

**NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.**
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24.

FILED BY CLERK

MAR -4 2011

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	
)	
Appellee,)	2 CA-CR 2009-0395
)	DEPARTMENT B
v.)	<u>MEMORANDUM DECISION</u>
)	Not for Publication
DELLA LISA VERMUELE,)	Rule 111, Rules of
)	the Supreme Court
Appellant.)	
_____)	

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20083043

Honorable Paul E. Tang, Judge

AFFIRMED

Thomas C. Horne, Arizona Attorney General
By Kent E. Cattani and Alan L. Amann

Tucson
Attorneys for Appellee

Robert J. Hirsh, Pima County Public Defender
By Michael J. Miller

Tucson
Attorneys for Appellant

ECKERSTROM, Judge.

¶1 A jury convicted appellant Della Vermuele of the first-degree murder of her son. The trial court sentenced her to life imprisonment without the possibility of parole. On appeal, she argues the court erred in admitting the following evidence: expert testimony, the results of a toxicology screen showing she had used cocaine, the hearsay statements of two witnesses, and several “gruesome” photographs. She also argues there was insufficient evidence she had acted with premeditation.¹ For the following reasons, we affirm her conviction and sentence.

Factual and Procedural Background

¶2 “We view the facts in the light most favorable to sustaining the convictions.” *State v. Robles*, 213 Ariz. 268, ¶ 2, 141 P.3d 748, 750 (App. 2006). For a few months in the summer of 2008, Vermuele and her adult son, Spencer C., lived with Ora and Martha C. at their residence in Tucson. At the end of July, after Vermuele had returned to the home angry and upset following a visit to the hospital, she and Spencer had a loud, heated argument in a bedroom they shared at the residence. After about twenty minutes, Ora tried to calm them down and asked Spencer to go on a walk. While Spencer was putting on his shoes in the bedroom, Vermuele went into the kitchen, let out a “primal scream,” grabbed a knife, went back to the bedroom and slammed the door shut. Ora tried to stop her as she passed him. Moments later, Spencer came out of the bedroom holding his abdomen and bleeding. He stated, “[C]all 911. My mom stabbed

¹In a separate opinion filed simultaneously with this memorandum decision, we address the sentencing arguments Vermuele has raised on appeal. *See* Ariz. R. Sup. Ct. 111(h).

me.” He then collapsed in a chair in the living room. Vermuele entered the living room and told Spencer, “You fucking drove me to it.”

¶3 By the time Spencer was taken to the hospital, he had died from a stab wound that had penetrated his right lung and his heart. Spencer also had stab wounds on his left arm, lower back, and the left side of his chin. Vermuele sustained a stab wound to her lower right abdomen and also was taken to the hospital, where she had surgery to repair her wound.

¶4 At trial, Vermuele testified she and Spencer had been arguing throughout the month of July about money and his methamphetamine use. Vermuele testified that, on the day of the killing, Spencer had threatened her so she had armed herself with a paring knife from the kitchen, but accidentally dropped it on her way to the bedroom. She claimed that she and Spencer had rushed to retrieve, and eventually struggled for possession of, a butcher knife on the entertainment center in the bedroom. Vermuele contended that she and Spencer had incurred their wounds during the struggle and that she did not know who had stabbed whom.

¶5 Vermuele was convicted after a jury trial of first-degree murder and was sentenced to natural life in prison. This appeal followed.

Discussion

Expert Testimony

¶6 Vermuele argues “the trial court erred by admitting the testimony of Dr. R[i]f[a]t Latifi as an expert in wounds when he testified that he was not a forensic expert, had only a subjective opinion, and when—according to his testimony—he did not

actually remember the injuries.” We review for an abuse of discretion a trial court’s decision whether a witness has sufficient qualifications to testify as an expert. *State v. Lee*, 189 Ariz. 608, 613, 944 P.2d 1222, 1227 (1997).

