

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

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE



DIVISION ONE
FILED: 12/13/2011
RUTH A. WILLINGHAM,
CLERK
BY: DLL

STATE OF ARIZONA,

Appellee,

v.

GENARO LOPEZ ARIAS,

Appellant.

1 CA-CR 10-0709

DEPARTMENT A

MEMORANDUM DECISION

(Not for Publication -
Rule 111, Rules of the
Arizona Supreme Court)

Appeal from the Superior Court in Maricopa County

Cause No. CR2009-150166-002 DT

The Honorable Glenn M. Davis, Judge

AFFIRMED

Thomas C. Horne, Attorney General
by Kent E. Cattani, Chief Counsel,
Criminal Appeals/Capital Litigation Division
and Suzanne M. Nichols, Assistant Attorney General
Attorneys for Appellee Phoenix

Law Office of Corso & Rhude
by Christopher P. Corso
John M. Rhude
Attorneys for Appellant Peoria

I R V I N E, Judge

¶1 Genaro Lopez Arias ("Arias") appeals his convictions and sentences for burglary in the first degree, misconduct involving weapons, impersonating a police officer, seven counts of aggravated assault, seven counts of kidnapping, and four counts of armed robbery. Arias argues that the trial court abused its discretion in denying defense counsel's request for a *Willits* jury instruction. For the reasons that follow, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 On appeal, we view the facts in the light most favorable to sustaining the verdict. *State v. Haight-Gyuro*, 218 Ariz. 356, 357, ¶ 2, 186 P.3d 33, 34 (App. 2008). On July 27, 2009, Arias and at least two men broke into a home with the intent to steal various items inside. Upon entry into the home, Arias and the two men immediately yelled, "Get on the floor. FBI. Put your hands up." Arias and the men were carrying assault rifles and were wearing bullet-proof vests, ski masks, and gloves. The men forced the four occupants of the home to the ground at gunpoint and duct taped their ankles together and their hands behind their backs.

¶3 While the four victims lay on the floor bound up, P.R. arrived at the home along with two friends. When P.R. and his friends entered the home, Arias and his accomplices forced them to the ground at gunpoint, taped them up, and placed a blanket

over their heads. Arias and his accomplices proceeded to steal various items from the house.

¶14 While Arias and his accomplices were ransacking the home, one of the victims was able to send a text message to his mother asking her to call the police, which she did. As Officer Vizcarra approached the victims' home, she saw a Hispanic male and several other people get into a gray truck parked near the victims' home. Officer Vizcarra reported the license plate number of the truck and attempted to perform a traffic stop. However, when the truck began to increase its speed, Officer Vizcarra backed off and allowed Officer Bauer to pursue the truck from a safe distance.

¶15 A few minutes later, Officer Bauer reported over the radio that the truck had crashed approximately two miles from the victims' home. Officer Bauer testified that a passing motorist told him that three men, believed to be Hispanic, had gotten out of the truck and run away. A subsequent search of the immediate area led to the apprehension of Arias, who was found hiding in a nearby yard. Arias's accomplices were also found hiding nearby.

¶16 Inside the truck, officers found three black ski masks, a camouflage mask, a bullet-proof vest, crowbars, a handgun, assault rifles, a shotgun, ammunition, a laptop, video game consoles, duct tape, and various personal items belonging

to the victims, including two wallets with driver's licenses for two of the victims. Officers later discovered that Arias was the registered owner of the truck.

¶7 The jury convicted Arias on all twenty-one counts. The court sentenced Arias to life in prison pursuant to A.R.S. § 13-706(B) (2009) because Arias had two prior, unrelated, convictions for violent or aggravated felonies. Arias timely appeals.

