IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

CHRISTOPHER DUANE YOUNG,
Appellant.

No. 2 CA-CR 2020-0087
Filed November 26, 2021

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NOT FOR PUBLICATION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 Pima County
No. CR20185465001
The Honorable Howard Fell, Judge Pro Tempore

AFFIRMED

COUNSEL

Mark Brnovich, Arizona Attorney General
Linley Wilson, Deputy Solicitor General/Section Chief of Criminal Appeals
By Jana Zinman, Assistant Attorney General, Phoenix
Counsel for Appellee

Joel Feinman, Pima County Public Defender
By Michael J. Miller, Assistant Public Defender, Tucson
Counsel for Appellant

MEMORANDUM DECISION

Vice Chief Judge Staring authored the decision of the Court, in which Presiding Judge Espinosa and Judge Eckerstrom concurred.

S T A R I N G, Vice Chief Judge:

¶1 Christopher Young appeals from his convictions and sentences for assault, unlawful imprisonment, and aggravated domestic violence. Young argues the trial court erred in denying his motion for mistrial "after the state asked [him] whether he had four prior felony convictions, when the trial court had only held that [his] two prior domestic violence convictions were admissible." Additionally, Young argues the court erred in denying his request for an instruction pursuant to *State v. Willits*, 96 Ariz. 184 (1964), based on a detective's "fail[ure] to preserve Young's cell phone after Young told him of the exonerating evidence it contained." For the following reasons, we affirm Young's convictions and sentences.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to sustaining the jury's verdicts and resolve all reasonable inferences against Young. *See State v. Felix*, 237 Ariz. 280, ¶ 30 (App. 2015). In May 2018, Young and J.M. went to a dance and music venue where Young performed as a DJ. Young consumed alcohol that evening, becoming intoxicated. J.M., however, did not drink alcohol that night. After the two returned to J.M.'s apartment, Young became upset, yanked her bedroom door from its hinges, and threw it in her closet. J.M. asked Young to leave, but he refused. She then attempted to leave, but after she opened her front door, she "blacked out." When she woke up, she was on the floor, her ears felt "like they were on fire," and she felt as if the room was spinning. She saw Young close the door and walk towards her, after which she blacked out again.

¶3 When J.M. next awakened, she was sitting on the floor in her bedroom, leaning against her bed. She tried to scream but could not hear herself, and Young put his hands over her mouth and nose. J.M. pushed his hand away so she could breathe and told him she "would do whatever he wanted" if he "just stop[ped]." Young then put a blanket over J.M.'s

head, picked her up, and dropped her; he then placed her on the bed and apologized.

¶4 Several minutes later, after J.M. was unable to locate her cell phone, she went to a friend's apartment in the same complex and the friend called 9-1-1. J.M. was transported to the hospital where she found pieces of her cell phone in her hair. She had numerous injuries that had not been present before this incident, including injuries to her head, redness and bruising on her chest, back, neck, arms, and legs, and scratches on her hip and arms.

¶5 Young was subsequently indicted on charges of aggravated assault, kidnapping, and aggravated domestic violence. The state alleged he had previously been convicted of (1) aggravated harassment, domestic violence; (2) aggravated assault, serious physical injury, domestic violence; (3) criminal damage; and (4) aggravated assault of a minor under fifteen. At trial, Young testified that some of J.M.'s injuries were consistent with their consensual "sexual activities," and that they had engaged in such activity several times in the three days prior to the alleged incident. Further, he testified J.M. had not wanted him to spend the night at her apartment after they returned from the dance venue because his snoring had "kept [her] up at night the last three nights," and he had left her apartment after collecting his belongings and arranging for a ride home. He also testified J.M. had subsequently stated she went to the hospital that day because she "slipped and fell" while mopping her floor.