¶7 Rule 702, Ariz. R. Evid., provides: “If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.” Expert opinion evidence “must be relevant, the witness must be qualified, and the evidence must be the kind that will assist the jury.” *Logerquist v. McVey*, 196 Ariz. 470, ¶ 57, 1 P.3d 113, 132 (2000).²

¶8 Latifi, the trauma surgeon who was on duty when Spencer and Vermuele arrived at the hospital, testified for the state. Latifi stated he regularly treats people with knife wounds in general and self-inflicted knife wounds in particular. When asked how he determines whether a wound is self-inflicted, Latifi conceded that it “is subjective from [his] standpoint, because [he is] not a forensic expert” but stated he often learns about the nature of knife wounds from talking to his patients. Latifi testified that Vermuele had told him she had stabbed Spencer in self-defense. He testified the position of the wound and the width of its incision led him to believe that Vermuele’s own wound had been self-inflicted. On cross-examination, however, Latifi admitted he could not

²Section 12-2203, A.R.S., a statute relating to the admission of expert testimony, was not in effect when Vermuele was convicted. We therefore do not discuss this statute or its constitutionality. *See Lear v. Fields*, ___ Ariz. ___, ¶ 1, 245 P.3d 911, 913 (App. 2011) (finding § 12-2203 unconstitutionally usurps supreme court’s rule-making authority and violates separation of powers doctrine).

“say that with certainty.” He later repeated that he did not know who inflicted the wounds on either Vermuele or Spencer. In response to a juror’s question about whether it was possible that Spencer’s wounds could have been self-inflicted, Latifi testified “that would be impossible” because “[t]he wound was very large and . . . very deep.”

¶9 After Latifi’s testimony, Vermuele moved to strike Latifi’s opinion that her wounds were self-inflicted and Spencer’s were not. She argued the relevant scientific literature “indicate[s] even a forensic specialist is unable to tell if a wound is . . . self-inflicted or not self-inflicted.” The trial court denied the motion to strike, finding the evidence “f[ell] under the parameters of Rule 702” and *Logerquist*. The court did not err in so doing.

¶10 Rule 702 requires only that the expert have “knowledge superior to people in general through actual experience or careful study.” *State v. Superior Court*, 152 Ariz. 327, 330, 732 P.2d 218, 221 (App. 1986). The witness must have expertise “applicable to the subject about which he intends to testify” and must have training or experience “qualify[ing] him to render opinions which will be useful to the trier of fact.” *Lay v. City of Mesa*, 168 Ariz. 552, 554, 815 P.2d 921, 923 (App. 1991). The degree of the expert’s qualification goes to the weight given the testimony rather than its admissibility. *State v. Davolt*, 207 Ariz. 191, ¶ 70, 84 P.3d 456, 475 (2004).

¶11 Vermuele emphasizes that Latifi is a trauma surgeon whose experience is in treating wounds and not a forensic pathologist and therefore unqualified to testify as an expert on how knife wounds occur. But Latifi’s experience and knowledge in how knife wounds occur was greater than that of the jurors, and the fact he is not a specialist in

forensic pathology does not preclude him from testifying as an expert in that area. *See State v. Villalobos*, 225 Ariz. 74, ¶ 27, 235 P.3d 227, 234 (2010) (medical examiner’s specialization in pathology did not preclude him from giving expert testimony about victim’s pain). “A person need not be expert in a detailed aspect of a specialized area of knowledge; it is sufficient if he can be qualified as expert in that specialty.” *State v. Macumber*, 112 Ariz. 569, 571, 544 P.2d 1084, 1086 (1976).

¶12 Vermuele points out that Latifi’s testimony contradicted that of the medical examiner, Dr. Cynthia Porterfield. Porterfield, a forensic pathologist, opined that it is not possible to determine the size of a knife from the wound it caused. She did concede, however, that the injury was from something “bigger than a small pocket knife.” She also testified it was possible Spencer could have stabbed himself, whereas Latifi contended it “would be impossible” to self-inflict the kind of wound that killed Spencer “unless you have [a] machete in your hand and you lean on . . . it to kill yourself.”

