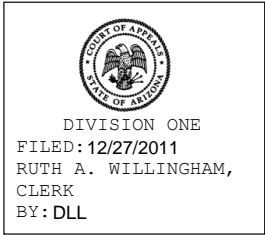


NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24



IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,) No. 1 CA-CR 10-0946
)
Appellee,) DEPARTMENT B
)
v.) **MEMORANDUM DECISION**
) (Not for Publication -
JEFFREY ALLAN HOWARD,) Rule 111, Rules of the
) Arizona Supreme Court)
Appellant.)
)
)
_____)

Appeal from the Superior Court in Maricopa County

Cause No. CR 2009-164344-001 DT

The Honorable Steven P. Lynch, Judge *Pro Tem*

AFFIRMED

Thomas C. Horne, Arizona Attorney General Phoenix
By Kent E. Cattani, Chief Counsel
Criminal Appeals/Capital Litigation Section
Joseph T. Maziarz, Assistant Attorney General
Attorneys for Appellee

James J. Haas, Maricopa County Public Defender Phoenix
By Eleanor Terpstra, Deputy Public Defender
Attorney for Appellant

D O W N I E, Judge

¶1 Jeffrey Allan Howard appeals his convictions for aggravated assault and shoplifting. Finding no error, we affirm.

FACTS AND PROCEDURAL HISTORY¹

¶12 M.D. was working as a loss prevention officer at a grocery store. He observed Howard enter the store, walk to the liquor aisle, and conceal a liquor bottle down the front of his pants. M.D. followed Howard when he left the store.

¶13 M.D. attempted to confront Howard, who pulled out a knife and threatened to kill him. M.D. backed away, and Howard walked away. M.D. followed, asking Howard to return the liquor. Howard became agitated and chased M.D. with the knife. M.D. ran, hid behind a car, and called 9-1-1.

¶14 Officers Ho and Gionet responded to the scene. M.D. provided Howard's description, and the officers searched the area where M.D. had last seen Howard. Unable to find him, they returned to the store and watched the store's surveillance video. After obtaining a "good description" from the video, the officers resumed their search. A short while later, they asked M.D. to come identify a person who appeared to match the individual M.D. described and the person the video depicted. M.D. positively identified Howard as the perpetrator. He also identified a knife officers had confiscated from Howard as the knife used in the assault.

¹ We view the facts in the light most favorable to sustaining the jury's verdicts. *State v. Tison*, 129 Ariz. 546, 552, 633 P.2d 355, 361 (1981), *cert. denied*, 459 U.S. 882 (1982).

¶15 Howard was indicted for aggravated assault, a class 3 dangerous felony ("count 1"), and shoplifting, a class 1 misdemeanor ("count 2"). Howard filed a motion *in limine*, seeking to exclude testimony about what the surveillance video depicted. He argued he would not be able to "effectively cross examine the witnesses" because the State did not preserve the video, and he did not have an opportunity to view it.² The court denied the motion, but stated Howard could request a *Willits* instruction at trial.³

¶16 A jury trial ensued. M.D., Officer Ho, and Officer Gionet testified and mentioned the video at times. Howard requested a *Willits* instruction. Although the trial court believed the State "had the ability to preserve" the video, it denied Howard's request, concluding the video was not exculpatory and that the defense was not prejudiced by its absence.

¶17 A unanimous jury found Howard guilty on both counts. Howard was sentenced to 12 years' imprisonment, with 403 days of

² On the night of the incident, the officers attempted to get a copy of the surveillance video, but were advised only the manager could download a copy, and the manager was not available. The detective assigned to the case made several attempts to obtain the video, but the store never provided it.

³ "When police negligently fail to preserve potentially exculpatory evidence, an instruction pursuant to *State v. Willits*, 96 Ariz. 184, 393 P.2d 274 (1964), permits the jury to infer that the evidence would have been exculpatory." *State v. Fulminante*, 193 Ariz. 485, 503, ¶ 62, 975 P.2d 75, 93 (1999).

pre-sentence incarceration credit as to count 1, and 180 days' imprisonment, with credit for time served, as to count 2. Howard timely appealed. We have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(1), 13-4031, and -4033(A).

DISCUSSION

¶18 Howard makes one argument on appeal: that the trial court erred by refusing to give a *Willits* instruction. "We review the refusal to give a *Willits* instruction for an abuse of discretion." *Fulminante*, 193 Ariz. at 503, ¶ 62, 975 P.2d at 93 (citation omitted).

