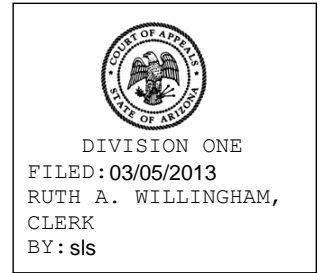


NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED  
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.  
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);  
Ariz. R. Crim. P. 31.24



IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION ONE

STATE OF ARIZONA, ) 1 CA-CR 11-0893  
)  
Appellee, ) DEPARTMENT D  
)  
v. ) **MEMORANDUM DECISION**  
) (Not for Publication -  
TRAMANE LOPEZ MITCHELL, ) Rule 111, Rules of the  
) Arizona Supreme Court)  
Appellant. )  
)  
)

Appeal from the Superior Court in Maricopa County

Cause No. CR2010-142843-001

The Honorable Christine E. Mulleneaux, Commissioner

**AFFIRMED**

Thomas C. Horne, Arizona Attorney General Phoenix  
By Kent E. Cattani, Chief Counsel,  
Criminal Appeals/Capital Litigation Section  
and Barbara A. Bailey, Assistant Attorney General  
Attorneys for Appellee

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

**T H O M P S O N**, Judge

¶1 The state charged defendant, Tramane Mitchell,<sup>1</sup> with

<sup>1</sup> On the court's own motion, it is hereby ordered amending

obstructing a highway or other public thoroughfare, a Class 3 misdemeanor (Count 1); two counts of resisting arrest, each a Class 6 felony (Counts 2 and 6); and three counts of aggravated assault of a police officer, one a Class 3 felony (Count 3) and the remaining two Class 4 felonies (Counts 4 and 5). The charges were filed<sup>2</sup> after a Phoenix Police officer observed defendant walking against traffic in the northbound lane of 35th Avenue, jumping in front of oncoming vehicles and causing their drivers "to swerve out of the way" to avoid hitting him. When contacted by police, defendant was verbally belligerent, denied walking in the street, and repeatedly refused to identify himself to the officers. The officers arrested defendant for obstruction of a public thoroughfare and for failure to identify himself.

¶2 Defendant resisted the officers' efforts to handcuff him at the scene and pinned one officer's arm underneath his body while they scuffled on the ground. It took three officers to prise defendant's hands out from under defendant's body and handcuff him.

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the caption for this appeal as reflected in this decision. The above referenced caption shall be used on all documents filed in this appeal.

<sup>2</sup> We view the trial evidence in the light most favorable to sustaining defendant's convictions and resolve all reasonable inferences against defendant. *State v. Manzanedo*, 210 Ariz. 292, 293, ¶ 3, 110 P.3d 1026, 1027 (App. 2005).

¶13 Later, while in the "horseshoe area" at the Fourth Avenue Jail with other arrestees, defendant again became verbally belligerent and combative and refused to comply with officers' commands. Defendant injured Phoenix Police Officers Joseph Ramirez and Steve Jones by punching Ramirez in the face and fracturing his nose, and by "waist tackling" Jones and causing him to fall and injure his back on the concrete floor.

¶14 After a trial, at which defendant presented witnesses and also testified, the jury found defendant guilty of two counts of resisting arrest (Counts 2 and 6), and three counts of aggravated assault (Counts 3, 4, and 5). The trial court sentenced defendant to the following terms of imprisonment: 3.75 years on Count 2, 15 years on Count 3, 10 years on Count 4, 10 years on Count 5, and 3.75 years on Count 6. The court ordered that the sentences on Counts 3 and 4 be served concurrently; it ordered that the sentences on the remaining counts be served concurrently to one another but consecutively to the sentences in Counts 3 and 4.

¶15 Defendant timely appealed. On appeal, defendant argues that the trial court abused its discretion by (1) precluding two defense witnesses and (2) denying his request for a *Willits* instruction based on the state's failure to preserve the names and identification of other inmates who were in the

holding cell with him at the jail.<sup>3</sup>

¶16 This court has jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution, and Arizona Revised Statutes (A.R.S.) sections 12-120.21(A)(1) (2003), 13-4031 (2010) and -4033 (2010). For reasons stated below, we find no abuse of discretion and affirm.