¶13 To the extent Latifi’s testimony differed from Porterfield’s, it was a conflict in the evidence for the jury to decide. *See State v. Cox*, 217 Ariz. 353, ¶ 27, 174 P.3d 265, 269 (2007) (“No rule is better established than that the credibility of the witnesses and the weight and value to be given to their testimony are questions exclusively for the jury.”), *quoting State v. Clemons*, 110 Ariz. 555, 556-57, 521 P.2d 987, 988-89 (1974). And Porterfield testified about the additional training she had received to specialize in forensic pathology. Therefore, the jury had ample information about the qualifications of each doctor in order to accord their opinions the appropriate weight.

¶14 Vermuele also argues Latifi did not “understand[]” or “remember[]” the wounds because he testified the knife had injured Spencer’s vena cava, whereas Porterfield testified the knife had hit the actual heart. But Porterfield did not address the vena cava in her testimony at all, so Latifi may have correctly observed the knife had punctured it as well. And, as stated above, to the extent his testimony did conflict with Porterfield’s, it was for the jury to decide what weight to give it. Latifi conceded on direct examination that he had not reviewed Spencer’s medical record before trial, but stated he remembered Spencer’s wounds. He also was thoroughly cross-examined about his qualifications and his memory of the events. We find no abuse of discretion in the admission of Latifi’s testimony under Rule 702.

¶15 In a related argument, Vermuele contends the testimony was inadmissible pursuant to *Logerquist*. The state points out that Vermuele failed to expressly mention that case in her objection to the evidence before the trial court. It further contends Vermuele has not argued that any *Logerquist* error was fundamental, thereby forfeiting the argument on appeal. *See State v. Moreno-Medrano*, 218 Ariz. 349, ¶¶ 16-17, 185 P.3d 135, 140 (App. 2008) (failure to argue error is fundamental waives issue on appeal).³ Vermuele counters that her trial objection—“that it was widely accepted that it was impossible to determine whether a wound was self inflicted or not”—implicitly raised the *Logerquist* argument to the trial court.

³Contrary to the state’s assertion, Vermuele argues in her opening brief that the error was fundamental.

¶16 In any event, the trial court expressly found the testimony admissible under *Logerquist*. Thus, the purpose of conducting review exclusively for fundamental error would not be served here. See *State v. Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d 601, 607 (2005) (purpose of stringent fundamental error standard to discourage defendants from strategically withholding objections to curable trial error then seeking appellate reversal); *State v. Rutledge*, 205 Ariz. 7, ¶ 30, 66 P.3d 50, 56 (2003) (purpose of objection is for trial court to cure possible error). We therefore address the issue on its merits.

¶17 We conclude the trial court did not err in admitting the evidence. Vermuele argues Latifi’s admittedly subjective opinion “is not the kind of objective study that is admissible under *Logerquist*.” But the court in *Logerquist* did not require that the expert’s opinion be based on objective study; rather, the court held only that any such objective opinions must comply with the requirement of *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), that they be based on generally accepted scientific principles. *Logerquist*, 196 Ariz. 470, ¶¶ 30-31, 62, 1 P.3d at 123, 133. The court made clear, however, that experts are not precluded from testifying about “their own experimentation and observation and opinions based on their own work without first showing general acceptance.” *Id.* ¶ 30, quoting *State v. Hummert*, 188 Ariz. 119, 127, 933 P.2d 1187, 1195 (1997). In other words,

Frye is applicable when an expert witness reaches a conclusion by deduction from the application of novel scientific principles, formulae, or procedures developed by others. It is inapplicable when a witness reaches a conclusion by inductive reasoning based on his or her own experience,

observation, or research. In the latter case, the validity of the premise is tested by interrogation of the witness; in the former case, it is tested by inquiring into general acceptance.

Id. ¶ 62; *see also State ex rel. Romley v. Fields*, 201 Ariz. 321, ¶ 19, 35 P.3d 82, 88 (App. 2001) (interpreting *Logerquist* as suggesting *Frye* not applicable to expert medical opinion testimony).

