IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

PABLO ISAAC HERNANDEZ,
Appellant.

No. 2 CA-CR 2018-0042
Filed May 8, 2019

Appeal from the Superior Court in Pima County
No. CR20161916001
The Honorable Michael Butler, Judge

REVERSED AND REMANDED

COUNSEL

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OPINION

Presiding Judge Staring authored the opinion of the Court, in which Chief Judge Eckerstrom concurred and Judge Brearcliffe concurred in part and dissented in part.

S T A R I N G, Presiding Judge:

¶1 In this appeal from Pablo Isaac Hernandez's conviction for unlawful flight from a law enforcement vehicle, we conclude the trial court erred by not giving an adverse-inference jury instruction based on *State v. Willits*, 96 Ariz. 184, 191 (1964).[1] We thus reverse Hernandez's conviction and remand for a new trial.

Factual and Procedural History

¶2 We view the facts in the light most favorable to sustaining the trial court's rulings and affirming Hernandez's conviction. *See State v. Gay*, 214 Ariz. 214, ¶¶ 2, 4 (App. 2007). On March 31, 2016, Pima County Sheriff's Deputy Michael Turner was driving a marked unit when a car ran a stop sign, entered his lane, and caused him to swerve to avoid a collision. While trying to avoid a collision, Turner "locked eyes" with the driver of the car for "a second to two seconds." He later testified the driver's face was "a face that [he] would never forget."

¶3 Turner attempted a traffic stop. The car did not stop, however, resulting in a pursuit that eventually ended in a parking lot, where the driver and two other occupants of the car fled on foot. Turner saw the driver's profile as he fled.

¶4 Within three minutes, federal marshals investigating another matter arrived at the parking lot and showed Turner a photograph bearing Hernandez's name. Turner identified him as the driver. Using the computer in his patrol unit, Turner then pulled up another photograph of Hernandez, and again identified him as the driver.

¶5 Before trial, Hernandez filed a motion to suppress evidence of Turner's pretrial identification, arguing the identification procedure was unduly suggestive under *State v. Dessureault*, 104 Ariz. 380 (1969), and the

[1]Such an instruction is commonly known as a "*Willits* instruction."

identification, if admitted, would be more prejudicial than probative under Rule 403, Ariz. R. Evid. He also moved to preclude Turner from making an identification during trial. The trial court denied the motions, finding the pretrial identification reliable. At trial, Turner again identified Hernandez as the driver.

¶6 Also before trial, Hernandez requested a *Willits* instruction based on the state's failure to collect DNA and fingerprint evidence from the car before releasing it to the registered owner. The trial court denied the motion, finding no loss or destruction of evidence, and also finding that, even had such evidence been discovered and preserved, it would have been "neutral" in terms of its capacity to exculpate or inculpate Hernandez.

¶7 Hernandez was convicted and sentenced to three years' imprisonment and this appeal followed. We have jurisdiction under A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A).

Discussion

Pretrial Identification

¶8 Hernandez argues the trial court erred when it failed to preclude Turner's pretrial and in-court identifications. We review the court's "rulings on pretrial identifications for abuse of discretion." *State v. Moore*, 222 Ariz. 1, ¶ 17 (2009); *see also State v. Leyvas*, 221 Ariz. 181, ¶ 9 (App. 2009) (fairness and reliability of challenged identification reviewed for clear abuse of discretion). "We defer to a . . . court's factual findings that are supported by the record and are not clearly erroneous." *Moore*, 222 Ariz. 1, ¶ 17. "The ultimate question of the constitutionality of a pretrial identification is, however, a mixed question of law and fact" we review de novo. *Id*. And, "[a] trial court ruling on a motion to suppress is reviewed based solely on the evidence presented at the suppression hearing." *Id.*

¶9 At the suppression hearing, Turner testified he was "[v]ery certain" of his identification of Hernandez as the driver when the marshals showed him the photograph moments after the pursuit ended. In challenging the reliability of Turner's identification and asserting the pretrial identification procedure was unduly suggestive, Hernandez points to Turner's other statement that, without that photograph, he "probably would not have been able to identify him later on down that road." The trial court, however, questioned Turner about that admission:

> The Court: And you mentioned if you hadn't had those pictures sitting here today, if

> it's the first time you saw him again, you don't know if you would be able to recognize him from the small view that you had when he went by you?
>
> [Turner]: From the incident, yeah, I could recognize him today, but from the point when—before I made contact with [Hernandez] that afternoon *I would not have been able to identify [him] as Pablo Hernandez, but the face of the driver I would be able to identify*.

(Emphasis added.)

¶10 The Due Process Clause of the Fourteenth Amendment "has been interpreted to require 'that any pretrial identification procedures [be] conducted in a manner that is fundamentally fair and secures the suspect's right to a fair trial.'" *State v. Rojo-Valenzuela*, 237 Ariz. 448, ¶ 6 (2015) (alteration in *Rojo-Valenzuela*) (quoting *State v. Lehr*, 201 Ariz. 509, ¶ 46 (2002)). "Whether an identification procedure is so suggestive that it violates a defendant's due process rights depends on the totality of the circumstances." *Id.* A two-part test exists "for determining the admissibility of identification testimony," examining first "whether the method or procedure used was unduly suggestive," and then, "if unduly suggestive, whether it led to a substantial likelihood of misidentification, i.e., whether it was reliable." *State v. Goudeau*, 239 Ariz. 421, ¶ 132 (2016) (quoting *Lehr*, 201 Ariz. 509, ¶ 46).

