend themselves (or their children) from criminals in, say, a home invasion. As such, the potential "irreparable harm" from not being able to defend oneself can result in the ultimate irreparable harm: Death. Since death is irreversible, immediate action to repeal this Rule is necessary (as with capital cases) before a defendant loses her life.

Emergency action is also warranted so as to immediately comply with A.R.S. § 12-109, which prohibits the Court from promulgating rules of procedures which abridge substantive rights of a litigant, as this Rule does. Since Rule 6(E)(4)(e)(2) does not point to any statute for authority, this Court's public forum is the proper venue to challenge this Rule's constitutionality. (Since there is no obvious law to challenge, a conventional legal challenge to the Rule is not actionable in a court of law.)

For the reasons above and below, petitioner requests that Rule 6(E)(4)(e)(2) be summarily repealed at the earliest Rules Committee meeting.

I. Distinguishing Between Civil and Criminal

Before quoting the text of Rule 6(E)(4)(e)(2) and showing its constitutional violations, it's necessary to point out that the Rule is only about *civil* injunctions against harassment ("IAH's"), governed under A.R.S. Title 12. It should not be confused with *criminal* Domestic Violence procedure, which is entirely different and governed under Title 13.

The distinction, as it relates to this Court's ruling in *Serna* about seizing weapons, is that when a defendant is charged with Domestic Violence, there is de facto probable cause to believe that a crime had been committed. So, in a criminal matter of DV, there is good cause to justify a Fourth Amendment seizure of weapons (as in any arrest for a crime), since a crime was alleged to have been

"afoot."

However, there can never be good cause to justify a Fourth Amendment seizure of weapons in a civil IAH. That's because it does not follow—and it cannot follow—that there is reasonable suspicion that a crime was afoot by way of a civil IAH. That's simply because civil harassment is not a crime. So even if a defendant is accused of civil harassment (usually *ex parte*), or even found "guilty" of civil harassment, that does not provide reasonable suspicion that a crime is afoot.

II. Analysis

Now, Rule 6(E)(4)(e)(2), in its current incarnation, says:

The judicial officer shall ask the plaintiff about the defendant's use of or access to weapons or firearms. If necessary to protect the plaintiff or other specifically designated person, the judicial officer may prohibit the defendant from possessing, purchasing or receiving firearms and ammunition for the duration of the Injunction Against Harassment.

This Rule of Procedure for civil injunctions tells judicial officers that they can seize property from defendants—specifically weapons or firearms—absent any suspicion of criminal activity. According to the Rule, the *only* requirement needed for judicial officers to seize weapons in a civil IAH is that a defendant use, or have access to, firearms.²

This flies in the face of *Serna* at two points.

² Typically defendants are ordered to surrender their property to the local sheriff.

First, in *Serna* this Court said that "In a state such as Arizona that freely permits citizens to carry weapons . . . the mere presence of a gun cannot provide reasonable and articulable suspicion that the gun carrier is presently dangerous." (*Serna*, ¶ 22, 410.)

But Rule 6(E)(4)(e)(2) equates the mere ownership of a gun (the use or presence thereof) with being dangerous. That is contrary to this Court's ruling in *Serna*. Therefore, on its face, the Rule violates the Fourth Amendment.

Second, in *Serna* this Court also said that for there to be a constitutional seizure of weapons, there also must be a "reasonable suspicion that the person was engaged or [is] about to engage in criminal activity." (At ¶ 1, 405.) But reasonable suspicion that a person is about to engage in criminal activity cannot follow from a civil injunction for the simple reason that civil harassment is not criminal activity.

If there truly were reasonable suspicion of criminal activity in a civil IAH—that a defendant were truly a credible threat to a plaintiff—then the proper remedy to protect a plaintiff is to call the police and report a crime, say of *criminal Harassment* (A.R.S. § 13-2921). If probable cause existed to believe the crime of criminal Harassment had occurred, the defendant would be arrested. Problem solved.

There are plenty of laws that criminalize people for abuse of weapons which can result in seizure if necessary. ("Misconduct involving Weapons" (A.R.S. § 13-

3102), or "Aggravated Assault" (A.R.S. § 13-1204), or "Disorderly Conduct" for example.) Some even rise to the level of felonies, prohibiting gun ownership or possession after conviction. But a civil IAH is not one of those laws. A civil IAH cannot be used to get around the Fourth Amendment to seize a defendant's weapons when there's not even probable cause to support an arrest for criminal Harassment or a gun crime.

To put this in perspective, since this Court ruled in *Serna* that peace officers cannot seize weapons—even for officer safety—when no criminal activity is afoot, neither can judicial officers seize weapons—even for another's safety—in civil injunctions where no criminal activity *can be* afoot.

Even if the Court's second requirement for seizure of weapons could be articulated in a civil IAH, Rule 6(E)(4)(e)(2) does not require “reasonable suspicion that a defendant was engaged or [is] about to engage in criminal activity” for a seizure. Therefore, the Rule patently violates the Fourth Amendment.

Even if someone is found "guilty" of civil harassment, and even if that could somehow be construed to give reasonable suspicion of criminal activity, that still does not give cause for a Fourth Amendment seizure in a civil IAH. Two reasons:

First, a finding in a civil IAH that a defendant is "dangerous" in a criminal sense (to justify a Fourth Amendment seizure) simply is inapposite civil law.

Second, the constitutional safeguards embodied in the Fourteenth

Amendment—the right to a fair trial and due process—are not in place in a civil IAH. Specifically, the standard to find civil harassment is not the same high standard that is required for a finding of criminal Harassment. ("Reasonable evidence" vs. "Beyond a reasonable doubt.") As such, any finding arising purely out of a *civil* IAH that a defendant has committed, or is about to commit, a *criminal* act cannot stand, because it violates the defendant's Fourteenth (and perhaps Fifth) Amendment right to due (criminal) process.

Furthermore, since the rules of evidence are compromised in civil injunctions, any finding of criminal activity arising out of evidence presented in an IAH are a further abridgement of a defendant's Fourteenth Amendment right to a fair trial. (See Rule 5 of the Arizona Rules of Protective Order Procedure.)