¶18 Here, Latifi’s opinion was based on his training and experience as a trauma surgeon. The evidentiary weight to be given his testimony did not depend on the validity of a scientific theory but on his credibility and the extent of his knowledge and experience. *See Logerquist*, 196 Ariz. 470, ¶ 22, 1 P.3d at 120. And, importantly, “[h]is credentials, his experience, his motives and his integrity were effectively probed and tested” during cross-examination. *Id.*, quoting *State v. Roscoe*, 145 Ariz. 212, 220, 700 P.2d 1312, 1320 (1984); *see also Lohmeier v. Hammer*, 214 Ariz. 57, ¶ 48, 148 P.3d 101, 114 (App. 2006) (finding testimony about cause of injuries “stemmed from ‘inductive reasoning based on [expert’s] own experience, observation, or research’” and, therefore, not subject to *Frye* hearing), quoting *Logerquist*, 196 Ariz. 470, ¶ 62, 1 P.3d at 133. Moreover, Porterfield’s conflicting testimony, based on her training in the field of forensic pathology, would have assisted the jury in giving the appropriate weight to Latifi’s “subjective” theory about how the wounds were inflicted. We find no abuse of discretion in the trial court’s admission of the evidence under *Logerquist*.

Cocaine Use

¶19 Vermuele argues the trial court abused its discretion when it allowed the state to question Vermuele about her cocaine use around the time of the homicide. We

review a trial court's decision on an evidentiary matter for an abuse of discretion. *State v. Smith*, 215 Ariz. 221, ¶ 48, 159 P.3d 531, 542 (2007).

¶20 Before Latifi testified, Vermuele objected to medical evidence that there was cocaine in her blood at the time of her surgery. She objected on the ground of relevance and asserted there was insufficient foundation for the evidence. The state contended it planned to establish foundation for the evidence during its questioning of Latifi, indicating it was not "relevant yet, but it could be." The trial court overruled the objection and stated it would "address the admissibility issues at a later time." Accordingly, the state elicited testimony from Latifi that a preliminary drug screen is generally given to all patients who are treated for trauma in the emergency department.

¶21 During Vermuele's testimony, at a bench conference outside the presence of the jury, the trial court and counsel discussed the admissibility of evidence that Vermuele had been using cocaine around the time Spencer was killed. The state argued Vermuele had opened the door to such questioning by introducing evidence about Spencer's drug use. It also argued the fact she tested positive for cocaine could have "affect[ed] her ability to remember and recall events." After argument, the court found the preliminary drug screen, although not itself admissible, gave the state "a good faith basis" to ask Vermuele about her cocaine use and allowed the question. Vermuele then testified she had been "using cocaine" in July 2008. On redirect examination, Vermuele testified she had last used cocaine three days before the incident.

¶22 Vermuele concedes "[t]he possibility that drug use affected [her] ability to accurately perceive and remember is relevant," but contends that here, because there was

no basis to believe she was affected by cocaine at the time of the killing, it was irrelevant and prejudicial.⁴ *See State v. Walton*, 159 Ariz. 571, 582, 769 P.2d 1017, 1028 (1989) (finding no abuse of discretion when trial court precluded evidence of witness’s drug use history absent showing “how it impaired his memory and perception”). She relies on the medical examiner’s testimony that a person only feels the influence of a drug found in his or her blood, not in the urine, and the fact the preliminary screen here showed cocaine in Vermuele’s urine.

¶23 We agree that Vermuele’s drug use at the time of the incident—an incident involving, under any version of the events, irrational and emotional behavior—was a relevant topic. Specifically, we agree with the trial court’s conclusion that it was, at minimum, relevant and probative to her ability to perceive and recall the events in question. And, although the preliminary drug screen was not itself admitted, it provided the state with a basis to ask Vermuele about her drug use around that time. Because the state’s questions here were appropriately targeted to the relevant time frame, the court did not abuse its discretion in implicitly concluding that the probative value of the evidence was not outweighed by the danger of unfair prejudice. *See Ariz. R. Evid.* 403.⁵

⁴She also contends that using evidence of her cocaine use to counter the evidence of Spencer’s drug use “would be using the evidence to show [Vermuele] had bad character, which is expressly prohibited by Ariz. R. Evid. 404(a).” But she has made this argument for the first time on appeal and has not shown fundamental, prejudicial error in the admission of this evidence. *See State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607-08 (2005). Therefore, we need not address the argument further.

