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

DIVISION ONE
FILED: 06/23/2011
RUTH A. WILLINGHAM, CLERK
BY: GH

STATE OF ARIZONA,	)	No. 1 CA-CR 08-1036
	)	1 CA-CR 10-0001
Appellee,	)	(Consolidated)
	)	
v.	)	DEPARTMENT C
	)	
ISIDRO SAUCEDA,	)	**MEMORANDUM DECISION**
	)	(Not for Publication -
Appellant.	)	Rule 111, Rules of the
	)	Arizona Supreme Court)
	)	

Appeal from the Superior Court in Maricopa County

Cause No. CR2005-112128-001 DT

The Honorable Raymond P. Lee, Judge

AFFIRMED

Thomas C. Horne, Arizona Attorney General — Phoenix
By Kent E. Cattani, Chief Counsel
Criminal Appeals/Capital Litigation Section
And Sarah E. Heckathorne, Assistant Attorney General
Attorneys for Appellee

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

O R O Z C O, Judge

¶1 Isidro Sauceda (Defendant) timely appeals his convictions and sentences on one count of first degree murder, two counts of attempted first degree murder, one count of aggravated assault, and one count of assisting a criminal street gang. The charges stemmed from a gang-related shooting. We have jurisdiction in accordance with Article 6, Section 9, of the Arizona Constitution, and Arizona Revised Statutes (A.R.S.) sections 12-120.21.A.1 (2003), 13-4031, and -4033.A (2010).[1] Defendant argues that the trial court erred by: (1) denying his motion to dismiss the indictment; (2) refusing his request for a *Willits* instruction; (3) improperly instructing on reasonable doubt; and (4) failing to instruct on a lesser-included offense in regard to the charges of attempted first degree murder. For the reasons that follow, we affirm.

DISCUSSION

Denial of Motion to Dismiss Indictment

¶2 A grand jury indicted Defendant on one count of first degree murder, a class one felony; two counts of attempted first degree murder, each a class two felony and dangerous offense; one count of aggravated assault, a class three felony and dangerous offense; and one count of assisting a criminal street

[1] We cite to the current version of the applicable statutes when no revisions material to this decision have since occurred.

gang, a class three felony and dangerous offense. Prior to trial, Defendant moved to dismiss the indictment, claiming it was obtained with false testimony from the investigating officer at the grand jury proceedings. The trial court summarily denied the motion.

¶3 A criminal defendant has a due process right not to stand trial on an indictment that the government knows is based on perjured testimony. *United States v. Basurto*, 497 F.2d 781, 785 (9th Cir. 1974). Arizona law requires that appellate review of a challenge to an indictment usually be made by special action prior to trial. *State v. Moody*, 208 Ariz. 424, 439-40, ¶ 31, 94 P.3d 1119, 1134-35 (2004). The one exception is when the indictment is procured through the knowing use of perjured testimony. *Id.* at 440, ¶ 31, 94 P.3d at 1135. We review the trial court's ruling on the motion to dismiss for abuse of discretion. *State v. Pecard*, 196 Ariz. 371, 376, ¶ 24, 998 P.2d 453, 458 (App. 1999).

¶4 The State's only witness at the grand jury proceedings was Glendale Police Department Detective L. (the Detective) who testified as to the information he obtained from his investigation of the shooting, including witness statements. He testified the shooting occurred after members of two rival street gangs showed up at the same party being held on neutral gang territory. To avoid trouble in these situations, rival

gang members will shake hands to acknowledge their presence and to indicate they do not intend to cause problems. A member of the Califas gang refused to shake hands with Defendant and other members of the West Side Phoeniqueras gang (the Phoeniqueras). The refusal was taken as a slight, and it caused "some bad feelings." Defendant, who the Detective testified was a member of the Phoeniqueras, pulled out a handgun and started shooting, killing one person and wounding three others. The three who were wounded were members of the Califas gang. The victim who died was a member of the Phoeniqueras and was unintentionally shot and killed by Defendant while shooting at members of the rival Califas gang.

¶5 Defendant argues that the Detective committed perjury when he testified before the grand jury that: (1) Defendant was a gang member; (2) Defendant apologized to the murder victim's brother before leaving the scene; and (3) the bullets recovered at the scene were all fired from the same gun. Perjury is a "false sworn statement [a witness makes regarding] a material issue, believing [the statement] to be false." A.R.S. § 13-2702.A.1 (2010). Thus, "[t]o constitute perjury, the false sworn statement must relate to a material issue and the witness must know of its falsity." *Moody*, 208 Ariz. at 440, ¶ 34, 94 P.3d at 1135.