¶6 Young moved for a mistrial after the state referred to his four prior felony convictions on cross-examination, but the trial court denied his motion. Young was convicted of aggravated domestic violence, assault as a lesser-included offense of aggravated assault, and unlawful imprisonment as a lesser-included offense of kidnapping. He was sentenced to concurrent terms of imprisonment, the longest of which is five years. This appeal followed. We have jurisdiction pursuant to article VI, § 9 of the Arizona Constitution and A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A).

Motion for Mistrial

¶7 A mistrial is "the most dramatic remedy for trial error" and should be granted only when the interests of justice require the jury to be discharged and a new trial be granted. *State v. Dann*, 205 Ariz. 557, ¶ 43 (2003) (quoting *State v. Adamson*, 136 Ariz. 250, 262 (1983)). The trial court enjoys broad discretion in deciding whether to grant a mistrial, and we will

not disturb its ruling absent an abuse of that discretion. *State v. Jones*, 197 Ariz. 290, ¶ 32 (2000) (trial court in best position to determine whether evidence "will actually affect the outcome of the trial"). "To determine whether a mistrial is warranted, courts consider '(1) whether the jury has heard what it should not hear, and (2) the probability that what it heard influenced [it].'" *State v. Miller*, 234 Ariz. 31, ¶ 25 (2013) (alteration in *Miller*) (quoting *State v. Laird*, 186 Ariz. 203, 207 (1996)).

¶8 Before trial, Young moved to preclude the state from introducing evidence that he had previously been convicted of four felony offenses for purposes of impeachment under Rule 609, Ariz. R. Evid. Young argued admission of his prior convictions would result in undue prejudice by denying him the right to a fair trial, portraying him as a "bad man" in front of the jury, and deterring him from testifying at trial. In response, the state argued two of the alleged prior felony convictions had involved domestic violence and were therefore admissible as elements of the aggravated domestic violence charge. *See* A.R.S. § 13-3601.02. Further, it asserted Young's prior convictions could be sanitized to "minimize any prejudicial effect."

¶9 At the motions hearing, the trial court stated as follows:

> [T]he State points out, and correctly so for a couple of these charges, because they're alleging an aggravated DV, they have to prove prior DV convictions in the last 84 months. And I think it's an element of the crime, and they're entitled to mention it substantively, and certainly in cross examination as well, if Mr. Young decides to testify, perhaps not the nature of the convictions, but the convictions themselves, or their existence.
>
> The following exchange then occurred:
>
> > [DEFENSE COUNSEL]: But I do believe that if Mr. Young decides to testify, that the State should then not be able to ask him, for purposes of proving up those two priors and the elements, if he actually had those two cases, you know, like a mini priors trial. Obviously, usually they just get to ask, have you been—

> THE COURT: Have you been convicted of a felony.
>
> [DEFENSE COUNSEL]: And that's it.
>
> THE COURT: Right. And here I would envision . . . if he testifies, have you been convicted of a felony? Yes. Was it domestic violence in CR20162411 or whatever the number is, or whatever? Yes, it was. In Pima County, maybe? Yes. That's about it. You don't plan to do anything beyond that, do you?
>
> [PROSECUTOR]: No, Your Honor.

¶10 The trial court subsequently stated that if Young testified, the state could ask him "to acknowledge that he has had felony convictions, and the dates. But beyond that, it would be just like a normal case where the nature of the felony wouldn't come out, wouldn't be relevant." In its related minute entry, the court ordered that the state "shall be permitted to introduce evidence and testimony regarding [Young]'s prior convictions with any necessary redactions to the exhibits," and, "in the event [Young] chooses to testify, counsel may question him [as to] whether he has been convicted of a felony and the date of the offenses; however, counsel shall not be permitted to question [him] regarding the nature of the felony."

¶11 On the first day of trial before a different judge, the state referenced the previous judge's ruling, stating, "I think [the court] made the rule that we could talk about the two D.V. priors that were within the past seven years as it is part of one of the charges" and "any other felony priors that would only—the fact that he had felony convictions would come out if he testified." The trial court confirmed that this was its understanding of the previous ruling, and defense counsel stated, "I agree, and I've advised my client accordingly."

