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EXCEPT AS AUTHORIZED BY APPLICABLE RULES.  
See Ariz.R.Sup.Ct. 111(c); ARCAP 28(c);  
Ariz.R.Crim.P. 31.24



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

STATE OF ARIZONA, ) 1 CA-CR 08-0099  
)  
Appellee, ) DEPARTMENT C  
)  
v. ) **MEMORANDUM DECISION**  
) (Not for Publication -  
RAMON LOPEZ, ) Rule 111, Rules of the  
) Arizona Supreme Court)  
Appellant. )  
)

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Appeal from the Superior Court in Mohave County

Cause No. CR-2006-1344

The Honorable Steven F. Conn, Judge

**AFFIRMED**

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Terry Goddard, Attorney General Phoenix  
by Kent E. Cattani, Chief Counsel,  
Criminal Appeals/Capital Litigation Section  
and Joseph T. Maziarz, Assistant Attorney General  
Attorneys for Appellee

Mohave County Appellate Defender Kingman  
By Jill L. Evans  
Attorneys for Appellant

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**I R V I N E**, Presiding Judge

¶1 Ramon Lopez ("Lopez") appeals from his convictions and sentences for manslaughter and aggravated assault. On appeal, Lopez argues that the trial court erred in failing to grant his motion to dismiss based on the State's failure to preserve potentially exonerating evidence. Lopez also argues that the court erred in failing to give a *Willits*<sup>1</sup> instruction. For the reasons stated below, we affirm.

#### FACTS AND PROCEDURAL HISTORY

¶2 We view the facts in the light most favorable to sustaining the jury's verdicts and resolve all reasonable inferences against Lopez. *State v. Vandever*, 211 Ariz. 206, 207 n.2, 119 P.3d 473, 474 n.2 (App. 2005).

¶3 Lopez lived with his wife and children in Dolan Springs, a remote area of Arizona. On August 27, 2007, a group of people, including Hector Lopez-Rivera ("Hector"), Librado Bueno ("Librado"), and Librado's son, met at Lopez's property and assisted in mixing and pouring concrete. Hector, Librado, and Librado's son then borrowed Lopez's truck and trailer to pick up some horses that Librado's family had purchased. After picking up the horses, the men returned to Hector's house for a family barbeque.

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<sup>1</sup> *State v. Willits*, 96 Ariz. 184, 393 P.2d 274 (1964).

¶14 That evening, Hector and Librado returned Lopez's truck and trailer. Lopez noticed them arrive and went outside. After talking and drinking beer with Lopez, Hector and Librado decided to leave when Lopez mentioned that he would kill the person responsible for his missing goats. Lopez went inside his house, Librado went behind the house to urinate, and Hector waited for Librado inside his truck. While behind the house, Librado suffered a gunshot wound to the head, killing him instantly.<sup>2</sup> After waiting in the truck for approximately two minutes, Hector noticed a shadow outside of the truck. Immediately thereafter, a bullet traveled through the truck window and hit Hector in the head. Hector drove to the hospital, leaving Librado at Lopez's property.

¶15 On September 7, 2006, the grand jury issued an indictment, charging Lopez with Count 1, first degree murder; Count 2, attempted first degree murder; and Count 3, aggravated assault. Before trial, Lopez filed a motion to dismiss alleging the State violated his due process rights to a fair trial. Lopez argued that the State:

neglected to perform basic crime scene investigation techniques, has failed to preserve evidence which is obviously material and relevant to the defense case, has released evidence relevant to the defense of the case which cannot now be

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<sup>2</sup> Hector did not hear the gunshot due to the noise of the generator.

retrieved, and failed to do any follow up investigation on the defendant's contentions, even though they were provided . . . within hours of the shooting.

Following a three-day evidentiary hearing, the court denied the motion, stating that Lopez failed to demonstrate "that this is a case where the State, acting in bad faith, failed to preserve evidentiary material which could have been subject to tests, the results of which might have exonerated [Lopez]. There was no denial of due process."