¶6 As support for his argument that the Detective presented knowingly false testimony when he told the grand jury that Defendant was a member of the Phoeniqueras, Defendant notes that when the Detective queried the police gang database prior to his grand jury testimony, the result was "negative" for him being a documented gang member. Defendant also relies on the Detective's trial testimony during which the Detective admitted that there were no police records linking Defendant to a gang.

¶7 Our review of the record finds there was substantial information developed by the Detective during his investigation of the shooting that would permit him to testify that Defendant was a member of the Phoeniqueras. This information included witness statements that: (1) Defendant claimed the Glendale gang and threw up signs and said "Glendale," which is a "gang type of thing;" (2) Defendant arrived at the party with other documented members or associates of the Phoeniqueras, which is significant because in "gang culture," a person is judged "by the company he keeps," and accordingly, if an individual is "hanging out with Phoeniquaras [he's] pretty much considered an associate" of that gang; and (3) Defendant was wearing various items of red clothing to the party, the color associated with the Phoeniqueras.

¶8 At trial, the Detective acknowledged that police records did not indicate Defendant was affiliated with any

particular gang. The Detective further testified, however, that not all gang members are in the police gang database. He explained that the gang database is comprised of reported contacts with gang members by law enforcement officers on the street and that it is not uncommon for gang members to deny being gang members when questioned by the police. The absence of an individual's name from the gang database merely means their gang membership has not been documented by an officer through the completion of a gang database card used to enter names of gang members into the database. Indeed, another witness who admitted during his testimony at trial that he was a gang member was also negative when his name was checked against the gang database. Thus, the fact that Defendant's name was not in the gang database did not preclude the Detective from reasonably believing that Defendant was a gang member based on information developed in his investigation of the shooting.

¶9 The one statement by the Detective while testifying before the grand jury that could be viewed as problematic was, "The people who were involved were all documented street gangs by the police, and documented as being involved in a street gang." While this statement on its face might include Defendant within its scope, when viewed in context, it appears that the Detective was referring to witnesses who gave statements to police following the shooting. The grand jury was made aware

that these witnesses did not include Defendant in that he was not located until approximately a year-and-a-half after the shooting.

¶10 Defendant also claims the Detective committed perjury when he told the grand jury that Defendant apologized to the brother of the murder victim before leaving the scene. His argument is based on a pretrial statement to investigators by the brother of the murder victim that after the shooting, Defendant "started screaming and his cousin goes, 'hey, I'm Stevo man, I'm his cousin, I'm sorry,' and that's it, he just left." Defendant argues that the Detective's testimony misled the grand jury into believing that the apology came from Defendant rather than his cousin and that he "apologized as a confession of guilt." Although it is unclear what the brother of the murder victim meant by his pretrial statement, there was trial testimony from multiple witnesses, including the murder victim's brother, that Defendant did tell the murder victim's brother that he was sorry before running off. Furthermore, Defendant's statement of apology could reasonably be construed to be an admission of guilt. Thus, we find no knowing falsity in the Detective's grand jury testimony concerning the apology.

¶11 Defendant additionally claims the Detective misled the grand jury with his testimony that the bullets "are all nine millimeter and were fired from the same gun." Defendant argues

that this testimony falsely eliminated the possibility of a second shooter. Defendant also complains that the Detective gave the same false testimony at trial.

¶12 We find no knowing falsity in either the Detective's grand jury or trial testimony on this point. His testimony was based on findings by the criminalist who examined both the projectiles and shell casings recovered by the police at the scene of the shooting. The criminalist's testimony at trial was clear and unambiguous that, though he could not match the projectiles to any one weapon due to their condition, the seven casings were unquestionably fired from the same weapon. Based on the criminalist's findings, it was entirely reasonable for the Detective to testify that seven shots were fired from the same gun.

¶13 Defendant's reliance on *Maretick v. Jarrett*, 204 Ariz. 194, 62 P.3d 120 (2003), is misplaced. Not only was there knowingly false testimony by the investigating officer in *Maretick*, which does not exist in the present case, it was compounded by the prosecutor cutting off questions by the grand jurors and failing to properly instruct the grand jury. *Id.* at 198, ¶ 14, 62 P.3d at 124. In concluding that a redetermination of probable cause was required, our supreme court stated that the false testimony in *Maretick*, alone, was not enough to merit reversal. *Id.* (citing *Crimmins v. Superior Court*, 137 Ariz. 39,

42, 668 P.2d 882, 885 (1983)). It was only when the false testimony was considered together with the other actions of the prosecutor that reversal became necessary. *Id.* at ¶ 16. Defendant makes no claim of similar misconduct by the prosecutor in the present case with respect to the grand jury investigation. There was no abuse of discretion by the trial court in denying the motion to dismiss.