¶11 In *Rojo-Valenzuela*, our supreme court held "[a]n inherently suggestive one-person show-up identification procedure implicates due process, but such an identification is nevertheless admissible at trial if it is sufficiently reliable." 237 Ariz. 448, ¶ 1. Here, assuming without deciding that federal marshals showing Turner a single photograph was equivalent to a one-person show-up procedure and thus inherently suggestive,[2] we must determine whether the resulting identification was nonetheless reliable. *Id.* In doing so, we consider the totality of circumstances including the following factors: "(1) the witness's opportunity to view or hear the perpetrator at the time of the offense; (2) the witness's degree of attention;

[2] An "unduly suggestive" identification procedure described in *Dessureault*, triggering "the need for a reliability analysis," is the same as an "inherently suggestive" identification procedure described in other case law. *See Rojo-Valenzuela*, 237 Ariz. 448, n.1.

(3) the accuracy of the witness's prior description; (4) the level of certainty; and (5) the length of time between the crime and the confrontation." *Goudeau*, 239 Ariz. 421, ¶ 132. This list of factors is not exclusive and "a court may rely on other indicia of reliability as well." *Rojo-Valenzuela*, 237 Ariz. 448, ¶ 8.

¶12 Turner had the opportunity to view Hernandez's face, "lock[ing] eyes" with him, as he swerved to avoid a collision. Although he viewed Hernandez briefly, Turner's full attention was on Hernandez's face during the near collision. He also saw Hernandez's profile as he fled on foot from the car. Within three minutes of Hernandez fleeing, Turner saw the marshals' photograph and recognized him. Further, Turner testified he was "[v]ery certain" in his identification of Hernandez and that he would have been able to identify him in court without having first viewed the photograph. Applying the *Goudeau* factors, this record adequately supports the trial court's finding that Turner's identification was sufficiently reliable to be presented to the jury. *See, e.g.*, *State v. Rojo-Valenzuela*, 235 Ariz. 617, ¶ 15 (App. 2014), *aff'd*, 237 Ariz. 448 (2015) (witness's identification reliable when "short duration of [witness's] observation was more than offset by his degree of attention"). Thus, the court did not abuse its discretion in admitting the identification.[3]

***Willits* Instruction**

¶13 Hernandez argues the trial court erred when it denied his request for a *Willits* instruction based on the state's failure to collect fingerprint and DNA evidence from the car before releasing it. "We review rulings regarding a *Willits* instruction for abuse of discretion." *State v. Glissendorf (Glissendorf II)*, 235 Ariz. 147, ¶ 7 (2014). "An error of law constitutes an abuse of discretion." *State v. Cheatham*, 240 Ariz. 1, ¶ 6 (2016).

¶14 In a *Willits* instruction, the jury is told that if it finds "that the state . . . allowed material evidence to be destroyed," or, in some circumstances failed to preserve evidence, it may "infer that the evidence would be against the interests of the state." *State v. Hunter*, 136 Ariz. 45, 50 (1983) (instruction required after destruction of evidence) (citing *Willits*);

[3]In view of our resolution of this issue, we need not reach the state's argument that the identification procedure was not unduly suggestive because the identification was made as a matter of law enforcement necessity. *See State v. Wood*, 180 Ariz. 53, 72 (1994) ("Our disposition of the other issues on appeal, however, makes it unnecessary to reach this issue.").

see also State v. Perez, 141 Ariz. 459, 464 (1984) (instruction required where state fails to preserve "obviously material, and reasonably accessible" evidence and prejudice shown). In *Willits*, the state charged the defendant with attempting to ignite an explosion, and his defense was that the explosion was an accident. 96 Ariz. at 186-87. The state destroyed the package of explosives that was recovered at the scene, and Willits argued it might have aided him in showing the explosion was accidental. *Id.* at 187-88. The trial court denied his request for a jury instruction that read: "If you find that the plaintiff, the State of Arizona, has destroyed, caused to be destroyed, or allowed to be destroyed any evidence whose contents or quality are in issue, you may infer that the true fact is against their interest." *Id.* at 187. Our supreme court, however, concluded the requested instruction should have been given because "an inference unfavorable to the prosecution could have been drawn" and "[t]his in itself could create a reasonable doubt as to the defendant's guilt." *Id.* at 191 (emphasis omitted).

¶15 Here, Hernandez's defense at trial was that he was not the driver of the car, and the state's evidence consisted solely of Turner identifying Hernandez as the driver. Before trial, Hernandez requested a *Willits* instruction "based upon the State's failure to preserve material evidence" because "[i]dentification is a major issue in this case and forensic evidence from inside the [car], including fingerprint and DNA evidence from the steering wheel could have shown that [Hernandez] was not driving the car." The state opposed the motion, arguing "the [car] had little probative value" and that "the identity of the driver is not an issue" because Turner identified Hernandez as the driver. The trial court ruled:

> [T]his is not evidence because we don't know what is there and it's not a loss of evidence and it's not a destruction of evidence. And whether you are talking about whether it's exculpatory, it just as easily could be inculpatory. It's a non—there is no indicator of which way the evidence goes.
>
> And what I believe, it's not appropriate to present an inference to the jury that something exculpatory was there because I don't think it rises to that level. It's a nullity in my mind. It's a neutral—the evidence could be against him and could be for him. That being the case obviously, because you had the opportunity if it's going to be an identification

> case—because you have the opportunity to discuss regarding what they could have done to further identify him and that's already in the record, I'm going to deny the motion because I don't think a *Willits* instruction is necessary under those circumstances.