⁵We do not agree with the state that the evidence of Spencer’s drug abuse “open[ed] the door” to questioning Vermuele regarding her own drug abuse. The admissibility of each piece of evidence must be evaluated under our evidentiary rules for

Hearsay Statements

¶24 Vermuele argues “the trial court abused its discretion by permitting hearsay testimony to prior consistent statements by Ora and Martha.” We review the court’s admission of evidence as an exception to the hearsay rule for an abuse of discretion. *State v. Tucker*, 205 Ariz. 157, ¶ 41, 68 P.3d 110, 118 (2003). Rule 801(d)(1), Ariz. R. Evid., provides that the prior statement of a witness is not hearsay if the witness testifies at trial, is subject to cross-examination about the statement, and the statement is inconsistent with the witness’s testimony.

¶25 Martha testified that, after Spencer had told her he had been stabbed and that she should call 9-1-1, Vermuele stated, “He drove me to it.” When asked whether she had told a police officer at the scene that Vermuele had said, “You fucking drove me to it,” Martha responded, “No, I did not say that.”

¶26 Tucson Police officer Lissette Gomez responded to Martha and Ora’s home on the day of the stabbing and testified that Martha told her Vermuele had stated, “You fucking drove me to it.” Over Vermuele’s objection, the trial court admitted the statement, finding it was admissible as a party admission and, in turn, Martha’s statement was admissible as a prior inconsistent statement because, in her testimony, she denied making the statement to Gomez.

its relevance on its own merits. Vermuele’s drug use at the time of the incident was not relevant merely because Spencer had also been using drugs at the time. It was relevant because it provided the jury insight into the nature of her behavior and the accuracy of her perceptions of the incident. Moreover, the trial court was required to consider any unfair prejudicial impact of the drug abuse evidence on the defendant in evaluating its admissibility under Rule 403, a consideration arguably not germane to the admissibility of similar evidence regarding Spencer’s drug abuse.

¶27 Ora testified he had not seen Vermuele with a knife “at any point during th[e] whole incident.” Later, when asked about his previous statements to a detective about the incident, Ora admitted he had told the detective he had seen her with a knife. He conceded he had given “two different accounts of what happened” to the detective because everything had “happened so fast.” And he acknowledged, based on the transcript of his interview with the detective, that in the beginning of his interview he stated that Vermuele had said, “The little bastard stabbed me,” but by the end of the interview, he maintained this had been a lie “to protect” Vermuele. At trial, he testified she had said, “[T]hat little son of a bitch . . . stabbed me.” Also based on the transcript of his interview with the detective, Ora conceded he had told the detective he saw Vermuele “lunge[] for Spencer” and “slice” his arm with the knife.

¶28 Based on the same interview transcript, Tucson Police detective Michael Carroll testified that Ora had told him he saw Vermuele with a knife and that she had sliced Spencer. Ora had also told him Vermuele had said, “The little bastard stabbed me,” but Ora recanted this statement at the end of the interview. Over Vermuele’s objection, the trial court admitted this testimony as well.

¶29 Vermuele contends that these segments of testimony are not rendered admissible as prior inconsistent statements under Rule 801(d)(1)(A) because “they were not inconsistent with [Martha’s and Ora]’s testimony . . . because they admitted making the statements . . . and did not state that the statements were inaccurate.” But Martha’s and Ora’s concessions at trial that they had made the statements to police officers do not negate the inconsistency of the statements with the rest of their trial testimony. *Cf. State*

v. Allred, 134 Ariz. 274, 277, 655 P.2d 1326, 1329 (1982) (declarant’s denial of making inconsistent statement is among factors showing unfair prejudice in admitting statement). In any event, even were we to interpret Martha’s and Ora’s concessions as rendering their statements consistent with their trial testimony, the statements were then merely cumulative, could not have affected the outcome of the case, and the trial court did not commit reversible error by admitting them. *See State v. Weatherbee*, 158 Ariz. 303, 305, 762 P.2d 590, 592 (App. 1988).