¶12 The next day, a detective testified that he had conducted a records check on Young and found he had been convicted of two domestic-violence-related offenses within the last eighty-four months. Young confirmed on direct examination that he had "a felony conviction." On cross-examination, the state asked Young whether he, "in fact, ha[d] four prior felony convictions," to which he replied, "I just remember the two." After the state offered to show him documentation to refresh his memory, the trial court held a bench conference, during which Young argued the

court had not ruled the state could "ask anything other than the fact that he has prior convictions." Specifically, Young asserted the previous ruling permitted the state to ask him whether he had a prior felony conviction without regard to the number of any such convictions. The state countered the court had prohibited it from discussing the nature, but not the number, of Young's prior convictions.

¶13 Young moved for a mistrial based on the state's alleged violation of the trial court's ruling. After consulting the pertinent minute entry, the court noted the ruling was "ambiguous" but ultimately denied Young's motion, stating the state's question had not prejudiced him. Young filed a motion for reconsideration, arguing that one of the four alleged felony convictions occurred in 2006, "which is well outside the 10-year time limit set forth under Rule 609," and that he had been "significantly prejudiced" because the state's question "told the jury that [he] had four prior felony convictions" and "implied that [he], and defense counsel, were not being honest." The court denied this motion.

¶14 On appeal, Young contends that because the trial court "only ruled that [his] prior domestic violence convictions could come in and the state agreed to the ruling," it "never considered whether there was a basis for admission of the other felonies," and therefore the jury "heard what it should not hear," satisfying the first prong of *Miller*. 234 Ariz. 31, ¶ 25 (quoting *Laird*, 186 Ariz. at 207). As to the second prong—the probability that what the jury heard influenced it—Young asserts the state's question about whether he had four prior convictions "suggested to the jury that he and defense counsel were liars" because on direct examination "he was asked and admitted that he had one prior conviction." *See id.* Thus, he concludes, because "the jury [already] had doubts about the state's case," as demonstrated by his conviction on two lesser-included offenses, without the state's "question about the number of priors and statement that [it] had document[s] to show Young, the balance of credibility between Young and [J.M.] may have [been] altered and Young may have been acquitted."

¶15 The state counters the trial court did not "prohibit the State from asking Young about the number of his prior convictions" but instead "limited the prosecutor regarding the nature of the prior convictions." Further, it contends it "was entitled to ask Young if he had four prior felony convictions after he testified during direct examination that he had [one] prior felony conviction." The state also argues it was required to "prove the existence of two prior domestic violence offenses" as an element of aggravated domestic violence, and because Young's testimony "directly

conflicted with the statutory requirements" for establishing this element, his testimony "had to be impeached." Finally, the state argues Young was not prejudiced because the prosecutor stopped questioning Young on the matter after his counsel objected and therefore "the jury did not find out the actual number of prior convictions," and the court provided limiting instructions regarding Young's prior convictions.

¶16 On the record before us, we cannot say the trial court abused its discretion by denying Young's motion for mistrial. On direct examination, Young testified in a manner suggesting he had but one felony conviction. The state was entitled to impeach him on that point, particularly given the need to prove at least two prior domestic violence convictions. *See* § 13-3601.02; *cf. State v. Tovar*, 187 Ariz. 391, 393 (App. 1996) (where a defendant "has put certain activity in issue by . . . denying wrongdoing, the government is entitled to rebut by showing that the defendant has lied" (alteration in *Tovar*) (quoting *United States v. Beverly*, 5 F.3d 633, 639 (2d Cir. 1993))). And, as a result of his objection and the bench conference that followed, Young never actually answered the question. Further, the court did not expressly rule that only Young's prior domestic violence convictions were admissible under Rule 609. Indeed, Young fails to identify anything in the record indicating the court's initial ruling was intended to preclude reference to his four prior felony convictions. In short, Young has not shown that the jury "heard what it should not hear," *Miller*, 234 Ariz. 31, ¶ 25 (quoting *Laird*, 186 Ariz. at 207), and therefore we find no error, *see Jones*, 197 Ariz. 290, ¶ 32.

