IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

LUCIO TORRES NAJERA,
Appellant.

No. 2 CA-CR 2022-0144
Filed May 30, 2023

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NOT FOR PUBLICATION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. S1100CR202102108
The Honorable Steven J. Fuller, Judge

AFFIRMED

COUNSEL

Kristin K. Mayes, Arizona Attorney General
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MEMORANDUM DECISION

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

E C K E R S T R O M, Judge:

¶1 Lucio Torres Najera appeals from his convictions and sentences for child molestation. For the reasons that follow, we affirm.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to sustaining the jury's verdicts. *See State v. Simpson*, 217 Ariz. 326, ¶ 2 (App. 2007). In October 2021, then-five-year-old V.V. reported to her mother that a relative had touched her genitals during a family party at her grandparents' house in Eloy earlier that day. V.V.'s mother contacted the police. An officer went to the home where the party had been held. V.V.'s grandmother accessed video surveillance footage from the party using an app on her cell phone supplied by the home security company. She showed it to the officer, who viewed the footage and recorded it using an app for his police body camera on his cell phone. The video showed Najera, V.V.'s great-uncle, pulling V.V. to him and reaching up inside her shorts two times. The officer located Najera at his home and arrested him, approximately four hours after the time stamp on the incriminating video. The next day, V.V. underwent a forensic interview and medical examination, during which she again reported having been touched on her genitals during the party.

¶3 A grand jury charged Najera with two counts of child molestation, each committed by touching V.V. on her vulva. During a two-day trial, Najera took the stand in his own defense. He identified himself and V.V. on the video but denied having touched her inappropriately, claiming that he had only been brushing dirt from her clothing. The jury found Najera guilty as charged. The trial court sentenced him to concurrent, fourteen-year prison terms. This appeal followed. We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A).

Police Recording of Surveillance Video

¶4 On the first day of trial, before the jury was selected, Najera made an oral motion *in limine* to preclude the state's use of the officer's cell phone recording of the home surveillance video. He argued that the recording was "not an original video," and that Rule 1002, Ariz. R. Evid.—the so-called "best evidence rule"—required that the original video be used to prove its contents. The trial court denied the motion, finding that the officer's recording of the footage could be admitted so long as the state lay a proper foundation. Later that day, after the officer explained how he had obtained the recording of the security camera footage, it was admitted and played for the jury.

¶5 On appeal, Najera contends the trial court erred in admitting the officer's cell phone recording of the footage. He argues that the state should have been required to obtain the "original surveillance video" from the security company, rather than presenting to the jury "a video of someone else's video of the original." We view trial court rulings on the admissibility of evidence, including recordings, for abuse of discretion. *See State v. Lavers*, 168 Ariz. 376, 386 (1991). However, we review the interpretation of the Arizona Rules of Evidence *de novo*. *State v. Steinle*, 239 Ariz. 415, ¶ 6 (2016).

¶6 As below, Najera argues that the trial court's admission of the officer's recording violated Rule 1002. But, as our supreme court has explained, that rule "applies when a witness seeks to testify about the contents of a writing, recording, or photograph without producing the item itself." *Id.* ¶ 18. Here, law enforcement relied in its investigation upon the home surveillance footage that was available to the homeowner via a cell phone app provided by the home security company. The investigating officer did not seek to testify regarding the contents of any other "original" surveillance video the security company may have possessed, as no such footage was ever sought or obtained. In addition, the officer did not merely testify about what he saw on the homeowner's cell phone and recorded using his body camera; the state also introduced the recording and played it for the jury to see for itself. Thus, Rule 1002 does not apply.

¶7 Najera contends that the hypothetical "original" surveillance video he insists should have been obtained from the security company would have been clearer and therefore the "best evidence" that should have been made available to the jury. The existence of different, clearer footage is pure speculation. Moreover, "the relative quality of a video recording does not necessarily make it inaccurate—it is ultimately for the jury to

decide whether it can identify the objects and persons the recording depicts." *State v. Haight-Gyuro*, 218 Ariz. 356, n.6 (App. 2008).

¶8 To the extent any distinction exists between the footage on the homeowner's phone and the officer's body camera recording of it, Rule 1003, Ariz. R. Evid., establishes that "[a] duplicate is admissible to the same extent as the original unless a genuine question is raised about the original's authenticity or the circumstances make it unfair to admit the duplicate." Najera does not dispute that the officer's recording was admissible as a duplicate. Indeed, although the officer agreed that his recording was "not the best quality," he testified that its quality was no different from the quality of the video he watched on the homeowner's cell phone using the app provided by the security company. He further explained that the body camera app he used to record the footage from the homeowner's phone would not have allowed for the alteration of the footage after he captured it.

¶9 For all these reasons, Najera has not established that the trial court abused its discretion in admitting the challenged recording.

Willits Instruction

¶10 During the settling of final jury instructions, Najera's counsel requested an instruction pursuant to *State v. Willits*, 96 Ariz. 184 (1964).[1] He argued that the quality of the officer's recording of the home security video—which he called "the key piece of evidence" in the case—was at issue and that the police had "failed to preserve the evidence." The state objected, arguing that it could not have preserved something it never possessed and that the existence of the recording in a different format did "not rise to the level of legal prejudice" or merit a *Willits* instruction. The trial court refused to provide the requested instruction, reasoning that the original video had not been in the state's possession and, in any event, would not tend to exonerate Najera.

