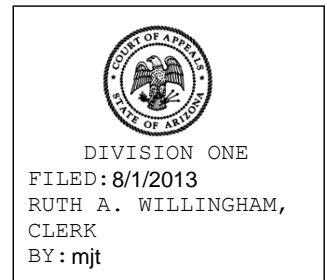


NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES. See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION ONE



STATE OF ARIZONA, ) 1 CA-CR 12-0605  
)  
Appellee, ) DEPARTMENT D  
)  
v. ) **MEMORANDUM DECISION**  
) (Not for Publication -  
AMMED HASSAN, ) Rule 111, Rules of the  
) Arizona Supreme Court)  
Appellant. )  
)  
)

Appeal from the Superior Court in Maricopa County

Cause No. CR2011-154825-001

The Honorable Shellie F. Smith, Judge *Pro Tempore*

**AFFIRMED**

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Thomas C. Horne, 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 Paul J. Prato, Deputy Public Defender  
Attorneys for Appellant

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**G O U L D**, Judge

¶1 Defendant-Appellant Ammed Hassan ("Hassan") appeals from his conviction and resulting sentence for burglary in the

second degree, a class three felony. Finding no reversible error, we affirm.

¶2 Hassan was sentenced on August 30, 2012; he filed a notice of appeal on September 19, 2012. Hassan's counsel filed a brief in accordance with *Anders v. California*, 386 U.S. 738 (1967), and *State v. Leon*, 104 Ariz. 297, 451 P.2d 878 (1969), advising this Court that after a search of the entire appellate record, no arguable ground exists for reversal. Hassan was granted leave to file a supplemental brief *in propria persona*, and did so on May 9, 2013.

¶3 Our obligation in this appeal is to review "the entire record for reversible error." *State v. Clark*, 196 Ariz. 530, 537, ¶ 30, 2 P.3d 89, 96 (App. 1999). We have jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution and Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(1), 13-4031 and 13-4033(A)(1) (West 2013).<sup>1</sup>

### ***Facts and Procedural History***<sup>2</sup>

¶4 In the late evening hours of October 21, 2011, police were notified by an alarm company that an alarm was going off in

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<sup>1</sup> Unless otherwise specified, we cite to the current version of the applicable statutes because no revisions material to this decision have occurred.

<sup>2</sup> We view the evidence in the light most favorable to sustaining the conviction and resulting sentence. See *State v. Guerra*, 161 Ariz. 289, 293, 778 P.2d 1185, 1189 (1989).

the victim's home. Upon arriving at the home, Detective Dowlen of the Scottsdale Police Department observed a man near the home holding a shoebox. After Dowlen had a brief look at the man's face, the man took off running, dropping the shoebox. Dowlen then gave chase on foot.

¶5 Although the man was able to evade capture, in the course of the chase a baseball cap flew off his head. As Dowlen returned to the house, he retrieved the cap from the ground. It was later determined that Hassan's DNA was on the interior band of the cap.

¶6 A short distance from the victim's house, police discovered the shoebox that was dropped by Hassan during the police pursuit. The box contained several pieces of costume jewelry that belonged to the victim.

¶7 In the course of the investigation, police located Hassan's truck parked at the clubhouse of the golf course adjacent to the victim's home. The officers eventually placed a GPS tracker on Hassan's truck.

¶8 A photo lineup containing a photo of Hassan was compiled and shown to Dowlen. Dowlen immediately identified Hassan from the line up, expressing his belief that Hassan was the man he had chased earlier.

¶9 The next day, Hassan retrieved his truck, and police followed him to the hotel where he was staying. Upon his arrival at the hotel, Hassan was arrested by the police.

¶10 Hassan was present and represented by counsel at all stages of the case. At trial, Dowlen identified Hassan as the suspect he saw running from the victim's house. The jury found Hassan guilty of burglary in the second degree. During the trial Hassan admitted to a prior felony conviction.

¶11 After Hassan was convicted, the trial court held a hearing regarding Hassan's prior felony convictions. The court determined that Hassan had a total of five prior convictions. Hassan was given an opportunity to speak at sentencing.

¶12 The trial court sentenced Hassan to a term of 13 years, and imposed an additional 2 years because the offense was committed while he was on pretrial release, making a total of 15 years.<sup>3</sup> A.R.S. § 13-708(D). He was given credit for 312 days served. In addition, he was ordered to pay \$700 in restitution to the victim.

### ***Discussion***

¶13 Hassan raises several issues in his supplemental brief. First, Hassan argues that Dowlen's identification of him as the

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<sup>3</sup> At the time of Hassan's arrest, he was on pretrial release for possession of a weapon by a prohibited person and criminal trespassing, first degree, both felonies. These charges were pending when Hassan committed the subject crime, but were both later dismissed prior to trial in this case.

suspect running from the victim's house was unreliable because (1) it was dark, and Dowlen only had a brief opportunity to look at the suspect's face, and (2) Dowlen's initial reports described the suspect as a Hispanic male, while Hassan is an African-American male.

¶14 The mere fact there may have been evidence challenging the reliability of Dowlen's identification does not constitute reversible error. "The credibility of witnesses is an issue of fact to be resolved by the jury; as long as there is substantial supporting evidence, we will not disturb their determination." *State v. Harrison*, 111 Ariz. 508, 509, 533 P.2d 1143, 1144 (1975). Here, in addition to Dowlen's testimony, there was substantial evidence supporting the reliability of his identification of Hassan. For example, Hassan's DNA was found on the baseball cap that fell off his head as he fled from Dowlen, and Hassan's car was found parked nearby the victim's house.

