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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. JESUS DIAZ, Appellant.	2 CA-CR 2008-0184 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20064741

Honorable Michael Cruikshank, Judge

AFFIRMED

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P E L A N D E R, Chief Judge.

¶1 Appellant Jesus Diaz appeals from his convictions for armed robbery, disorderly conduct, and assault. He argues the trial court erred in refusing certain jury instructions and precluding evidence he offered to impeach a witness. Finding no error, we affirm.

Background

¶2 We view the evidence in the light most favorable to upholding the convictions. *See State v. Tucker*, 205 Ariz. 157, n.1, 68 P.3d 110, 113 n.1 (2003). In December 2006, Diaz entered a Tucson convenience store at around 3:00 a.m., when the clerk was alone in the store. The clerk was away from the register when he entered the store. Diaz first asked to buy a pack of gum and the clerk told him to leave the money with her and she would put it in the register later. He then told her he wanted to buy "a cigarette," so the clerk went to the register. Diaz gave the clerk his identification so she could check his age. When the clerk told Diaz how much he owed, he told her, "[D]o what I tell you because I don't want to do worse. It could be worse." The clerk then noticed a gun in his hand. Diaz told her to open the register, and the clerk gave him the money in it, between $30 and $35 according to her testimony. Diaz left the store in "an old truck," and the clerk called her manager. The manager instructed her to call the police, and she called 911, reporting the store had been robbed and a firearm had been used.

¶3 A Tucson police officer received a description of Diaz's truck and saw it while he was en route to the store. He stopped Diaz and found a gun in his pocket. A cigarette of

the same brand taken by the robber and $34 in cash were found in his truck. The state charged Diaz with armed robbery and aggravated assault. The jury found Diaz guilty of armed robbery but not guilty of aggravated assault, instead finding him guilty of the lesser-included offenses of disorderly conduct and assault. The trial court sentenced Diaz to concurrent prison terms, the longest of which was a mitigated, seven-year term on the armed robbery conviction. This appeal followed.

Discussion

I. *Willits* instruction

¶4 Diaz first contends the trial court erred in denying his request for a jury instruction based on *State v. Willits*, 96 Ariz. 184, 393 P.2d 274 (1964). He maintains he was entitled to a *Willits* instruction because the state failed to preserve a recording of the store clerk's call to 911. "We review the refusal to give a *Willits* instruction for an abuse of discretion." *State v. Fulminante*, 193 Ariz. 485, ¶ 62, 975 P.2d 75, 93 (1999).

¶5 "When the state destroys material evidence, the contents or quality of which are at issue in trial, the jury may infer that the facts are against the state's interest." *State v. Murray*, 184 Ariz. 9, 33, 906 P.2d 542, 566 (1995). "'A *Willits* instruction is appropriate when the state destroys or loses evidence potentially helpful to the defendant.'" *Id., quoting State v. Lopez*, 163 Ariz. 108, 113, 786 P.2d 959, 964 (1990). "To be entitled to a *Willits* instruction, a defendant must prove: (1) that the state failed to preserve material evidence that was accessible and might tend to exonerate him, and (2) resulting prejudice."

Fulminante, 193 Ariz. 485, ¶ 62, 975 P.2d at 93; *see also State v. Davis*, 205 Ariz. 174, ¶ 35, 68 P.3d 127, 133 (App. 2002).

¶6 The state does not deny that a recording of the 911 call once existed but was not preserved. Thus, Diaz must show that the recording "ha[d] a tendency to exonerate him" and that the state's failure to preserve the recording prejudiced him. *Murray*, 184 Ariz. at 33, 906 P.2d at 566. Diaz argues that the store clerk's testimony about what had happened during the robbery was inconsistent with evidence from the store's surveillance video. He maintains "[i]t is likely that the 911 call [recording] would have contained greater inconsistencies" in the store clerk's version of events.

¶7 First, we note that the record does not show what the 911 recording contained beyond the fact that the clerk told the operator a weapon had been involved in the robbery. Indeed, as the state points out, Diaz did not even explain why a *Willits* instruction was appropriate or required. He merely noted that the state had not preserved the 911 tape recording. Thus, Diaz's claim that the recording "had a *tendency* to exonerate" him is purely speculative. As the state argues, it is "just as likely" that the recording "may have prejudiced, not exculpated," Diaz. *See State v. Dunlap*, 187 Ariz. 441, 464, 930 P.2d 518, 541 (App. 1996) (when specific content of files unknown, "claim that the destroyed or lost files would have supported [defendant's] theory of the case entitling him to a *Willits* instruction is entirely speculative"); *see also Davis*, 205 Ariz. 174, ¶ 37, 68 P.3d at 133 (to warrant *Willits*

instruction, "[e]vidence must possess exculpatory value that is apparent before it is destroyed").