¶11 On appeal, Najera contends the trial court erred in not providing a *Willits* instruction regarding the state's failure to obtain the original home surveillance video from the security company. We review a

[1]Under *Willits*, when the state fails to preserve evidence that is potentially exonerating, the accused may be entitled to an instruction informing the jury that it may draw an adverse inference from the state's action. 96 Ariz. at 191.

trial court's denial of such an instruction for an abuse of discretion. *State v. Glissendorf*, 235 Ariz. 147, ¶ 7 (2014).

¶12 "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." *Id.* ¶ 8 (quoting *State v. Smith*, 158 Ariz. 222, 227 (1988)). Here, the state preserved a copy of the video as it was available to the homeowner and presented to police. It is well settled that the state "'does not have an affirmative duty to seek out and gain possession of potentially exculpatory evidence,' nor does it have a duty to gather evidence for a defendant to use in establishing a defense." *State Hernandez*, 250 Ariz. 28, ¶ 11 (2020) (quoting *State v. Rivera*, 152 Ariz. 507, 511 (1987)). But even assuming, *arguendo*, that the state should have obtained the original video from the home security company, Najera cannot establish either a qualifying "tendency to exonerate" or prejudice.

¶13 Najera can only speculate that a version of the surveillance video obtained directly from the security company would be of any higher quality than that presented in court. Indeed, Najera only contends that "an original copy of the video . . . may have been of better quality than the video presented at trial." But, "[t]o show that evidence had a 'tendency to exonerate,' the defendant must do more than simply speculate about how the evidence might have been helpful." *Glissendorf*, 235 Ariz. 147, ¶ 9; *see also Smith*, 158 Ariz. at 227 (no abuse of discretion in trial court's denial of *Willits* instruction when "nothing except speculation" to suggest lost piece of paper would have contained exculpatory information).

¶14 Moreover, the recording played for the jury showed Najera's hand going into V.V.'s shorts. No version of the surveillance video, no matter how clear, could have shown what happened under V.V.'s shorts or definitively proven or disproven—as Najera contends—whether he had touched V.V.'s genitals. "A trial court does not abuse its discretion by denying a request for a *Willits* instruction when a defendant fails to establish that the lost evidence would have had a tendency to exonerate him." *State v. Fulminante*, 193 Ariz. 485, ¶ 62 (1999); *see also State v. Willcoxson*, 156 Ariz. 343, 346-47 (App. 1987) (upholding denial of *Willits* instruction when police took only black-and-white, rather than color, photographs of victim's injuries, as available photos were "satisfactory" even if not "the very best evidence").

¶15 Thus, the trial court acted within its discretion in denying Najera's request for a *Willits* instruction.

Sufficiency of the Evidence

¶16 Finally, Najera contends the state presented insufficient evidence to support his convictions for child molestation. In particular, he argues that V.V. "failed to describe in detail what happened" and "failed to list the name of the person who touched her." He also observes that no eyewitnesses saw him touch V.V. as alleged, that the video did not "definitive[ly]" show such touching, and that no DNA evidence or injuries to V.V.'s genitalia were observed during her medical examination.

¶17 Sufficiency of the evidence is a question of law requiring *de novo* review on appeal. *State v. West*, 226 Ariz. 559, ¶ 15 (2011). Viewing the evidence in the light most favorable to sustaining the verdicts, and resolving all inferences against Najera, we must determine whether the state presented evidence that "reasonable persons could accept as sufficient to support a conclusion of [his] guilt beyond a reasonable doubt." *State v. Spears*, 184 Ariz. 277, 290 (1996). In so doing, we may not "reweigh evidence or reassess the witnesses' credibility." *State v. Buccheri-Bianca*, 233 Ariz. 324, ¶ 38 (App. 2013). If jurors could reasonably differ as to whether the evidence establishes the necessary facts, that evidence is sufficient as a matter of law. *See State v. Davolt*, 207 Ariz. 191, ¶ 87 (2004).

¶18 The evidence presented at trial in this case was sufficient. *See* A.R.S. §§ 13-1401(A)(3)(a), 13-1410(A). V.V., who was six years old at the time of the trial, testified that during the party at her grandmother's house, someone had touched her twice inside her shorts. She agreed that the touching had been on her "privates"—"the place that people aren't supposed to touch." This testimony was consistent with what she had reported to her mother the day of the party—when she identified "her uncle" as the perpetrator—and to the nurse who examined her the following day. In addition, another relative testified that he saw Najera holding V.V. at the party and that, when she walked away from him, she was "walking different," with her "little legs . . . crossed," "like something had happened" and something was wrong.

¶19 V.V. communicated the events like any young child, unsophisticated in the identity of distant relatives, using gestures and simple, inartful terminology. These characteristics do not render either her contemporaneous reports or her trial testimony inherently unreliable. Regardless, the purported gaps in V.V.'s testimony—like the absence of eyewitnesses, a clearer video, and DNA evidence or injuries—are a matter of the weight of the evidence, which we leave to the jury. *See Davolt*, 207 Ariz. 191, ¶ 87; *Buccheri-Bianca*, 233 Ariz. 324, ¶ 38.

¶20 In short, viewing the evidence in the light most favorable to the prosecution, that evidence was sufficient to allow a rational trier of fact to conclude that the state had proven beyond a reasonable doubt that Najera had twice touched five-year-old V.V.'s vulva on the date in question—the elements of child molestation under §§ 13-1401(A)(3)(a) and 13-1410(A). *See State v. Cox*, 217 Ariz. 353, ¶ 22 (2007).

Disposition

¶21 For the foregoing reasons, we affirm Najera's convictions and sentences.