¶16 Concerning the standard a defendant must satisfy to obtain a *Willits* instruction, our supreme court recently held: "To be entitled to a *Willits* instruction, a defendant must prove that (1) the state failed to preserve material and reasonably accessible evidence that could have had a tendency to exonerate the accused, and (2) there was resulting prejudice." *Glissendorf II*, 235 Ariz. 147, ¶ 8 (quoting *State v. Smith*, 158 Ariz. 222, 227 (1988)); *see also State v. Speer*, 221 Ariz. 449, ¶ 40 (2009); *State v. Broughton*, 156 Ariz. 394, 399 (1988). Although *Glissendorf II* acknowledges that a defendant "must do more than simply speculate about how the evidence might have been helpful," 235 Ariz. 147, ¶ 9, the phrase "tendency to exonerate," "does not mean the evidence must have had the potential to completely absolve the defendant," *id.* ¶ 10. Indeed, "tendency to exonerate" has been used interchangeably with "potentially helpful." *Id.*; *see also State v. Murray*, 184 Ariz. 9, 33 (1995); *State v. Davis*, 205 Ariz. 174, ¶ 35 (App. 2002). Thus, "a defendant 'is entitled to an instruction if he can demonstrate that the lost evidence would have been material and potentially useful to a defense theory supported by the evidence.'" *Glissendorf II*, 235 Ariz. 147, ¶ 10 (quoting *State v. Glissendorf (Glissendorf I)*, 233 Ariz. 222, ¶ 17 (App. 2013), *vacated*, 235 Ariz. 147).

¶17 Hernandez maintains he was entitled to a *Willits* instruction because the state failed to preserve the car or collect fingerprint and DNA evidence from it, and that such evidence would have tended to exonerate him. Specifically, he argues the "absence of DNA and fingerprints could have substantiated his defense that he was not the driver." The state counters that Hernandez was not entitled to a *Willits* instruction because he "failed to show that fingerprinting and DNA testing of the car would have a tendency to exonerate him." The state also contends "whether the surfaces of the car would have produced fingerprint and DNA evidence is entirely speculative" and the absence of such evidence "would not support his defense theory of misidentification because people often do not leave behind fingerprints or DNA after touching an item." On the record before us, we agree with Hernandez.

¶18 First, the state failed to preserve any fingerprints and DNA that may have been present in the car before returning it to its owner. And,

because the sole issue was the identification of the driver, and the validity of that identification was disputed, physical evidence from the interior of the car, particularly the driver's side, was material. This evidence was also reasonably accessible, as the car had been abandoned by the occupants and the sheriff's department had possession of it. Deputies had the opportunity to examine the car for fingerprints and DNA before releasing it.[4]

¶19 Second, fingerprint and DNA evidence collected from the car could have had the potential to exonerate Hernandez. We disagree with the state's argument that whether the surfaces of the car could have produced such evidence is "entirely speculative." At trial, Hernandez admitted a photograph showing several visible fingerprints both on the window and driver's door frame. Hernandez neither could nor needed to show more about these fingerprints (i.e., whether they were on the inside or outside of the car or whether they were forensically useable) because, due to the actions of the state, he did not at any point have access to the car. Moreover, both the state and our dissenting colleague disregard the fact that, although not necessarily dispositive, the absence of Hernandez's fingerprints and DNA in the vehicle—particularly on the steering wheel, gear shift and door handle—would have been exculpatory.[5]

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[4]Ordinarily, a *Willits* instruction is not warranted merely because the state fails to test evidence, but rather when the state causes or allows the evidence to be unavailable to the defendant. *See Broughton*, 156 Ariz. at 399 (instruction inappropriate where state delayed testing evidence but did not destroy or lose it); *State v. Watkins*, 126 Ariz. 293, 301 (1980) (failure to identify blood type on weapon not destruction of evidence); *State* v. *Todd*, 244 Ariz. 374, ¶ 24 (App. 2018) (decision not to develop DNA or fingerprint evidence from weapon not destruction or loss of evidence). Here, the deputies neither preserved the car nor examined it for fingerprints or DNA. Instead, they released it to the owner a few weeks after the incident, which was approximately three months before Hernandez's arrest. This prevented the defense from conducting any fingerprint or DNA testing of its own.

[5]Likewise, the presence of fingerprints or DNA belonging neither to Hernandez nor anyone else with legitimate access to the car could have been exculpatory. As the trial court correctly noted, the presence of Hernandez's fingerprints or DNA in the car would have inculpated him. But, as made clear in *Glissendorf II*, and implicit in *Willits* itself, a defendant

¶20 Mindful of the inherently uncertain tilt of evidence which has been lost or destroyed, a *Willits* instruction merely erects a rebuttable presumption. It does not require the jury to infer the missing evidence would have been adverse to the state; the jury is free to reject that notion. Nor does a *Willits* instruction preclude the state from presenting evidence about why the absence of particular evidence is neither dispositive nor even exculpatory. The instruction allows the jury to weigh all of the evidence, the absence of evidence, and any explanation the state may have for why it was destroyed or otherwise not preserved.