Thus, any Fourth Amendment seizure arising from a compromised Fourteenth Amendment civil matter is untenable.

III. the supreme Law of the Land

History in this forum shows that this Court interprets the phrase "grant relief necessary" in A.R.S. § 12-1809(F)(3)—the sole statute governing civil IAH's—to justify a seizure. But this interpretation is inconsistent with the Court's interpretation of sister law A.R.S. § 12-1810, the statute governing injunctions against workplace harassment.

A.R.S. § 12-1810 has the exact same phrase—"grant relief necessary"—as §

12-1809 (At F(2).) Nevertheless, Rule 6(F)(4)(d) of Protective Order Procedure, which applies to injunctions against workplace harassment, is not the same as Rule 6(E)(4)(e)(2). Specifically, Rule 6(F)(4)(d) does not tell judicial officers that they can seize firearms in IAWH's. Whereas as Rule 6(E)(4)(e)(2) does. (Neither of the controlling statutes mentions firearms.) Stare decisis (and common sense) requires the same interpretation of the same phrase that appears in both A.R.S. §§ 12-1809(F)(3) and 12-1810(F)(2). Rule 6(F)(4)(d) interprets the statute correctly. Rule 6(E)(4)(e)(2) does not.

Even if A.R.S. § 12-1809 could be construed to allow judicial officers to seize firearms without reasonable suspicion of criminal activity, and even if that's what the Legislature intended, such a seizure would still be unenforceable, per Judge Norris in her dissent in *Serna*. There she argued against a similar misconstrue of a statute to abridge the Fourth Amendment, saying "this Constitution shall be the supreme Law of the Land, and the Judges in every State shall be bound thereby . . ." (See Footnote 14 in *State v. Serna*, 232 Ariz. 515, 307 P.3d 82 (App. 2013).) So neither the Legislature—nor the Judiciary—can lawfully override the Fourth Amendment.

Last there is the violation of state law. A.R.S. § 12-109 says "The Rules [of Procedure] shall not abridge . . . substantive rights of a litigant." Since Rule 6(E)(4)(e)(2) abridges the substantive constitutional Fourth Amendment (and

arguably, the Fourteenth Amendment) rights of defendants, it must be repealed.

IV. Venue

This Court's public forum (as opposed to a courtroom) is the proper venue for a constitutional challenge to this Rule because this matter, one of great public importance, is capable of evading review.

First off, it is not clear what law a litigant would challenge in court to repeal this Rule, since Rule 6(E)(4)(e)(2) does not cite any statute for authority to seize weapons or firearms.

The only statute governing civil Injunctions Against Harassment is A.R.S. § 12-1809. But there is no language in that statute that refers to, or even hints at seizure, let alone a seizure of firearms. As such, there's no explicit, or even implicit, Fourth Amendment violation in the statute to challenge in a court of law. (Perhaps the Legislature knew it could not violate the Fourth Amendment rights of defendants, and so did not provide for the seizure of weapons in a civil IAH?) As such, there is nothing in the statute that a court could enjoin to remedy unconstitutional seizures proximately caused by Rule 6(E)(4)(e)(2).

Nor can a judge order the Legislature to add language to A.R.S. § 12-1809 to nullify this Rule. For example, a judge could not order the Legislature to add language from the sister law governing injunctions against workplace harassment which says "This section does not permit a court to issue a temporary restraining

order or injunction that prohibits activities that are constitutionally protected." (See (A.R.S. § 12-1810(L)(2).)

Nor can a judge order the Supreme Court to repeal this Rule. So even if this matter were actionable and a litigant could somehow bring a Special Action in the court of appeals to challenge this Rule, and even if the defendant drew Judge Norris (the dissent in *Serna I*), and even if Judge Norris believed that it's unconstitutional for (judicial) officers to seize weapons without suspicion of any criminal activity (as was ultimately affirmed in *Serna II*), she cannot repeal this Rule. Nor can she enjoin the Supreme Court from enforcing it.

Ultimately, then, a challenge to this Rule would have to be heard by those who sanctioned it, the Justices of the Arizona Supreme Court. But a legal challenge to this Rule before the Arizona Supreme Court is impossible because the Rules for IAH's provide for only one level of appeal. At best, the highest court before which a defendant could appear to challenge an unlawful seizure is the court of appeals. (But only if it was a Superior Court judge who initially seized a defendant's property in a civil IAH).³

³ Federal court does not appear to be a viable alternative either. Who would one sue? County Sheriffs, to enjoin them from following court orders? That won't fly. Even if a federal court didn't abstain from what appears to be a state matter, the Federal Rules of Civil Procedure also point to this Court's public forum as the proper venue to challenge Rule 6(E)(4)(e)(2).

For example, Rule 5.1(a) of the Federal Rules of Civil Procedure, which operates under the assumption that all laws originate in the Legislature, requires that notice be given to the Attorney General when there's a federal constitutional challenge to a state

For all these reasons, bringing a lawsuit to challenge the constitutionality of this Rule is not viable. Frankly, this Rule appears to be a creature of the Judiciary's own making. So, as the Judiciary giveth, the Judiciary can taketh away. The Court's public forum is the proper venue for repealing this Rule.

V. Conclusion

In *State v. Serna* this Court unanimously ruled that peace officers cannot seize weapons from citizens absent "reasonable suspicion that criminal activity is afoot." Specifically, this Court, upholding the Fourth Amendment, said that there were two requirements that must be met for officers to seize weapons of individuals. There must be "[1] a reasonable suspicion that the person to be searched has engaged or is about to engage in criminal activity and [2] a reasonable belief that the person is armed and dangerous." (With the proviso that "the mere presence of a gun cannot provide reasonable and articulable suspicion that the gun carrier is presently dangerous.") (*Serna*, 235 Ariz. 270 ¶ 28, 331 P.3d 405, 411 (2014).)

But Rule 6(E)(4)(e)(2) fails to uphold these requirements and so fails to uphold the Fourth Amendment of the Constitution. Moreover, the Court's

statute. Once the AG is put on notice, the AG can take corrective action to remedy a constitutional violation without the state enduring the burden of a lawsuit.