¶16 A jury trial commenced on October 16, 2007. The State presented substantial evidence that Librado's fatal gunshot wound was a "contact wound."<sup>3</sup> At the conclusion of the State's case, Lopez filed a renewed motion to dismiss. The court denied the motion. Lopez disputed the State's evidence. Lopez argued that he acted in self-defense and that the bullet that killed Librado was shot from a distance and possibly ricocheted off an unspecified object. Lopez testified that Librado told him that his brother stole Lopez's goats. Lopez then instructed Hector and Librado to leave; however, Hector and Librado refused and indicated they had a gun. Fearful for his safety, Lopez went inside and retrieved a rifle. Lopez stated that he was on his front porch when one person approached from behind. Lopez fired one warning shot, causing the person to immediately drop to the

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<sup>3</sup> A contact wound results from the barrel of the gun being against the skin when fired.

ground. Lopez fired another shot in order to scare the person standing near the truck parked in the driveway.

¶17 Before closing arguments, Lopez requested a *Willits* instruction. The court refused to give the proposed instruction and stated: "there is not a basis for a *Willits* instruction in this case . . . I had anticipated that there would actually be some testimony at this trial at least raising the issue of ricochet and I don't think there has been any and I don't think that the failure to do things in this case raises to the level of justifying a *Willits* instruction." The jury found Lopez guilty of the lesser-included offense of manslaughter on Count 1, not guilty on Count 2, and guilty of aggravated assault on Count 3. The court sentenced Lopez to fifteen years' imprisonment for Count 1 and six years' imprisonment for Count 3. The court further ordered the sentences to be served consecutively.<sup>4</sup>

¶18 Lopez timely appealed from his convictions and sentences. We have jurisdiction pursuant to Arizona Revised Statutes sections 12-120.21(A)(1) (2003), 13-4031 (2010) and - 4033 (2010).<sup>5</sup>

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<sup>4</sup> On November 14, 2007, Lopez filed a motion for new trial that argued, among others, due process violations. The court summarily denied the motion.

<sup>5</sup> We cite the current version of the applicable statute because no revisions material to this decision have since occurred.

## DISCUSSION

¶9 Lopez first argues that the State failed to preserve certain evidence and conduct certain investigations that were essential to his defense and, accordingly, violated his due process rights to a fair trial. Specifically, Lopez contends that: no attempt was made to retrieve or x-ray bullet fragments that would have showed the bullet's trajectory; no swabs were taken of the interior of the wound; no interviews were done to determine the positioning of Librado's body; and Librado's clothing was not seized. We review a trial court's denial of a motion to dismiss for an abuse of discretion. *State v. Moody*, 208 Ariz. 424, 448, ¶ 75, 94 P.3d 1119, 1143 (2004). We defer to the trial court's factual findings that are supported by the record and are not clearly erroneous. *State v. Tapia*, 159 Ariz. 284, 288, 767 P.2d 5, 9 (1988).

¶10 "[T]he state may choose not to gather or preserve certain evidence and, absent bad faith, there is no constitutional violation." *State v. Havatone*, 159 Ariz. 597, 599, 769 P.2d 1043, 1045 (App. 1989). "Unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law." *State v. Speer*, 221 Ariz. 449, 457, ¶ 36, 212 P.3d 787, 795 (2009) (quoting *Arizona v. Youngblood*, 488 U.S. 51, 58 (1988)). "The test under the Arizona

Constitution is the same." *Speer*, 221 Ariz. at 457, ¶ 36, 212 P.3d at 795. As our supreme court recognized in *Speer*, "[t]he critical distinction for constitutional purposes is 'between material exculpatory evidence and potentially useful evidence.'" *Id.* at ¶ 37 (quoting *Illinois v. Fisher*, 540 U.S. 544, 549 (2004)). When there is no assertion the police acted in bad faith in failing to preserve evidence, and one could only say the unpreserved evidence "could have been subjected to tests, the results of which might have been exculpatory or inculpatory," there "is no showing of prejudice in fact," and "all that can be said is that the defendant might have been prejudiced." *State v. Youngblood*, 173 Ariz. 502, 506, 844 P.2d 1152, 1156 (1993). The failure to preserve such evidence does not give rise to a due process violation. *Id.*; *State v. O'Dell*, 202 Ariz. 453, 458, ¶ 13, 46 P.3d 1074, 1079 (App. 2002).

