

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION TWO

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COURT OF APPEALS  
DIVISION TWO

THE STATE OF ARIZONA,	)	
	)	
Appellee,	)	2 CA-CR 2004-0253
	)	2 CA-CR 2004-0254
	)	(Consolidated)
v.	)	DEPARTMENT B
	)	
CARLOS RAFAEL MENDOZA,	)	<u>MEMORANDUM DECISION</u>
	)	Not for Publication
Appellant.	)	Rule 111, Rules of
	)	the Supreme Court

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APPEALS FROM THE SUPERIOR COURT OF COCHISE COUNTY

Cause Nos. CR200400305 and CR200301029

Honorable Thomas E. Collins, Judge

AFFIRMED

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Terry Goddard, Arizona Attorney General  
By Randall M. Howe and Joseph L. Parkhurst

Tucson  
Attorneys for Appellee

Mark A. Suagee, Cochise County Public Defender  
By Kelly A. K. Smith and Mark A. Higgins

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ESPINOSA, Judge.

¶1 Appellant Carlos Mendoza was convicted after a jury trial of first-degree murder, kidnapping, and tampering with physical evidence. The trial court sentenced him to concurrent prison terms of twenty-five years “day-for-day without the possibility of early

release” on the murder conviction<sup>1</sup> and twenty-eight years on the kidnapping, as well as a consecutive term of 4.5 years for tampering with evidence. On appeal, Mendoza argues the trial court erred in denying his motion to dismiss the murder charge and his motions to preclude the testimony of two witnesses and deoxyribonucleic acid (DNA) evidence identifying the victim. We affirm.

### **Factual and Procedural Background**

¶2 We view the evidence in the light most favorable to sustaining the verdicts and resolve all reasonable inferences against Mendoza. *See State v. Greene*, 192 Ariz. 431, ¶ 12, 967 P.2d 106, 111 (1998). Sometime in late September or early October 2003, the victim, Jennifer Dueman, visited Mendoza’s home where he lived with his girlfriend, Shelly Van Camp and another couple, Ruth Gray and Jacob Payne. During the evening, a dispute arose between Dueman and Van Camp, and Van Camp asked Mendoza and Payne to “beat [Dueman] up, but don’t kill her.” Mendoza and Payne lured Dueman into the bathroom and bound her wrists, ankles, and mouth. Van Camp and others in the home heard Dueman screaming for help. Then, Van Camp heard a loud “bang . . . like [a] head hit[ting] the ground really, really hard,” and Dueman’s screaming stopped. Later that night, Mendoza and Payne wrapped Dueman’s body, still bound, in a blanket and carried it out the back door of

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<sup>1</sup>We note the sentence imposed on the murder conviction is not authorized under A.R.S. § 13-703 and the trial court was clearly without authority to impose it. However, due to the state’s failure to raise the issue below or by cross-appeal to this court, we have no jurisdiction to correct the illegal sentence. *See State v. Dawson*, 164 Ariz. 278, 792 P.2d 741 (1990).

the home and over a fence. Payne waited for what “seemed to be hours” while Mendoza dragged Dueman’s body out of sight and buried it.

¶3 In mid-November 2003, the remains of Dueman’s body were discovered approximately four hundred feet behind Mendoza’s home. An assistant Cochise County medical examiner autopsied the remains and concluded in his report that “[t]he decedent died of homicidal violence of undetermined etiology.” In late November 2003, the examiner released the remains to Dueman’s brother who had them cremated. Prior to trial, Mendoza filed a motion to dismiss the murder charge based on the state’s failure to preserve Dueman’s remains. The trial court denied the motion.

#### **Motion to Dismiss**

¶4 Mendoza contends the trial court erred in denying his motion to dismiss the first-degree murder charge, arguing his due process rights required the state to preserve and provide him access to Dueman’s remains as material and potentially exculpatory evidence.<sup>2</sup> He maintains the state breached its duty when it permitted the remains to be cremated before he had an opportunity to examine them. The decision whether to grant a defendant’s motion

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<sup>2</sup>In his motion, Mendoza claimed the state had violated his right to due process of law under the United States and Arizona Constitutions. He does not specify on appeal, however, upon which source his due process arguments are founded. But we need not distinguish between Mendoza’s state and federal rights to due process because, for purposes of unpreserved evidence, article II, § 4 of the Arizona Constitution provides defendants protection identical to the protections of the Due Process Clause of the United States Constitution. *See State v. Youngblood*, 173 Ariz. 502, 508, 844 P.2d 1152, 1158 (1993) (“Ultimately, the court applies the due process clause of the Arizona Constitution in the same manner as its federal counterpart.”) (Feldman, C.J., dissenting). Therefore, we look to Arizona cases in addressing Mendoza’s due process claims and do not differentiate between the due process protections of the Arizona and United States Constitutions.

for dismissal is within the sound discretion of the trial court, and absent an abuse of discretion, we will not disturb its ruling. *State v. Hansen*, 156 Ariz. 291, 294, 751 P.2d 951, 954 (1988). We review Mendoza’s due process claims *de novo*. See *State v. O’Dell*, 202 Ariz. 453, ¶8 , 46 P.3d 1074, 1078 (App. 2002).

¶5 As a general proposition, due process requires the state to give defendants an opportunity to examine exculpatory evidence. See *id.* ¶ 10; *State v. Tucker*, 157 Ariz. 433, 438, 759 P.2d 579, 584 (1988) (due process imposes obligation on prosecution to disclose exculpatory evidence). “[W]here evidence has been lost or destroyed, a conviction should be reversed if (1) there is bad faith on the part of the state, or (2) a defendant was prejudiced by the loss of evidence.” *Hansen*, 156 Ariz. at 294, 751 P.2d at 954. In this case, we find neither bad faith on the state’s part nor prejudice to Mendoza.

#### **a. Prejudice**

¶6 Mendoza claims he was prejudiced because independent tests on Dueman’s remains could have established the time of her death with greater precision than the assistant county medical examiner had determined.<sup>3</sup> He argues this information, in turn, would have enabled him to better establish a timeline of events and assert an alibi defense, generally citing *State v. Youngblood*, 173 Ariz. 502, 506, 844 P.2d 1152, 1156 (1993), for the

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<sup>3</sup>Dr. Todd Gauser, the Assistant County Medical Examiner, testified Dueman’s remains were in an advanced state of decay, mostly skeletonized, the skin mummified, all internal organs missing, and no insect larvae remained to help establish a more precise time of death. The time of Dueman’s death, therefore, could only be forensically estimated as sometime between August and October 2003. Circumstantial evidence narrowed the time of death to late September or early October.

proposition that a defendant suffers prejudice when the state loses or destroys material evidence favorable to the defendant.

¶7 But that cannot be said to be the case here. It is unknowable whether the unpreserved evidence would have been favorable to Mendoza. There is only surmise—it is *possible* Mendoza would have had further tests conducted on Dueman’s remains, and it is *possible* these tests would have established a more precise time of death, *possibly* giving Mendoza the basis for an alibi defense. However, it is also possible these tests would not have established a more precise time of death or would have only reinforced the state’s asserted timeline of events. “Where the nature of the evidence—exculpatory, inculpatory, or neutral—is unknown, as in th[is] case[], there can be no showing of prejudice in fact. Thus, only a showing of bad faith implicates due process.” *Id.* at 507, 844 P.2d at 1157.

**b. Bad Faith**

¶8 An event timeline is useful in addressing Mendoza’s claim that the state acted in bad faith. On November 12, 2003, two boys found Dueman’s remains in a wash. The next day, Dr. Todd Glauser, the Assistant Medical Examiner, performed the autopsy. On November 21, Cochise County Sheriff’s Detective Wheeler interviewed Payne and Gray, who each recounted an incident in which Mendoza had tied up a woman named Jennifer Dueman in the bathroom of their home. On November 24, a warrant was issued for Mendoza’s arrest. On November 26, Glauser turned over Dueman’s remains to a Tucson funeral home at the direction of Dueman’s brother. On December 3, Glauser wrote on the

death certificate that the cause of Dueman's death was homicide. On December 12, Mendoza was indicted, and that same day, Dueman's remains were cremated.

¶9 Mendoza argues the state acted in bad faith because it permitted Dueman's remains to be destroyed contrary to state law, after it had identified homicide as the cause of death and had identified Mendoza as a suspect in her murder. Section 11-599, A.R.S., provides that, before a body may be cremated, a medical examiner must certify "there is no evidence of foul play or violence." At trial, Glauser admitted he had permitted Dueman's remains to be cremated even though he knew her death likely involved foul play and "knew that this evidence[, i.e., Dueman's remains,] might be used in a criminal proceeding." Mendoza's sole argument is "[t]here is no plausible reason for destruction of this evidence. It was done in bad faith."

¶10 The presence or absence of bad faith for purposes of due process "must necessarily turn on the [state]'s knowledge of the exculpatory value of the evidence at the time it was lost or destroyed." *State v. Dunlap*, 187 Ariz. 441, 452, 930 P.2d 518, 529 (App. 1996), quoting *Arizona v. Youngblood*, 488 U.S. 51, 56, 109 S. Ct. 333, 336 (1988). That is, "bad faith" has less to do with the actor's intent than with the actor's knowledge that the evidence was "constitutionally material." *Id.*, quoting *State v. Walker*, 185 Ariz. 228, 238, 914 P.2d 1320, 1330 (App. 1995), quoting *Youngblood*, 488 U.S. at 57-58, 109 S. Ct. at 337. Evidence is constitutionally material only if its exculpatory value is "apparent." *Walker*, 185 Ariz. at 238, 914 P.2d at 1330.

¶11 We cannot say the trial court erred in refusing to find bad faith here. As noted above, the exculpatory value of the evidence was not apparent. It is unknown whether an independent examination of Dueman’s remains would have helped or hindered Mendoza’s defense at trial. Nor do we find evidence of bad faith as that term is commonly understood. Although Dr. Glauser acknowledged he had known Dueman’s remains might be evidence in a future homicide trial, there is no evidence to suggest he permitted the remains to be destroyed on the belief a potential defendant might wish to have an independent examination of them. And nothing suggests he believed an independent examination could have resulted in more information than he had obtained from Dueman’s remains. Rather, it appears Glauser authorized the destruction of Dueman’s remains out of inadvertence, carelessness, or perhaps, respect for Dueman’s family.<sup>4</sup>

¶12 We also note defense counsel requested and received an instruction pursuant to *State v. Willits*, 96 Ariz. 184, 393 P.2d 274 (1964), at trial. The jury was accordingly instructed that, if it found the state had destroyed evidence that might have been helpful to the defendant, it could infer the evidence would have been unfavorable to the state. *See id.* at 191, 393 P.2d at 279. Through his cross-examination of Glauser, Mendoza alerted the jurors that Dueman’s remains had been cremated before the defense had had an opportunity

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<sup>4</sup>At trial, Glauser testified he had not known if law enforcement officers were conducting an investigation or if they had identified any suspects at the time he released Dueman’s remains. He said he had also been unaware he was required to notify the county attorney if he determined homicide was the cause of death. *See* A.R.S. § 11-594(A)(6). His testimony suggests he simply believed it would have been pointless to preserve Dueman’s remains because of their advanced state of decomposition and because “there really wasn’t anything to analyze.”

to perform an independent examination of them. Because, for purposes of due process, Mendoza cannot establish he was prejudiced by the loss of the evidence and the state did not act in bad faith, the *Willits* instruction adequately protected Mendoza's due process rights. *See State v. Serna*, 163 Ariz. 260, 264, 787 P.2d 1056, 1060 (1990) (*Willits* instruction adequately protects defendant's due process rights when state destroys or fails to preserve evidence unless defendant is prejudiced or state acted in bad faith); *see also Youngblood*, 173 Ariz. at 506-07, 844 P.2d at 1156-57 ("With respect to evidence which *might* be exculpatory, and where there is no bad faith conduct, the *Willits* rule more than adequately complies with the fundamental fairness component of Arizona due process.").

### **Disclosure of Evidence**

¶13 Mendoza next asserts the state failed to timely disclose certain evidence, specifically, statements by two of the state's witnesses and DNA evidence identifying the victim, in violation of Rule 15, Ariz. R. Crim. P., 16A A.R.S., and *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194 (1963). The trial court denied Mendoza's motion to preclude this evidence at trial.

#### **a. Witness Interview Tapes and Transcripts**

¶14 Before trial, the state timely disclosed to Mendoza several transcripts and tapes of interviews Cochise County sheriff's deputies had conducted with Gray and Payne. However, the state did not disclose until May 12, 2004, transcripts and tapes of an interview conducted on November 21, 2003. This disclosure was made after several requests from Mendoza and only twelve days before trial.

¶15 There is no question the state failed to comply with its disclosure responsibilities.<sup>5</sup> Accordingly, the trial court considered imposing sanctions on the state but did not. “Imposing sanctions for non-disclosure is a matter to be resolved in the sound discretion of the trial judge, and that decision should not be disturbed absent a clear abuse of discretion.” *State v. Hill*, 174 Ariz. 313, 325, 848 P.2d 1375, 1387 (1993). We will not find that a trial court has abused its discretion unless no reasonable judge would have reached the same result under the circumstances. *State v. Armstrong*, 208 Ariz. 345, ¶ 40, 93 P.3d 1061, 1070 (2004).

¶16 We find no abuse of discretion here. A trial court may impose any reasonable remedy or sanction it finds just under the circumstances for a party’s failure to comply with disclosure requirements. Ariz. R. Crim. P. 15.7, 16A A.R.S. Mendoza contends preclusion of Gray’s and Payne’s testimony would have been the appropriate sanction. However, our supreme court has cautioned:

The trial court . . . should seek to apply sanctions that affect the evidence at trial and the merits of the case as little as possible, since the Rules of Criminal Procedure are designed to implement, and not to impede, the fair and speedy determination of cases. Prohibiting the calling of a witness should be invoked only in those cases where other less stringent sanctions are not applicable to effect the ends of justice.