But even if the AG saw the Fourth Amendment violation in Rule 6(E)(4)(e)(2), the AG would be powerless to remedy the unconstitutional seizures. For the AG cannot tell judges what to do. But this Court can.

requirements for a constitutional Fourth Amendment seizure (that a crime is afoot) can never be met by way of a *civil* Injunction Against Harassment. (Because it's a civil fact finding procedure, not a criminal one.)

For all these reasons, Rule 6(E)(4)(e)(2) is unconstitutional and must be repealed. And it must be repealed immediately before a defendant, disarmed as a consequence of this Rule, is irreparably raped or murdered.

RESPECTFULLY SUBMITTED this 9th day of January 2015.

By /s/ Victoria Timm

COMMITTEE ON THE IMPACT OF DOMESTIC VIOLENCE AND THE COURTS

Meeting Date: February 10, 2015	Type of Action Requested: <input type="checkbox"/> Formal Action/Request <input checked="" type="checkbox"/> Information Only <input type="checkbox"/> Other	Subject: Case Law Update Bench Briefing Update
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From: Kay Radwanski

Presenter: Kay Radwanski

Description of Presentation: Ms. Radwanski will discuss two opinions that have been issued recently by Arizona courts that relate to domestic violence. In May 2014, the Arizona Court of Appeals, Division I, issued an opinion in Michaelson v. Garr, 234 Ariz. 542, 323 P.3d 1193. This case focused on the result of a contested hearing regarding an Order of Protection. The second case, State v. Ketchner, 339 P.3d 645, was issued by the Arizona Supreme Court in December 2014. This case focuses on the scope of admissible expert testimony in a criminal trial.

Ms. Radwanski also will provide an update on the CIDVC-sponsored Bench Briefing Project.

Recommended Motion: Information only.

234 Ariz. 542
Court of Appeals of Arizona,
Division 1.

In re the Matter of Julie MICHAELSON,
Plaintiff/Appellee,
v.
William GARR, Defendant/Appellant.

No. 1 CA–CV 13–0302. | May 6, 2014.

Synopsis

Background: Petitioner sought order of protection against her ex-fiance. The Superior Court, Maricopa County, No. FN2012–003403, Lisa M. Roberts, Judge Pro Tempore, issued ex parte order of protection and, after hearing requested by ex-fiance, continued order of protection. Ex-fiance appealed.

Holdings: The Court of Appeals, Portley, J., held that:

[1] record belied ex-fiance’s argument that trial court improperly considered text messages that ex-fiance sent to petitioner’s 18-year-old daughter;

[2] trial court properly considered partially illegible e-mail from ex-fiance to petitioner as proof that ex-fiance violated ex parte order of protection; and

[3] trial court did not err in continuing firearm prohibition against ex-fiance for the remainder of order of protection.

Affirmed.

West Headnotes (12)

[1] **Protection of Endangered Persons**
⚡ Presumptions and burden of proof

On appeal of the decision of a trial court to continue an order of protection, an appellate court views the facts in the light most favorable to upholding the trial court’s ruling.

3 Cases that cite this headnote

[2] **Protection of Endangered Persons**
⚡ Dismissal; mootness

Appeal of the decision of a trial court to continue an order of protection is not rendered moot by the expiration of the order of protection, because expired orders of protection have ongoing collateral legal consequences. A.R.S. § 13–3602(K).

Cases that cite this headnote

[3] **Protection of Endangered Persons**
⚡ Perfection; briefs and assignments

Appellate court would decline to treat petitioner’s failure to file answering brief, on appeal by petitioner’s ex-fiance of trial court’s decision to continue order of protection against ex-fiance, as confession of error.

1 Cases that cite this headnote

[4] **Protection of Endangered Persons**
⚡ Discretion of lower court

Appellate court reviews the decision of a trial court to continue an order of protection for an abuse of discretion.

1 Cases that cite this headnote

[5] **Appeal and Error**
⚡ Abuse of discretion

Trial court abuses its discretion when it makes an error of law in reaching a discretionary

conclusion or when the record, viewed in the light most favorable to upholding the trial court's decision, is devoid of competent evidence to support the decision.

3 Cases that cite this headnote

[6]

Appeal and Error

←Cases Triable in Appellate Court

Appellate court reviews any questions of law de novo.

Cases that cite this headnote

[7]

Protection of Endangered Persons

←Record

Record belied argument of petitioner's ex-fiance that trial court improperly considered text messages that ex-fiance sent to petitioner's 18-year-old daughter, at hearing on continuance of order of protection against ex-fiance, where trial court stated that the messages were "not relevant for purposes of today's hearing" and that "[t]he only thing that's relevant is what [ex-fiance] did to [petitioner] directly that constitutes an act of domestic violence."

Cases that cite this headnote

[8]

Protection of Endangered Persons

←Extension, renewal, and conversion

Trial court properly considered partially illegible e-mail from petitioner's ex-fiance to petitioner as proof that ex-fiance violated ex parte order of protection, at hearing on continuance of order of protection against ex-fiance; although contents of e-mail were illegible, e-mail clearly displayed ex-fiance's name, e-mail address, and date on which it was sent. 17B A.R.S. Rules Protect.Ord. Proc., Rule 5(A).

Cases that cite this headnote

[9]

Protection of Endangered Persons

←Preservation of grounds of review

Petitioner's ex-fiance waived on appeal any error in trial court's admission of text messages that were not printed out and exclusion of testimony about ex-fiance's engagement and upcoming marriage, at hearing on continuance of order of protection against ex-fiance, where ex-fiance did not object at hearing to admission of unprinted text messages or preclusion of ex-fiance's romantic situation.

Cases that cite this headnote

[10]

Protection of Endangered Persons

←Extension, renewal, and conversion

Trial court did not err in continuing firearm prohibition against petitioner's ex-fiance for the remainder of order of protection against ex-fiance; at hearing on continuance of order of protection, trial court reviewed text messages on petitioner's phone, considered testimony, and determined that ex-fiance was a credible threat to petitioner's physical safety, and, although all but one of the messages were not read into the record, appellate court would presume that the messages supported trial court's determination. A.R.S. § 13-3602(G)(4).

