IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

JIMMY DEJUAN WILLIAMS,
Appellant.

No. 2 CA-CR 2019-0190
Filed March 5, 2020

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NOT FOR PUBLICATION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. 31.19(e).

Appeal from the Superior Court in Pinal County
No. S1100CR201801131
The Honorable Christopher J. O'Neil, Judge

AFFIRMED

COUNSEL

Mark Brnovich, Arizona Attorney General
Joseph T. Maziarz, Chief Counsel
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MEMORANDUM DECISION

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

V Á S Q U E Z, Chief Judge:

¶1 After a jury trial, Jimmy Williams was convicted of promoting prison contraband, and the trial court sentenced him to a fifteen-year prison term. On appeal, Williams argues the court erred by denying his request for a jury instruction pursuant to *State v. Willits*, 96 Ariz. 184 (1964). For the following reasons, we affirm.

Factual and Procedural Background

¶2 We view the facts and all reasonable inferences in the light most favorable to affirming Williams's conviction. *See State v. Duffy*, 247 Ariz. 537, ¶ 2 (App. 2019). In February 2018, Lieutenant Albert Franco was scheduled to conduct a "quarterly search" at Florence West Facility, within the Arizona Department of Corrections, where Williams was an inmate. Franco was assigned to Williams's building and searched Williams and his pod first.

¶3 During the search, Franco noticed that Williams's "left sock was crunched up." Franco touched it and heard "the noise of the plastic." Upon questioning, Williams said he had tobacco, and handed the item to Franco. Franco kept the item in his hand, but did not look at it because he was "keeping [a] visual on [Williams]." After Franco finished searching Williams, and Williams started to walk away, Franco examined the item and discovered it was a clear plastic baggie that contained a cigarette and "six little vials" of a "white powdery substance."

¶4 Franco immediately ordered Williams be taken to "medical," where Williams was strip searched and underwent a "[u]rinalysis test." Franco then verified that the baggie was sealed, placed it in his left pants pocket, and continued searching the remaining inmates housed in the pod. About ten minutes after retrieving the baggie from Williams, Franco took it to the "search cart" and photographed it. He then sealed the baggie in an "evidence bag" and recorded the retrieval time, date, description, and location on the evidence bag. Franco placed the evidence bag into his pants pocket and continued to search the housing area. When Franco completed

the search, which was about four hours after he had initially retrieved the baggie from Williams, Franco gave the evidence bag to the investigator responsible for securing evidence. The "white powdery substance" later tested positive for methamphetamine.

¶5 A grand jury indicted Williams for promoting prison contraband. Before trial, Williams requested a *Willits* instruction regarding the state's failure to preserve the photographs Franco had taken before he sealed the baggie in the evidence bag. The trial court reserved its ruling until the close of evidence. Williams renewed his request for a *Willits* instruction during trial and at the close of evidence. The court denied the request.

¶6 A jury found Williams guilty as charged, and the trial court sentenced him as described above. This appeal followed. We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A)(1).

Discussion

¶7 Williams argues the trial court erred by denying his request for a jury instruction pursuant to *Willits*. Williams maintains the photographs "would have been potentially useful" to support his defense theory that "he did not possess methamphetamine in the prison" and the state's failure to preserve the photographs was sufficient to warrant a *Willits* instruction. We review the court's ruling for an abuse of discretion. *See State v. Carlson*, 237 Ariz. 381, ¶ 38 (2015).

¶8 "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 (Glissendorf II)*, 235 Ariz. 147, ¶ 8 (2014) (quoting *State v. Smith*, 158 Ariz. 222, 227 (1988)). A "tendency to exonerate" requires that there is "a real likelihood that the evidence would have had evidentiary value." *Id.* ¶ 9 (mere speculation is insufficient to show evidence had a "tendency to exonerate"). If the defendant establishes both factors, "*Willits* 'require[s] trial judges to instruct [jurors] that if they find that the state has lost, destroyed[,] or failed to preserve material evidence that *might* aid the defendant and they find the explanation for the loss inadequate, they may draw an inference that that evidence would have been unfavorable to the state.'" *Carlson*, 237 Ariz. 381, ¶ 39 (alterations in *Carlson*) (quoting *State v. Youngblood*, 173 Ariz. 502, 506 (1993)).

