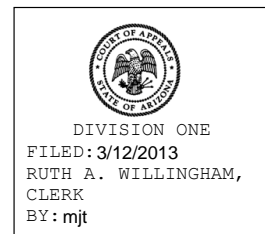


NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES. See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

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



STATE OF ARIZONA,) 1 CA-CR 11-0857
)
Appellee,) DEPARTMENT B
)
v.) **MEMORANDUM DECISION**
) (Not for Publication -
KRYSTAL QUEZADA,) Rule 111, Rules of the
) Arizona Supreme Court)
Appellant.)
)
)

Appeal from the Superior Court in Maricopa County

Cause No. CR2009-153247-001

The Honorable Samuel A. Thumma, Judge

AFFIRMED

Thomas C. Horne, Attorney General Phoenix
By Kent E. Cattani, Chief Counsel
Criminal Appeals/Capital Litigation Section
And Aaron J. Moskowitz, Assistant Attorney General
Attorneys for Appellee

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

G O U L D, Judge

¶1 Krystal Quezada appeals her conviction and sentence for trafficking in stolen property in the second degree, a class three felony. Quezada argues the trial court abused its discretion by denying her request for a *Willits* instruction. For the reasons discussed below, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

¶2 In February 2009, Quezada and her husband lived with her mother-in-law, the victim. On the morning of February 25, 2009, the victim placed three gold bangles in her jewelry box. When the victim came home from work the next evening, she noticed her bangles were missing from her jewelry box.

¶3 After searching her house and not finding the bangles, the victim called the police and reported the jewelry as missing. The police eventually discovered the bangles were pawned at a pawn shop on February 26, 2009. The tickets from the pawn shop listed Quezada as the person who pawned the jewelry.¹ A forensic

¹ The pawn shop manager testified that pawn shops are required by law to keep both pawn and police tickets for property transactions. Both tickets contain some of the same information. A pawn ticket is the contract between the pawn shop and the customer which shows that the customer provided a government issued identification card for the transaction of either selling an item or getting a collateral loan on the item the customer brought in. A police ticket contains a description of the item brought in by the customer and a fingerprint of the customer. The pawn shop keeps one copy of the police ticket and the police department receives the other copy.

technician later determined that Quezada's fingerprint matched the fingerprint on the police ticket obtained from the pawn shop.

¶4 During a tape-recorded interview with Detective D., Quezada later admitted that she stole the bangles and pawned them at the pawn shop.

¶5 In the course of his investigation, the detective assigned to the case asked the pawn shop manager for the surveillance video from the day of the sale. The pawn shop's general practice was to keep surveillance videos for ninety days. The detective testified at trial that he requested the pawn shop's video surveillance within the ninety day holding period. However, the pawn shop manager testified the police did not request the video until their retention period for holding the video "had expired already."

¶6 Prior to the close of trial, Quezada requested a *Willits* instruction based on the State's alleged failure to preserve the video surveillance from the pawn shop. When asked by the Court how this evidence would have a tendency to exonerate the defendant, counsel for Quezada asserted that the Court "could conclude based on the inadequacy of the rest of the State's investigation that this evidence could have had a tendency to be exculpatory evidence." The court found that Quezada had not shown how the evidence would have had a tendency to exonerate her and denied her request.

¶7 The jury found Quezada guilty of trafficking in stolen property in the second degree. The trial court sentenced her to one year of unsupervised probation. Quezada timely appealed her conviction and sentence. We have jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution, and A.R.S. §§ 12-120.21(A)(1), 13-4031 and -4033(A).

DISCUSSION

¶8 We review a trial court's denial of a request for a *Willits* instruction for an abuse of discretion. *State v. Speer*, 221 Ariz. 449, 457, ¶ 39, 212 P.3d 787, 795 (2009). A *Willits* instruction allows the trier of fact to draw an inference that evidence lost or destroyed by the State would have been unfavorable to the State. *State v. Willits*, 96 Ariz. 184, 191, 393 P.2d 274, 279 (1964); *State v. Broughton*, 156 Ariz. 394, 399, 752 P.2d 483, 488 (1988).

¶9 A defendant is entitled to a *Willits* instruction if she shows "(1) the state failed to preserve material and reasonably accessible evidence that had a tendency to exonerate the accused, and (2) there was resulting prejudice." *State v. Davis*, 205 Ariz. 174, 180, ¶ 35, 68 P.3d 127, 133 (App. 2003) (citation omitted). In establishing prejudice, a defendant must show actual prejudice; the potential exculpatory value of the lost or destroyed evidence may not be speculative. *Davis*, 205 Ariz. at 180, ¶ 37, 68 P.3d at 133. See *State v. Fulminante*, 193 Ariz.

485, 503, 975 P.2d 75, 93 (1999) (a trial court does not abuse its discretion by denying a request for a *Willits* instruction when the defendant fails to establish that the lost or destroyed evidence would have had a tendency to exonerate her).

¶10 Here, the trial court did not err when it denied Quezada's request for a *Willits* instruction. Even assuming the State failed to preserve the surveillance video, Quezada has made no showing that the surveillance tape was exculpatory. Indeed, apart from Quezada's speculation about the contents of the video, there is nothing in the record to support her assertion the video would have been exculpatory, particularly in light of the fact she admitted to pawning the victim's jewelry and her fingerprint was on the pawn shop ticket.

CONCLUSION

¶11 For the foregoing reasons, we affirm Quezada's judgment and sentence.

/S/

ANDREW W. GOULD, Judge

CONCURRING:

/S/

PATRICIA K. NORRIS, Presiding Judge

/S/

RANDALL M. HOWE, Judge