¶21 We conclude that Hernandez has met his burden of showing that the evidence, if preserved, would have been potentially helpful to him. He was entitled to a *Willits* instruction as to the state's failure to preserve any fingerprint and DNA evidence in the car. The trial court erred by denying the instruction.[6]

Disposition

¶22 For the foregoing reasons, we reverse Hernandez's conviction and remand for a new trial.[7]

B R E A R C L I F F E, Judge, concurring in part and dissenting in part:

¶23 I concur in the opinion's reasoning and holding as to the pretrial identification, but I cannot agree with its conclusion and remand on the *Willits* instruction. The state elected not to seek out and collect fingerprint or DNA evidence from the stolen car, but instead to base its case on the pursuing law enforcement officer's positive identification. The defendant could have, and did, try to undermine the identification and use

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need only show that the lost evidence would have had the potential to be exculpatory: he need not show it would necessarily have been so.

[6] The state has not argued that error in failing to give a *Willits* instruction would be harmless.

[7] Hernandez argues the trial court also erred by precluding expert testimony from a Tucson Police Department detective, who would describe proper non-suggestive identification procedures. *See Wood*, 180 Ariz. at 72. Hernandez maintains such testimony was relevant to explain to a jury how the photo identification here, which deviated substantially from those procedures, was suggestive. Because we reverse for the reasons stated above, we do not reach this issue.

an "incomplete investigation" as fodder in his opening statement and in cross-examination of the state's witnesses. What he was not entitled to was a *Willits* instruction premised on required showings he did not make. I would affirm the trial court in full.

¶24 A *Willits* instruction is appropriate "when the state loses or destroys evidence that would have been useful to the defense, even if that destruction is innocent." *Glissendorf II*, 235 Ariz. 147, ¶ 7. A *Willits* instruction instructs the jury that it may "infer," if it finds the state's explanation inadequate, that the lost or destroyed evidence "would be against the interests of the state." *See Hunter*, 136 Ariz. at 50 (instruction required after destruction of evidence); *see also Perez*, 141 Ariz. at 464 (instruction required where state fails to preserve "obviously material, and reasonably accessible" evidence and shows prejudice). It is not an impotent instruction. Indeed, it instructs a jury that it may conclude, absent a satisfactory explanation, that the state, at best, failed to collect evidence or, at worst, destroyed evidence that would have cleared an innocent man. Consequently, there are showings beyond the mere loss or destruction of evidence that must be made to be entitled to such an instruction.

¶25 Our supreme court's opinion in *Glissendorf II*, 235 Ariz. 147, is the most recent detailed discussion of the *Willits* issue. As the majority describes above, in *Glissendorf II*, the court identified a "two-element test" to determine whether a *Willits* instruction must be given. *Id.* ¶ 8. A defendant requesting a *Willits* instruction, however, must make four inherent predicate showings before that two-element test is satisfied: (1) that evidence existed; (2) which was destroyed (or not preserved) by the state; (3) which could have had a "tendency to exonerate" the defendant by being "potentially useful to a defense theory supported by evidence;" and (4) prejudice. *Id.* ¶ 8 (quoting *Glissendorf I*, 233 Ariz. 222, ¶ 17). Here, Hernandez did not demonstrate that evidence existed—latent fingerprints and DNA residue—or that, once possessed by the state, it had later been destroyed or lost. But most importantly, Hernandez failed both to present a defense theory supported by evidence, which the lost evidence could have advanced, and to show any prejudice from its loss.

No Showing That Evidence Existed or Was Destroyed or Lost

¶26 At trial, Hernandez expected the trial court to assume that collectible and usable fingerprint or DNA evidence was present in the subject car—a Monte Carlo—because we should expect to find fingerprints in certain places, and everyone leaves DNA behind. Although a photograph of the Monte Carlo showed what Turner described as a

"fingerprint" on the driver's side window, there was no testimony as to whether the print was on the inside or outside, that the print was forensically useable, or whether it pre-dated or was contemporaneous with the events here. There was additionally no showing at all, beyond speculation, that any DNA evidence was present—forensically useable or otherwise.

¶27 Moreover, even if we presume that the fingerprint in the photograph was collectible and useable, Hernandez failed to make any showing whatever that it was impossible still to gain latent fingerprints or DNA residue evidence from the Monte Carlo. Contrary to the majority's statement in footnote four, although it is certainly true that the Monte Carlo was released to its owner before Hernandez was arrested, there was no evidence or even avowal that the defense attempted to examine or test the car. Hernandez—to support his request for the *Willits* instruction—could have had his counsel track down the Monte Carlo and ask the owner a few simple questions, such as "After you picked up the car, did you wash it?" "Did you wipe down the interior?" "Did you vacuum the inside?" "Has anyone other than you been in the car since you recovered it?" "May we have the car dusted for prints and scraped for DNA?" Rather than taking any of those steps, Hernandez merely relies on, and demands that the court rely on, the assumption that the purported evidence was no longer obtainable.