¶8 Even assuming, however, that the 911 recording had some evidentiary value to Diaz's defense and might have had some tendency to exonerate him, *see State v. Hunter*, 136 Ariz. 45, 51, 664 P.2d 195, 201 (1983), he has not shown he was entitled to a *Willits* instruction. When Diaz was arrested shortly after the robbery, he was found in possession of the same brand of cigarette he had tried to purchase from the store and cash in the same amount as had been stolen. The truck he was driving matched the clerk's description of the robber's vehicle. Likewise, the clothes he was wearing matched the clerk's description of the robber. The clerk identified Diaz as the robber, and Diaz also was captured on surveillance videotape in the store at the time the robbery occurred. In view of the overwhelming evidence of his guilt, we cannot say Diaz was prejudiced by the state's failure to preserve the 911 recording. *See State v. Geotis*, 187 Ariz. 521, 525, 930 P.2d 1324, 1328 (App. 1996) ("[D]enial of [defendant's request for *Willits*] instruction [in drug-possession-for-sale prosecution] was non-prejudicial in light of the fact that defendant's fingerprints were found on a bag containing marijuana."); *see also Davis*, 205 Ariz. 174, ¶ 39, 68 P.3d at 133. The trial court did not err in refusing Diaz's request for a *Willits* instruction.

II. Evidence of other acts by victim/witness

¶9 Diaz next contends "[t]he trial court committed reversible error by precluding evidence that the [clerk had been] arrested for child neglect three days before the incident."

The clerk had been cited after she left her seven-year-old child unattended at a mall. The charge later was dismissed without prejudice. Diaz sought to introduce evidence of the citation in order to show that the clerk had "some kind of problem paying attention to things." The trial court precluded the evidence for impeachment or any other purposes. We review the trial court's evidentiary ruling for an abuse of discretion. *Murray*, 184 Ariz. at 30, 906 P.2d at 563; *see also State v. Cox*, 201 Ariz. 464, ¶ 5, 37 P.3d 437, 439 (App. 2002).

¶10 "Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of crime as provided in Rule 609, [Ariz. R. Evid.,] may not be proved by extrinsic evidence." Ariz. R. Evid. 608(b). The trial court may, however, allow inquiry into specific instances of conduct on cross-examination if they are "probative of truthfulness or untruthfulness" and can be proven without extrinsic evidence. *Id.*; *see also State v. Dickens*, 187 Ariz. 1, 13, 926 P.2d 468, 480 (1996) (other acts of witness admissible to establish character "only if the other acts are probative of truthfulness and if they may be proved without extrinsic evidence"). As the state points out, the clerk's citation "ha[d] nothing to do with her character for truthfulness." Indeed, Diaz acknowledges he "was not attempting to impeach [the clerk's] character for truthfulness." Because the proffered evidence did not go to the clerk's veracity and because her citation did not result in a conviction, the evidence was not admissible under Rule 608 or Rule 609.

¶11 Diaz argues, however, that the evidence was offered not for impeachment, but rather, "to demonstrate [the clerk's] lack of competence as a witness insofar as she is

extremely inattentive." He maintains the evidence, therefore, was admissible under Rule 404(b), Ariz. R. Evid. But, "evidence of a witness' other acts is [only] admissible [under Rule 404(b)] if it is relevant for some purpose other than showing that the witness acted in conformity therewith. Thus, evidence of other acts may be used to establish such things as the witness' motive, intent, or plan." *Dickens*, 187 Ariz. at 13, 926 P.2d at 480. Diaz does not argue the proffered evidence bears on the clerk's "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Ariz. R. Evid. 404(b). Rather, as the state points out, his argument essentially is that the clerk "was unable to pay attention to detail on this date [of the robbery] because she has been unable to pay attention to detail in the past." That argument is an attempt "to prove the character of a person in order to show action in conformity therewith." *Id.* Thus, the trial court did not abuse its discretion in precluding evidence of the clerk's citation.