Cases that cite this headnote

[11]

Appeal and Error

←Failure to set forth evidence in general

In the absence of the record, an appellate court will presume that the evidence at a trial was sufficient to sustain a finding, the verdict, or a charge to the jury.

[Cases that cite this headnote](#)

[12] **Appeal and Error**

🔑 Duty to make

It is an appellant's responsibility to preserve the record and ensure that it contains the materials relevant to his appeal.

[Cases that cite this headnote](#)

Attorneys and Law Firms

**1195 William Garr, Scottsdale Defendant/Appellant in Propria Persona.

Judge MAURICE PORTLEY delivered the Opinion of the Court, in which Presiding Judge DONN KESSLER and Judge PATRICIA K. NORRIS joined.

OPINION

PORTLEY, Judge.

*544 ¶ 1 William Garr appeals the order of protection issued and affirmed by the superior court in favor of his ex-fiancee, Julie Michaelson. For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

[1] ¶ 2 Michaelson ended her engagement to Garr in late September 2012. She sought and was granted an ex parte order of protection on October 16, 2012. The order of protection prohibited Garr from having any contact with Michaelson; from committing crimes against her; and from possessing, receiving, or purchasing any firearms or ammunition. The order was served on Garr the following day.

[2] ¶ 3 Five months later, Garr requested a hearing and one was scheduled. Both parties testified at the hearing, and the superior court continued the order of protection. Garr then filed this appeal.²

DISCUSSION

[3] ¶ 4 Garr contends that the superior court erred by continuing the order of protection. In particular, he argues that there was no specific allegation of domestic abuse and the court did not state a basis for continuing the order. He also claims that the portion of the order preventing him from possessing or using weapons violates federal law.³

[4] [5] [6] ¶ 5 We review the decision of the superior court to continue an order of protection for an abuse of discretion. *Cardoso*, 230 Ariz. at 619, ¶ 16, 277 P.3d at 816. The court abuses its discretion when it makes an error of law in reaching a discretionary conclusion or “when the record, viewed in the light most favorable to upholding the trial court’s decision, is devoid of competent evidence to support the decision.” *Mahar*, 230 Ariz. at 534, ¶ 14, 287 P.3d at 828 (citation omitted) (internal quotation marks omitted). We review any questions of law de novo. *In re Marriage of Pownall*, 197 Ariz. 577, 580, ¶ 7, 5 P.3d 911, 914 (App.2000).

¶ 6 An order of protection shall be continued by the court if the plaintiff demonstrates by a preponderance of the evidence that “there is reasonable cause to believe ... [that] [t]he defendant may commit an act of domestic violence.” A.R.S. § 13-3602(E)(1);⁴ Ariz. R. Prot. Order P. 8(F). In the context of a past or current romantic relationship, the term “domestic violence” is broadly defined in § 13-3601(A) and includes a wide array of criminal acts as well as harassment by “verbal, electronic, mechanical, telegraphic, telephonic or written” communication. A.R.S. §§ 13-3601(A), (A)(6), -2921(A)(1).

¶ 7 At the hearing, Michaelson never claimed that Garr committed any acts of physical domestic violence. Instead, she testified that Garr was harassing her. Specifically, she testified that on September 26, 2012, Garr sent her between 60–110 unwanted text messages, and on October 4, 2012, he called her employer, identified himself as an attorney and gained access to her work schedule, and then sent her a text stating that he “had all the information he needed” *545 **1196 and knew when she was at work or at home. Michaelson also testified that on October 15, 2012, after she declined to accept the

flowers he attempted to send to her at work, Garr sent her a text indicating that their relationship was brought together by God and only God could separate them. After considering the testimony of both parties and the other evidence, the court stated that “the Plaintiff has established by a preponderance of the evidence that an act of domestic violence has occurred. The order of protection is affirmed.”

^[7] ¶ 8 Garr, however, contends that the court considered improper evidence to reach its decision. First, he claims that the court considered text messages he sent to Michaelson’s eighteen-year-old daughter. The record belies the argument because the court stated the evidence was “not relevant for purposes of today’s hearing. The only thing that’s relevant is what Mr. Garr did to [Michaelson] directly that constitutes an act of domestic violence.” As a result, we reject the argument.⁵

^[8] ¶ 9 Garr next challenges the admission of an illegible email he sent to Michaelson that she submitted to show the court that he contacted her after being served with the order of protection. At the hearing, Garr stated that the email “was not accurate” and that he did not “agree to that at all.” Although the contents of the email were illegible, the email clearly displayed his name, email address, and the date on which it was sent. As a result, his argument goes to the weight and not the admissibility of the evidence. *See, e.g., State v. Lacy*, 187 Ariz. 340, 349, 929 P.2d 1288, 1297 (1996) (“Lack of positive identification goes to the weight of evidence, not to its admissibility.”); *State v. Hatton*, 116 Ariz. 142, 149, 568 P.2d 1040, 1047 (1977) (noting that evidence that was “not a conclusive link in the case goes only to the weight and not the admissibility”). Because the superior court was the trier of fact and had to determine whether an act of domestic violence occurred, the court properly considered the email as proof that Garr violated the order of protection. *See* Ariz. R. Prot. Order 5(A).

^[9] ¶ 10 Garr also argues that the superior court erred by (1) admitting evidence of text messages that had not been printed out and (2) excluding testimony about Garr’s engagement and upcoming marriage. Because Garr did not object to the admission of the unprinted text messages⁶ or to the preclusion of his then-current romantic situation,⁷ he waived any error and we will not review those rulings for the first time on appeal. *See State v. Lopez*, 217 Ariz. 433, 435, ¶¶ 5–6, 175 P.3d 682, 684 (App.2008) (noting that defendant’s failure to object to the introduction of testimony on the grounds of hearsay waived the issue on appeal).

^[10] ¶ 11 Finally, Garr argues that the superior court erred

by continuing the portion of the order preventing him from possessing or purchasing firearms or ammunition for the duration of the order of protection.⁸ We disagree.

