IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

MANUEL RAMON CAMPOS,
Appellant.

No. 2 CA-CR 2019-0215
Filed July 31, 2020

Appeal from the Superior Court in Graham County
No. CR201900028
The Honorable Michael D. Peterson, Judge

AFFIRMED

COUNSEL

Mark Brnovich, Arizona Attorney General
Michael T. O'Toole, Chief Counsel
By Mariette S. Ambri, Assistant Attorney General, Tucson
Counsel for Appellee

E.M. Hale Law PLLC, Lakeside
By Elizabeth M. Hale
Counsel for Appellant

MEMORANDUM DECISION

Judge Espinosa authored the decision of the Court, in which Presiding Judge Eppich and Judge Eckerstrom concurred.

E S P I N O S A, Judge:

¶1 Manuel Campos appeals from his conviction of weapons misconduct, arguing the trial court erred in denying a requested jury instruction. For the following reasons, we affirm.

Factual Background

¶2 We review the facts in a light supportive of the jury's verdict. *State v. Payne*, 233 Ariz. 484, ¶ 93 (2013). One afternoon in January 2019, Campos entered the home of his brother's girlfriend, D.C., wearing a trench coat and carrying a shotgun partially concealed under his coat. Campos entered through the back door, located her, fired a shot at the floor near D.C.'s desk, and then ran out the back door with the gun. D.C. telephoned 9-1-1.

¶3 Thatcher police officer J.R. Maner arrived at D.C.'s residence within minutes, and D.C. showed him the location where the gun had been fired. There, Maner observed a shotgun shell and a shotgun "wad" next to a "divot" in the flooring "about the size of a quarter." D.C. then showed Maner the back door where Campos had entered and exited the house. Maner used his personal phone to video-record his examination of the scene.

¶4 Meanwhile, Graham County sheriff's deputy Christopher Martin began driving in the area looking for Campos based on information he had heard "on dispatch." He then saw Campos near Thatcher High School, about two blocks from D.C.'s residence. Martin got out of his patrol vehicle and spoke with Campos, who was holding a "jacket." Martin searched Campos for weapons and found a utility knife. As Martin turned to secure the knife in his patrol car, Campos dropped the jacket and ran. Martin pursued Campos on foot but eventually lost sight of him near the high school and radioed other officers and told them the direction Campos had been headed.

¶5 Still at D.C.'s residence, Maner heard over his radio that Campos had been seen near the high school. Concerned about an armed suspect being near the school, Maner left to help locate Campos. On leaving, he instructed D.C. to remain outside and not reenter the home. After Maner left, however, D.C. and her neighbor went back inside, along with another of D.C.'s friends.

¶6 Shortly thereafter, Thatcher police sergeant Dwayne West arrived at D.C.'s residence and questioned her about the incident. He was subsequently joined by a detective with a police department camera. While the detective took photographs of the scene, West began following shoe tracks leading from the back of the residence in an attempt to retrace the path Campos had taken and find any weapons or items related to the incident. He eventually discovered two yellow, unspent 20-gauge shells in a trash can.

¶7 Meanwhile, other officers located and arrested Campos and then assisted in searching for the shotgun. Martin, who had joined in the search, ultimately found a loaded shotgun under a bush near the garbage can in which the shotgun shells had been discovered, about a block from D.C.'s residence. This bush already had been searched and cleared by another officer before Martin discovered the shotgun. Forensic analysis later determined the shotgun shell found in D.C.'s residence had been fired by the shotgun found in the bush, and Campos's DNA was discovered on a shell that was still loaded in the shotgun's chamber.

¶8 Campos was charged with aggravated assault, two counts of attempted armed robbery, attempted robbery, two counts of burglary, disorderly conduct with a weapon, and two counts of misconduct with weapons based on his possession as a prohibited possessor of the shotgun and the knife, respectively. Before trial, the weapons misconduct charges were severed from the other seven charges. After a trial on the two weapons counts, the jury found Campos guilty of possessing the shotgun while a prohibited possessor, but not guilty as to the utility knife. The court sentenced him to a maximum term of twelve years' imprisonment for his possession of the shotgun.[1] Campos appealed from the judgment and sentence. This court has jurisdiction under A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A).

[1]At sentencing, Campos admitted two prior felony convictions.

***Willits* Instruction**

¶9 At trial, the defense cast doubt on D.C.'s testimony that a shotgun had been fired in her home as she had described, and argued that the gun might have belonged to D.C., herself a convicted felon, who was a prohibited possessor like Campos. After the state had rested, Campos moved for a judgment of acquittal pursuant to Rule 20, Ariz. R. Crim. P., alleging numerous deficits with the state's investigation on the day of his arrest and the evidence at trial. After the trial court denied the motion, Campos requested that the jury be instructed pursuant to *State v. Willits*, 96 Ariz. 184 (1964), arguing law enforcement officers had failed to properly maintain the crime scene and crime scene evidence, allowed civilians to enter the crime scene, failed to identify individuals who were in the house at the time of the investigation, failed to collect evidence from the victim, and failed to test for gun residue, among other things. The state objected, and the court declined to give the instruction.