III. Dangerous offense instruction

¶12 Finally, Diaz argues the trial court erred "by improperly refusing to instruct the jury on the mental state required to find that the dangerous nature allegation was proven." Relying on A.R.S. § 13-202(A), he maintains, as he did below, "because the robbery statute requires intentional conduct, then the dangerous [nature] instruction must advise the jury that the use of a deadly weapon must be intentional." According to Diaz, because A.R.S. §§ 13-

704(A) and 13-105(13)[1] do not contain a culpable mental state for the use of a deadly weapon, the mental state required for robbery—intentional conduct, *see* A.R.S. § 13-1902—should have been applied to the dangerous-offense sentence enhancement factor as well. "A trial court's refusal to give a jury instruction is reviewed for abuse of discretion." *State v. Anderson*, 210 Ariz. 327, ¶ 60, 111 P.3d 369, 385 (2005). But "[w]e review *de novo* whether the[] instructions to the jury properly stated the law." *State v. Orendain*, 188 Ariz. 54, 56, 932 P.2d 1325, 1327 (1997).

¶13 Section 13-202(A) provides: "If a statute defining an offense prescribes a culpable mental state that is sufficient for commission of the offense without distinguishing among the elements of such offense, the prescribed mental state shall apply to each such element unless a contrary legislative purpose plainly appears." Again, Diaz contends that, because § 13-105(13) defines a "'[d]angerous offense'" as "an offense involving the discharge, use or threatening exhibition of a deadly weapon or dangerous instrument" and does not provide a culpable mental state, the state was required to prove for sentence enhancement purposes that his "use of a deadly weapon [was] intentional." That is so, he argues, because the armed robbery charge required proof of an intentional mental state. *See* A.R.S. §§ 13-1902, 13-1904. We disagree. As this court stated in *State v. Tamplin*, 146

[1]Significant portions of the Arizona criminal sentencing code have been renumbered, effective January 1, 2009. *See* 2008 Ariz. Sess. Laws, ch. 301, §§ 1-120. For ease of reference and because the renumbering included no substantive changes, *see* 2008 Ariz. Sess. Laws, ch. 301, § 119, we refer in this decision to the current section numbers rather than those in effect at the time of the offenses in this case.

Ariz. 377, 380, 706 P.2d 389, 392 (App. 1985), "A.R.S. § 13-202 refers to statutes defining an offense. A.R.S. [§§ 13-105(13), 13-704] do[] not define an offense." Thus, § 13-202 does not require that the culpable mental state of an underlying crime be applied to the finding of a dangerous offense. *Id.*

¶14 Diaz, however, seeks support for his position in *Tamplin* and *State v. Garcia*, 219 Ariz. 104, 193 P.3d 798 (App. 2008). In both cases, he argues, when "the underlying offense[s] required a mental state of 'recklessly[,]' . . . the Court applied that mental state to the dangerous nature allegation." But in both *Tamplin* and *Garcia*, the court merely ruled that, in the dangerous-offense enhancement statutes, "the legislature specifically meant to require that the infliction of serious physical injury had to be done intentionally or knowingly, but for the use of a dangerous instrument these mental states were not required." *Tamplin*, 146 Ariz. at 380, 706 P.2d at 392; *see also Garcia*, 219 Ariz. 104, ¶¶ 9, 13-15, 193 P.3d at 800, 801-02. Thus, we agree with the state that the court in those cases did not "assign a mens rea to a dangerous nature allegation, and neither case stands for the proposition that the dangerous [offense] allegation is an element of the crime charged."[2] In sum, the trial court did not abuse its discretion in refusing Diaz's proposed instruction.

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[2]In *Tamplin*, the court mentioned in dicta "one can use a dangerous instrument recklessly as the jury necessarily found in this case." 146 Ariz. at 380, 706 P.2d at 392. That statement, although arguably supportive of Diaz's argument, did not announce a broad rule, but rather simply pointed out that, on the facts of that case, the jury had to have found Tamplin's use of hot water had been reckless in order to find him guilty of the underlying offense of child abuse by criminal negligence.

Disposition

¶15 Diaz's convictions and sentences are affirmed.

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JOHN PELANDER, Chief Judge

CONCURRING:

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JOSEPH W. HOWARD, Presiding Judge

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PHILIP G. ESPINOSA, Judge