¶19 "A *Willits* instruction is appropriate when the state destroys or loses evidence potentially helpful to the defendant." *State v. Lopez*, 163 Ariz. 108, 113, 786 P.2d 959, 964 (1990) (citations omitted). To warrant a *Willits* instruction, a defendant must establish: (1) the State failed to preserve material, accessible evidence that might tend to exonerate him; and (2) resulting prejudice. *Fulminante*, 193 Ariz. at 503, ¶ 62, 975 P.2d at 93; see also *State v. Murray*, 184 Ariz. 9, 33, 906 P.2d 542, 566 (1995). A defendant is not entitled to a *Willits* instruction "merely because a more exhaustive investigation could have been made." *Murray*, 184 Ariz. at 33, 906 P.2d at 566 (citation omitted). Nor does a court err in refusing a *Willits* instruction if the defendant

fails to establish that the evidence would have had a tendency to exonerate him. *Id.* (citation omitted).

¶10 Howard's reliance on *State v. Perez*, 141 Ariz. 459, 687 P.2d 1214 (1984), is unpersuasive. In *Perez*, a videotape of the alleged robbery was viewed by the victim and several detectives. 141 Ariz. at 463-64, 687 P.2d at 1218-19. The video was not introduced into evidence because the store owner had reused the tape and erased the relevant portions before officers secured it. *Id.* at 461, 687 P.2d at 1216. The Arizona Supreme Court noted that the State could have secured the video by request or, if necessary, through a search warrant. *Id.* at 463, 687 P.2d at 1218. It went on to hold, though, that notwithstanding the failure to preserve the video, the defendant was not entitled to a *Willits* instruction because the video was not exculpatory and the defendant was not prejudiced. *Id.* at 464, 687 P.2d at 1219.

¶11 Even assuming that the State could have secured the surveillance video in this case, we agree with the trial court that Howard did not establish it was exculpatory in nature or that he was prejudiced by its absence. Defense counsel argued below that "if the video were to be present, it could possibly exonerate our client." Possible exoneration, though, is not the standard. See *State v. Youngblood*, 173 Ariz. 502, 506, 844 P.2d 1152, 1156 (1993) ("Speculation [regarding whether destroyed

evidence may have been exculpatory] is not the stuff out of which constitutional error is made."); *State v. Dunlap*, 187 Ariz. 441, 464, 930 P.2d 518, 541 (App. 1996) (no error in declining *Willits* instruction when claim that contents of destroyed files would tend to exonerate defendant was speculative).

¶12 M.D. testified that he saw Howard enter the store, go directly to the liquor department, put a bottle of Jagermeister "[d]own the front of his pants," and cover it up with his shirt. M.D. made one comment about the video as to the shoplifting charge, testifying that it showed Howard "concealing the bottle of liquor down the front of his pants." Officer Ho testified that the video showed Howard hiding and shielding something in his waistband as he exited the store. But Officer Ho could not recall viewing portions of the video showing Howard in the liquor aisle or in the act of shoplifting.

¶13 In terms of the aggravated assault charge, the State's witnesses all agreed that the surveillance video showed no altercation between M.D. and Howard. M.D. explained that the assault occurred in the parking lot and that the store's cameras only recorded inside the store. Howard does not suggest that the surveillance video would have depicted an assault; indeed, he has steadfastly denied engaging in an altercation with M.D.

Under these circumstances, the video was obviously not exculpatory as to the aggravated assault charge.⁴

¶14 Because Howard's claim that the video would have tended to exonerate him of shoplifting is speculative, and it was clearly not exculpatory as to the aggravated assault offense, the court did not abuse its discretion by denying a *Willits* instruction.

CONCLUSION

¶15 For the foregoing reasons, we affirm Howard's convictions and sentences.

/s/

MARGARET H. DOWNIE,
Presiding Judge

CONCURRING:

/s/

PETER B. SWANN, Judge

/s/

DONN KESSLER, Judge

⁴ We are also unpersuaded by Howard's suggestion that a *Willits* instruction was required because the video would have weakened M.D.'s credibility as to where the alleged assault occurred. M.D. was adamant in his testimony that the assault occurred outside the store. Viewing the evidence in the light most favorable to the defense (which is not the proper standard), Officer Ho was vague when questioned about where M.D. told him the assault occurred -- i.e., inside the store's front door or outside.