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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. JERRY FLYNN WALKER, Appellant.	)	2 CA-CR 2012-0128 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20073435

Honorable Howard Fell, Judge Pro Tempore

AFFIRMED

West, Elsberry, Longenbach & Zickerman, PLLC
By Anne Elsberry
Tucson
Attorneys for Appellant

E C K E R S T R O M, Presiding Judge.

¶1 After a jury trial, appellant Jerry Walker was convicted of sale of a narcotic drug and possession of a narcotic drug for sale, both class two felonies. Before sentencing, the trial court granted Walker's motion for a new trial on count two of the indictment, the possession for sale count ("Count Two"), based on irregularities in the form of verdict. The court found Walker had two or more historical prior felony

convictions and sentenced him to an enhanced, presumptive prison term of 15.75 years on count one of the indictment, for sale of a narcotic drug ("Count One").

¶2 Walker then filed a motion to vacate the trial court's judgment on Count One, on the ground that the court had erred in failing to instruct the jury, sua sponte, that possession of a narcotic drug was a lesser-included offense of sale of a narcotic drug. The court granted the motion, and the state appealed the court's decision. On review, we reversed the court's decision vacating the judgment and remanded the case for further proceedings. *State v. Walker*, No. 2 CA-CR 2011-0200 (memorandum decision filed Feb. 15, 2012). Walker was resentenced to a presumptive prison term of 15.75 years on Count One, and the court granted the state's motion to dismiss Count Two. After resentencing, Walker filed a motion to vacate the judgment on Count One, which the court denied. This appeal followed.

¶3 Counsel has filed a brief pursuant to *Anders v. California*, 386 U.S. 738 (1967), and *State v. Clark*, 196 Ariz. 530, 2 P.3d 89 (App. 1999), avowing she has reviewed the record and found no arguable, meritorious issues to raise on appeal and asking this court to search the record for fundamental error. In a pro se, supplemental brief, Walker argues the trial court erred or abused its discretion in failing to rule on his motions in limine before trial; in failing to grant his request for dismissal or, in the alternative, for a *Willits*[1] instruction based on the state's alleged failure to preserve recovered currency; in denying his motion to dismiss for the state's alleged bad-faith

[1]*State v. Willits*, 96 Ariz. 184, 187, 191, 393 P.2d 274, 276, 279 (1964) (state's failure to preserve potentially exculpatory evidence remedied by permitting jury to infer its exculpatory nature).

failure to produce requested audiotapes of dispatcher transmissions; in failing, sua sponte, to declare a mistrial based on testimony that contained hearsay; and in failing to sentence him in accordance with the rule of lenity he argues should apply when sentencing statutes conflict.

¶4 Viewed in the light most favorable to upholding the jury's verdict, *see State v. Tamplin*, 195 Ariz. 246, ¶ 2, 986 P.2d 914, 914 (App. 1999), the evidence established the following. In August 2007, Tucson police officer Scott Glass, in plain clothes and driving an unmarked vehicle, was engaged in an operation to apprehend narcotics sellers by making purchases with currency that had been photocopied and could later be identified by serial number. After Glass noticed M.M. standing on a street corner and pulled over to the curb, M.M. leaned into the vehicle and Glass asked him "if he could hook me up with [twenty]," meaning a quantity of crack cocaine. Glass testified that M.M. then walked down and across the street to Walker, and both men walked back to Glass's vehicle. Walker leaned into the passenger-side window and asked Glass what he wanted; Glass responded, "A [twenty]," and Walker "said sure," leaned out of the vehicle and, with his right hand, "drop[ped] something into [M.M.]'s left hand. M.M. then leaned back into the vehicle and "with his left hand dropped a rock [of an unidentified substance] into [Glass's] right hand," and Glass handed M.M. the twenty-dollar "buy money." Glass was asked what happened next, and he stated, "I asked [M.M.] if he could supply more for me and he said yes." Walker objected to this answer as hearsay and moved to strike it, but it does not appear the trial court ruled on his objection.

¶5 Shortly after Glass drove away, Officer Bart Rohr arrested Walker and, in a search incident to that arrest, found the twenty-dollar bill used as "buy money," identified by its serial number, in Walker's right front pant pocket. Glass secured the "rock" he had received from M.M. as evidence, and it was later determined to be 197 milligrams of a narcotic drug. Rohr then photocopied the twenty-dollar bill recovered from Walker's pocket alongside the earlier photocopy of the buy money previously given to Glass and initialed the new photocopy. The actual currency was returned to a fund to be used in future investigations.

Discussion

Failure to Rule Before Trial on Walker's Motions in Limine

¶6 Walker first contends the trial court erred in failing to rule before trial on pro se motions in limine he filed on January 12, 2009. According to the transcript Walker cites, his advisory counsel drew the motions to the court's attention but told the court, "I think some of these are more proper for in-trial objections." The court then asked counsel to let the court know if he determined there were motions in limine that needed to be addressed before trial, because "if there [were] any," the court planned to resolve them "before opening statements." Counsel did not suggest any of the motions required pretrial resolution, and the motions in limine were not addressed again.

¶7 Although Walker argues generally that "the jury heard extrinsic evidence that it should not have heard as a result of the court not ruling on his motion in limine," he never identifies any such evidence. Our review of Walker's pro se motion in limine reveals many of his requests to preclude evidence pertained to evidence already

precluded by law or evidentiary rule, such as his request to preclude "[a]ny reference, either direct or indirect, to Defendant's failure to testify or present evidence should he exercise his right not to testify on his own behalf or offer evidence." *See State v. Rutledge*, 205 Ariz. 7, ¶ 26, 66 P.3d 50, 55 (2003) ("The Fifth Amendment of the United States Constitution, [a]rticle [II], [§] 10, of the Arizona Constitution, and A.R.S. [§] 13-117(B) prohibit any comment, direct or indirect, by a prosecutor about the failure of a defendant to testify."). Walker has not directed our attention to any admitted evidence that would have been precluded had his motions in limine been granted before trial, and we have seen no such instances during our review of the record. *Cf.* Ariz. R. Crim. P. 31.13(c)(1)(vi) (argument on appeal "shall contain the contentions of the appellant with respect to the issues presented, and the reasons therefor, with citations to the authorities, statutes and parts of the record relied on"). The trial court did not err or abuse its discretion in following counsel's suggestion of addressing Walker's concerns, if necessary, during trial.

***Willits* Instruction and Motion to Dismiss for State's Failure to Preserve Currency**

¶8 Walker contends he is entitled to reversal of his conviction and a new trial because "the trial court erred in not granting his motion to dismiss or in the alternative [f]or a *Willits* instruction" with respect to the state's failure to preserve the original twenty-dollar bill used as buy money. In presenting this claim, Walker fails to suggest any reason the court erred in denying his pretrial motion to dismiss, and we see no arguable basis for finding such error. Instead, Walker argues his conviction should be

reversed because he was entitled to a *Willits* instruction and was prejudiced by the court's denial of that request.

¶9 But the trial court did provide the jury with a *Willits* instruction. In its final instructions to the jury, the court stated,

> If you find that the State has lost, destroyed or failed to preserve evidence whose contents or quality are important to the issues of this case then you should weigh the explanation, if any, given for the loss or unavailability of the evidence. If you find that such explanation is inadequate then you may draw an inference unfavorable to the state, which, in itself, may create a reasonable doubt as to the defendant's guilt.

The state's decision to substitute photocopies for the original buy money was the subject of vigorous cross-examination and argument by Walker's counsel. And, as Walker's counsel argued at trial, the jury was free to apply the court's general *Willits* instruction to that evidence as well as to a stipulation that the state had destroyed audiotapes of dispatcher transmissions after Walker had requested them. We find no trial error with respect to this claim.

Motion to Dismiss for State's Failure to Preserve Dispatcher Transmissions

¶10 In a related argument, Walker contends the trial court's *Willits* instruction "was an inadequate remedy" for the state's failure to preserve audiotapes of dispatcher transmissions related to his offense and arrest, despite his request for their production. He alleges the state's failure to prevent destruction of the tapes amounted to bad faith and argues the court therefore abused its discretion in denying his motion to dismiss.

¶11 This issue was the subject of considerable pretrial litigation. Shortly after Walker was arrested in August 2007, his attorney asked the state to produce "copies of

tapes, CDs, 911 calls, communication tapes, call text[, and] logs" and to "[p]lease advise if there was any audio (wire) of the deal and/or video." The prosecutor responded, "We have one CD of the interview of your client . . . and no DVD and no body wire to my knowledge. We will double check on the body wire and will secure whatever radio logs or transmissions are still available."

¶12 In July 2008, Walker filed a pro se motion for disclosure "of the police radio transmission tape" recording, arguing any description of offenders Glass had broadcast would be relevant to Walker's pending motion to suppress the twenty-dollar bill obtained during a search incident to his arrest. At an August 2008 hearing on Walker's motion to suppress, police officers testified Glass had transmitted information to members of the police team, including Rohr, over a non-public radio frequency and those transmissions had not been recorded. The state then drew the court's attention to Walker's pro se disclosure motion, and Walker acknowledged the recordings he had requested in that motion had "never exist[ed]."

¶13 Relying again on the September 2007 correspondence between his attorney and the prosecutor, in August 2009 Walker filed a motion to compel production of recorded radio transmissions "between the police officers involved and the dispatcher," in order to establish the time particular police officers arrived on the scene.[2] In response, the state argued it had previously informed Walker and the trial court that "no [recording of] radio transmissions existed" with respect to Walker's case and it believed the issue

[2]Although recordings of dispatcher transmissions were not disclosed, it appears the state had disclosed call log information containing some of this information.

had been resolved at the August 2008 hearing. The court granted Walker's request for production but denied his related motion to dismiss, indicating it would "most likely" instruct the jury pursuant to *Willits* at trial. The court also ordered the state to determine whether a recording of dispatcher transmissions had once existed—but had since been destroyed—or had never existed at all. Walker filed another motion to suppress or dismiss in July 2010, after the state notified the court a recording of the dispatcher's radio transmissions "did exist at one time," but "the recordings are automatically purged after [one hundred eighty] days."

¶14 At a hearing on Walker's motion to suppress or dismiss, the trial court found the state's error in failing to preserve a recording of the dispatcher's transmissions did not "rise[] to the level" requiring dismissal. The court did agree, however, to permit the jury to infer the unpreserved tapes contained evidence adverse to the state's case, pursuant to *Willits*. In rejecting Walker's assertion that the state's destruction of the tapes would deny him a fair trial, the court explained a *Willits* instruction is designed to cure such prejudice.

¶15 We review a trial court's ruling on a motion to dismiss criminal charges, as well as the court's choice of an appropriate sanction for a violation of the discovery rules, for an abuse of discretion. *See State v. Lukezic*, 143 Ariz. 60, 69, 691 P.2d 1088, 1097 (1984); *State v. Mangum*, 214 Ariz. 165, ¶ 6, 150 P.3d 252, 254 (App. 2007). Rule 15.7(a), Ariz. R. Crim. P., provides that "[a]ll orders imposing sanctions shall take into account the significance of the information not timely disclosed." Moreover, "a discovery sanction should be proportionate to the harm caused," *State v. Krone*, 182 Ariz.

319, 322, 897 P.2d 621, 624 (1995), and "should have a minimal effect on the evidence and merits of the case." *State v. Towery*, 186 Ariz. 168, 186, 920 P.2d 290, 308 (1996).

¶16 Walker contends *State v. Lopez*, 156 Ariz. 573, 754 P.2d 300 (App. 1987), supports his argument that charges should have been dismissed. But in that case, we affirmed the lower court's dismissal for the state's failure to preserve evidence pertaining to "the crucial issue" in the case and noted that the "choice of appropriate sanctions for violation of discovery rules is a matter wholly left to the sound discretion of the trial court." *Id.* at 574-75, 754 P.2d at 301-02. We conclude the trial court here did not abuse its discretion in providing the jury with a *Willits* instruction as a sanction for the state's conduct, and that instruction adequately protected Walker's due process right to a fair trial. *See State v. Tucker*, 157 Ariz. 433, 443, 759 P.2d 579, 589 (1988) (*Willits* instruction protects defendant's right to fair trial when "jury could infer exactly what the destroyed evidence, at best, could have proved"); *see also Arizona v. Youngblood*, 488 U.S. 51, 58 (1988) (unless defendant "can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law").

Mistrial for Admission of Hearsay

¶17 We find no merit in Walker's argument that the trial court erred in failing to declare a mistrial based on the admission of hearsay testimony. Walker challenges Glass's testimony that M.M. had said "yes" when Glass asked if he could supply more of the drugs after the sale had been completed. But assuming this testimony was inadmissible hearsay, it would only be relevant to the state's theory that the drugs

recovered near Walker when he was arrested were intended "for sale," as charged in Count Two of the indictment, and that charge has now been dismissed. Accordingly, any error in admitting the testimony would be harmless, because we can say beyond a reasonable doubt that the error had no influence on Walker's conviction for sale of a narcotic drug, the only conviction at issue here. *See State v. Wood*, 180 Ariz. 53, 63, 881 P.2d 1158, 1168 (1994) (erroneous admission of testimony reviewed "under a harmless error standard").

Sentencing

¶18 Walker is mistaken that the sentencing statutes applied in this case are conflicting and that, therefore, the rule of lenity required the trial court to consider a lesser sentence. Walker appears to argue that his sentence could not be subject to former § 13-604.02(B), 1999 Ariz. Sess. Laws, ch. 261, § 7, requiring a sentence of no less than the presumptive term for an offense committed while on release, when the conviction for which he had been paroled was also considered a historical prior felony conviction subjecting him to an enhanced sentence pursuant to former A.R.S. § 13-604(D), 2007 Ariz. Sess. Laws, ch. 248, § 1. Nothing in the plain language of these statutes suggests any such conflict, and the trial court did not err in concluding both provisions applied to Walker's sentence.

Disposition

¶19 We conclude substantial evidence supported the jury's verdict, and Walker's sentence was authorized by statute and imposed in a lawful manner. In our examination of the record pursuant to *Anders*, we have found no reversible error and no

arguable issue warranting further appellate review. *See* 386 U.S. at 744. Accordingly, we affirm Walker's conviction and sentence.

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Presiding Judge

CONCURRING:

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

/s/ Michael Miller
MICHAEL MILLER, Judge