IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

SHAWN MOORE,
Appellant.

No. 2 CA-CR 2020-0038
Filed December 18, 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NOT FOR PUBLICATION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. S1100CR201801822
The Honorable Christopher J. O'Neil, Judge

AFFIRMED

COUNSEL

Mark Brnovich, Arizona Attorney General
Linley Wilson, Deputy Solicitor General/ Section Chief of Criminal Appeals
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Counsel for Appellee

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MEMORANDUM DECISION

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

B R E A R C L I F F E, Judge:

¶1 Shawn Moore appeals from his conviction after a jury trial for one count of aggravated assault. The trial court sentenced him to a prison term of ten years. On appeal, Moore contends that the court abused its discretion in denying his request for an instruction pursuant to *State v. Willits*, 96 Ariz. 184 (1964). We affirm.

Factual and Procedural Background

¶2 When a trial court refuses a jury instruction, we view the facts in the light most favorable to the proponent of the instruction. *State v. Todd*, 244 Ariz. 374, ¶ 21 (App. 2018). Moore was an inmate at the Arizona Department of Corrections. In March 2018, Corrections Officer Joshua Nielsen assisted another corrections officer in transporting Moore from the recreation area back to his cell. After Moore was restrained, the two officers signaled to the control room to open the door to the recreation area. Once the door opened, Moore lunged toward Nielsen and head-butted his face, breaking Nielsen's nose.

¶3 After Moore head-butted Officer Nielsen, an officer in the control room activated an incident command system, calling additional staff to the scene. As part of such a response, one officer is assigned to bring a handheld video camera with him, which an officer did on this occasion.

¶4 The state charged Moore with aggravated assault. At trial, Moore did not dispute that he had head-butted Officer Nielsen but claimed that he did so under duress. According to Moore, Nielsen had called him an "805" twice that day, once before Nielsen took Moore to the recreation area and again as Moore was leaving the recreation area. Moore testified that the term 805 means "a rat, a coward, a number of things that you can't have in prison" and that, by Nielsen calling him an 805, he would be at risk of assault or murder by other inmates. Moore claimed that the only way he

could clear himself of the 805 label was to physically assault a corrections officer.

¶5 Several state witnesses testified that the term 805 refers to an inmate in protective custody. Multiple witnesses testified that being labeled as one in protective custody could put you in danger of physical assault. Nonetheless, Officer Nielsen denied that he had called Moore an 805, and another inmate in the same unit as Moore testified that he had not heard Nielsen refer to Moore as an 805.

¶6 Before trial, Moore had requested a copy of the handheld video recording but was unable to obtain it. In a pretrial interview, Officer Goodale, an investigator for the Inspector General Bureau, told Moore's counsel that it no longer existed. Moore requested a *Willits* instruction "concerning the destruction of [the video recording] by the state."

¶7 During trial, in his questioning of Officer Goodale, Moore asked whether Goodale had been able to obtain a copy of the videotape. Goodale testified that it no longer existed and to his "understanding" the tape had been "recorded over or deleted." When the questioning continued, the state objected that the tape was irrelevant. Moore argued that the video would have captured a conversation between himself and a Deputy Warden or Captain who had asked Moore why he attacked Officer Nielsen, to which Moore responded he did it because Nielsen called him an 805. Moore further claimed his recorded statement would have been admissible as an excited utterance. The state asserted that any such statement was not an excited utterance, but was rather self-serving hearsay and inadmissible. The trial court sustained the objection.

¶8 After the close of evidence, at settlement of jury instructions, Moore again requested a *Willits* instruction regarding the videotape. The state opposed such an instruction. The state referred to its earlier argument that, even if Moore's statement were made and captured on tape, it did not constitute an excited utterance and would have been inadmissible. It added that there was no evidence that the video would have contained anything exculpatory. The trial court agreed that Moore's purported statement was not an excited utterance but was inadmissible hearsay and thus it would not have contained exculpatory material, and a *Willits* instruction was not warranted. The instruction was not given.

¶9 Moore was convicted and sentenced as described above and this appealed followed. We have jurisdiction under A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A).