¶11 Here, the trial court found that the State did not act in bad faith in failing to preserve the evidence. We agree. After being arrested, Lopez was interviewed by detectives from the Mohave County Sheriff's Office. During the interview, Lopez stated that Hector and Librado had stolen his goats and, as a result, he became angry. Lopez stated that he first shot Librado, then Hector. He explained that he shot Hector from a distance of "about some thirty, forty meters" and Librado from approximately six meters. At the evidentiary hearing on the

motion to dismiss and at trial, Dr. Julie Gibson, an investigator from the Mohave County Medical Examiner's Office, testified that the gunshot wound to Librado's right cheek was "obviously" a contact wound due to the "muzzle imprint."<sup>6</sup> Dr. Gibson recovered the bullet from Librado's right cerebellum and found "soot" inside the wound, also consistent with a contact wound. Dr. Gibson explained that x-rays were not taken because she did not think it was warranted and the medical examiner's office did not have an x-ray machine. She refrained from dissecting the wound because doing so would cause Librado's body to become un-viewable at the funeral. Dr. Rexene Worrell, another Mohave County Medical Examiner, corroborated this testimony. Even Lopez's own expert witness testified that the blood found on and around the rifle's muzzle would be consistent with a contact wound.

¶12 Further, the unpreserved evidence had no exculpatory value. Lopez argues at great length that the State failed to preserve evidence showing that the fatal gunshot wound may have been from several feet away or a deflected bullet; however, Lopez's opening brief acknowledges that the evidence was only "potentially exonerating." Apparently Lopez's theory is that a gunshot wound from a further distance is more supportive of his

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<sup>6</sup> A muzzle imprint is an imprint that the gun leaves on a person's skin if the muzzle of the gun was against the skin when the gun was fired.



justification defense at trial. As the State noted in its response to Lopez's motion to dismiss, the evidence not collected and preserved likely benefited Lopez - such evidence may have disproved Lopez's theories.

¶13 Because Lopez failed to show either bad faith or prejudice, we conclude that the trial court did not abuse its discretion in denying his motion to dismiss, renewed motions to dismiss, and motion for new trial.

¶14 Lopez also argues that the trial court erred in denying his request for a *Willits* instruction. We review a trial court's refusal to give a jury instruction for an abuse of discretion. *State v. Anderson*, 210 Ariz. 327, 343, ¶ 60, 111 P.3d 369, 385 (2005).

¶15 A *Willits* instruction directs a jury that, if it finds the State "destroyed, caused [sic] to be destroyed, or allowed to be destroyed any evidence whose contents or quality are in issue," it may "infer that the true fact is against [the State's] interest." 96 Ariz. at 187, 393 P.2d at 276. "Destruction or nonretention of evidence does not automatically entitle a defendant to a *Willits* instruction." *State v. Murray*, 184 Ariz. 9, 33, 906 P.2d 542, 566 (1995). To merit a *Willits* instruction, a defendant must show: (1) the State failed to preserve material and reasonably accessible evidence that had a tendency to exonerate him, and (2) this failure prejudiced him.

*Id.* Furthermore, the evidence destroyed “must possess exculpatory value that is apparent before it is destroyed.” *State v. Davis*, 205 Ariz. 174, 180, ¶ 37, 68 P.3d 127, 133 (App. 2002). “A *Willits* instruction is not given merely because a more exhaustive investigation could have been made.” *Murray*, 184 Ariz. at 33, 906 P.2d at 566 (citation omitted).

¶16 Here, the State had no duty to conduct every examination on Librado’s wound or to seek each piece of potentially exculpatory evidence. See *State v. Rivera*, 152 Ariz. 507, 511, 733 P.2d 1090, 1094 (1987) (“Generally, the State does not have an affirmative duty to seek out and gain possession of potentially exculpatory evidence.”). Given the overwhelming evidence, including Lopez’s statements to the police and expert medical testimony, Lopez cannot show that the State ever thought additional tests had obvious exculpatory value. Lopez offers nothing more than mere speculation that further investigation would corroborate his justification defense. Even if the court had given a *Willits* instruction, we are convinced that the jury would have returned the same verdict because of the overwhelming evidence of Lopez’s guilt. Therefore, we conclude that the trial court did not abuse its discretion in denying Lopez’s request for a *Willits* instruction.

**CONCLUSION**

¶17 For the foregoing reasons, Lopez's convictions and sentences are affirmed.

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PATRICK IRVINE, Presiding Judge

CONCURRING:

/s/

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MICHAEL J. BROWN, Judge

/s/

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DONN KESSLER, Judge