IN THE
# ARIZONA COURT OF APPEALS
DIVISION TWO

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THE STATE OF ARIZONA,
*Appellee*,

*v.*

JORDAN LANE HIDDE,
*Appellant*.

No. 2 CA-CR 2015-0417
Filed December 1, 2016

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THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
*See* Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Crim. P. 31.24.

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Appeal from the Superior Court in Pinal County
No. S1100C201402657
The Honorable Steven J. Fuller, Judge

**AFFIRMED**

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COUNSEL

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**MEMORANDUM DECISION**

Judge Espinosa authored the decision of the Court, in which Judge Kelly[1] and Judge Staring concurred.

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E S P I N O S A, Judge:

**¶1** After a jury trial, Jordan Lane Hidde was convicted of two counts of aggravated assault and was sentenced to concurrent presumptive prison terms of 7.5 years. On appeal, he challenges the trial court's denial of his request for a *Willits*[2] instruction regarding fingerprint and DNA[3] evidence that police did not attempt to obtain from a pellet gun found in the victims' vehicle, and he challenges the court's decision to admit evidence of his alcohol and prescription pain medication use around the time of the incident. For the following reasons, we affirm.

**Factual and Procedural Background**

**¶2** We view the facts in the light most favorable to sustaining the convictions. *See State v. Brown*, 233 Ariz. 153, ¶ 2, 310 P.3d 29, 32 (App. 2013). In October 2014, around 11:00 p.m., Hidde drove to the desert for solitary target shooting. Shortly after he arrived, three teenagers, K.K., J.C., and D.M., approached in two pickup trucks on their way to go "off-roading." As the pick-ups passed by Hidde's parked car, he flashed his headlights and made a "peace sign." Hidde then shined a laser light on J.C.'s truck as he and his passenger, D.M., drove away. J.C. saw the laser and drove

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[1]The Hon. Virginia C. Kelly, a retired judge of this court, is called back to active duty to serve on this case pursuant to orders of this court and our supreme court.

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

[3]Deoxyribonucleic acid.

back, stopping close to Hidde, who was standing on the side of the road with his car between him and J.C.'s truck. Upon being asked about the laser, Hidde told J.C. to leave, pointed an AR-15 rifle with a mounted laser sight at J.C., and began to count down from five. As J.C. began to drive away, Hidde opened fire. One bullet struck the side of the front bumper of J.C.'s truck, while another passed through the tailgate and entered D.M.'s arm. J.C. drove directly to the hospital and called 9-1-1 to report the incident on the way.

**¶3** Meanwhile, Hidde got into his vehicle and sped away, driving to his home. He too called 9-1-1, and falsely reported that a pistol of his had been stolen earlier in the day at a convenience store. A police officer responded to his residence within minutes and found him smelling of alcohol and freshly shaven. Hidde admitted he had been drinking.

**¶4** At the scene of the shooting, police found the pistol Hidde claimed had been stolen as well as a trail of motor oil leading all the way to Hidde's driveway. Later that night, a search of J.C.'s truck revealed a pellet gun lodged under the passenger seat, which was photographed but not collected for evidence.

**¶5** Hidde did not mention the encounter with J.C. and D.M. to the 9-1-1 operator or the responding officer, but when police returned and confronted him, he admitted shooting at J.C.'s vehicle. He then mentioned he had two drinks earlier that evening before he went target shooting and claimed he had fired in response to his perception of danger when he saw the passenger "reaching down for something." Hidde said he feared the passenger was reaching for a gun but admitted he did not see what the passenger was reaching for or know whether there was a gun in J.C.'s truck. He stated his fear was compounded by J.C.'s "hostile" tone, the bright lights on K.K.'s truck, his being "outnumbered," and his vehicle being turned off. Hidde claimed he shined the laser as an attempt to call J.C. back to tell him he was target shooting but admitted he had "fully load[ed his] weapons" in preparation for the encounter. He also admitted he had shaved his goatee after he returned home in an attempt to change his appearance.