Willits Instruction

¶17 To obtain a *Willits* instruction, a defendant must prove: "(1) the state failed to preserve obviously material and reasonably accessible evidence that could have had a tendency to exonerate the accused; and (2) there was resulting prejudice." *State v. Hernandez*, 250 Ariz. 28, ¶ 10 (2020); *see State v. Glissendorf*, 235 Ariz. 147, ¶ 8 (2014). The first prong requires showing "a real likelihood that the evidence would have had evidentiary value." *Glissendorf*, 235 Ariz. 147, ¶ 9 (mere speculation insufficient to show "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.'" *State v. Carlson*, 237 Ariz. 381, ¶ 39 (2015) (alterations in *Carlson*) (quoting *State v. Youngblood*, 173 Ariz. 502, 506 (1993)). The instruction is

"powerful" and "in itself may create a reasonable doubt as to the defendant's guilt." *Hernandez*, 250 Ariz. 28, ¶ 1. We review the trial court's refusal to give a *Willits* instruction for an abuse of discretion. *See State v. Fulminante*, 193 Ariz. 485, ¶ 62 (1999).

¶18 Young requested a *Willits* instruction, arguing the state had failed to preserve evidence contained on his cell phone. Specifically, Young asserted his phone had contained recordings and Facebook messages supporting his version of events, and because he had been taken into custody and "lost all of his belongings," he had repeatedly asked a detective to retrieve this evidence from his phone, which was located at his former residence. And, Young argued, because the detective had failed to preserve such evidence, it was ultimately destroyed "[b]y the natural course of Facebook that only keeps the messages for a certain amount of time," and therefore he was entitled to a *Willits* instruction.

¶19 The trial court concluded the alleged failure to preserve evidence contained on Young's cell phone had "nothing to do with state action," and Young "should have asked someone to retrieve that information for him." In response, Young argued that destruction of the evidence had involved "state inaction," and that he had "thought the detective was going to retrieve it" based on his repeated requests and offer to provide the detective with his phone's password. The court then asked Young what information would have tended to exonerate him, and he asserted the phone had contained recordings establishing the reason he left J.M.'s apartment was that she "kick[ed him] out . . . for snoring." The court noted Young had already testified to his version of events and was able to cross-examine J.M. on that issue "at least twice." Additionally, Young asserted his phone had contained messages indicating that J.M. had "slipp[ed] on the floor because of [a] mop bucket." The court stated that "[a]ll of this was available to" Young, and that "it wasn't incumbent upon the police to prepare a defense" for him, "particularly when they didn't even know what [he] was going to say about the mop or the scratches or anything else."

¶20 The trial court continued:

> [I]t's not incumbent upon [police] to retrieve evidence that was, at that time, in [Young's] possession that could have been retrieved had he asked someone else to do it. It was never—the data was never in the possession of the police. And in order for there to be a *Willits*

> instruction, the defendant has to prove that the State failed to preserve material and reasonably . . . accessible evidence that could have had a tendency to exonerate him and that there was resulting prejudice. . . . *Glissendorf* is the case. It says that to be entitled to a *Willits* instruction, an accused need not prove evidence was destroyed by the State that would have conclusively established a defense, but rather that he's entitled to the instruction if he can demonstrate that the lost evidence, this wasn't even lost, would have been material and potentially useful to defense theory which would be supported by the evidence. The failure to preserve potentially useful evidence is not a denial of due process unless the criminal defendant can show that the police had bad faith when they lost or destroyed evidence. None of that is applicable here.