### **DISCUSSION**

#### *Preclusion of Defense Witnesses*

¶17 Prior to trial, the state filed a motion *in limine* to preclude the testimony of two defense witnesses, Vincent Salvato, an investigator for the Public Defender's Office, and Dr. Shil Patel, a physician who had examined defendant sometime after the night of his arrest. The state had interviewed both and maintained that neither one's testimony was relevant to proving whether defendant committed the charged offenses or to his defenses of justification and/or self-defense. Salvato was expected to testify to problems he had in obtaining identifying information about the other inmates who were in the horseshoe area with defendant on the night of the assault that the defense requested from the Phoenix Police Department and/or the Maricopa County Sheriff's Office. Patel was expected to testify

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<sup>3</sup> *State v. Willits*, 96 Ariz. 184, 393 P.2d 274 (1964).

regarding his ongoing treatment of defendant for a condition called a "retinal hole."

¶18 The trial court held a hearing on the motion at which it heard argument from counsel. Regarding Salvato's testimony, defense counsel argued that it was essential to defendant's right to a fair trial that the jury learn about the problems in obtaining the names of the other inmates. He maintained that the "process" of obtaining the information was "relevant to the jury so that they [could] determine whether they, the government and the agencies, conducted themselves properly and fairly in this case." According to defense counsel, the delay might raise "some question in the mind of the jury" concerning the fairness of the Phoenix Police Department's investigation of the assaults.

¶19 As to Patel's testimony, defense counsel conceded that Patel indicated that the retinal hole "could have been caused by other factors" or could be a "chronic" condition. However, counsel noted that Patel also stated that the condition was "consistent" with the injuries defendant sustained during his scuffle with police at the jail. He maintained that Patel's testimony therefore would be useful to the jury when it considered the photographs of defendant's injuries at trial, "so that when they see this photograph they understand that we're not just talking about swelling or a bump on the head. We're

talking about injuries that were severe enough that required surgery, medical treatment."

¶10 The prosecutor noted that the defense had eventually obtained the inmate information it sought and that Salvato's testimony about the steps he took in securing it was not relevant to a consideration of defendant's guilt. According to the prosecutor, in his interview Patel stated that he had "no way of knowing when the defendant received the retinal hole or what caused the retinal hole." His testimony therefore would provide the jury with no relevant information making it "more or less likely" that defendant resisted arrest or committed the assaults and might instead confuse the jury.

¶11 At the conclusion of the hearing, the trial court granted the state's motion *in limine*. Prior to the start of testimony, defense counsel asked the court to reconsider its decision with respect to Patel's testimony. Counsel conceded that, "in the interview . . . [Patel] could not really pinpoint the date of the injury," but that Patel did say defendant's injuries were "consistent with an assault." It was therefore important to defendant's self-defense defense to present testimony from "his doctor regarding his medical condition or the injuries that he sustained because of the processing in the jail."

¶12 The trial court affirmed its prior rulings and stated that it was precluding Patel's testimony because "there's simply no way to link the defendant's eye condition with anything that actually occurred" on the date of the assaults. Patel's testimony therefore was not relevant and "would lead the jurors off on a tangent." The court noted that defendant could adequately establish his self-defense arguments through the photographs of defendant's injuries that he expected to introduce at trial.

¶13 On appeal, defendant argues that both witnesses' testimonies were relevant and important to defendant's self-defense defense. Salvato's testimony would have shown "bias" on the part of the Phoenix Police Department in investigating the offenses and "bad faith" on the part of the prosecution for not interviewing any of the other inmates that were present during the assaults; and Patel's testimony was "crucial to [defendant's] self-defense claim" and "relevant to whether he sustained injury." We find these arguments without merit.

¶14 It is well established that decisions regarding the admission or exclusion of evidence are left to the sound discretion of the trial court and will be reversed on appeal only when they constitute a clear and prejudicial abuse of the court's discretion." *State v. Ayala*, 178 Ariz. 385, 387, 873 P.2d 1307, 1309 (App. 1994) (internal citations and quotations

omitted); see also *State v. Amaya-Ruiz*, 166 Ariz. 152, 167, 800 P.2d 1260, 1275 (1990) ("The trial court has considerable discretion in determining the relevance and admissibility of evidence, and we will not disturb its ruling absent a clear abuse of that discretion."). To require reversal, the prejudice to the defendant from the trial court's error "must be sufficient to create a reasonable doubt about whether the verdict might have been different." *Ayala*, 178 Ariz. at 387, 873 P.2d at 1309.

¶15 Relevant evidence is evidence having "any tendency to make a fact more or less probable than it would be without the evidence" when "the fact is of consequence in determining the action." Ariz. R. Evid. 401. The trial court properly determined that the witnesses' testimony was not relevant to a determination of his guilt with respect to the charges in this case.