Analysis

¶10 On appeal, Moore claims that the trial court abused its discretion in denying his request for a *Willits* instruction. "We review the refusal to give a *Willits* instruction for an abuse of discretion." *State v. Fulminante*, 193 Ariz. 485, ¶ 62 (1999). "We are obliged to affirm the trial court's ruling if the result was legally correct for any reason." *State v. Perez*, 141 Ariz. 459, 464 (1984). The proponent of a jury instruction bears the burden of demonstrating the need for the instruction. *See State v. Glissendorf*, 235 Ariz. 147, ¶ 8 (2014).

¶11 Pursuant to *Willits*, 96 Ariz. 184, a defendant is entitled to an instruction permitting the jury to infer that missing or destroyed evidence would have been exculpatory when the state negligently failed to preserve the evidence. *Fulminante*, 193 Ariz. 485, ¶ 62. "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. Smith*, 158 Ariz. 222, 227 (1988).

¶12 As he did below, Moore claims that the videotape would have captured his admissible, excited utterance that Officer Nielsen had called him an 805, which, in turn, would have supported his defense of duress. The state asserts that such a statement would not qualify as an excited utterance, and thus would have been inadmissible and, consequently, would not have been exculpatory. It further asserts that, even if the statement were admissible and had been recorded, the state had no obligation to preserve the tape because it was not "obviously material."

Excited Utterance

¶13 Hearsay is "any out-of-court statement offered at trial to prove the truth of the matter asserted." *See State v. Allen*, 157 Ariz. 165, 172 (1988); Ariz. R. Evid. 801(c). Hearsay is inadmissible unless a rule, statute, or constitutional provision provides otherwise. Ariz. R. Evid. 802. Assuming, for the purposes of this decision, that the video recording would have captured Moore's statement that Officer Nielsen called him an 805, it would have been offered to prove that Nielsen had indeed done so, and thus it would have been hearsay. A hearsay statement that also qualifies as an excited utterance, however, may be admitted. Ariz. R. Evid. 803(2).

¶14 An excited utterance is a statement "relating to a startling event or condition, made while the declarant was under the stress of excitement that it caused." Ariz. R. Evid. 803(2). As we have explained,

"(1) there must have been a startling event; (2) the statement must relate to the startling event; and (3) the statement must be made spontaneously, that is, soon enough after the event so as not to give the declarant time to fabricate." *State v. Anaya*, 165 Ariz. 535, 538 (App. 1990). The statement may be admitted if, under the totality of the circumstances, the declarant may be considered to be speaking under the stress of nervous excitement. *State v. Beasley*, 205 Ariz. 334, ¶ 30 (App. 2003).

¶15 Moore appears to argue that either (or both) the head-butting of Officer Nielsen or his physical restraint by other officers shortly thereafter was a startling event, and argues that his statement about being called an 805 related to that event. The trial court below did not specify why it deemed Moore's recorded statement inadmissible as an excited utterance. For purposes of this decision we will assume that Moore's statement met the first two prongs of the excited utterance test—that a startling event occurred and that the statement related to the startling event. Nonetheless, under the totality of the circumstances, we cannot agree that Moore made the statement while under stress of nervous excitement such that it was sufficiently spontaneous and reliable.

¶16 The requirement of spontaneity ensures that the statement is more likely accurate and less likely to be fabricated. *See State v. Whitney*, 159 Ariz. 476, 482 (1989) ("spontaneity gives rise to trustworthiness"); *see also State v. Yee*, 121 Ariz. 398, 401 (App. 1978). The rationale is that those speaking while under the influence of a startling event do not have the opportunity to reflect and to make a self-serving, and false, statement. *See Whitney*, 159 Ariz. at 482.

¶17 In *State v. Conn*, 137 Ariz. 152, 154-55 (App. 1982), the defendant asserted that his statements to police officers at the time of his arrest for burglary and sexual assault—that he had been home all night and "there was no way" he could have committed the crimes—were admissible excited utterances. He made an offer of proof that one of the arresting officers would testify that he "appeared excited, surprised and amazed at being arrested." *Id.* at 154. The trial court excluded evidence of his statements. *Id.* at 155. On appeal, we concluded that, even if the trial court believed that the defendant had been excited at the time of his arrest, it could still "properly find that the statements were unreliable since the [defendant] had every reason to fabricate and sufficient time for reflection." *Id.* Other courts have similarly concluded that, although an arrest may cause excitement, "only the briefest reflection" or "some reflection" is needed to deny guilt or to make exculpatory statements once one is arrested; that opportunity and motive for fabrication thus renders such

statements unreliable as excited utterances. *See United States v. Esparza*, 291 F.3d 1052, 1055 (8th Cir. 2002); *see also United States v. Elem*, 845 F.2d 170, 174 (8th Cir. 1988).