Denial of *Willits* instruction

¶14 Defendant next argues that the trial court erred by refusing his request for a *Willits* instruction based on the absence at trial of bullet fragments removed from the head of one of the wounded victims. *See generally State v. Willits*, 96 Ariz. 184, 393 P.2d 274 (1964). A *Willits* instruction permits the jury to draw an inference from the State's failure to preserve material evidence that the lost or destroyed evidence would be unfavorable to the State. *State v. Fulminante*, 193 Ariz. 485, 503, ¶ 62, 975 P.2d 75, 93 (1999). Defendant maintains that the absence of the bullet fragments deprived him of the ability to test the fragments and prove another gunman may have been responsible for the murder and attempted murder charges. In denying Defendant’s request, the trial court ruled that the evidence was insufficient to show “that the police had and discarded or destroyed, lost, or otherwise mishandled any of those fragments.”

¶15 To be entitled to a *Willits* instruction, Defendant must show: (1) the State failed to preserve accessible, material evidence that "might tend to exonerate him;" and (2) prejudice resulted. *Id*. A defendant, however, is not entitled to a *Willits* instruction "merely because a more exhaustive investigation could have been made." *State v. Murray*, 184 Ariz. 9, 33, 906 P.2d 542, 566 (1995). "Whether either showing has been made . . . is a question for the trial court," and the refusal to give a *Willits* instruction "will not be reversed absent a clear abuse of discretion." *State v. Perez*, 141 Ariz. 459, 464, 687 P.2d 1214, 1219 (1984).

¶16 We agree with the trial court that the evidence at trial does not show that the State lost, destroyed, or failed to preserve the bullet fragments. A surgeon testified that bullet fragments were removed from the victim who had been shot twice in the head. When asked what happened to the fragments, the surgeon indicated such items are "usually" given to an officer waiting outside the operating room. The surgeon further testified that when an officer is not present, there is some other procedure followed by the hospital but that he had no knowledge of that procedure. This evidence does not establish that the fragments were lost or destroyed by the police. There was no evidence the fragments were actually given to the police. Nor was there any evidence the fragments are not still in the

possession of the hospital. Absent evidence that the hospital does not have the fragments in its possession (and, therefore, available for testing by Defendant), there was no abuse of discretion by the trial court in refusing to give a *Willits* instruction.

¶17 Further, Defendant fails to show that the bullet fragments have exculpatory value. The police recovered seven nine-millimeter casings and five nine-millimeter projectiles at the scene. A criminalist testified all seven casings were fired from the same weapon. Defendant does not offer any specifics regarding the nature or size of the fragments of the other two projectiles removed from the victim's head at the hospital or make any showing that testing of the fragments would tend to exculpate him or otherwise support his theory of more than one shooter. On this record, we cannot conclude that Defendant was prejudiced by any unavailability of the bullet fragments. *See State v. Dunlap*, 187 Ariz. 441, 464, 930 P.2d 518, 541 (App. 1996) (holding defendant not entitled to *Willits* instruction when claim that lost or destroyed evidence is exculpatory is "entirely speculative").

Reasonable Doubt Instruction

¶18 Defendant also argues that the trial court committed structural error by instructing the jury on reasonable doubt using the instruction required by *State v. Portillo*, 182 Ariz.

592, 898 P.2d 970 (1995). Defendant claims this instruction is constitutionally infirm because it "violates the Fifth Amendment right to the requirement of proof beyond a reasonable doubt, the Sixth Amendment right to a jury trial, and the right to due process of law guaranteed by the Fifth and Fourteenth Amendment." Our supreme court has repeatedly rejected similar constitutional challenges to the *Portillo* instruction. *See, e.g., State v. Garza*, 216 Ariz. 56, 66-67, ¶ 45, 163 P.3d 1006, 1016-17 (2007); *State v. Ellison*, 213 Ariz. 116, 133, ¶ 63, 140 P.3d 899, 916 (2006); *State v. Dann*, 205 Ariz. 557, 575-76, ¶ 74, 74 P.3d 231, 249-50 (2003). As an intermediate appellate court, we are bound by our supreme court's decisions. *State v. Sullivan*, 205 Ariz. 285, 288, ¶ 15, 69 P.3d 1006, 1009 (App. 2003). Accordingly, we find no error.