¶21 In response to Young's motion, the state asserted Facebook does not automatically destroy messages and argued the messages at issue were irrelevant because they had involved "incidents when [J.M.] was aggressive towards him, not this specific incident." It also pointed out that Young had been living with his fiancée at the time he was taken into custody, and therefore "[s]he could have preserved" his phone. Young then claimed that whether Facebook messages are deleted is "dependent upon the settings" of the account, and the trial court noted there had "been no testimony about what the settings of [Young's] Facebook account were." The court denied Young's request for a *Willits* instruction, concluding the factors it was required to consider did not support such an instruction and Young had "not been prejudiced by the police not doing what they had no requirement to do."

¶22 On appeal, Young contends he was entitled to a *Willits* instruction because he told the detective there was evidence on his phone supporting "key parts of [his] account" as to the events underlying his charges and such evidence "was readily available to the detective since Young was offering it to him." Further, he asserts the evidence "was not available to [him] because he was being arrested and taken to jail," and he did "not immediately realize that the police had not taken his phone and he needed to take action to preserve it." And, Young argues, due to his

"unsatisfactory relationship" with his first attorney and her subsequent withdrawal from his case, "substantial time passed before his trial attorney had an opportunity to attempt to access the information." Finally, he argues "he was prejudiced by not having access to [the evidence] for use at trial" because if the evidence on the phone indicated J.M. "threw him out for snoring and fell while mopping, it would cast serious doubt on her story," leading the jury to accept his "explanations of the contradictions the state claims." Thus, he concludes, "the fact that under some conditions a defendant could preserve evidence does not mean that a *Willits* instruction is not required when the police fail to preserve it."

¶23 The state responds that a *Willits* instruction "was not warranted" because Young "failed to make a showing that the Facebook messages or the recordings on his cell phone were no longer available," and he "could have submitted a copy or screenshot of his Facebook messages showing that the messages had been deleted prior to a specific date or his fiancée could have testified that his cell phone was no longer at her residence." Further, it argues the detective "had no obligation to conduct a more thorough investigation to locate potentially exculpatory evidence" where such evidence was also available to Young. And, the state contends Young's assertion that his cell phone contained evidence helpful to his defense was purely speculative. Moreover, it argues, Young fails to show prejudice because information allegedly contained within the text messages and recordings was ultimately relayed to the jury through his own testimony.

¶24 Generally, the state "does not have an affirmative duty to seek out and gain possession of potentially exculpatory evidence," *State v. Rivera*, 152 Ariz. 507, 511 (1987), "nor does it have a duty to gather evidence for a defendant to use in establishing a defense," *Hernandez*, 250 Ariz. 28, ¶ 11; *see also State v. Willcoxson*, 156 Ariz. 343, 346 (App. 1987) ("failure to pursue every lead or gather every conceivable bit of physical evidence" does not require *Willits* instruction). Moreover, on the record before us, Young did not establish that the recordings and Facebook messages on his cell phone were no longer available. *See State v. Geotis*, 187 Ariz. 521, 525 (App. 1996) (no abuse of discretion in denying *Willits* instruction where "there was no showing that [the evidentiary items at issue] were rendered inaccessible to defendant for his later use"). He offered nothing more than a bare assertion that the Facebook messages had been "destroyed." And, Young provided no explanation as to where the recordings on his phone had been located and how they were destroyed or rendered unavailable to him as a result of the state's "inaction." Further, nothing in the record

indicates Young made any independent attempt to obtain the cell-phone evidence he now argues was key to his defense. Thus, we cannot say the trial court abused its discretion in declining Young's request for a *Willits* instruction. *See Fulminante*, 193 Ariz. 485, ¶ 62; *State v. Perez*, 141 Ariz. 459, 464 (1984) (appellate court "obliged to affirm the trial court's ruling if the result was legally correct for any reason").

Disposition

¶25 For the foregoing reasons, we affirm Young's convictions and sentences.