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<sup>5</sup>Under Rule 15.1(b)(1) and (c)(1), Ariz. R. Crim. P., the prosecutor was required to give Mendoza copies of the November 21, 2003, transcripts and tapes within thirty days of his arraignment. Mendoza was arraigned on December 22, 2003, but more than four and one-half months passed before the state made the required disclosures in mid-May 2004.

*State v. Schrock*, 149 Ariz. 433, 436-37, 719 P.2d 1049, 1052-53 (1986), quoting *State v. Smith*, 123 Ariz. 243, 252, 599 P.2d 199, 209 (1979) (citations omitted in *Schrock*). Prior to precluding evidence as a discovery sanction, a trial court must inquire about the surrounding circumstances and “should determine if less stringent sanctions can be used[,] . . . how vital the [proposed] precluded witness is to the proponent’s case, whether the opposing party will be surprised and prejudiced by the witness’s testimony, whether the discovery violation was motivated by bad faith or wilfulness, and any other relevant circumstances.” *Id.* at 437, 719 P.2d at 1053, quoting *Smith*, 123 Ariz. at 252, 599 P.2d at 209 (footnotes and citation omitted in *Schrock*).

¶17 First, a less stringent sanction was available to Mendoza in that, had he required more time to review the transcripts and tapes, he could have requested a trial continuance.<sup>6</sup> The trial court offered him this remedy, but he refused it. Second, Gray’s and Payne’s testimony was vital to the state’s case because Gray was an eyewitness to the kidnapping and Payne had helped Mendoza bind Dueman and dispose of her body. Third, Mendoza does not point to anything specific in the transcripts showing the disclosure violation prejudiced him, and the record suggests the substance of Gray’s and Payne’s statements at the November 21 interview was known to him through several other timely disclosed transcripts of interviews of the witnesses. Finally, there is no evidence of bad faith

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<sup>6</sup>Mendoza points out that the comments to Rule 15.7, Ariz. R. Crim. P., 16A A.R.S., discourage the use of continuances as “sanctions” because they encourage rather than punish dilatoriness. A continuance remains an available sanction, however, *see* Rule 15.7(a)(3), and might have been appropriate in this case.

by the prosecutor, who was initially unaware the November 21 interview transcripts existed. Although a prosecutor is obligated to seek evidence of which he is unaware and which is outside his possession, *see* Rule 15.1(f), nothing in the record suggests the prosecutor carried out this duty in bad faith.

**b. DNA Evidence**

¶18 Mendoza next argues the state failed to timely disclose DNA evidence that identified the victim, asserting the trial court should have precluded its admission. As noted above, we will not disturb a trial court’s chosen sanction for failure to disclose evidence absent an abuse of discretion. *Hill*, 174 Ariz. at 325, 848 P.2d at 1387.

¶19 Again, there is no question the state violated the disclosure requirements of Rule 15 when, on the first day of Mendoza’s trial, it produced DNA results identifying Dueman as the victim.<sup>7</sup> Although we do not condone the prosecutor’s apparent disregard for the disclosure requirements of Rule 15, we need not address whether the trial court should have imposed greater sanctions because we can say the admitted evidence did not contribute to the outcome of the trial. *See State v. Davolt*, 207 Ariz. 191, ¶¶ 39-43, 84 P.3d 456, 470 (2004) (trial court’s erroneous denial of motion to suppress evidence constituted harmless error because it did not contribute to verdict). The DNA evidence was used only to confirm the victim’s identity rather than to identify Mendoza, and Dueman’s identity was never truly

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<sup>7</sup>Rule 15.6 required the state to file a motion at least seven days prior to trial asking for additional time to complete scientific testing. The state also could have filed a motion, once within that seven-day period, requesting an extension of time for disclosure. The state did not file either motion before it introduced the DNA evidence.

in doubt, contrary to Mendoza’s assertion. Both Gray and Payne, as well as another witness present at the home on the night in question, identified Dueman from photographs at trial. And Linda Barrett, a lifelong friend of Dueman, identified Dueman’s remains from a distinct “J.D.” tattoo still visible on the breast. Finally, Mendoza was aware the DNA test results were pending and would be available some time around the start of trial. Thus, the admission of the DNA evidence was harmless error at best. *See id; see also State v. Moorman*, 154 Ariz. 578, 584, 744 P.2d 679, 685 (1987) (trial court’s admission of evidence even if erroneous constituted harmless error in light of great amount of other evidence).

**Disposition**

¶20 For the foregoing reasons, we affirm Mendoza’s convictions and sentences.

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PHILIP G. ESPINOSA, Judge

CONCURRING:

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PETER J. ECKERSTROM, Presiding Judge

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J. WILLIAM BRAMMER, JR., Judge