Lack of Lesser-Included Offense Instruction

¶19 Finally, Defendant contends the trial court erred by failing to instruct on attempted second degree murder as a lesser-included offense on the two counts of attempted first degree murder. We disagree.

¶20 A defendant has the constitutional due process right to a *sua sponte* instruction on all lesser-included offenses in capital cases. *Beck v. Alabama*, 447 U.S. 625, 638 (1980). This holding, however, has not been extended to noncapital offenses. *State v. Lucas*, 146 Ariz. 597, 604, 708 P.2d 81, 88 (1985),

rejected on other grounds by State v. Ives, 187 Ariz. 102, 106, 927 P.2d 762, 766 (1996). Thus, the trial court is under no obligation to give a lesser-included offense instruction on a noncapital charge absent a properly preserved request, unless failure to instruct the jury would fundamentally violate a defendant's right to a fair trial. *Lucas*, 146 Ariz. at 604, 708 P.2d at 88. Fundamental error in regard to lack of a jury instruction "only occurs when failure to give the contested charge interferes with defendant's ability to conduct his defense." *Id.*

¶21 Prior to settlement of jury instructions, Defendant submitted a memorandum requesting that the jury be instructed on the lesser-included offenses of second degree murder and manslaughter in regard to the charge of first degree murder (Count One) and to attempted second degree murder with respect to the two charges of attempted first degree murder (Counts Two and Three). The trial court granted the request for the lesser-included offense instructions in regard to Count One. There was, however, no discussion by the trial court and counsel as to lesser-included offense instructions in regard to Counts Two and Three, and no objection by Defendant to the absence of such instructions in the final instructions to the jury. Because Defendant did not object to the trial court's failure to instruct on attempted second degree murder as a lesser-included

offense on the two counts of attempted first degree murder, our review of this claim of error is limited to fundamental error. *See* Ariz. R. Crim. P. 21.3.c ("No party may assign as error on appeal the court's . . . failing to give any instruction . . . unless the party objects thereto before the jury retires . . . ."); *State v. Rivera*, 152 Ariz. 507, 516, 733 P.2d 1090, 1099 (1987) (holding jury instruction claim waived except for fundamental error by lack of objection, notwithstanding written request).

¶22 The lack of the lesser-included offense instruction in regard to the two counts of attempted first degree murder does not rise to the level of fundamental error because it did not interfere with defendant's ability to conduct his defense. The defense at trial was that Defendant was not the shooter, not that he acted with a lesser culpable mental state. Defendant was fully able to present this defense even in the absence of an instruction on the lesser-included offense of attempted second degree murder.

¶23 Moreover, to obtain relief under fundamental error review, the defendant bears the burden of establishing not only the existence of fundamental error, but also that the error in his case caused him actual prejudice. *State v. Henderson*, 210 Ariz. 561, 567, ¶ 20, 115 P.3d 601, 607 (2005). The showing of prejudice that must be made depends on the type of error that

occurred and the facts of the particular case. *Id.* at 568, ¶ 26, 115 P.3d at 608.

¶24 In the present case, the trial court instructed on two lesser-included offenses in regard to the charge of first degree murder, but the jury nevertheless found Defendant guilty on the greater offense as charged. The victim, with respect to the first degree murder charge, was Defendant's best friend. The State's theory on this charge was that Defendant accidently killed his friend while attempting to deliberately kill the other victims and was therefore guilty of first degree murder based on "transferred intent." Under the doctrine of transferred intent, when an assailant aims at one person and hits another, the felonious intent toward the intended victim is transferred to the actual victim. *State v. Johnson*, 205 Ariz. 413, 419, ¶ 19, 72 P.3d 343, 349 (App. 2003). Consequently, to find Defendant guilty of premeditated first degree murder of his friend, the jury had to necessarily conclude that Defendant deliberately and with premeditation attempted to kill the other victims. Under these circumstances, Defendant cannot meet his burden of showing any likelihood that the jury would have found him guilty of a lesser offense on the two counts of attempted first degree murder if a lesser-included offense instruction had been given.

CONCLUSION

¶25 For the foregoing reasons, we affirm Defendant's convictions and sentences.

/S/
_____
PATRICIA A. OROZCO, Presiding Judge

CONCURRING:

/S/
_____
DONN KESSLER, Judge

/S/
_____
MICHAEL J. BROWN, Judge