¶16 This matter went to trial in July and August of 2011. The trial court confirmed that defendant had received the requested inmate information in either April or May. Despite any travails in obtaining the information, defendant had it sufficiently ahead of time that he subpoenaed and presented the testimony of two of the inmates that were in the horseshoe at the time of the assaults. An explanation of the steps that defendant's investigator may have had to go through to



ultimately obtain that information from the appropriate agency, including any delays encountered, is not relevant because it has no bearing on any fact that would make it "more or less probable" that defendant "intentionally, knowingly or recklessly" caused injury to Ramirez and Jones, or resisted arrest, or acted in self-defense while in the holding cell at the jail. Ariz. R. Evid. 401.

¶17 Furthermore, defense counsel elicited testimony from the officer who conducted the investigation of this case that she had not interviewed any of the other inmates who were in the horseshoe area with defendant because she did not think it was necessary to do so. Defendant was thus able to suggest to the jury possible flaws in the state's handling of the investigation. The trial court did not abuse its discretion in precluding Salvato's testimony regarding his efforts in securing the inmate information.

¶18 It similarly did not abuse its discretion in precluding Patel's testimony. Patel treated defendant months after the incident occurred. It was uncontested that Patel had no idea what caused the retinal hole in defendant's eye and could not positively link its existence to any injuries defendant received during the altercation at the jail. It was also uncontested that Patel opined that, in some instances, a

retinal hole can occur naturally or occur as the result of an eye injury that happened "many, many years ago."

¶19 A trial court may exclude even relevant evidence if its probative value is substantially outweighed by the danger of "unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." *Amaya-Ruiz*, 166 Ariz. at 167, 800 P.2d at 1275. Here, the trial court properly concluded that the testimony about the retinal hole was *not* relevant and also that it would have sidetracked the jury down a needless path. There was no question at trial that defendant was also injured during the altercation at the jail. Given that fact and the fact that there was no way of linking the retinal hole to the injuries he received that night, Patel's testimony would have had no bearing on the issue of whether defendant was the aggressor or acted in self-defense. The trial court did not abuse its discretion when it granted the state's motion *in limine* and precluded the testimony of both these witnesses in this case. *Ayala*, 178 Ariz. at 387, 873 P.2d at 1309.

*Failure to Give a Willits Instruction*

¶20 Defendant requested that the trial court give a *Willits* instruction, arguing that it was warranted (1) because the state failed to timely produce the names and identification of the other inmates in the horseshoe area with defendant until

the defense "got a court order" to secure the names and (2) by that time he was only able to track down some of the inmates. The trial court denied the request, reasoning that a *Willits* "instruction is not merely given because a more exhaustive investigation" could have been done by the police and also that, in any event, defendant did have the information prior to trial and was able to find at least two of the inmates.

¶21 On appeal, defendant contends that the trial court erred when it denied his request for the instruction and that he was "prejudiced" because "[t]he additional inmates could have provided exculpatory testimony." The trial court did not abuse its discretion in denying defendant's request for the *Willits* instruction in this case.

¶22 We review a trial court's denial of a request for a *Willits* instruction for an abuse of discretion. *State v. Fulminante*, 193 Ariz. 485, 503, ¶ 62, 975 P.2d 75, 93 (1999). A *Willits* instruction is appropriate only when the state "destroys or loses evidence potentially helpful to the defendant." *State v. Murray*, 184 Ariz. 9, 33, 906 P.2d 542, 566 (1995) (citation omitted). It is not given merely because the state could have carried out a more exhaustive investigation. *Id.* Furthermore, the state does not have an affirmative duty to either seek out or gain possession of potentially exculpatory evidence. *State v. Rivera*, 152 Ariz. 507, 511, 733 P.2d 1090, 1094 (1987).

¶123 As noted above, the investigating officer in this case testified that she had not tracked down or interviewed the other inmates in the horseshoe area because she did not believe it was necessary. She testified that she came to that conclusion after viewing the videotape of the incident because she found that the officers' statements of what occurred and the videotape<sup>4</sup> of the incident appeared to be consistent, and she therefore "never had any reason to believe there was anything else that [the other inmates] could have contributed to the information that we had." As the trial court noted, having reached this conclusion the state was not required to seek out additional information from the other inmates on the off chance that it might have some value for defendant. *Id.* Most importantly however, the instruction was not required because it is uncontested that defendant, in fact, received the necessary information well over one month before the start of the trial. The trial court did not abuse its discretion in denying defendant's request for a *Willits* instruction in this case.

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<sup>4</sup> The videotape was played for the jury at trial.

**CONCLUSION**

¶24 For the foregoing reasons, we affirm defendant's convictions and sentences.

/s/

JON W. THOMPSON, Judge

CONCURRING:

/s/

JOHN C. GEMMILL, Presiding Judge

/s/

DONN KESSLER, Judge