Gruesome Photographs

¶30 Vermuele argues “the trial court abused its discretion by admitting gruesome pictures showing Spencer’s head and partially open eyes, and multiple pictures of a large amount of blood in the living room of the . . . house.” We review a trial court’s decision to admit photographs into evidence for an abuse of discretion. *State v. Anderson*, 210 Ariz. 327, ¶ 39, 111 P.3d 369, 381 (2005). When deciding whether to admit photographs, a trial court considers three factors: their relevance, “tendency to incite passion or inflame the jury,” and “probative value versus potential to cause unfair prejudice.” *Id.*, quoting *State v. Murray*, 184 Ariz. 9, 28, 906 P.2d 542, 561 (1995).

¶31 Photographs may be relevant to prove *corpus delicti*, identify the victim, show the nature and location of an injury, determine the degree of the crime, corroborate witnesses and the state’s theory of the crime, and to explain testimony. *State v. Chapple*, 135 Ariz. 281, 288, 660 P.2d 1208, 1215 (1983). “Any photograph of the deceased in any murder case [is relevant] because the fact and cause of death are always relevant in a

murder prosecution.” *Id.*; accord *State v. Bocharski*, 200 Ariz. 50, ¶ 22, 22 P.3d 43, 48-49 (2001).

¶32 Vermuele contends exhibits ten and eleven were “not probative of any issue” and were solely admitted to inflame the jury. Exhibit ten shows the left upper half of Spencer’s body. Dr. Porterfield explained that the “two linear or long shaped areas of red discoloration” portrayed in the photograph were bruises that may have occurred either during the altercation or at the hospital. The state also used exhibit ten when questioning Porterfield to show the contrast between the bruises and other injuries Spencer had sustained. Exhibit eleven shows a close-up view of Spencer’s face and the injury on his chin. Porterfield testified that the chin wound was a superficial “small sharp force injury.”

¶33 Vermuele’s defense was that during the altercation, either Spencer stabbed himself or she stabbed him in self-defense, but she did not intentionally stab him. In that context, the photographs were relevant to demonstrate the nature and location of Spencer’s wounds, important facts in evaluating whose version of the events was most consistent with Spencer’s injuries. The trial court did not abuse its discretion in concluding that the probative value of the photographs was not outweighed by any prejudicial impact.

¶34 Vermuele also contends “[t]he trial court erred in admitting Exhibit 19 when Exhibit 20 would have been adequate.” Exhibit nineteen shows the right side of Spencer’s body above the waist, including the fatal wound. Exhibit twenty shows a close-up of the wound without showing Spencer’s face. Porterfield testified exhibits

nineteen and twenty were “the same thing . . . just a little bit [of a] different angle.” However, exhibit nineteen had some additional probative value to the extent it demonstrated the wound in proportion to the body and could assist the jury in evaluating the circumstances of the stabbing. While we acknowledge that a photograph showing the face and fatal wound of the deceased is arguably disturbing and carries some risk of unfair prejudice, we cannot overlook that the jury was required to receive considerable evidence of an equally disturbing nature in the form of both photographs and testimony. In the overall context of this murder case, we are skeptical that this photograph had a substantial additional impact on the jury beyond other evidence that was undisputedly admissible. “There is nothing sanitary about murder, and there is nothing in Rule 403, Ariz. R. Evid., that requires a trial judge to make it so.” *State v. Rienhardt*, 190 Ariz. 579, 584, 951 P.2d 454, 459 (1997). Thus, the trial court did not abuse its considerable discretion in concluding the probative value of exhibit nineteen was not substantially outweighed by the danger of unfair prejudice.

¶35 Vermuele contends three of the photographs of the crime scene “were inflammatory because they showed a large puddle of blood,” but at the same time she concedes one of those photographs, exhibit sixty-three, “may [have] aid[ed] the jury in understanding the scene.” She contends, however, that exhibits sixty-seven and sixty-nine “do not show anything different from Exhibit 63 and are merely inflammatory.”⁶ She relies solely on *Bocharski*, in which the court found that certain autopsy photographs

⁶Our record does not contain exhibit sixty-seven. Thus, we presume the court did not err in admitting it. See *State v. Geeslin*, 223 Ariz. 553, ¶ 5, 225 P.3d 1129, 1130 (2010); *Lohmeier v. Hammer*, 214 Ariz. 57, ¶ 48, 148 P.3d 101, 114 (App. 2006).

should not have been admitted and had been “introduced primarily to inflame the jury.” 200 Ariz. 50, ¶ 26, 22 P.3d at 49. But in *Bocharski*, the photographs showing the victim’s wounds lacked probative value because the defendant “did not challenge the fact of the victim’s death, the extent of her injuries, or the manner of her demise.” *Id.* ¶ 23.