¶18 The circumstances here do not bear the necessary indicia of reliability needed for an admissible excited utterance. Although the time between the startling event and Moore's alleged statement would not have been long, Moore would still have had a sufficient amount of time between head-butting Officer Nielsen and the arrival of the response team with the video camera, and certainly the motive to fabricate his justification. Furthermore, because Moore admits that he purposefully head-butted Nielsen after Nielsen called him an 805 the *second* time that day, there would have been ample time before the assault for Moore to have anticipated the need for a fabricated justification. Applying the excited utterance exception here, therefore, would be without the "guarantee of trustworthiness which serves as the basis of this exception." *State v. Rivera*, 139 Ariz. 409, 411 (1984). The trial court did not abuse its discretion in determining that Moore's purported statement was not an excited utterance, and, given the absence of any other applicable exception to the hearsay rule, that it was inadmissible and thus without a tendency to exonerate Moore.

Requirement to Preserve Tape

¶19 Even if the erased videotape had captured Moore's statement and were admissible, the "[d]estruction or nonretention of evidence does not automatically entitle a defendant to a *Willits* instruction." *State v. Murray*, 184 Ariz. 9, 33 (1995). The state's only obligation is to "act in a timely manner to ensure the preservation of evidence it is aware of where that evidence is obviously material and reasonably within its grasp." *Perez*, 141 Ariz. at 463; *see also State v. Fuentes*, 247 Ariz. 516, ¶ 32 (App. 2019) (state's duty to preserve evidence arises when the evidence is "obviously material").

¶20 In *State v. Hernandez*, 250 Ariz. 28 (2020), the defendant claimed he was entitled to a *Willits* instruction regarding the state's failure to collect DNA or fingerprint evidence in a car that he was alleged to have been driving when he fled from a law enforcement vehicle. *Id.* ¶¶ 2-7. At trial, Hernandez claimed the existence of an alternative driver. *Id.* ¶ 19. Our supreme court affirmed the trial court's ruling denying the *Willits* instruction, holding that Hernandez had failed to prove both that this evidence was obviously material and that it had a tendency to exonerate him. *Id.* ¶ 22. The court explained that evidence is "'obviously material'

when, at the time the state encounters the evidence during its investigation, the state relies on the evidence or knows the defendant will use the evidence for his or her defense." *Id.* ¶ 16. And, because the state could not have known at the time of its investigation that Hernandez would claim he had not been driving the vehicle, it was reasonable for the state to not collect DNA and fingerprint evidence from the interior of the car. *Id.* ¶ 19.

¶21 Here, it was similarly reasonable for the state to not preserve the video-recording of events after Moore head-butted Officer Nielsen because the video was not "obviously material." Moore's purported statement to an unknown corrections official was not sufficient to indicate to the state that Moore would later claim a defense of duress resting on Nielsen having called Moore an 805. And, although Moore contends that he stated that Nielsen called him an 805, Moore did not tell anyone that being called an 805 put him under "duress" thus compelling his physical assault of the officer. Nor was there any other reason for the state to believe that this video would be material to its investigation. The state presented sufficient evidence that Moore head-butted Nielsen. It was not obligated to anticipate defenses Moore might raise and then preserve all potentially material evidence to any conceivable defense. *See id.* ¶ 23.

¶22 Because Moore's statement following his assault did not qualify as an excited utterance and would have been inadmissible, it would not have been exculpatory as required by *Willits*. And, because Moore's statement, if recorded, was not obviously material to his defense, the state did not have an obligation to preserve it. The trial court did not abuse its discretion in denying Moore's request for a *Willits* instruction.

Disposition

¶23 For the foregoing reasons, we affirm Moore's conviction and sentence.