DISCUSSION

¶8 Arias argues that the trial court abused its discretion in denying defense counsel's request for a *Willits* jury instruction. A fair trial includes the right to jury instructions related to any theory of the case reasonably supported by the evidence presented. *State v. Shumway*, 137 Ariz. 585, 588, 672 P.2d 929, 932 (1983). A defendant's due process right to a fair trial is violated when the State either fails to preserve or destroys evidence favorable to the defendant and prejudice subsequently ensues. *Brady v. Maryland*, 373 U.S. 83, 87 (1963). "A defendant is entitled to a *Willits* instruction only upon proof that (1) the state failed to preserve material evidence that was accessible and might have tended to exonerate [the defendant], and (2) there was resulting prejudice." *State v. Bolton*, 182 Ariz. 290, 308-09, 896 P.2d 830, 848-49 (1995).

¶9 A trial court's refusal to give a requested *Willits* jury instruction is reviewed for an abuse of discretion. *State v. Speer*, 221 Ariz. 449, 457, ¶ 39, 212 P.3d 787, 795 (2009). "An error of law committed in reaching a discretionary conclusion may, however, constitute an abuse of discretion." *State v. Robles*, 213 Ariz. 268, 270, ¶ 4, 141 P.3d 748, 750 (App. 2006) (citation omitted). Whether a trial court properly instructs the jury on the law receives de novo review. *State v. Orendain*, 188 Ariz. 54, 56, 932 P.2d 1325, 1327 (1997).

¶10 Arias argues that the State failed to preserve material and reasonably accessible evidence having a tendency to exonerate him. Specifically, Arias alleges that police created a photo lineup of potential perpetrators, showed those photos to one of the victims, R.R., and then failed to preserve the photos. Arias argues that the State's alleged failure to preserve the photos substantially prejudiced his rights because he was unable to effectively prepare his defense.

¶11 The State argues that no such photo lineup was ever created or shown to any of the victims at any point. Detective Hickman testified that whenever a photo lineup of potential perpetrators is printed, a record of that lineup is automatically saved onto a police database. Detective Hickman stated that he conducted an "extensive search" and was unable to

find any record of a photo lineup ever being printed or shown to any of the victims at any point.

¶12 Detective Hickman further testified that although R.R. informed police that she saw one of the perpetrators lift up his ski mask, he did not show R.R. a photo lineup because R.R. indicated that she believed she saw a "light skinned" male, and the three men whom police arrested were not light skinned. Thus, a photo lineup would have served little purpose. Detective Hickman also stated that he did not create a photo lineup because the perpetrators were all wearing ski masks.

¶13 Additionally, testimony from the other victims supports the State's position that a photo lineup was never created or shown to R.R. Two of the victims, P.R. and P.R., both testified that they were only shown photos of stolen property and that they were never shown photos of potential perpetrators. P.R. further testified that he can confirm R.R. was never shown photos of potential perpetrators because he was with R.R. when she claims police showed her pictures of potential perpetrators.

¶14 The trial court did not abuse its discretion in declining to give a *Willits* instruction because there is significant doubt as to whether R.R. was ever shown any photos of potential perpetrators. *See State v. Bolton*, 182 Ariz. 290, 309, 896 P.2d 830, 849 (1995) (holding that the decision to refuse a jury instruction is within the trial court's discretion

and that this Court will not reverse that decision absent a clear abuse of that discretion).

¶15 Even assuming a photo lineup was shown to R.R., we find that Arias was not prejudiced by the State's failure to preserve the photos because there was considerable evidence of Arias's guilt. See *State v. Reffitt*, 145 Ariz. 452, 462, 702 P.2d 681, 691 (1985) (finding no significant prejudice in lack of *Willits* instruction because there was overwhelming evidence of the defendant's guilt). Additionally, the jury heard R.R.'s testimony that she believed one of the assailants was light skinned. The jury weighed the credibility of R.R.'s testimony in light of the additional evidence Arias was not significantly prejudiced by the trial court's refusal to issue a *Willits* jury instruction.

CONCLUSION

¶16 For the foregoing reasons, we affirm Arias's convictions and sentences.

/s/

PATRICK IRVINE, Judge

CONCURRING:

/s/

ANN A. SCOTT TIMMER, Presiding Judge

/s/

DANIEL A. BARKER, Judge