¶15 Hassan further argues that the photo lineup presented to Dowlen was unduly suggestive, and as a result Dowlen should have been precluded from making an in-court identification. *State v. Dessureault*, 104 Ariz. 380, 453 P.2d 951 (1969). More specifically, Hassan argues that the photo lineup was unduly suggestive because Dowlen's initial report described the suspect as a Hispanic male, while everyone in the lineup was African-American, including Hassan.

¶16 However, Hassan never moved to suppress Dowlen's identification, and "if the in-court identification is not challenged at the trial level, it will be presumed thereafter that prior identification procedures did not taint the in-court identification." *Dessureault*, 104 Ariz. 380 at 384, 453 P.2d 951 at 955. Moreover, even if we were to consider the merits of Hassan's argument, because he failed to object at trial, we review this claim for fundamental error only. *State v. Henderson*, 210 Ariz. 561, 567, ¶ 19, 115 P.3d 601, 607 (2005). Here, the lineup consisted of Hassan and five other men that shared similar physical characteristics, and prior to viewing the lineup Dowlen was read an admonition that made it clear he did not have to identify anyone. Dowlen chose the photo of Hassan immediately, certain that Hassan was the man who had fled from him. We find no evidence in the record that the lineup was unduly suggestive.

¶17 Hassan next argues that the prosecution used perjured testimony by several police officers at trial. In support of this contention, Hassan points to instances where the officers allegedly made errors or inconsistent statements during their testimony. However, such contentions merely go to the weight and credibility of these witnesses, and do not, in light of all the evidence in this case, constitute reversible error, much less proof of perjury.

¶18 Hassan also contends that the prosecution denied him access to witnesses during discovery, and that his counsel failed to interview certain witnesses.<sup>4</sup> As to Hassan's claim that his attorney did not interview certain witnesses, Hassan fails to specify which witnesses his counsel should have interviewed and how he was prejudiced by counsel's failure to interview them. Likewise, Hassan has not identified which witnesses the prosecution denied him access to, nor what the nature of their anticipated testimony might be. Because Hassan has failed to adequately present these arguments we are unable to discern any error.

¶19 Hassan also claims that he should have received a *Willits* instruction because the police destroyed evidence in bad faith. Specifically, he claims there was evidence in his truck that he could not access, as well as footprints in the grass near the scene of the chase that were not documented. 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). A defendant is entitled to a *Willits*

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<sup>4</sup> To the extent Hassan seeks to raise a claim for ineffective assistance of counsel, that issue may not be raised on direct appeal; therefore, we do not reach that issue in this decision. *State v. Spreitz*, 202 Ariz. 1, 3, ¶ 9, 39 P.3d 525, 527 (2002).

instruction if he 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. *Id.* at ¶ 37, 68 P.3d at 133.

¶20 Hassan states that the trial court intended to give a *Willits* instruction but did not. However, our review of the record shows that this is inaccurate; Hassan withdrew his request for a *Willits* instruction during the trial. Thus, Hassan never requested a *Willits* instruction when jury instructions were settled at the close of the evidence, and the trial court never had an opportunity to rule on the issue. Absent an objection to the presence or absence of a jury instruction at trial, a party waives the right to object on appeal. Ariz. R. Crim. P. 21.3(c). As such, we review for fundamental error only. *State v. Hargrave*, 225 Ariz. 1, 14, ¶ 51, 234 P.3d 569, 582 (2010).

¶21 Moreover, even assuming Hassan properly requested a *Willits* instruction at trial, he has not shown that the potential exculpatory value of the evidence was more than speculative, nor has he shown that he was prejudiced. In short, Hassan has shown



nothing that would entitle him to a *Willits* instruction, nor is there anything on the record to support this claim.

¶22 Finally, Hassan argues that police conducted an illegal search of his hotel room after his arrest.<sup>5</sup> However, Hassan failed to file a motion to suppress or otherwise object to the search of his hotel; this issue has been raised for the first time on appeal and is limited to fundamental error review. *Henderson*, 210 Ariz. at 567, ¶ 19, 115 P.3d at 607. In any case, Hassan has not identified what items were seized, nor has he shown how he was prejudiced by the search. Our review of the record reflects that none of the evidence removed from the hotel room was used by the State at trial.

¶23 We have read and considered the entire record and have found no meritorious grounds for reversal of Hassan's conviction or for modification of the sentence imposed. *Clark*, 196 Ariz. at 541, ¶ 50, 2 P.3d at 100. Hassan was present at all critical stages of the proceedings and was represented by counsel. All proceedings were conducted in compliance with the Arizona Rules of Criminal Procedure, and substantial evidence supported the finding of guilt. Accordingly, we affirm.

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<sup>5</sup> Hassan does not argue that the search of his vehicle was illegal.

**Conclusion**

¶24 Counsel's obligations pertaining to Hassan's representation in this appeal have ended. Counsel need do nothing more than inform Hassan of the status of the appeal and his future options, unless counsel's review reveals an issue appropriate for submission to the Arizona Supreme Court by petition for review. *State v. Shattuck*, 140 Ariz. 582, 584-85, 684 P.2d 154, 156-57 (1984). Hassan shall have thirty days from the date of this decision to proceed, if he so desires, with an *in propria persona* motion for reconsideration or petition for review.<sup>6</sup>

/S/  
\_\_\_\_\_  
ANDREW W. GOULD, Presiding Judge

CONCURRING:

/S/  
\_\_\_\_\_  
MARGARET H. DOWNIE, Judge

/S/  
\_\_\_\_\_  
PATRICIA A. OROZCO, Judge

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<sup>6</sup> Pursuant to Arizona Rule of Criminal Procedure 31.18(b), Defendant or his counsel has fifteen days to file a motion for reconsideration. On the court's own motion, we extend the time to file such a motion to thirty days from the date of this decision.