¶ 12 A court issuing an order of protection can “prohibit the defendant from possessing or purchasing a firearm for the duration of the order” after determining that “the defendant is a credible threat to the physical safety of the plaintiff.” A.R.S. § 13–3602(G)(4). Here, the superior court reviewed the text messages on Michaelson’s cell phone, along with the testimony, and determined that Garr was a credible threat to Michaelson’s physical safety.

****1197 *546** ^[11] ^[12] ¶ 13 The superior court scrolled through the multiple text messages between Garr and Michaelson contained on Michaelson’s phone and read one message into the record.⁹ The remaining text messages reviewed by the court were not read into the record or otherwise preserved in any form in the record and so are unavailable for our review. *See State v. Villegas–Rojas*, 231 Ariz. 445, 446 & n. 1, ¶ 4, 296 P.3d 981, 982 & n. 1 (App.2012) (noting that where an officer’s probable cause statement was before the superior court but not in the record on appeal, it was unavailable for appellate review). As a result, “[i]n the absence of the record, an appellate court will presume that the evidence at a trial was sufficient to sustain a finding, the verdict, or a charge to the jury.” *Bryant v. Thunderbird Acad.*, 103 Ariz. 247, 249, 439 P.2d 818, 820 (1968); *accord Duckstein v. Wolf*, 230 Ariz. 227, 233, ¶ 15, 282 P.3d 428, 434 (App.2012). Moreover, because Garr is challenging the ruling, it was his responsibility to preserve the record and ensure that it contained the materials relevant to his appeal. *See Villegas–Rojas*, 231 Ariz. at 446 n. 1, ¶ 4, 296 P.3d at 982 n. 1 (“It is [Appellant’s] responsibility to ensure the record ‘contains the material to which he takes exception.’” (quoting *State v. Wilson*, 179 Ariz. 17, 19 n. 1, 875 P.2d 1322, 1324 n. 1 (App.1993))). Accordingly, because we presume the evidence supports the judgment, the superior court did not err by continuing the firearm prohibition against Garr for the remainder of the order of protection.

CONCLUSION

¶ 14 Based on the foregoing, we affirm.

Parallel Citations

323 P.3d 1193, 686 Ariz. Adv. Rep. 42

Footnotes

- 1 On appeal, we view the facts “in the light most favorable to upholding the trial court’s ruling.” *Mahar v. Acuna*, 230 Ariz. 530, 532, ¶ 2, 287 P.3d 824, 826 (App.2012).
- 2 Although the order of protection against Garr expired on October 13, 2013, pursuant to [Arizona Revised Statutes \(“A.R.S.”\) section 13–3602\(K\)](#) (West 2014), we do not consider his appeal to be moot because “expired orders of protection have ongoing collateral legal consequences.” See *Cardoso v. Soldo*, 230 Ariz. 614, 617–18, ¶ ¶ 9–10, 277 P.3d 811, 814–15 (App.2012) (explaining that the collateral consequences exception allows this court to review an otherwise expired order of protection).
- 3 Michaelson did not file an answering brief. In the exercise of our discretion, we decline to treat her failure to file an answering brief as a confession of error. See *Gonzales v. Gonzales*, 134 Ariz. 437, 437, 657 P.2d 425, 425 (App.1982) (“Although we may regard [the] failure to respond as a confession of reversible error, we are not required to do so.”).
- 4 We cite to the current version of the applicable statute absent any changes material to this Opinion.
- 5 Similarly, we reject Garr’s claim that the order of protection was not filed under the name of the party requesting protection. Because Michaelson named herself as the plaintiff on the petition, the argument is specious.
- 6 Before Michaelson submitted the evidence to the court, Garr had an opportunity to review the text messages on Michaelson’s cell phone and made no objection.
- 7 The court properly found that Garr’s anticipated marriage was not relevant to determine whether the order, which had been issued five months earlier, should be continued. See Ariz. R. Prot. Order 5(A).
- 8 Garr now challenges the firearm prohibition solely on federal grounds. Specifically, he contends that because he did not meet the definition of an “intimate partner” pursuant to [18 U.S.C. § 922\(g\)\(8\)](#), the firearm prohibition could not apply to him as a matter of law. Because we can resolve the issue under state law, we do not address his argument.
- 9 The message read aloud was, “Bill, you are too much. I CAN’T TAKE IT ANYMORE. It is time to stop now.”

339 P.3d 645
Supreme Court of Arizona.

STATE of Arizona, Appellee,
v.
Darrell Bryant KETCHNER, Appellant.
No. CR–13–0158–AP. | Dec. 18, 2014.

Synopsis

Background: Defendant was convicted in the Superior Court, Mohave County, [Rick A. Williams, J.](#), No. CR200900715, of first-degree felony murder, attempted first-degree murder, first-degree burglary, and three counts of aggravated assault and was sentenced to death.

Holdings: On automatic appeal, the Supreme Court, [Timmer, J.](#), held that:

[1] as a matter of first impression, sociologist’s expert testimony about separation violence, lethality factors, and characteristics common to domestic abusers was inadmissible profile evidence, and

[2] error in admitting the evidence was not harmless.

Affirmed in part, reversed in part, and remanded.

West Headnotes (6)

[1] **Criminal Law**
🔑 Construction of Evidence

Facts are reviewable in the light most favorable to sustaining the jury’s verdicts.

[Cases that cite this headnote](#)

[2] **Criminal Law**
🔑 Admissibility

Admission of sociologist’s expert testimony offered by state in attempt to educate jury about domestic violence patterns and general characteristics exhibited by domestic violence victims and abusers was reviewable for abuse of discretion, which could include error of law, on appeal from conviction for aggravated assault and attempted first-degree murder of girlfriend and first-degree felony murder of her daughter.

[Cases that cite this headnote](#)

[3] **Criminal Law**
🔑 Character of defendant; predisposition

Sociologist’s expert testimony about separation violence, lethality factors, and characteristics common to domestic abusers was inadmissible profile evidence in capital murder prosecution resulting in convictions for aggravated assault and attempted first-degree murder of girlfriend and first-degree felony murder of her daughter; nature of girlfriend’s abusive relationship with defendant was uncontested, and only reason to elicit the testimony was to invite jury to find that defendant’s character matched that of a domestic abuser who intended to kill or otherwise harm his partner in reaction to loss of control over the relationship.