¶28 In *Glissendorf II*, as discussed more fully below, it was established that the evidence—audiotape and videotape of the victim interview—once existed but was destroyed and no longer available. 235 Ariz. 147, ¶ 2. Here, reasonable people can speculate that the evidence *might* have existed and that it *might* have been unrecoverable at the time Hernandez was arrested, but we do not know. Speculation as to what may have been found in the car, however, is insufficient to support the giving of a *Willits* instruction. *See Smith*, 158 Ariz. at 227 (*Willits* instruction not appropriate when defendant merely speculates that lost piece of paper would have contained information implicating another).

Fingerprint and DNA Evidence Not Relevant to a Defense Theory Supported by Evidence

¶29 It is, however, a greater deficiency that Hernandez failed to articulate any connection between the evidence purportedly destroyed and a defense theory supported by any other evidence in the case. Even had Hernandez successfully shown that useful fingerprint or DNA evidence existed at one time and was no longer available—thereby checking off the

first two boxes on the *Glissendorf II* list—he without question failed to check the third.

¶30 For the state's loss of evidence to merit a *Willits* instruction, the defendant must demonstrate that lost evidence would have had a "tendency to exonerate" him. *Glissendorf II*, 235 Ariz. 147, ¶ 8. In showing that evidence has a "tendency to exonerate," "the defendant must do more than simply speculate about how the evidence might have been helpful." *Id.* ¶ 9. That is, he must show "a real likelihood that the evidence would have had evidentiary value." *Id*. As our supreme court implies in *Glissendorf II*, evidence with the "potential to completely exonerate the defendant"—such as, perhaps, a videotape of him a town away at the time of the crime—has evidentiary value. A showing that he might have been "completely absolve[d]" is not necessary, *id.* ¶ 10, but a defendant must meet the required threshold of "evidentiary value" by "demonstrat[ing] that the lost evidence would have been material and *potentially useful to a defense theory supported by the evidence*," *id.* (quoting *Glissendorf I*, 233 Ariz. 222, ¶ 17) (emphasis added); *State v. Axley*, 132 Ariz. 383, 393 (1982) (*Willits* instruction, like any other, "must be predicated on some theory of the case which may be found in the evidence, and, when not so predicated, [it] should not be given, as [its] tendency would be to mislead the jury." (quoting *State v. McIntyre*, 106 Ariz. 439, 445 (1970))).

¶31 In *Glissendorf II*, the Tucson Police Department possessed an audio recording of an interview of one of the two victims of child molestation. 235 Ariz. 147, ¶ 2. Another state agency had videotaped the same interview and the audio recording was summarized in a written police report. *Id.* Six-to-twelve months after the state initially chose not to prosecute, both recordings were routinely destroyed per standard police procedure. *Id*. Some years later, the state elected to bring charges. *Id.* At trial, the victim testified inconsistently with the police report summary of her interview in some respects. *Id.* ¶ 19. The victim also testified that the report summary was "both inaccurate and incomplete." *Id.* At trial, the defendant's requested *Willits* instruction was denied because the recordings had not been "maliciously destroyed" nor shown to contain "exculpatory evidence." *Id*. ¶ 5.

¶32 In his defense, Glissendorf did not merely rely on the presumption of innocence and count on the state's failure to meet its burden of proof. As related in *Glissendorf I*, Glissendorf's defense theory, begun in opening statements, supported through his use of the report summary in impeaching the victim, and summed up in closing, was that the victim's statements were inconsistent. *Glissendorf I*, 233 Ariz. 222, ¶¶ 13, 15-16. In

his opening statement, Glissendorf apparently alluded to an evolution in the victim's story. *Id.* ¶ 15 (state's characterization of opening statement). And "[d]uring cross-examination, Glissendorf attempted to highlight the discrepancies between [the victim's] testimony and her allegations from 2001, using the police report for impeachment." *Id.* ¶ 13. Lastly, in closing, Glissendorf asserted that the victim's "memory was unreliable, at minimum, and she possibly had fabricated the additional allegations about the bedroom incident because her first report had not resulted in prosecution." *Id.* ¶ 16. Glissendorf's defense, which was supported by the testimony and the fact of the earlier non-prosecution, was that the victim was mistaken or had possibly, with motive, lied.

¶33 On review, our supreme court concluded that the "several differences between [the victim's] story as recounted in the 2001 police report and her trial testimony more than a decade later, including the number of times Glissendorf had touched her," "had the potential to assist" him in impeaching the state's sole witness to the crime. *Id.* ¶ 19. The court observed that, by allowing the audio recordings to be destroyed, the state had caused the defendant a "two-fold harm"—depriving him of "objective impeachment evidence and undermining the exculpatory impact" of the inconsistencies between the victim's testimony and the written report summary. *Id.* It concluded that Glissendorf had "easily met the 'tendency to exonerate' standard" in his case, and that the trial court had erred in refusing to give the instruction. *Id.* ¶¶ 1, 19.