¶36 Here, because Vermuele contested the manner in which Spencer had been killed and her actions at the time of the incident, the photographs of the crime scene from opposite perspectives allowed the jurors to interpret the different witnesses’ accounts of what had happened and were therefore relevant and probative. Although Vermuele contends the photographs are gruesome, as the state points out there was no evidence the jurors were visibly upset by viewing the photographs, and objectively, the photographs “are far more benign” than other photographs courts have found admissible. *See, e.g., id.* ¶¶ 20, 25, 29 (no abuse of discretion in admission of photographs showing victim’s decomposed body with “gross marbling of the skin, discoloration of the face, and fluid coming from both the nose and mouth,” even when jurors visibly shocked by photographs); *State v. Amaya-Ruiz*, 166 Ariz. 152, 170-71, 800 P.2d 1260, 1278-79 (1990) (probative value of “arguably gruesome” photographs of bloody corpse at crime scene outweighed possible prejudice to defendant). We therefore find no abuse of discretion in the admission of the photographs.

Insufficient Evidence of Premeditation

¶37 Vermuele argues “there was insufficient evidence that [she] acted with premeditation rather than on a sudden quarrel and in the heat of passion when Spencer was stabbed.” We review the sufficiency of evidence de novo. *State v. Bible*, 175 Ariz.

549, 595, 858 P.2d 1152, 1198 (1993). A person commits first-degree murder if, “[i]ntending or knowing that the person’s conduct will cause death, the person causes the death of another person . . . with premeditation.” A.R.S. § 13-1105(A)(1).⁷

“Premeditation” means that the defendant acts with either the intention or the knowledge that he will kill another human being, when such intention or knowledge precedes the killing by any length of time to permit reflection. Proof of actual reflection is not required, but an act is not done with premeditation if it is the instant effect of a sudden quarrel or heat of passion.

A.R.S. § 13-1101(1); *accord State v. Ellison*, 213 Ariz. 116, ¶ 66, 140 P.3d 899, 917 (2006). After the state rested, Vermuele moved for a judgment of acquittal, arguing the state had presented insufficient evidence of planning or premeditation. The trial court denied the motion, finding Vermuele’s act of leaving the bedroom to get the knife was sufficient evidence of reflection.

¶38 Vermuele acknowledges that “the acquisition of a weapon by the defendant before the killing” can be evidence of premeditation. But she contends the testimony that she emitted a “primal scream” right before she picked up the knife shows she was in a state of passion and was not reflecting on her actions. First, the jurors were entitled to reject Martha’s testimony about the primal scream. *See State v. Clemons*, 110 Ariz. 555, 556-57, 521 P.2d 987, 988-89 (1974) (“No rule is better established than that the credibility of the witnesses and the weight and value to be given to their testimony are questions exclusively for the jury.”). Second, if they did believe Martha’s testimony,

⁷We cite the current version of the statute, as its material provisions have not changed since Vermuele committed her offense.

Vermuele screamed before she picked up the knife and walked back to the bedroom. Thus, even if she was in a state of passion when she screamed, she had the time and opportunity to reflect before she picked up the knife and walked back to the bedroom. *See State v. Thompson*, 204 Ariz. 471, ¶ 31, 65 P.3d 420, 428 (2003) (actual reflection can be shown by threats to the victim, escalating violence between the defendant and victim, or acquisition of weapon by defendant before killing). Regardless whether the jurors believed Martha’s testimony about the primal scream, there was substantial evidence from which the jury could have found premeditation, and we find no error.

Disposition

¶39 For the foregoing reasons and those set forth in our separate opinion, Vermuele’s conviction and sentence are affirmed.

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Judge

CONCURRING:

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

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge