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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. BROCK EVERETT ELSON, Appellant.	)	2 CA-CR 2013-0023 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PINAL COUNTY

Cause No. S1100CR201000653

Honorable James H. Keppel, Judge

AFFIRMED

Harriette P. Levitt — Tucson
Attorney for Appellant

E S P I N O S A, Judge.

¶1 After a jury trial, appellant Brock Elson was convicted of attempted aggravated assault, a dangerous offense. The trial court sentenced him to an enhanced, presumptive, 7.5-year prison term. Counsel has filed a brief in compliance with *Anders v. California*, 386 U.S. 738 (1967), *State v. Clark*, 196 Ariz. 530, 2 P.3d 89 (1999) and *State v. Leon*, 104 Ariz. 297, 451 P.2d 878 (1969), stating she has reviewed the record

and has found no error or arguable issues to raise on appeal. She asks this court to search the record for error.

¶2 In a supplemental brief, Elson argues (1) procedures following a remand to the grand jury for a redetermination of probable cause for indictment violated the prohibition against double jeopardy and principles of collateral estoppel and deprived the trial court of jurisdiction; (2) the state "failed to collect and preserve pertinent evidence that could have negated [his] guilt," in violation of *Brady v. Maryland*, 373 U.S. 83 (1963); (3) the trial court abused its discretion in denying his request for a *Willits*[1] instruction; and (4) because of these errors, he was denied a fair trial, in violation of his right to due process. He asks this court "to vacate the judgment of conviction and sentence, and remand with instructions to dismiss the case with prejudice, or grant a new trial."

DISCUSSION

¶3 We view the evidence in the light most favorable to sustaining the jury's verdict. *State v. Haight-Gyuro*, 218 Ariz. 356, ¶ 2, 186 P.3d 33, 34 (App. 2008). On the afternoon of February 8, 2010, E.J. was at her boyfriend's house when two men came to the door and asked about a for-sale sign in the front yard. After E.J. telephoned her boyfriend, she saw Elson pointing a gun at her head. She jumped away just before he pulled the trigger, and he shot her in the shoulder.

[1]*State v. Willits*, 96 Ariz. 184, 393 P.2d 274 (1964).

The Indictment and Double Jeopardy

¶4 Elson was indicted for attempted first-degree murder, conspiracy to commit first-degree murder, and aggravated assault. Elson filed a motion to dismiss the indictment or to remand, challenging the sufficiency of the state's presentation to the grand jury. After the state failed to respond to the motion, the trial court remanded the case to the grand jury for a redetermination of probable cause. The grand jury found probable cause on the same charges originally alleged, and a new cause number was assigned. At arraignment, the court granted the state's request to proceed under the original cause number, ordered the case renumbered accordingly, and dismissed the second cause number without prejudice. Elson is mistaken that this administrative action implicated principles of double jeopardy or collateral estoppel, or that it impaired the court's jurisdiction. *See Serfass v. United States*, 420 U.S. 377, 388-89 (1975) (jeopardy had not attached when court dismissed indictment; for defendant tried by jury, jeopardy does not attach until trial jury is empaneled and sworn).

Allegations of *Brady* Violations and Denial of *Willits* Instruction

¶5 Elson next argues the state's failure to test a bullet fragment or blood found at the scene for DNA[2] evidence violated his right to be informed of exculpatory evidence pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963). But Elson's allegation that "this evidence possessed exculpatory value" is entirely speculative, and there simply is no indication police officers acted in bad faith by failing to conduct such tests. "[U]nless a criminal defendant can show bad faith on the part of the police, failure to preserve

[2]Deoxyribonucleic acid.

potentially useful evidence does not constitute a denial of due process of law." *Arizona v. Youngblood*, 488 U.S. 51, 58 (1988).

¶6 Similarly, a *Willits* instruction permits the jury to infer that missing evidence would have been exculpatory and is appropriate "[w]hen police negligently fail to preserve potentially exculpatory evidence." *State v. Fulminante*, 193 Ariz. 485, ¶ 62, 975 P.2d 75, 93 (1999). But the failure to preserve evidence does not automatically entitle a defendant to a *Willits* instruction. *State v. Murray*, 184 Ariz. 9, 33, 906 P.2d 542, 566 (1995). "To receive a[n] instruction, the 'defendant must show (1) that the state failed to preserve material and reasonably accessible evidence having a tendency to exonerate him, and (2) that this failure resulted in prejudice.'" *State v. Speer*, 221 Ariz. 449, ¶ 40, 212 P.3d 787, 795 (2009), *quoting Murray*, 184 Ariz. at 33, 906 P.2d at 566. "A trial court does not abuse its discretion by denying a request for a *Willits* instruction when a defendant fails to establish that the lost evidence would have had a tendency to exonerate him." *Fulminante*, 193 Ariz. 485, ¶ 62, 975 P.2d at 93.

¶7 Elson's argument that he was entitled to a *Willits* instruction is premised on mere speculation that DNA testing would have shown the bullet fragment and blood found at the scene were not related to E.J.'s gunshot wound. Because it is not apparent DNA tests would have had any evidentiary value, much less exculpatory value, the trial court did not abuse its discretion in denying Elson's request for a *Willits* instruction. *See Speer*, 221 Ariz. 449, ¶ 37, 212 P.3d at 795 (due process violated only when exculpatory value of evidence apparent).

CONCLUSION

¶8 We conclude substantial evidence supported Elson's conviction, *see* A.R.S. §§ 13-1203(A)(1), 13-1204(A)(2) and (D), and his sentence was authorized by law, *see* A.R.S. § 13-704(A). We reject Elson's claims that he was denied due process or a fair trial. In our examination of the record, we have found no fundamental or reversible error and no arguable issue warranting further appellate review. *See Anders*, 386 U.S. at 744. Accordingly, Elson's conviction and sentence are affirmed.

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge

CONCURRING:

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Presiding Judge

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