[Cases that cite this headnote](#)

[4] **Criminal Law**
🔑 Character of defendant; predisposition

Profile evidence which tends to show that a defendant possesses one or more of an informal compilation of characteristics or an abstract of characteristics typically displayed by persons engaged in a particular kind of activity may not be used as substantive proof of guilt because of the risk that a defendant will be convicted not for what he did, but for what others are doing.

[Cases that cite this headnote](#)

[5]

Criminal Law

🔑 Presumption as to Effect of Error; Burden

Harmless error review places the burden on the state to prove beyond a reasonable doubt that the error did not contribute to or affect the verdict or sentence.

[Cases that cite this headnote](#)

[6]

Criminal Law

🔑 Opinion evidence

Erroneous admission of profile evidence about separation violence, lethality factors, and characteristics common to domestic abusers required reversal in capital murder prosecution resulting in convictions for first-degree felony murder of girlfriend's child and first-degree burglary; defendant did not contest that he assaulted girlfriend and assaulted and killed her child, key factual dispute relating to burglary was whether defendant entered the home intending to commit felony or to have consensual sex with girlfriend, and the evidence provided expert opinion about how abusers who have lost control of a victim react, inviting jury to conclude that defendant went to the home intending to either kill or harm girlfriend to regain control of his family.

[Cases that cite this headnote](#)

Attorneys and Law Firms

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David Goldberg (argued), Attorney at Law, Fort Collins, CO, for Darrell Bryant Ketchner.

Justice **TIMMER** authored the opinion of the Court, in which Chief Justice **BALES**, Vice Chief Justice **PELANDER** and Justices **BERCH** and **BRUTINEL** joined.

Opinion

Justice **TIMMER**, opinion of the Court.

[1] ¶ 1 Darrell Bryant Ketchner was sentenced to death after a jury found him guilty of first-degree felony murder, attempted first-degree murder, first-degree burglary, and three counts of aggravated assault. We have jurisdiction over his automatic appeal under [Article 6, Section 5\(3\) of the Arizona Constitution](#) and [A.R.S. § 13-4031](#).¹

I. BACKGROUND ²

¶ 2 In 1997, Ketchner began an on-and-off romantic relationship with Jennifer, the mother of two daughters, Ariel and Kenzie. In addition, Ketchner and Jennifer had three children together.

¶ 3 Beginning in 2008, Ketchner and Jennifer's relationship became increasingly volatile. The couple had several verbal and physical altercations, and Ketchner made death threats against Jennifer, Kenzie, and Kenzie's boyfriend, Nate. Jennifer obtained orders of protection in January 2008 and in January 2009 after violent encounters between Ketchner, Jennifer, and Kenzie that resulted in criminal charges against Ketchner. At Jennifer's request, the court vacated each order of protection, but Ketchner pleaded guilty to one misdemeanor assault charge, and other misdemeanor charges remained pending at the time of the crimes here.

¶ 4 On March 25, 2009, Ketchner told Jennifer that he would "slit her throat" if she sued for child support. He came to Jennifer's home the next day, but she refused to let him in. Ketchner then smashed the windshield and driver-side window of Nate's car, which was parked in the driveway. As a result, a criminal damage charge was filed against Ketchner. Jennifer obtained a third protective order, which was in place when the crimes in this case occurred. Nevertheless, Jennifer continued to see Ketchner occasionally and had dinner with him once at his home.

¶ 5 On May 15, Nate was driving when Ketchner blocked the way with his own vehicle. Ketchner jumped out, ran to Nate's car, and tried to open the locked driver-side door. Ketchner repeatedly yelled that he was going to "rip [Nate's] head off" if he did not drop the criminal damage

charge against him. He also called Jennifer “a psychotic bitch” who “was going to get what’s coming to her.” Ketchner then punched the car door and left.

¶ 6 On July 2, Ketchner approached a marked patrol car occupied by Officer Kunert and said he wished to review a police report concerning criminal charges against him that he believed might be dropped soon. Officer Kunert told Ketchner how to obtain the report, and Ketchner left.

¶ 7 Two days later, Jennifer and her family celebrated a daughter’s birthday without Ketchner, who had been told that he could not have the children that day. Later that evening, Jennifer and Ariel sat at the kitchen table while Kenzie went into a bedroom with her younger siblings and Nate. A few minutes later, as Nate was walking back toward the kitchen, Ketchner walked in through a side door. Jennifer moved to the living room, screaming, “No, no, Darrell, no.” Ketchner then grabbed her by the hair and began striking her. Nate retreated into a bedroom and then fled. Meanwhile, Kenzie and her younger siblings escaped the home through a bedroom window.

¶ 8 Ketchner pursued Jennifer outside to the driveway, where she screamed, “He’s trying to kill me, he’s stabbing me,” and “Darrell, get out of the house.” A neighbor *647 saw Ketchner beating Jennifer, who was lying on the driveway, and yelled, “Darrell, get off of her.” Ketchner stepped back, looked at the neighbor, and then ran back into the house. Once inside, he went toward Jennifer’s bedroom, where she kept a gun. Ketchner came back outside, walked to where Jennifer was lying, and shot her in the head. Neighbors called 911, and Ketchner ran off.

¶ 9 Law enforcement and emergency personnel arrived in minutes. They found Ariel lying in a pool of blood in Jennifer’s bedroom. Ketchner had stabbed her eight times, and she later died. Jennifer survived her injuries but had no memory of the attacks.

¶ 10 Police searched the surrounding area but could not find Ketchner that night. The next morning, police found him lying on a golf course with Jennifer’s loaded gun and a bag of items that included sex toys, pornographic movies, clothing, zip ties, and medicines.

¶ 11 A grand jury indicted Ketchner on seven counts: first-degree murder, attempted first-degree murder, three counts of aggravated assault, first-degree burglary, and misconduct involving weapons. Ketchner pleaded guilty to the weapons charge and began serving a fifteen-year sentence.

