FILED BY CLERK
AUG 30 2012
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. DAVID MUNOZ, Appellant.	2 CA-CR 2011-0345 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20101708001

Honorable Richard S. Fields, Judge

AFFIRMED

Thomas C. Horne, Arizona Attorney General
By Kent E. Cattani and Joseph T. Maziarz — Phoenix
Attorneys for Appellee

Lori J. Lefferts, Pima County Public Defender
By Lisa M. Hise — Tucson
Attorneys for Appellant

K E L L Y, Judge.

¶1 Following a jury trial, appellant David Munoz was convicted of molestation of a child, aggravated assault, and three counts of sexual abuse. The trial court sentenced him to concurrent and consecutive prison terms totaling 28.25 years. On appeal, he

argues the court erred by refusing to instruct the jury pursuant to *State v. Willits*, 96 Ariz. 184, 393 P.2d 274 (1964). For the reasons that follow, we affirm.

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). In April 2010, Munoz followed J.G. and her minor sister F.G. as they left a convenience store. After following them for some distance, Munoz "r[an] towards [them] with his hands extended" and "grabbed" them on their "buttocks." J.G. and F.G. screamed and told Munoz to "leave [them] alone." Both J.G. and F.G. struggled with Munoz as he pulled on their shirts and touched them both over and under their clothing. While trying to pull Munoz away from her sister, F.G. fell to the ground and Munoz "threw himself upon her" and tried to remove her shorts. J.G. pulled Munoz off of F.G., and F.G. ran to a nearby business to get help. Munoz told J.G. not to scream and left the area shortly thereafter.

¶3 Law enforcement officers arrived at the scene, spoke with J.G. and F.G., photographed them, and collected DNA[1] swabs from their skin and from under their fingernails. After J.G. identified Munoz in a videotaped recording taken from a security camera at the convenience store, Munoz was located and arrested. This appeal followed his conviction and sentencing.

[1]Deoxyribonucleic acid.

Discussion

¶4 Munoz argues the trial court erred by refusing his request for a *Willits* instruction. We review the court's refusal to give a *Willits* instruction for an abuse of discretion. *State v. Speer*, 221 Ariz. 449, ¶ 39, 212 P.3d 787, 795 (2009). Such an instruction allows the jury to infer that missing evidence would have been exculpatory and is appropriate "[w]hen police negligently fail to preserve potentially exculpatory evidence." *State v. Fulminante*, 193 Ariz. 485, ¶ 62, 975 P.2d 75, 93 (1999). "To receive a *Willits* instruction, the 'defendant must show (1) that the state failed to preserve material and reasonably accessible evidence having a tendency to exonerate him, and (2) that this failure resulted in prejudice.'" *Speer*, 221 Ariz. 449, ¶ 40, 212 P.3d at 795, *quoting State v. Murray*, 184 Ariz. 9, 33, 906 P.2d 542, 566 (1995). "'A trial court does not abuse its discretion by denying a request for a *Willits* instruction when a defendant fails to establish that the lost evidence would have had a tendency to exonerate him.'" *Id.*, *quoting Fulminante*, 193 Ariz. 485, ¶ 62, 975 P.2d at 93.

¶5 Prior to trial, Munoz had requested a *Willits* instruction, arguing the state had not obtained the victims' clothing as evidence. After a hearing, the trial court denied the request, concluding the "materiality of the clothes" was "highly speculative." On appeal, Munoz argues the instruction was warranted because the clothing was potentially exculpatory. *See Fulminante*, 193 Ariz. 485, ¶ 62, 975 P.2d at 93. He claims that, because he was accused of touching the victims under their shirts, "he might have left DNA on the clothing" and the clothing might have been stretched or torn. He further asserts that because F.G. was assaulted on the ground, there might have been dirt on her

shirt. He reasons that, had the clothing been preserved, it might not be stretched or soiled or contain his DNA, and, therefore, he could have used it to demonstrate "he had not grabbed [the victims] as they described."[2] We agree with the court that these claims are speculative.

¶6 Munoz has not pointed to any evidence to support his claim that an absence of his DNA on the clothing would be significant or would tend to exonerate him.[3] *See Speer*, 221 Ariz. 449, ¶ 40, 212 P.3d at 795. In fact, the state's criminologist testified that it was "[r]are" to obtain DNA from clothing based only on touch.[4] And, even if the clothing was not stretched or soiled, that would not have been inconsistent with the victims' accounts of Munoz's actions. J.G. testified that Munoz did not pull on her shirt with enough force to tear it, and F.G. testified that Munoz only attempted to rip off her shirt. In any event, using photographs of the victims that showed the front of their shirts, Munoz pointed out during closing argument that the shirts depicted in the photographs were neither soiled nor stretched.

---

[2]During argument, Munoz acknowledged the evidence showed he had approached J.G. and F.G. and that he "probably" had grabbed their buttocks. But he denied any further touching and struggling with them.

[3]Munoz also asserts the motion should have been granted because an investigating officer testified that, in retrospect, he believed the clothing might have had evidentiary value. But, even if the clothing had potential evidentiary value, this does not establish that it had any tendency to exonerate Munoz. And, a defendant is not entitled to a *Willits* instruction "merely because a more exhaustive investigation could have been made." *Murray*, 184 Ariz. at 33, 906 P.2d at 566.

[4]DNA matching that of Munoz was found under J.G.'s fingernails.

¶7 We conclude Munoz's claim that the clothing would tend to exonerate him is wholly speculative. *See State v. Smith*, 158 Ariz. 222, 227, 762 P.2d 509, 514 (1988) (no abuse of discretion in denying *Willits* instruction when "nothing except speculation" suggested lost evidence exculpatory); *State v. Dunlap*, 187 Ariz. 441, 464, 930 P.2d 518, 541 (App. 1996) (same); *see also State v. Davis*, 205 Ariz. 174, ¶ 37, 68 P.3d 127, 133 (App. 2002) (exculpatory value of evidence must be "apparent" under *Willits*). We, therefore, find no abuse of the trial court's discretion.

Disposition

¶8 Munoz's convictions and sentences are affirmed.

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

CONCURRING:

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

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge