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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STATE OF ARIZONA, Appellee, v. MARCO LEVONTE WILLIAMS, Appellant.	2 CA-CR 2008-0230 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court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-20063095

Honorable Gus Aragón, Judge

AFFIRMED

David Alan Darby — Tucson
Attorney for Appellant

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

¶1 Following a jury trial, Marco Levonte Williams was convicted of drive-by shooting and two counts of aggravated assault. The trial court sentenced him to seven years' imprisonment for the drive-by shooting and five years' imprisonment for each count of aggravated assault, all mitigated terms to be served concurrently. Williams appealed. Counsel has filed a brief citing *Anders v. California*, 386 U.S. 738 (1967), and *State v. Clark*,

196 Ariz. 530, 2 P.3d 89 (App. 1999), raising as a "colorable issue" whether the trial court erred by failing *sua sponte* to preclude one victim's out-of-court identification of Williams. Williams raises three additional issues in his pro se supplemental brief. We find no error warranting reversal and affirm.

¶2 Viewed in the light most favorable to sustaining the jury's verdicts, *see State v. Haight-Gyuro*, 218 Ariz. 356, ¶ 2, 186 P.3d 33, 34 (App. 2008), the evidence at trial showed that, following a near collision with the victims' car, Williams turned his car onto a side street and stopped. When the victims pulled their car alongside Williams's, he fired a single gunshot through his front passenger window, striking the driver's-side door of the victims' car. The victims called 911 and described Williams and his car to the operator. Shortly after hearing the description on the radio, a police officer in the vicinity of the shooting spotted Williams and followed him into a downtown parking garage, where Williams was arrested and identified by both victims.

Identification

¶3 Counsel points out that one of the victims had not been wearing his prescription glasses when he identified Williams at the "one man show up" in the parking garage. When the victim was asked at trial whether he had been sure that Williams was the man who had shot at him, the victim testified: "Yes, because I first saw the car, and then I saw the girl [Williams's passenger], so I don't think I was confused that he was."

¶4 "A trial court has broad discretion to admit or exclude evidence at trial." *State v. Oliver*, 158 Ariz. 22, 30, 760 P.2d 1071, 1079 (1988). Generally, we review evidentiary

rulings for a clear abuse of that discretion. *Id*. Because Williams did not object to the identification testimony, however, we review the trial court's failure to preclude it for fundamental error only. *See State v. Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d 601, 607 (2005) ("Fundamental error review . . . applies when a defendant fails to object to alleged trial error."). Fundamental error is "'error going to the foundation of the case, error that takes from the defendant a right essential to his defense, and error of such magnitude that the defendant could not possibly have received a fair trial.'" *Id.*, *quoting State v. Hunter*, 142 Ariz. 88, 90, 688 P.2d 980, 982 (1984). "To obtain relief under the fundamental error standard of review, [a defendant] must first prove error." *Id*. ¶ 23.

¶5 "Although suggestiveness is inherent in a one-man show-up, a show-up identification is admissible if the identification is reliable," considering the factors set forth by the Supreme Court in *Neil v. Biggers*, 409 U.S. 188, 199-200 (1972). *State v. Hicks*, 133 Ariz. 64, 67-68, 649 P.2d 267, 270-71 (1982). These factors include the length of time between the crime and the identification, the witness's opportunity to view the defendant during the crime, the accuracy of any prior description by the witness, and the witness's level of certainty and degree of attention. *Biggers*, 409 U.S. at 199-200. The victim in question testified he only needed his glasses "to read a lot," and the evidence relevant to the factors identified in *Biggers* did not require the court to preclude the identification testimony *sua sponte*.

¶6 Moreover, Williams did not rely solely on a mistaken-identity theory of defense. He testified to a different version of events than the victims and maintained he had

never fired his gun, but he admitted having had an altercation with the victims at the location in question after a near collision with their vehicle. Although Williams's counsel argued to the jury that the victims' identification of Williams was unreliable, counsel conceded that Williams had "acknowledge[d] the road rage incident" and that the vehicle Williams had been stopped in was "the vehicle . . . involved." Nonetheless, the court instructed the jury they "must be satisfied beyond a reasonable doubt that the in-court identification of the defendant by the victims was independent of the previous pretrial identification." If the in-court identification was "not derived from an independent source," the court instructed the jury they "must find from other evidence in the case that the defendant is the guilty person beyond a reasonable doubt." Therefore, any error in admitting the identification testimony was not fundamental.

Deposition Testimony

¶7 Williams contends the trial court erred by allowing the deposition testimony of his passenger to be read to the jury after she refused to comply with the trial court's order that she testify at trial.[1] He appears to contend he was thereby denied the right to confront and cross-examine the witness. Again, he failed to object to this evidence at trial; therefore, we review its admission for fundamental error. *See Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d at 607. "The Confrontation Clause [of the United States Constitution] prohibits the

[1]We are unable to review the deposition transcript because it appears not to have been made part of the record on appeal, and the court reporter was excused from transcribing it as it was read to the jury. But Williams acknowledged on cross-examination that the witness had testified Williams fired a gun at people in a gray car; the victims were in a gray Buick Regal.

admission of testimonial hearsay unless (1) the declarant is unavailable and (2) the defendant 'had a prior opportunity to cross-examine' the declarant." *State v. Armstrong*, 218 Ariz. 451, ¶ 32, 189 P.3d 378, 387 (2008), *quoting Crawford v. Washington*, 541 U.S. 36, 59 (2004); *see also* Ariz. R. Crim. P. 19.3(c)(i) (prior recorded testimony admissible if declarant unavailable and party against whom testimony offered had "right and opportunity to cross-examine the declarant with an interest and motive similar to that which the party now has").

¶8 In this case, the witness was unavailable by virtue of her refusal to testify. *See* Ariz. R. Evid. 804(a)(2); *State v. Miller*, 186 Ariz. 314, 322, 921 P.2d 1151, 1159 (1996). And Williams had had a prior opportunity to cross-examine her at her deposition. Williams did not oppose the state's successful motion to depose the witness pursuant to Rule 15.3, Ariz. R. Crim. P. That rule provides that "depositions shall be taken in the manner provided in civil actions," Ariz. R. Crim. P. 15.3(d), which includes cross-examination pursuant to the Rules of Evidence. *See* Ariz. R. Civ. P. 30(c). Williams also had the right to be present at the deposition, although it is unclear whether he exercised that right. *See* Ariz. R. Crim. P. 15.3(e). We find no fundamental error in the trial court's failure *sua sponte* to preclude the deposition testimony.

Denial of Motion for Judgment of Acquittal

¶9 To the extent we understand Williams's next argument, he appears to contend the trial court erred in denying his motion for judgment of acquittal on the drive-by-shooting charge because the evidence showed his vehicle was not in motion when he fired his gun from it. He asserts that, by enacting A.R.S. § 13-1209, the legislature intended "to curtail or

reduce the number of senseless shootings from moving ve[hic]les, that have a higher tendency to strike objects other [than those the shooter] intended," and that the facts of his case bear "no resembl[a]nce to the normal action associated with a Drive-by Shooting."

¶10 But the best evidence of the legislature's intent is the statutory language itself, which does not include the element Williams contends was necessary. *See Taylor v. Cruikshank*, 214 Ariz. 40, ¶ 10, 148 P.3d 84, 87 (App. 2006). "We resort to additional considerations 'such as the statute's context, history, subject matter, effects and consequences, spirit, and purpose' only if the language proves to be ambiguous." *Id.*, *quoting State v. Fell*, 203 Ariz. 186, ¶ 6, 52 P.3d 218, 220 (App. 2002). Section 13-1209(A) provides: "A person commits drive by shooting by intentionally discharging a weapon from a motor vehicle at a person, another occupied motor vehicle or an occupied structure." Because substantial evidence was presented at trial to satisfy all of these elements, the trial court did not abuse its discretion by denying Williams's motion for judgment of acquittal. *See* Ariz. R. Crim. P. 20(a) (directing court to enter judgment of acquittal only "if there is no substantial evidence to warrant a conviction"); *State v. Cifelli*, 214 Ariz. 524, ¶ 11, 155 P.3d 363, 366 (App. 2007) ("We review a trial court's denial of motion for judgment of acquittal for an abuse of discretion" and "'will reverse only if there is a complete absence of "substantial evidence" to support a conviction.'"), *quoting State v. Sullivan*, 187 Ariz. 599, 603, 931 P.2d 1109, 1113 (App. 1996).

Willits Instruction

¶11 Police officers believed the bullet that struck the victims' car likely had lodged somewhere inside the driver's-side door, but they could not find it after removing the door panel. They elected not to remove or cut into the door to look further inside, and the bullet was never recovered. Approximately seven months before trial, the car was seized from its owner by federal agents and later sold at auction.[2] Williams suggests the bullet could have constituted exculpatory evidence if ballistics tests had revealed it had not been fired from his gun. He asserts he was entitled to an instruction pursuant to *State v. Willits*, 96 Ariz. 184, 393 P.2d 274 (1964), based on the state's failure "to preserve[]" the door, although he did not request the instruction at trial. We review for fundamental error the trial court's failure to give a *Willits* instruction *sua sponte*. *See Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d at 607.

¶12 "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." *State v. Fulminante*, 193 Ariz. 485, ¶ 62, 975 P.2d 75, 93

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[2]The following stipulation was read to the jury:

> The 1998 Buick Regal owned and driven by [victim A] on August 4th, 2006, was seized by the United States Customs and Border Protection on September 2, 2007, at approximately six p.m. at or near Nogales, Arizona.
>
> On September 5, 2007, Rob Robertson Enterprises took possession of the vehicle for storage. On November 9, 2007, the vehicle was forfeited to the United States Government and was auctioned for sale on December 12th, 2007, by Robertson Enterprises. There is no record that the vehicle was reregistered in Arizona.

(1999). Williams proved neither. In fact, his counsel specifically informed the court that he did not request a *Willits* instruction because there was "no evidence as to what condition [the bullet] would have been in" had it been recovered, and he did not "believe that the bullet was ever in the possession of the police." *See State v. Rivera*, 152 Ariz. 507, 511, 733 P.2d 1090, 1094 (1987) ("Generally, the State does not have an affirmative duty to seek out and gain possession of potentially exculpatory evidence."); *see also State v. Murray*, 184 Ariz. 9, 33, 906 P.2d 542, 566 (1995) ("A *Willits* instruction is not given merely because a more exhaustive investigation could have been made."). The evidence at trial did not require the court to come to a different conclusion.

¶13 Nor did it require a conclusion that the bullet, if it could have been retrieved in suitable condition for testing, was potentially exculpatory.

> The duty of police to preserve potentially exculpatory evidence arises when the evidence is "obviously material." *State v. Perez*, 141 Ariz. 459, 463, 687 P.2d 1214, 1218 (1984). This requirement reflects the due process standard of "constitutional materiality" that governs the preservation of evidence." *See State v. Walters*, 155 Ariz. 548, 551, 748 P.2d 777, 780 (App. 1987). To be constitutionally material, "[*e*]*vidence must both possess an exculpatory value that was apparent before the evidence was destroyed*, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means." *Id*. (quoting *California v. Trombetta*, 467 U. S. 479, 489 . . . (1984).

State v. Tinajero, 188 Ariz. 350, 355, 935 P.2d 928, 933 (App. 1997) (affirming refusal of *Willits* instruction, sought based on state's failure to preserve truck involved in collision, because defendant failed "to demonstrate why police had a reason to retain the truck") (emphasis in *Tinajero*), *disapproved on other grounds by State v. Powers*, 200 Ariz. 363,

¶ 10, 26 P.3d 1134, 1135 (2001). Although Williams claimed he had not fired his gun, three witnesses testified otherwise, and there was no evidence at trial of another explanation for the bullet hole in the victims' vehicle. Williams's speculation on appeal that the bullet hole could have been caused at a different time and that the victims had needed a "cover . . . to have their car insurance pay for the repair" is completely unsupported.

Conclusion

¶14 Pursuant to our obligation under *Anders*, we have reviewed the entire record for fundamental error and have found none. Williams'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