**¶6** J.C. and D.M. both denied that they had threatened or intimidated Hidde and denied that D.M. had reached for anything. They also denied that D.M. knew there was a pellet gun in J.C.'s vehicle. No testimony suggested that Hidde and the victims had ever met before their encounter that night.

**¶7** The jury found Hidde guilty of two counts of aggravated assault, and the judge sentenced him as described above. On appeal, Hidde argues the trial court wrongly denied his request for a *Willits* instruction regarding the absence of fingerprint and DNA test evidence from the pellet gun found in J.C.'s vehicle, and he contends the court erroneously admitted evidence of his use of alcohol and prescription medication.

## *Willits* Instruction

**¶8** At trial, Hidde requested a *Willits* instruction based on the failure of police to process the pellet gun found in J.C.'s truck for fingerprints and DNA, arguing such testing might have produced exculpatory evidence. *See State v. Willits*, 96 Ariz. 184, 393 P.2d 274 (1964). The trial court denied the request on the basis that there was no "real likelihood" that additional processing would have produced valuable evidence.

**¶9** "We review rulings regarding a *Willits* instruction for abuse of discretion." *State v. Glissendorf*, 235 Ariz. 147, ¶ 7, 329 P.3d 1049, 1052 (2014). "To be entitled to a *Willits* instruction, a defendant must prove that (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). "Failure to preserve" is not limited to destruction or loss of evidence, but also applies "where the state fails to act in a timely manner to ensure the preservation of evidence that is obviously material, and reasonably accessible." *State v. Perez*, 141 Ariz. 459, 464, 687 P.2d 1214, 1219 (1984). For the evidence to have a "tendency to exonerate" "does not mean the evidence must have had the potential to completely absolve the defendant," but only that it was material and "potentially helpful" to the defendant. *Glissendorf*, 235 Ariz. 147, ¶ 10, 329 P.3d at 1052. But the helpfulness

must not be merely speculative, *id.* ¶ 9; in other words: "A *Willits* instruction must be predicated on a theory supported by the evidence, or else it should not be given, because such would tend to mislead the jury." *Smith*, 158 Ariz. at 227, 762 P.2d at 514 (*Willits* instruction not appropriate for lost piece of paper bearing license plate number when no evidence suggested number was incorrectly transcribed by police).

**¶10** Hidde claims fingerprint or DNA evidence tying D.M. to the pellet gun, if such were found, would have been material to impeach his and J.C.'s claims that D.M. did not know about the weapon, undermining their credibility as key witnesses to the incident and corroborating Hidde's self-defense claim. But that potential helpfulness was only speculative. The record contains no evidence that D.M. ever touched the pellet gun. The mere fact that it was found in J.C.'s truck does not indicate that D.M. knew about or had any contact with it, especially when it was found tightly lodged under a seat and police "had a hard time getting [it] out."

**¶11** Hidde asserts "there was no way for [him] to know that a gun was going to be found underneath [D.M.]'s seat when he made the statements that he saw [D.M.] reach for a gun." That argument, however, misrepresents Hidde's statements in evidence, which made it clear he did not actually see a gun in D.M.'s hand or in J.C.'s truck at all. Moreover, when police found and returned the pellet gun, there was no obvious indication that it could have had any materially helpful evidentiary value. *Compare State v. Perez*, 141 Ariz. 459, 463, 687 P.2d 1214, 1218 (1984) (state has duty to ensure preservation of "obviously material" evidence), *with State v. Murray*, 184 Ariz. 9, 33, 906 P.2d 542, 566 (1995) (*Willits* instruction not warranted "merely because a more exhaustive investigation could have been made"). Thus, because the possible helpfulness of the ungathered evidence from J.C.'s pellet gun was entirely speculative, we conclude the trial court did not abuse its discretion in denying Hidde a *Willits* instruction.