¶34 *Hunter*, 136 Ariz. 45, and *State v. Leslie*, 147 Ariz. 38 (1985), also illustrate defenses sufficient to permit a *Willits* instruction. In *Hunter*, a first-degree murder case, police entered the victim's home and found signs of a struggle and the victim in a pool of blood on the kitchen floor. 136 Ariz. at 47. A pair of scissors was next to the body and a bloody hunting knife was in another room. *Id.* The responding police officers seized the knife but not the scissors. *Id.* Later, as detectives were completing their investigation, a friend of the family came to the house to clean it before the victim's wife returned. *Id.* After receiving permission from a detective present, the friend "picked up the scissors from beside the body, wiped them off with a towel, and put them on a kitchen counter." *Id.* As the court recounts, "[i]t was later determined that the victim had suffered several stab wounds . . . a chest wound apparently caused by a knife, and . . . an abdominal wound consistent with the pair of scissors." *Id.* After the police determined that the scissors "may have been significant," a detective returned and retrieved the scissors. *Id.*

¶35 At trial, Hunter claimed he had killed the victim in self-defense. *Id*. He testified that he brought the scissors to the victim's home to have him sharpen them. *Id.* He stated that, after he handed the victim the scissors, the victim took some "playful swipes" at him and then he "shoved the victim into the doorjamb." *Id.* The conflict escalated, and then, he testified, the victim attacked him with the scissors, and he defended himself with a knife he grabbed from a wall display. *Id.*

¶36 Hunter sought a *Willits* instruction because the police failed to preserve the scissors to allow for collection of latent fingerprints. *Id*. at 50. The trial court refused to give the instruction. *Id*. On review, our supreme court concluded that Hunter was entitled to the instruction. *Id*. As the court stated, "if the victim's fingerprints were on the scissors they would have to have been placed there during the stabbing incident, as appellant claimed at trial." *Id.* at 51. This would have "tended to corroborate [Hunter's] claim that the victim attacked him with the scissors." *Id*. "This is not a case," the court concluded, "in which the destroyed evidence was of no evidentiary value whatsoever." *Id.*

¶37 In *Leslie*, the defendant was convicted of capital murder. 147 Ariz. at 41. The victim was found bludgeoned to death in her garage, her body was covered by several rugs, and a small, blood-stained axe was found in the garage. *Id.* at 42. Her car was missing. *Id*. Later, police in a neighboring county attempted to arrest Leslie for speeding on the freeway. *Id*. He pulled off the freeway, got out of the car and fled, leaving two female passengers in the car. *Id*. Police impounded the car and later determined it belonged to the victim. *Id*. Leslie was arrested several hours later. *Id*.

¶38 At trial, Leslie testified and admitted that he burglarized the victim's home and stole her silver, but he denied killing her and claimed that "he never saw [the victim] that day." *Id.* To link Leslie not just to the stolen car but also to the murder, the state highlighted "several spots" found on the exterior of the car after it was impounded. *Id.* at 45. The police officer who noted the spots believed them to be too small to test so he never notified the crime lab about them or sought to have them analyzed. *Id.* at 45-46. Despite not having tested the spots, the same officer testified that based on his "experience as a police officer" in his opinion it was blood. *Id.* at 46. A police criminalist admitted on cross-examination, however, that there was enough of the substance on the car to determine whether it was blood, although not enough to "type group[]" it. *Id.*

¶39 Based on the testimony regarding the blood, the defendant requested a *Willits* instruction, which was denied. *Id*. Then, in closing argument, the prosecutor stated:

> What about the blood on the car? Okay. Detective Butler should have had the car checked out by the crime lab. There is no question about that, and we can all see that, I can see it. . . . The fact of the matter is, it looked like blood.
>
> Detective Butler has seen blood before, you have all seen blood, there is a pretty strong inference that it was blood, blood that was put on the car after [the victim] was killed.

Id. at 46.

¶40 On appeal, our supreme court determined that the spots potentially being blood "was a vital part of the state's case." *Id*. at 46. It noted that there were no fingerprints on the murder weapon, and there was no blood on the defendant or on the inside of the car. *Id.* But blood found on the car "would indicate that the car was in the garage at the time of the murder and contradict defendant's testimony that he had not seen the victim" when "he burglarized the house and stole the car." *Id*. The court concluded that the trial court abused its discretion in failing to give the *Willits* instruction. It further stated:

> We might be able to overlook the failure to preserve the evidence had the state not emphasized the fact it was blood. The state, in effect, created prejudice by using the blood to contradict the defendant's claim that he had never seen the victim. Thus we find prejudice in the state's failure to remove the spots and have them preserved, coupled with the state's affirmative comments concerning the fact that the spots were blood.

Id. at 47.

¶41 Here, the majority incorrectly asserts that the third showing required by *Glissendorf II*—that the missing evidence be "potentially useful to a defense theory supported by evidence," 235 Ariz. 147, ¶ 10 (quoting

Glissendorf I, 233 Ariz. 222, ¶ 17)—was met because "Hernandez's defense at trial was that he was not the driver of the car." Opinion at ¶ 15. That is just not so. Hernandez asserted no defense at all. At all times, he solely relied on the purported inability of the state to prove its case, whether because of a slip-shod investigation or weak identification evidence. Hernandez did not, for example, offer evidence of an alibi tending to show he was elsewhere at the time the officer placed him at the scene. Nor did Hernandez—as was his right—offer any evidence of his own that he was not the driver. Hernandez merely put the state to its burden of proof.