¶10 On appeal, Campos contends the trial court abused its discretion by denying the requested *Willits* instruction. The state responds that the request was properly rejected because "a *Willits* instruction is not appropriate for evidence that still exists," and any evidence that "arguably no longer exists" did not satisfy the requirements for a *Willits* instruction.

¶11 A trial court's denial of a *Willits* instruction is reviewed for an abuse of discretion. *See State v. Carlson*, 237 Ariz. 381, ¶ 38 (2015). The instruction allows 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 (1999). A defendant "is entitled to an adverse-inference instruction when the state loses or destroys evidence that would have been useful to the defense, even if that destruction is innocent." *State v. Glissendorf*, 235 Ariz. 147, ¶ 7 (2014). But "[d]estruction or nonretention of evidence does not automatically entitle a defendant to a *Willits* instruction." *State v. Murray*, 184 Ariz. 9, 33 (1995). Nor does the fact that "a more exhaustive investigation could have been made." *Id.*; *see State v. Rivera*, 152 Ariz. 507, 511 (1987) (The state has no "affirmative duty to seek out and gain possession of potentially exculpatory evidence."); *see also State v. Willcoxson*, 156 Ariz. 343, 346 (App. 1987) ("[I]n almost every case prosecuted, the claim can be made that the investigation could have been better. We do not believe that a failure to pursue every lead or gather every conceivable bit of physical evidence will require a *Willits* instruction.").

¶12 To be entitled to a *Willits* instruction, a defendant must demonstrate 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*, 235 Ariz. 147, ¶ 8 (quoting *State v. Smith*, 158 Ariz. 222, 227 (1988)); *see also State v. Wooten*, 193 Ariz. 357, ¶ 62 (App. 1998). Speculation as to what the evidence might have shown is insufficient. *See Smith*, 158 Ariz. at 227. Instead, "[t]he defendant must 'demonstrate that the lost evidence would have been material and potentially useful to a defense theory supported by the evidence.'" *State v. Williamson*, 236 Ariz. 550, ¶ 36 (App. 2015) (quoting *Glissendorf*, 235 Ariz. 147, ¶ 10); *see Smith*, 158 Ariz. at 227 ("A *Willits* instruction must be predicated on a theory supported by the evidence, or else it should not be given, because such would tend to mislead the jury.").

¶13 Several of Campos's claims fail because the evidence he contends was lost or destroyed was still available. Campos maintains officers failed to identify or interview those persons with D.C. at her residence during the investigation, suggesting D.C.'s neighbors "could have exonerated [him]" or "provided critical support to [his] case." But Maner testified that when he had spoken with the neighbor at the scene, she had only said "she wasn't involved" in the incident, and Campos does not claim the neighbors were unavailable to provide statements. Moreover, D.C. testified at trial and was available for cross-examination regarding potential exonerating information Campos claims existed. Given that the neighbors were not questioned, and Campos's speculation as to what statements they would have made, a *Willits* instruction was not required on this basis. *See Smith*, 158 Ariz. at 227; *State v. Dunlap*, 187 Ariz. 441, 464 (App. 1996) (*Willits* instruction not applicable where nature of evidence unknown and defendant's exculpatory claim wholly speculative).

¶14 Campos also claims evidence became unavailable as a result of Officer Maner's failure to search and secure D.C.'s house on arrival and take photographs, statements, or interviews before leaving. Such evidence, however, was in fact preserved by Maner when he immediately made a video recording of his initial investigation inside the residence, and subsequently documented his investigation in his police report. And he testified at trial that photographs of the scene taken later that afternoon by the detective corresponded to what Maner observed when he initially had arrived, agreeing nothing "appear[ed] to have been moved or tampered with in [any way] from the time [he] saw it." Campos's mere speculation that unknown evidence was lost because Maner left the scene unsecured,

again provides no basis for a *Willits* instruction. *See Dunlap*, 187 Ariz. at 464.[2]

¶15 Campos further argues officers failed to perform a sweep of D.C.'s house and preserve her clothing, which could have been tested for gunpowder and—assuming no powder was found—used to show that the shotgun had not been fired as D.C. described. But the officers found ample evidence corroborating D.C.'s account, including the spent shell, the shotgun wad, the divot in the floor, Campos's presence in the neighborhood, and the abandoned shotgun loaded with a shell bearing Campos's DNA. The officers were not obligated to conduct a more extensive investigation in order to produce potentially exculpatory evidence. *See Murray*, 184 Ariz. at 33; *Willcoxson*, 156 Ariz. at 346; *Rivera*, 152 Ariz. at 511. Campos similarly argues that because D.C. and others entered the residence once Maner left and before another officer arrived, exculpatory evidence might have been lost. But that claim is entirely speculative and did not therefore justify a *Willits* instruction. *See Dunlap*, 187 Ariz. at 464.

