IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

JOSEPH DANIEL JENKINS,
Appellant.

No. 2 CA-CR 2015-0050
Filed June 29, 2016

Appeal from the Superior Court in Pinal County
No. S1100CR201301093
The Honorable Craig A. Raymond, Judge Pro Tempore

AFFIRMED

COUNSEL

Mark Brnovich, Arizona Attorney General
Joseph T. Maziarz, Section Chief Counsel, Phoenix
By Tanja K. Kelly, Assistant Attorney General, Tucson
Counsel for Appellee

Law Firm of Richard Luff, LLC, Tucson
By Richard Luff
Counsel for Appellant

MEMORANDUM DECISION

Chief Judge Eckerstrom authored the decision of the Court, in which Presiding Judge Vásquez and Judge Miller concurred.

E C K E R S T R O M, Chief Judge:

¶1 After a jury trial, Joseph Jenkins was convicted of two counts of aggravated assault upon a corrections officer. He was sentenced to consecutive prison terms totaling eleven years. Jenkins now appeals, raising multiple claims of trial error. For the following reasons, we affirm.

Factual and Procedural Background

¶2 In April 2011, while Jenkins was incarcerated, he struck J.G., an Arizona Department of Corrections (ADOC) Officer, on the right side of the jaw. Jenkins was charged with aggravated assault upon a corrections officer. In 2013, during Jenkins's trial for the 2011 offense, D.H., another ADOC officer, testified. While D.H. was testifying, Jenkins approached the witness stand and struck him. The court declared a mistrial.

¶3 Jenkins was re-indicted and charged with both assaults. He was convicted and sentenced as noted above. This appeal followed.

Severance

¶4 Jenkins first claims the trial court erred in denying his motion to sever the two assault charges. Assuming arguendo the trial court erred, Jenkins did not renew his motion and has therefore waived this issue absent fundamental error. *See State v. Laird*, 186 Ariz. 203, 206, 920 P.2d 769, 772 (1996). Jenkins has not argued the denial of his motion to sever constituted fundamental error and has therefore waived the issue on appeal. *See State v. Moreno-Medrano*, 218 Ariz. 349, ¶ 17, 185 P.3d 135, 140 (App. 2008).

Willits Instruction

¶5 Jenkins next claims the trial court erred in denying his requested *Willits*[1] instruction. "We review rulings regarding a *Willits* instruction for abuse of discretion." *State v. Glissendorf*, 235 Ariz. 147, ¶ 7, 329 P.3d 1049, 1052 (2014). In order to be entitled to a *Willits* instruction, a defendant must show "(1) the state failed to preserve material and reasonably accessible evidence that could have had a tendency to exonerate the accused, and (2) there was resulting prejudice." *Id.* ¶ 8, *quoting State v. Smith*, 158 Ariz. 222, 227, 762 P.2d 509, 514 (1988).

¶6 At trial, J.G. testified that, under the "security alert procedures," ADOC officers were supposed to videotape certain inmates any time they "were escorted out of their pod." Jenkins was one of these inmates, but J.G. conceded that Jenkins had not been recorded at the time of the assault. No testifying witnesses actually saw Jenkins deliver any blow to J.G.[2] Jenkins claims that, had J.G. and D.H. complied with the procedure requiring a videotape of him any time he left his pod, there would be a recording of the incident, and such a video might have shown he was innocent.

¶7 But in order to be entitled to a *Willits* instruction, a defendant must show the state "has destroyed, caused to be destroyed, or allowed to be destroyed" evidence. *State v. Willits*, 96 Ariz. 184, 187, 393 P.2d 274, 276 (1964). Jenkins has not provided, and we cannot find, any authority supporting the proposition that a failure to create evidence can be equated with a failure to preserve evidence that already exists. *Cf. 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 . . . potentially exculpatory evidence.").

¶8 Furthermore, when the officers declined to record Jenkins, they were unaware that anything of any evidentiary import was about to transpire. Therefore, they cannot be said to have

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[1]*State v. Willits*, 96 Ariz. 184, 393 P.2d 274 (1964).

[2]J.G. was struck from the side and did not actually see Jenkins strike him.

"failed to preserve . . . evidence." *Glissendorf*, 235 Ariz. 147, ¶ 8, 329 P.3d at 1052, *quoting Smith*, 158 Ariz. at 227, 762 P.2d at 514.[3] Accordingly, the trial court did not err in denying Jenkins's request for a *Willits* instruction.

Guilty Except Insane Instruction

¶9 Jenkins's final claim of error is that the trial court committed fundamental error in failing to instruct the jury on the defense of "guilty but insane under ARS [§] 13-502." Jenkins never sought such an instruction, but he claims on appeal the court should have given the instruction sua sponte. "[A] trial court has a duty to instruct on the law relating to the facts of the case when the matter is vital to a proper consideration of the evidence, even if not requested by the defense and failure to do so constitutes fundamental error." *State v. Avila*, 147 Ariz. 330, 337, 710 P.2d 440, 447 (1985).

¶10 Jenkins has not pointed to any evidence admitted at trial which would support a defense of guilty except insane. He did not testify as to his own mental state, nor did he call any other witnesses to testify on the issue. Because there was no evidence supporting a defense of guilty except insane, we conclude there was no error. *See State v. Taylor*, 160 Ariz. 415, 422, 773 P.2d 974, 981 (1989).

Disposition

¶11 For the foregoing reasons, we affirm Jenkins's convictions and sentences.

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[3]Jenkins provided no evidence that the officers intentionally failed to film the incident or expected any incident to occur. We therefore do not address whether a deliberate failure to follow established procedures in preserving evidence could justify a *Willits* instruction.