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See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24



DIVISION ONE
FILED: 10/04/2012
RUTH A. WILLINGHAM,
CLERK
BY: sls

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,) 1 CA-CR 11-0212
)
Appellee,) DEPARTMENT E
)
v.) **MEMORANDUM DECISION**
) (Not for Publication - Rule
BRYAN KEITH KEMP,) 111, Rules of the Arizona
) Supreme Court)
Appellant.)
)

Appeal from the Superior Court in Maricopa County

Cause No. CR 2010-112274-001 DT

The Honorable Lisa Ann VandenBerg, Commissioner

AFFIRMED

Thomas C. Horne, Arizona Attorney General Phoenix
By Kent E. Cattani, Chief Counsel
Criminal Appeals/Capital Litigation Section
and Joseph T. Maziarz, Section Chief Counsel
Criminal Appeals/Capital Litigation Section
Attorneys for Appellee

James J. Haas, Maricopa County Public Defender Phoenix
By Tennie B. Martin, Deputy Public Defender
Attorneys for Appellant

N O R R I S, Judge

¶1 Bryan Keith Kemp timely appeals his convictions and sentences for one count of disorderly conduct and two counts of

aggravated assault. He argues the superior court abused its discretion by refusing to give the jury a *Willits* instruction when the State allegedly failed to preserve a surveillance video from the night of his offenses. For the reasons discussed below, we disagree and affirm his convictions and sentences.

¶2 An instruction pursuant to *State v. Willits*, 96 Ariz. 184, 393 P.2d 274 (1964), "would have instructed the jury that if it found that the state had lost or destroyed evidence whose content or quality was in issue, it [could] infer that the true fact [was] against the state's interest." *State v. Bolton*, 182 Ariz. 290, 308, 896 P.2d 830, 848 (1995) (citations omitted). "To be entitled to a *Willits* instruction, a defendant must prove: (1) that the state failed to preserve material evidence that was accessible and might tend to exonerate him, and (2) resulting prejudice." *State v. Fulminante*, 193 Ariz. 485, 503, ¶ 62, 975 P.2d 75, 93 (1999) (citation omitted).

¶3 Here, Kemp's convictions arose out of his conduct on and off a Phoenix city bus.¹ The bus driver testified that after Kemp boarded the bus, Kemp began calling him offensive names and threatening him. The driver called his dispatcher, police responded and removed Kemp from the bus. A patrol officer

¹We view the facts in the light most favorable to sustaining the verdicts and resolve all reasonable inferences against Kemp. *State v. Guerra*, 161 Ariz. 289, 293, 778 P.2d 1185, 1189 (1989).

testified that as he walked Kemp to his patrol car, Kemp kicked him in the thigh and struggled with him on the ground. Kemp injured his head during the struggle, and officers took him to a nearby hospital. A second patrol officer testified that as he escorted Kemp from the hospital after he was treated, Kemp kicked him in the shin. Disputing this testimony, Kemp testified he never threatened the driver or kicked the officers.

¶4 Before trial, Kemp's counsel requested a *Willits* instruction, arguing police had lost a surveillance video from the bus.² The superior court stated it would consider the loss of the video in deciding the disorderly conduct charge, which the parties had tried to the bench. The court refused, however, to instruct the jury on *Willits*, finding the video would not have captured anything "of any import" to the assault charges the parties had tried to the jury, because those charges were based on Kemp's conduct outside the bus.

¶5 On appeal, Kemp argues he was entitled to a *Willits* instruction because his "defense was a polar opposite from the testimony of the police and of the bus driver," and surveillance from the bus would have supported his version of the events.

²A police assistant testified he removed a "DVR" from the bus, never watched it, kept it in his locker overnight, then gave it to the second patrol officer. The officer, however, testified: "I don't remember either way. I don't remember receiving it. I don't remember not receiving it. I just don't remember." In any event, by the time of trial, the State could not produce the DVR.

The problem with Kemp's argument, however, is that an accused is entitled to a *Willits* instruction only when the State has lost or destroyed accessible, material evidence. *Fulminante*, 193 Ariz. at 503, ¶ 62, 975 P.2d at 93 (citation omitted). Here, Kemp failed to show there was a missing videotape that actually recorded any of his conduct.

¶16 The responding police sergeant testified he asked police assistants to download the surveillance, but they "had some kind of issues with the recorder" and "couldn't get it to work properly." Consistent with this testimony, one police assistant testified that when he entered the bus,

[He] notice[d] when [he] pulled the DVR out, the lights were not on, so [he] pulled the DVR from the bus out and [he] took the spare DVR that [he] brought to the bus and [he] put it in. When [he] put that [spare] DVR in, [he] could not get the lights to come on on the bus.

There's an indicator panel that [told] the bus driver the DVR [was] in the docking station and [was] working, and [he] could not get those lights to come on.

On cross-examination, he reiterated, "the lights that normally are on, telling me that the DVR is running and operating, were not on when I pulled the DVR out of the docking station." A third officer testified, in his experience, "when the lights aren't on, the video isn't working. . . . In fact, of all the videos [he] pulled on all the buses . . . [he] would say maybe