¶42 In his opening statement, this course was laid out:

> So you will learn what the State has in this case, and what they have is a very quick few seconds of observation of who the driver was. They have another observation as to the profile as the driver was running away. They have a bad description of whoever that driver was and they also have a photo suggestion to try to make a[n] identification. But what don't they have? Fingerprints, photos, a video, the registration of the vehicle. Nothing in the vehicle that linked that driver to Mr. Hernandez.

He continued:

> [We] don't have the burden of proof as the Judge has told you.
>
> The burden lays only on this table and [the prosecution] ha[s] the burden to prove to you beyond a reasonable doubt as the Judge just said. That means that you must be left firmly convinced that it was Pablo Hernandez driving that day.

And, in summary:

> [A]t the end of this trial my co-counsel . . . will come before you and he will ask a question of you. If you are still wondering if it actually was Mr. Hernandez in that vehicle, let alone the driver, if that's still something you are thinking

> about, then you have to come with the only appropriate verdict of not guilty.

¶43 Hernandez did not assert that any evidence showed he was not in the car, or that he was in fact not present at the time, or that someone else confessed to the crime; each of which, if such evidence existed, could have been a defense theory supported by evidence. Instead, Hernandez simply based his case on the state's burden of proof. Such is a wholly legitimate, fair, and common-place way to defend a case. *See State v. Hall*, 136 Ariz. 219, 221 (App. 1983) ("It is axiomatic that the burden is always on the state to prove all of the elements of the crime and the identity of the person who committed the crime beyond a reasonable doubt."); Ariz. R. Crim. P. 19.1(b)(4), (b)(5) ("the State must offer evidence in support of the charge;" "the defendant may . . . offer evidence in his or her defense"). *See also, e.g.*, *State v. Rodriguez*, 126 Ariz. 28, 35 (1980) ("The only question we have here is whether the defendant's attorney, over the objection of defendant, as a trial strategy, could decide not to call any witnesses after the State had rested. We think he could."). But doing so is not the same as having a defense theory supported by evidence. It is rather only and wholly a calculated risk that the *state's* theory will be insufficiently supported by evidence.

¶44 Had Hernandez, like Glissendorf, Hunter, and Leslie, either testified, presented some other testimony, or pointed to evidence supporting a defense theory to which fingerprint or DNA evidence would have been potentially useful, he might have met the third *Glissendorf II* requirement.[8] Contrarily, had Hunter not asserted a self-defense theory supported by his testimony, had Leslie not testified that he was present but never saw the body of the victim, or had Glissendorf not been able to show concrete inconsistencies in the victim's testimony, it is unlikely that our supreme court would have found error in those cases.[9]

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[8]This is not to say that, to receive a *Willits* instruction, Hernandez must exercise his constitutional right to testify in derogation of his constitutional right to refuse to do so. However, his testifying would merely be one of many possible ways, and likely the most direct way, by which to support a defense theory with evidence.

[9]One case suggests that, even where the defendant does not assert a defense theory supported by other evidence, a *Willits* instruction may be required where the state makes the untested evidence a centerpiece of its case. *State v. Lang*, 176 Ariz. 475, 485 (App. 1993) (state focused closing

¶45 The requirement that there be "a defense theory supported by the evidence" to which the lost evidence is "potentially useful," *id.*, either means something or it does not. *Hunter*, *Leslie*, and *Glissendorf II* certainly suggest that it does. In each case, there was independent evidence—whether the defendant's trial testimony or contradictions between pretrial statements and another witness's trial testimony.[10] And, in each case, that evidence supported an asserted defense—self-defense, actual innocence, or fabricated witness testimony. If this predicate showing for a *Willits* instruction simply means that the defendant must put the state to its burden of proof, the requirement adds nothing to the inquiry; the state always bears the burden of proof. Perhaps in this case on review, or in another appropriate case, our supreme court will illustrate more concretely what it means by the need to have a "defense theory supported by evidence," *Glissendorf II*, 235 Ariz. 147, ¶ 10 (quoting *Glissendorf I*, 233 Ariz. 222, ¶ 17), before the failure to give a *Willits* instruction becomes reversible error.

No Showing of Prejudice by the Loss of the Evidence

¶46 Finally, Hernandez failed to make any showing that he was prejudiced by the purported loss of evidence. Our supreme court in *Glissendorf II* repeated the requirement from a line of cases that a defendant seeking a *Willits* instruction show prejudice from the loss of evidence *before* he can obtain the instruction—not merely that he show prejudice on appeal because he was denied the instruction itself. 235 Ariz. 147, ¶ 8. As the court stated thirty years earlier in *Perez*:

> We hold today that where the state fails to act in a timely manner to ensure the preservation of evidence that is obviously material, and

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argument on envelope tested for fingerprints but not DNA). Here, the state did not mention fingerprints or DNA except to address Hernandez's cross-examination and closing argument, and to say, in closing, "Now, there was a lot of testimony about DNA or fingerprint evidence, but there is no DNA or fingerprint evidence in this case." The state emphasized, "What we have is the out-of-court pretrial identification that Turner made within four or five minutes of first seeing Pablo Hernandez. We have the in-court identification of Pablo Hernandez."

