

IN THE  
**ARIZONA COURT OF APPEALS**  
DIVISION TWO

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THE STATE OF ARIZONA,  
*Appellee,*

*v.*

JOSÉ BOSQUEZ,  
*Appellant.*

No. 2 CA-CR 2017-0025  
Filed December 13, 2017

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THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND  
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.  
NOT FOR PUBLICATION  
*See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Crim. P. 31.24.*

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Appeal from the Superior Court in Pinal County  
No. S1100CR201600230  
The Honorable Steven J. Fuller, Judge

**AFFIRMED**

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COUNSEL

Mark Brnovich, Arizona Attorney General  
Joseph T. Maziarz, Chief Counsel, Phoenix  
By Amy Pignatella Cain, Assistant Attorney General, Tucson  
*Counsel for Appellee*

Rosemary Gordon Pánuco, Tucson  
*Counsel for Appellant*

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MEMORANDUM DECISION

Chief Judge Eckerstrom authored the decision of the Court, in which Presiding Judge Vásquez and Judge Brearcliffe concurred.

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ECKERSTROM, Chief Judge:

¶1 José Bosquez appeals from his conviction and sentence for aggravated assault, claiming the court erred in denying his requested jury instruction pursuant to *State v. Willits*, 96 Ariz. 184 (1964). Finding no error, we affirm.

¶2 In May 2015, Bosquez punched a correctional officer. He was convicted as noted above and sentenced to an enhanced, maximum prison term of six years, to be served consecutively to the term he was already serving for other offenses.

¶3 Bosquez contends he was entitled to a *Willits* instruction because “the state effectively lost any possible video evidence of the assault.” “We review the refusal to give a *Willits* instruction for an abuse of discretion.” *State v. Fulminante*, 193 Ariz. 485, ¶ 62 (1999). “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.” *State v. Glissendorf*, 235 Ariz. 147, ¶ 8 (2014), quoting *State v. Smith*, 158 Ariz. 222, 227 (1988).

¶4 Bosquez has not shown the state failed to preserve material evidence. *Id.* Although he points to testimony establishing the presence of security cameras in the yard where the assault took place, no testimony actually established that any footage of the assault had ever existed. The criminal investigator testified that he asked for any footage of the assault, and received only footage of Bosquez on his way to receive medical care after it was over. Because Bosquez has not shown any video ever existed, he has not shown the state failed to preserve evidence.

¶5 Moreover, Bosquez has not shown that a video, if it existed, would have had the tendency to exonerate him. *Id.* He claims the video would have shown “who threw the first punch and whether anything was done to precipitate the assault.” Multiple witnesses testified that Bosquez had initiated the conflict. Bosquez did not testify that he had acted in

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self-defense, nor present any other evidence of such, nor did he request that the jury be instructed on self-defense.

¶6 Because Bosquez has not shown that the state actually lost any evidence, nor that the evidence he speculates might have existed would have been helpful to his defense, he cannot satisfy the first prong of the *Willits* test. See *Glissendorf*, 235 Ariz. 147, ¶ 9. We therefore conclude the trial court did not abuse its discretion in refusing to give the requested instruction. We affirm Bosquez's conviction and sentence.