¶9 Williams contends the trial court erred in denying his request for a *Willits* instruction because the court "wrongfully believed that the instruction [was a commentary on the evidence and only] should be given when the defendant made a showing that the evidence was exculpatory." And, he maintains the court erred in finding "[t]he possibility that those photographs would have contained anything with a tendency to exonerate and frankly anything different from what we see in that bag today is speculative." Williams claims the "photographs [taken by Franco] were potentially helpful to [his] defense" and "a significant amount of time passed with the item in the pocket of a correctional officer p[er]forming other searches of inmates in the prison."

¶10 Williams argues that in *State v. Hernandez*, 246 Ariz. 543, ¶ 20 (App. 2019), on which the trial court relied, this court acknowledged the "inherently uncertain tilt of evidence" that would result in giving a *Willits* instruction, but that this court did not hold the instruction amounted to "a commentary on the evidence." And he relies on *Glissendorf II* for the proposition that "a defendant need only show that the lost evidence would have had the potential to be exculpatory and he need not show it would necessarily have been so."

¶11 In *Hernandez*, we concluded the defendant had been entitled to a *Willits* instruction because the fingerprint and DNA evidence, if preserved, "would have been potentially helpful to him." *Id.* ¶¶ 16, 19, 21 ("tendency to exonerate" used interchangeably with "potentially helpful"). The evidence in that case established a sheriff's deputy "was driving a marked unit when a car ran a stop sign, entered his lane, and caused him to swerve to avoid a collision." *Id.* ¶ 2. The deputy attempted to stop the vehicle, but the vehicle failed to stop. *Id.* ¶ 3. The deputy pursued the vehicle into a parking lot, where he saw the driver and two other individuals flee from the vehicle. *Id.* Shortly thereafter, the deputy was shown a photograph of the defendant and positively identified him as the driver. *Id.* ¶ 4. At trial, a photograph of the vehicle showed fingerprints on the window and driver's door frame, yet the state did not collect DNA or fingerprint evidence from the vehicle before releasing it to its owners. *Id.* ¶¶ 18-19. This court determined the defendant was entitled to a *Willits* instruction because the "several visible fingerprints" could "have been exculpatory," but "due to the actions of the state, [the defendant] did not at any point have access to the car," to conduct any DNA or fingerprint collection of his own. *Id.* ¶¶ 19, 21 & n.4.

¶12 Unlike in *Hernandez*, where the state failed to collect DNA and fingerprint evidence and the only remaining evidence was a photograph

admitted at trial, 246 Ariz. 543, ¶¶ 17-20, here, the evidence bag containing the baggie from Williams's sock was admitted at trial and shown to the jury. Additionally, Franco described discovering the baggie and its contents, ensuring it was sealed, photographing its contents, placing it in a sealed evidence bag, securing it on his person, and later giving it to the investigator. Despite Williams's assertion that the photographs would have been potentially helpful to his defense, he did not demonstrate "a real likelihood that the evidence would have had evidentiary value," *see Glissendorf II*, 235 Ariz. 147, ¶ 9, nor did he argue or make any showing of prejudice, *see id.* ¶ 8. Indeed, we agree with the trial court's reasoning:

> [T]here is no evidence in this case as to how the existence of the photographs would have been material and potentially useful to any defense theory. In other words, there is no evidence and no reason to believe from the evidence that the photographs would have contained anything with a tendency to exonerate the Defendant, to support any defense, mitigate the Defendant's involvement or otherwise help the Defense.

Accordingly, the court did not abuse its discretion in denying Williams's request for a *Willits* instruction.[1] *See Carlson*, 237 Ariz. 381, ¶ 38.

Disposition

¶13 For the foregoing reasons, we affirm Williams's conviction and sentence.

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[1]We need not address whether the *Willits* instruction "constitute[s] a comment on the evidence, in violation of the Arizona Constitution," as "we avoid deciding constitutional issues if the case can be resolved on non-constitutional grounds." *See State v. Rios*, 255 Ariz. 292, ¶ 12 (App. 2010).