¶ 12 A jury convicted Ketchner on the remaining six counts. The jury found that Ketchner had committed felony murder but did not reach a consensus on premeditated murder. After finding three aggravating circumstances and then considering evidence in the penalty phase, the jury determined that Ketchner should be sentenced to death. The trial court subsequently sentenced Ketchner to death for Ariel’s murder and imposed prison sentences totaling seventy-five years for the non-capital counts.

II. DISCUSSION

A. Profile Evidence

1. Admissibility

^[2] ¶ 13 At trial, the State introduced expert testimony from Dr. Kathleen Ferraro, a sociologist who specializes in domestic violence issues, to educate the jury about domestic violence patterns and general characteristics exhibited by domestic violence victims and abusers. Ketchner argues, as he did before the trial court, that Dr. Ferraro impermissibly created a “profile” of domestic abusers. We review the trial court’s ruling permitting this testimony for an abuse of discretion, *see State v. Boyston*, 231 Ariz. 539, 544 ¶ 14, 298 P.3d 887, 892 (2013), which can include an error of law, *State v. Wall*, 212 Ariz. 1, 3 ¶ 12, 126 P.3d 148, 150 (2006).

^[3] ¶ 14 Dr. Ferraro testified about characteristics common to domestic violence victims and their abusers, many of which matched the evidence in this case. Notably, Dr. Ferraro testified about “separation assault”:

Q. What is separation assault?

A. When someone decides to leave a violent relationship is a very dangerous time, because then the abuser feels their control has—they’ve lost their control and they’ll use violence. It’s a very high risk period for homicide when a person does leave the relationship. And it’s another aspect of why people go back again, because they’re not safe just because they leave the relationship.

Dr. Ferraro then described risk factors for “lethality” in an abusive relationship: presence of a gun in the house, stepchildren in the home, prior threats to kill, drug and

alcohol use, forced sex, and strangulation.

[4] ¶ 15 Profile evidence tends to show that a defendant possesses one or more of an “ ‘informal compilation of characteristics’ or an ‘abstract of characteristics’ typically displayed by persons” engaged in a particular kind of activity. *See State v. Lee*, 191 Ariz. 542, 544–45 ¶ 10, 959 P.2d 799, 801–02 (1998) (quoting *Florida v. Royer*, 460 U.S. 491, 493, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983); *Reid v. Georgia*, 448 U.S. 438, 440–41, 100 S.Ct. 2752, 65 L.Ed.2d 890 (1980)) (describing drug-courier profiles). Although there may be legitimate uses for profile evidence, such as at suppression and probable cause hearings when the justification for making a stop or arrest is at issue, profile evidence may not be used as substantive proof of guilt because of the “risk that a defendant will be convicted *648 not for what he did but for what others are doing.” *Id.* at 545 ¶¶ 11–12, 959 P.2d at 802 (quoting *State v. Cifuentes*, 171 Ariz. 257, 257, 830 P.2d 469, 469 (App.1991)).

¶ 16 The State disputes that Dr. Ferraro offered profile evidence, characterizing her testimony as describing patterns in abusive relationships rather than relating general characteristics of domestic abusers. According to the State, “this testimony was not used to show that Ketchner was guilty because he fit a domestic abuser profile, but rather to show that the relationship between [Jennifer] and Ketchner was in many ways typical of relationships involving abuse.”

¶ 17 Although the admissibility of profile evidence in the context of domestic violence is an issue of first impression in Arizona, other courts have addressed the issue. In *Ryan v. State*, 988 P.2d 46 (Wyo.1999), the jury in a first-degree murder trial heard extensive evidence that the defendant physically abused his wife in the months leading to her murder, that he demonstrated jealous and controlling behavior toward her, and that he and his wife had separated a few weeks before the murder. *Id.* at 51–52. An expert witness testified that “separation violence” occurs when an abuser commits extreme acts of violence in an effort to assert control over his or her partner after their relationship has ended. *Id.* at 53. The Wyoming Supreme Court concluded that, although admission of the evidence was harmless in that case, this testimony was improper profile evidence that implicitly invited the jury to infer criminal conduct based on the described characteristics. *Id.* at 56–57. The court did not explicitly identify the grounds for its decision, but it relied on cases that articulated three bases for excluding profile evidence as substantive evidence of guilt: that the evidence lacked relevance, that its probative value was substantially outweighed by its prejudicial effect, and that

it constituted impermissible character evidence. *Id.* at 55.

¶ 18 Other courts have likewise found such profile evidence inadmissible. *See Brunson v. State*, 349 Ark. 300, 79 S.W.3d 304, 312–13 (2002) (relying on *Ryan* to reverse a conviction after admission of testimony from a domestic violence expert regarding a profile of batterers who become murderers); *Parrish v. State*, 237 Ga.App. 274, 514 S.E.2d 458, 463 (1999) (holding that expert’s testimony about typical characteristics of a batterer improperly placed defendant’s character in issue). Courts have also precluded profile evidence relating to “battering parents,” *see Commonwealth v. Day*, 409 Mass. 719, 569 N.E.2d 397, 399–400 & n. 2 (1991); *Duley v. State*, 56 Md.App. 275, 467 A.2d 776, 779–80 (Md.Ct.Spec.App.1983), and persons who sexually abuse children, *see Hall v. State*, 15 Ark. App. 309, 692 S.W.2d 769, 773 (1985); *State v. Maule*, 35 Wash.App. 287, 667 P.2d 96, 99 (1983). *Ryan* and like cases are consistent with this Court’s decision in *Lee* that profile evidence should not be introduced as substantive evidence of guilt.

¶ 19 Dr. Ferraro’s testimony about separation violence and lethality factors was inadmissible profile evidence. This evidence did not explain behavior by Jennifer that otherwise might be misunderstood by a jury; indeed, the nature of her abusive relationship with Ketchner was uncontested. *Cf. State v. Salazar–Mercado*, 234 Ariz. 590, 594 ¶ 15, 325 P.3d 996, 1000 (2014) (noting that expert testimony about general behavior patterns of child sexual-abuse victims is permitted when helpful for a jury to understand the evidence). Rather, Dr. Ferraro’s testimony predicted an abuser’s reaction to loss of control in a relationship. There was no reason to elicit this testimony except to invite the jury to find that Ketchner’s character matched that of a domestic abuser who intended to kill or otherwise harm his partner in reaction to a loss of control over the relationship. The trial court thus erred by permitting Dr. Ferraro to opine about separation violence, lethality factors, and any characteristics common to domestic abusers.