¶16 Campos next contends a *Willits* instruction was required because officers did not preserve his own clothing "to check for gunshot residue," and because he was wearing them at the time of the alleged gunshot, his clothes were likely to contain gunpowder if any was present. While not tested, however, Campos's coat and shoes were preserved and admitted into evidence. Although a forensic firearm examiner testified that "[m]ost of the gunpowder w[ould] be burned off," a *Willits* instruction was inappropriate because the state neither lost nor destroyed the evidence and Campos made no showing that it could not have been made available to him for testing. *See Glissendorf*, 235 Ariz. 147, ¶ 7; *see also State v. Axley*, 132 Ariz. 383, 393 (1982) (no error in refusing to give instructions that "do not fit the facts"). Thus, a *Willits* instruction was not merited simply because the state could have performed testing on the clothing but did not. *See Murray*, 184 Ariz. at 33; *Rivera*, 152 Ariz. at 511; *see also Willcoxson*, 156 Ariz. at 346.

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[2]Campos also argues that Maner's filming the crime scene with his personal phone and failing to upload the video until "a couple of months" later merited a *Willits* instruction. But, as noted above, Maner's video, which was eventually uploaded and available, corroborated photos of the crime scene taken shortly afterward, and Campos alleges no discrepancies between them.

¶17 Campos also asserts "the officers failed to contact or follow-up with people in the area that could have provided critical evidence regarding whether or not [he] had been seen in the area." At trial, Sergeant West testified that he had attempted to speak with the residents of the trailer park in the vicinity of D.C.'s house regarding the incident but they refused to speak with him. Campos, however, was not prevented from contacting those potential witnesses and calling them as witnesses at trial. Not only was this evidence not lost or destroyed by the state, but the notion that it would be exculpatory was speculative and therefore once again insufficient to justify a *Willits* instruction. *See Smith*, 158 Ariz. at 227; *Dunlap*, 187 Ariz. at 464.

¶18 Campos's remaining claims involve evidence that may have become unavailable. As noted earlier, he also argues that the failure to obtain and test D.C.'s clothes for gunpowder residue merited a *Willits* instruction. On appeal, he refers to his theory of defense that he "was not present at the scene" and had no shotgun in his possession the day of the incident, supported by his sister's testimony that he had not been carrying a shotgun when she dropped him off in the area, Officer Woods's failure to immediately see the weapon under the bush when he initially searched for it, and that other, unknown, DNA besides his own had been found on one of the shells. None of those circumstances, however, was necessarily inconsistent with the state's evidence. And even assuming that the lack of gunpowder testing was material and "potentially useful to a defense theory supported by the evidence," *Glissendorf*, 235 Ariz. 147, ¶¶ 8-10 (quoting *State v. Glissendorf*, 233 Ariz. 222, ¶ 17 (App. 2013)), we agree with the state that any conceivable error in failing to give the jury a *Willits* instruction regarding D.C.'s clothing was harmless.

¶19 Error is harmless if it may be said, beyond a reasonable doubt, that it did not contribute to or affect the verdict. *State v. Bible*, 175 Ariz. 549, 588 (1993).[3] As observed earlier, not only did D.C. immediately report, and later testify at trial, that Campos had entered her home, fired the shotgun near where she was sitting, and ran out the backdoor, but she was not meaningfully impeached, and her testimony was corroborated by other evidence. Police found a spent shotgun shell and shotgun wad in D.C.'s house near a divot in her floor, and when Campos was soon thereafter located a few blocks away, holding a trench coat as described by D.C., he

[3]Campos also raises claims related to the treatment of the knife as evidence, but because he was acquitted of the weapons misconduct charge involving the knife, we do not address those claims.

fled on foot. *See State v. Swinburne*, 116 Ariz. 403, 413-14 (1977) (flight may be considered as evidence of guilt). The shotgun that had fired the shell found in D.C.'s house was found only one block away on a route between D.C.'s residence and the location where Campos was found, and his DNA was discovered on a shell loaded in that shotgun. Based on this evidence, both direct and circumstantial, a jury could not rationally have found that Campos had not possessed the shotgun that day, *see Bible*, 175 Ariz. at 588 (in evaluating harmless error, reviewing court "must be confident beyond a reasonable doubt that the error had no influence on the jury's judgment"), and a *Willits* instruction would not have affected its decision. Thus, even if the trial court had erred in refusing to give the instruction, any error would have been harmless in view of the overwhelming evidence of Campos's guilt.

Disposition

¶20 For the foregoing reasons, the trial court's judgment of conviction and imposition of sentence are affirmed.