**Evidence of Alcohol and Prescription Pain Medication Use**

**¶12** Hidde next contends the trial court erred when it denied his motion to exclude evidence of his use of alcohol and

prescription pain medication. He argues the court failed to make a required relevancy determination pursuant to Rule 401, Ariz. R. Evid., before balancing probative value and potential prejudice under Rule 403, Ariz. R. Evid. We review the denial of a motion in limine for abuse of discretion, *State v. Gamez*, 227 Ariz. 445, ¶ 25, 258 P.3d 263, 267 (App. 2011), and absent a clear abuse of discretion, "we will not second-guess a trial court's ruling on the admissibility or relevance of evidence," *State v. Rodriguez*, 186 Ariz. 240, 250, 921 P.2d 643, 653 (1996).

**¶13** "A fundamental requirement for admission of any evidence is that it be relevant." *State v. Fisher*, 141 Ariz. 227, 245, 686 P.2d 750, 768 (1984), *abrogated on other grounds as recognized by State v. Wilson*, 237 Ariz. 296, ¶ 12, 350 P.3d 800, 803 (2015). "Evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action." Ariz. R. Evid. 401.

**¶14** After the jury had been selected but before any evidence had been presented, Hidde argued to the trial court that testimony of alcohol or prescription medication use was "irrelevant" and "highly prejudicial." He pointed out that although police reports indicated "the officer smelled the odor of intoxicants on [Hidde]," there was "no evidence that he was actually intoxicated." Regarding the prescription drugs, Hidde similarly argued there was no evidence of intoxication, the only evidence being that he "generally takes a painkiller" which he wanted brought to the jail. After questioning counsel about the relevance of the evidence Hidde sought to exclude, the court found that, while "testimony related to alcohol and prescription medication" was "prejudicial," "its probative value substantially outweighs any prejudicial effects."

**¶15** Although the trial court did not expressly find the evidence relevant, explicit findings are unnecessary if the record shows the court considered the elements of the rule, or if the necessary findings are implicit in the court's decision. *See State v. Beasley*, 205 Ariz. 334, ¶ 15, 70 P.3d 463, 466 (App. 2003) ("explicit findings are not necessary when it is clear the necessary factors were argued, considered, and balanced by the trial court as part of its ruling"); *State v. Ellerson*, 125 Ariz. 249, 252, 609 P.2d 64, 67 (1980)

(lack of explicit findings "not fatal," where "it would appear from a complete reading of the transcript of the hearing on the motion in limine . . . that the court did consider the matters required by Rule 609(a)"), *overruled on other grounds by State v. Fettis*, 136 Ariz. 58, 664 P.2d 208 (1983).

**¶16** The evidence that Hidde had consumed alcohol that night before the shooting and that he "generally takes a painkiller," although not proving Hidde was intoxicated at the time of the shooting, supports an inference that his judgment was impaired or at least affected when the incident occurred, as the trial court suggested in questions posed to counsel. The inquiry for determining relevance is whether the evidence had "*any tendency* to make a fact more or less probable." Ariz. R. Evid. 401 (emphasis added). While the court could have expressly stated the basis for its ruling, its reasoning is clear from the record, and its finding of relevance implicit in its reference to the "probative value" of the evidence. *See Beasley*, 205 Ariz. 334, ¶ 15, 70 P.3d at 466. We conclude the trial court did not abuse its discretion in finding evidence of Hidde's use of alcohol or drugs relevant to the jury's construction of what actually happened, in light of the conflicting testimony.

**¶17** Hidde additionally contends the trial court erred by not precluding the evidence of alcohol and prescription medication use under Ariz. R. Evid. 403, as it carried "stigma" and "lacked any connection to the underlying allegations." But he does not meaningfully argue the evidence was unfairly prejudicial, focusing again only on its relevance. As explained above, evidence related to Hidde's use of alcohol or painkillers on the night of the incident could inform the jury's determination of the issue whether Hidde committed aggravated assault or whether, as he maintained, his actions were justified by the belief of a reasonable person. *See* A.R.S. § 13-404(A) (limiting self-defense justification in threatening or using physical force against another when and to the extent a reasonable person would believe physical force immediately necessary to protect against use or attempted use of unlawful physical force). We cannot say the trial court abused its discretion in finding the

"probative value" of the evidence "substantially outweigh[ed] any prejudicial effect" from its admission.

## Disposition

**¶18** For the foregoing reasons, Hidde's convictions and sentences are affirmed.