2. Harmless Error Review

[5] ¶ 20 The admission of Dr. Ferraro’s testimony requires reversal of Ketchner’s convictions and sentences unless the error was harmless. *See State v. Henderson*, 210 Ariz. 561, 567 ¶ 18, 115 P.3d 601, 607 (2005). “Harmless error review places the burden on the [S]tate to prove beyond a reasonable doubt that the error did not contribute to or *649 affect the verdict or sentence.” *Id.* (citation omitted). Notably, the State failed to argue in its brief that the error

was harmless.

^[6] ¶ 21 The only charges in dispute at trial were first-degree murder and burglary. Ketchner did not contest that he assaulted Jennifer and assaulted and killed Ariel. But he claimed that the State had failed to prove that he premeditatedly murdered Ariel or committed burglary, the predicate charge for felony murder. Because the jury did not find Ketchner guilty of premeditated murder, we must decide whether the State has demonstrated beyond a reasonable doubt that the profile evidence did not contribute to or affect the felony-murder verdict.

¶ 22 As the State acknowledged at oral argument before this Court, the prosecutor did not argue that Ketchner remained unlawfully in Jennifer’s home with the intent to commit a felony. Instead, the key factual dispute relating to the burglary charge was whether Ketchner entered Jennifer’s home intending to commit a felony or instead to have consensual sex with Jennifer. The prosecutor argued that Ketchner entered to kill Jennifer “to take control of the family that he was losing.” Defense counsel countered that Ketchner entered, possibly high on methamphetamine, expecting to have sex. Counsel further maintained that after Ketchner saw Nate, a quarrel erupted that sparked the violent events, and therefore Ketchner was guilty of only second-degree murder. Evidence supported both scenarios, and the trial court instructed the jury on first-degree murder and the lesser-included offense of second-degree murder. *State v. Vickers*, 159 Ariz. 532, 542, 768 P.2d 1177, 1187 (1989) (“The court must instruct the jury on every lesser-included offense to the one charged if the evidence supports the giving of the instruction.”).

¶ 23 Dr. Ferraro’s profile evidence provided an expert opinion about how abusers who have lost control of a victim react, inviting the jury to conclude that Ketchner went to Jennifer’s home that evening intending to either kill or harm her to regain control of his family. The prosecutor repeatedly referred to this “control” motive as a theme in his opening statement and closing argument:

They were moving on. They were happy. He had lost control, and that night he decided to take control. That night he decided to fulfill his threats, and that night he was there to kill....

Darrell Bryant Ketchner came to [Jennifer’s house] to kill, to take control of the family that he was losing. The family that had shut him out....

Darrell Ketchner had come there to kill, to take control of this family that he was losing....

The defendant was angry.... Because they are not letting him back in where he has always been allowed back. He is losing his control....

The defendant no longer had control of her, of his kids, of their life....

They were moving on. They were strong. And he had lost control. And that night he decided to take that control back. He decided to kill, and he did....

On that night, Darrell Ketchner entered into the house ... knife in hand, dark clothes, immediately attacking, taking control of the family that was shutting him out, the family he was losing....

He was losing his family. He was losing control. He was losing it.

¶ 24 The prosecutor emphasized the profile evidence by pointing out Dr. Ferraro’s testimony to the jury as aiding their understanding of domestic violence “commonalities” and “patterns,” including separation violence. The prosecutor then related these patterns to the parties’ relationship in this case and described the “lethality” factors present—gun in the home, stepchildren in the home, prior threats to kill, and drug use—and impliedly asked the jurors to find that Ketchner acted in conformity with the abuser profile.

¶ 25 Because the profile evidence provided an expert opinion on a key issue before the jury—whether Ketchner entered Jennifer’s house with the intent to commit a felony—the State has not proved beyond a reasonable doubt that the evidence did not contribute to or affect the jury’s verdict on the felony murder and burglary counts. For this *650 reason, we reverse the felony murder and burglary convictions and resulting sentences.

¶ 26 The error, however, is harmless as to the convictions and sentences for aggravated assault and attempted first-degree murder. Whether Ketchner entered Jennifer’s house with the intent to commit a felony was not relevant to these offenses, and the evidence that he committed those offenses was uncontested.

III. CONCLUSION

¶ 27 We reverse Ketchner’s convictions and sentences for first-degree murder and first-degree burglary and remand for a new trial. We affirm Ketchner’s convictions and sentences on three counts of aggravated assault and one

count of attempted first-degree murder.

Footnotes

- 1 We cite the current versions of statutes unless material changes have been made since Ketchner committed the offenses.
- 2 “We view the facts in the light most favorable to sustaining the jury’s verdicts.” *State v. Forde*, 233 Ariz. 543, 552 ¶ 2 n. 2, 315 P.3d 1200, 1209 n. 2 (2014) (citation omitted).

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COMMITTEE ON THE IMPACT OF DOMESTIC VIOLENCE AND THE COURTS

Meeting Date: February 10, 2015	Type of Action Requested: <input type="checkbox"/> Formal Action/Request <input type="checkbox"/> Information Only <input checked="" type="checkbox"/> Other	Subject: CIDVC Strategic Planning
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From: Kay Radwanski

Presenter: Judge Wendy Million

Description of Presentation: In 1994, CIDVC was established as a committee of the Arizona Judicial Council. CIDVC's purpose, as stated in ACJA 1-110, is to "assist with the development and implementation of policies that acknowledge the severity of the problem of domestic violence in Arizona, increase awareness of victim resources, provide sanctions for criminal conduct, enhance the follow-through by law enforcement to enforce orders of protection, assess state and local proceedings and services and make recommendations for system changes that will promote enhanced safety for victims and the professionals who interact with them and encourage offender accountability."

The beginning of its 21st year offers the committee an opportunity to engage in strategic planning--to set direction and priorities based on CIDVC's purpose and to examine current issues and develop projects that align with the committee's priorities.

Recommended Motion: n/a