[10]In the *Willits* case itself, the police allowed seized explosives to be destroyed by the military, which prevented Willits from proving his defense that the explosion was accidental. This defense was supported by expert testimony and Willits's own testimony at trial. 96 Ariz. 184, 187-88.

> reasonably accessible, a defendant is entitled to a *Willits* instruction upon a showing that he or she was prejudiced thereby. In other words, where the state failed to procure obviously material evidence, the defendant must show actual prejudice before he or she can claim entitlement to a *Willits* instruction.

141 Ariz. at 464. That is, even if a defendant asserts a defense theory supported by evidence, he must show he was denied evidence that would have advanced that theory in a concrete way.

¶47 In *Perez*, the defendant was accused of robbing a convenience store. *Id*. at 463. He asserted a "mistaken identity" defense. *Id*. at 464. Detectives investigating the robbery viewed a store surveillance tape of the robbery, but did not take possession of the tape and it was ultimately erased by the store owner. *Id*. at 461, 463. Perez argued that the state's failure to preserve the videotape required a *Willits* instruction, and that, had the instruction been given, he "could have been acquitted." *Id*. at 463. The trial court denied the requested instruction and he was ultimately convicted of the robbery. *Id.* at 461. On appeal, our supreme court concluded that the tape was "obviously material" and the state—although it never possessed the tape—"could have, and . . . should have" secured its possession. *Id.* at 463.

¶48 While recognizing the state "does not have an affirmative duty to seek out and gain possession of potentially exculpatory evidence," our supreme court stated that the prosecution does have a duty "to act in a timely manner to ensure the preservation of evidence it is aware of where that evidence is obviously material and reasonably within its grasp." *Id.* at 463. However, our supreme court found, despite the foregoing, that the trial court did not abuse its discretion in refusing to give a *Willits* instruction because Perez had not shown prejudice. *Id.* at 464. Our supreme court stated:

> Though the videotape, in the instant case, was obviously material, easily accessible, and available for seizure for at least a "couple of days" before it was erased, the appellant has failed to make the requisite showing of prejudice. He has presented no evidence to support his assertion that had the videotape been presented to the jury, he would have been

> acquitted of the February 13th robbery because the tape would have proven his mistaken identity defense. *In fact, the only evidence of the tape's probative value indicates that it would have inculpated rather than exonerated appellant*.

Id. (emphasis added). Beyond the fact that Perez might have certainly benefitted from the *Willits* instruction at trial, because, as the court recognized, the tape would have likely confirmed the eyewitness accounts of the defendant's presence in the store, Perez "benefitted from its destruction" and was not prejudiced. *Id*. (emphasis omitted).

¶49 Here, the trial court found that, even had fingerprint and DNA evidence been found and collected, the results would have been "neutral" in terms of its capacity to exculpate or inculpate Hernandez. That is, had the Monte Carlo been tested for latent fingerprints and DNA, the presence of Hernandez's fingerprints and DNA would have inculpated him. However, the absence of useable fingerprints or conclusive DNA samples—or even the presence of fingerprint or DNA evidence showing that someone else at some point had been in the car—could not have exonerated him wholly or partially. Consequently, neither fingerprint nor DNA evidence would have been of any evidentiary value to Hernandez even had he presented an actual defense theory, and thus he cannot show the prejudice required for a *Willits* instruction.

¶50 Requiring that lost evidence be "potentially useful" in advancing a defense theory otherwise supported by actual evidence, such that a defendant is prejudiced by its loss, places reasonable limits on what can be a powerful instruction. Without such a reasonable limits, in every case with a claim that the state failed to prove presence at the scene of a crime beyond a reasonable doubt, the defendant will demand a *Willits* instruction because fingerprints or DNA —or even some witness who may or may not have seen him across town at the time—was not sought out. A defendant will be able to claim, for example, that, despite surveillance camera footage of someone who looks just like him in the convenience store holding a gun on the cashier, he is entitled to a *Willits* instruction because investigators failed to swab the counter for DNA and dust the door for prints. He will argue, because we would expect to find his prints and DNA at the store if he was the robber, the absence of his prints and DNA "tends to exonerate him"—a claim tethered to no defense other than the presumption of innocence and the state's burden of proof. A trial court, citing this opinion, would be required to give the *Willits* instruction. But a *Willits* instruction should not be the rule. A court should require that a

defendant seeking the instruction show some reason, grounded in other evidence, as to why the uncollected evidence matters. By not requiring a link between the missing evidence and a defense theory otherwise supported by evidence in the record, this opinion is making new law.

¶51 Because Hernandez did not meet any of the requirements stated in *Glissendorf II* for a *Willits* instruction, let alone all of them, I cannot conclude that the trial court abused its discretion in denying the instruction. I respectfully dissent in part.[11]

[11] Although the majority did not address the remaining issue on appeal—whether the defendant's cold expert was properly precluded—I would affirm the trial court on this basis as well. Given that Detective Deloria's proposed testimony was to describe police conduct—the preferred use of six-pack photographic line-ups—under *different* circumstances, it was not relevant to the facts of this case. Consequently, Deloria's proffered testimony did not satisfy Rule 702(a)-(c), Ariz. R. Evid., and the court did not abuse its discretion in precluding it.