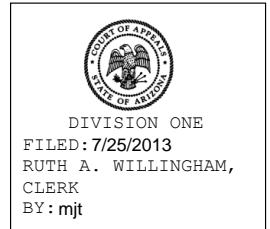


NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24



IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,) No. 1 CA-CR 11-0750
)
Appellee,) DEPARTMENT B
)
v.) **MEMORANDUM DECISION**
) (Not for Publication -
ROBERT STEVEN CURTIS,) Rule 111, Rules of the
) Arizona Supreme Court)
Appellant.)
)
)
_____)

Appeal from the Superior Court in Maricopa County

Cause No. CR2010-149647-001

The Honorable Robert L. Gottsfield, Judge (Retired)

AFFIRMED

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

James J. Haas, Maricopa County Public Defender Phoenix
By Christopher V. Johns, Deputy Public Defender
Attorneys for Appellant

O R O Z C O, Judge

¶1 Robert Steven Curtis appeals his conviction and sentence for second-degree murder. He contends the trial court abused its discretion in denying his motion to dismiss for

failure to preserve exculpatory evidence. For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 Curtis was indicted for first-degree murder for shooting and killing the victim and first-degree burglary for entering the victim's motor home with the intent to commit a felony.

¶3 Before trial, Curtis moved to dismiss the charges. He alleged that the police exercised bad faith by failing to measure, weigh, and preserve the column fan that he claimed the victim threw at him when he entered the motor home. He argued that the police should have preserved the fan in light of its "obvious" value as both "material exculpatory evidence" and "potentially useful evidence" to show that his conduct was justified.

¶4 After an evidentiary hearing, the court found that the police had not acted in bad faith in failing to preserve the fan and Curtis had not suffered prejudice because there were photographs of the fan. It also found no due process violation and denied the motion. The court, however, granted Curtis's request for a *Willits*¹ instruction to allow the jury to infer

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

from the State's failure to preserve the evidence that the evidence would have been unfavorable to the State.

¶15 Although Curtis testified that he shot the victim in self-defense, the jury convicted him of second-degree murder.² The trial court sentenced Curtis to a mitigated term of ten years in prison and designated the sentence "clearly excessive" pursuant to Arizona Revised Statutes (A.R.S.) section 13-603.L (2010).

¶16 Curtis timely appealed. We have jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution and A.R.S. §§ 12-120.21.A.1 (2003), 13-4031 (2010), and -4033.A.1 (2010).

DISCUSSION

¶17 Curtis argues that the court abused its discretion in denying his motion to dismiss. In reviewing the ruling on the pretrial motion, we limit our review to the evidence admitted at the evidentiary hearing. See *State v. Blackmore*, 186 Ariz. 630, 631, 925 P.2d 1347, 1348 (1996) (stating that review of a denial of a motion to suppress is restricted "to consideration of the facts the trial court heard at the suppression hearing"). We review the ruling for an abuse of discretion. *State v. Moody*, 208 Ariz. 424, 448, ¶ 75, 94 P.3d 1119, 1143 (2004).

² The jury acquitted Curtis of first-degree murder but found him guilty of the lesser-included offense of second-degree murder. It also acquitted him of first-degree burglary.

¶18 Curtis contends the fan should have been preserved because of its value as both "material exculpatory evidence" and "potentially useful evidence." "Material exculpatory evidence" is evidence that possesses "an exculpatory value that was apparent before the evidence was destroyed" and is "of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means." *California v. Trombetta*, 467 U.S. 479, 489 (1984). When the State suppresses or fails to disclose "material exculpatory evidence," "the good or bad faith of the prosecution is irrelevant: a due process violation occurs whenever such evidence is withheld." *Illinois v. Fisher*, 540 U.S. 544, 547 (2004).

¶19 If, however, a defendant can demonstrate "potentially useful evidence" was suppressed, the court has a different standard to consider. "Potentially useful evidence" is evidence "of which no more can be said than that it could have been subjected to tests, the results of which might have exonerated the defendant." *Arizona v. Youngblood*, 488 U.S. 51, 57 (1988). Failure to preserve "potentially useful evidence" does not constitute a denial of due process unless the defendant can show bad faith on the part of the police. *Id.* at 58; see also *Fisher*, 540 U.S. at 548-49 (bad faith required even when contested evidence provides a defendant's "only hope for exoneration"); *State v. Speer*, 221 Ariz. 449, 457, ¶ 36, 212

P.3d 787, 795 (2009) (same test applies under Arizona Constitution).

¶10 In this case, Phoenix Police Sergeant Long testified that the investigation revealed that Curtis shot the victim in the stomach after the victim broke into Curtis's residence and threw rocks at his head. After the victim retreated to his motor home, Curtis followed him and entered the motor home with his shotgun. Phoenix Police Homicide Detective Ruggeri, the case agent, testified that during an interview, Curtis stated that when he entered the victim's motor home, the victim threw "a heater or a fan or an object" at him, hitting his arm. At that point, the evidence revealed that Curtis fired twice and killed the victim. Detective Ruggeri testified that he called the scene investigator that night to alert him that "a fan, a heater or an object was alleged by Mr. Curtis to have been thrown at him."

¶11 Phoenix Police Crime Scene Specialist Raponi testified that she recalled hearing something to the effect that a fan "came into play" during a fight and that she should look for it. She said she found the fan and examined it with a flashlight. Knowing that the fan had been photographed and not finding any blood on it or seeing anything unusual about it other than that it was broken, she did not impound it. She testified that she did not measure the fan and did not know how much it weighed,

but she could tell its size from the photographs because it was slightly larger than a nearby computer tower.

¶12 Based on the evidence presented, we agree with the trial court that the column fan was not immediately recognized as having any apparent exculpatory value; therefore, it was not "material exculpatory evidence." We also fail to see how subjecting the fan to additional testing would have exonerated Curtis, as there was no dispute whether the victim struck Curtis with the fan. Accordingly, the fan was not "potentially useful evidence."

¶13 Moreover, even if we presume that the column fan was "potentially useful evidence" and the police were negligent in failing to measure, weigh, and preserve it, *see Youngblood*, 488 U.S. at 58 (stating that the police were, at worst, negligent in failing to refrigerate clothing and perform tests on semen samples), there was no basis for the trial court to consider that the police acted in bad faith when determining not to impound the fan. And, even if we assume that the police should have taken the fan after Curtis told them that it had been thrown at him, the police photographed the fan. They also returned to the scene two days after the shooting; however, the motor home and the fan were gone and could not be located. Consequently, Curtis failed to show that the police acted in bad faith.

¶14 Furthermore, Curtis suffered no prejudice because there were photographs of the fan, and he could have used the photographs to find a similar fan to show to the jury to support his self defense claim. Accordingly, we find no abuse of discretion.

CONCLUSION

¶15 For the foregoing reasons, we affirm Curtis's conviction and sentence.

/S/

PATRICIA A. OROZCO, Judge

CONCURRING:

/S/

RANDALL M. HOWE, Presiding Judge

/S/

MAURICE PORTLEY, Judge