

**NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.**
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

FILED BY CLERK

MAR 31 2010

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	
)	
Appellee,)	2 CA-CR 2009-0125
)	DEPARTMENT B
v.)	
)	<u>MEMORANDUM DECISION</u>
)	Not for Publication
DETRICK RAY SIMMONS,)	Rule 111, Rules of
)	the Supreme Court
Appellant.)	
)	

APPEAL FROM THE SUPERIOR COURT OF PINAL COUNTY

Cause No. CR200800652

Honorable Bradley M. Soos, Judge Pro Tempore

AFFIRMED IN PART; VACATED IN PART

Terry Goddard, Arizona Attorney General
By Kent E. Cattani and Laura P. Chiasson

Tucson
Attorneys for Appellee

Harriette P. Levitt

Tucson
Attorney for Appellant

B R A M M E R, Judge.

¶1 Detrick Ray Simmons appeals from his convictions and sentences for first-degree murder, drive-by shooting, possession of a firearm by a prohibited possessor,

discharging a firearm at a residential structure, and disorderly conduct. He contends the admission of hearsay evidence was fundamental, prejudicial error and the prosecutor committed misconduct by relying on that hearsay evidence “to secure a conviction.” He also claims insufficient evidence supported his convictions. Simmons additionally argues he was deprived of his rights to counsel and due process because his appointed attorney discovered a potential conflict of interest and the trial court denied his request for advisory counsel. Simmons last asserts the court erroneously denied his request for a jury instruction pursuant to *State v. Willits*, 96 Ariz. 184, 393 P.2d 274 (1964). We vacate Simmons’s conviction and sentence for drive-by shooting but affirm his other convictions and sentences.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to upholding Simmons’s convictions and sentences. *See State v. Haight-Gyuro*, 218 Ariz. 356, ¶ 2, 186 P.3d 33, 34 (App. 2008). During the night of September 14, 2006, three shootings occurred in Casa Grande, Arizona. The first, at approximately 8:30 that evening, occurred at an apartment complex. O. was inside her apartment when she heard gunshots. She looked outside, saw a man walk by, and heard him say to “maybe two other people” “something about somebody being jumped.” She saw the men get into two vehicles and leave.

¶3 The second shooting occurred at a different location about an hour later. Witnesses heard several gunshots, and bullet holes were found in the walls of B.’s home. G., who lived nearby, told police the shots had “made his house shake” and said he had

seen Simmons and another individual shooting in the alley, where a police officer found bullet casings. About fifteen minutes after G. saw Simmons in the alley, A. was shot to death in his car a short distance away. Nearby, a baseball cap with Simmons's DNA¹ was found in the street, and bullet casings were also found strewn in the road.

¶4 Officers began searching for Simmons and found him at an apartment in Phoenix. When Simmons left the apartment in a car with two others, officers followed and stopped the car after it had gone a short distance. Simmons fled the car on foot, dropping a pistol at a nearby apartment complex as he ran. The casings found at the site of the second shooting were determined to have come from the pistol Simmons dropped. Officers also recovered from the apartment an assault rifle wrapped in a jacket on which Simmons's DNA was found. The bullet casings recovered at the scene of the third shooting had come from the assault rifle.

¶5 A grand jury charged Simmons with first-degree murder of A.; drive-by shooting of A.; possession of a deadly weapon by a prohibited possessor; discharge of a firearm at a structure, B.'s home; two counts of disorderly conduct, one naming G. as a victim and the other naming O.; and aggravated assault of T. After a thirteen-day trial, although the jury acquitted Simmons of aggravated assault and the disorderly conduct charge involving O., it found him guilty of the remaining counts. The trial court sentenced Simmons to life imprisonment without possibility of parole for twenty-five

¹Deoxyribonucleic acid.

years for the murder of A. and to concurrent prison terms for the remaining counts, the longest of which was twenty-four years. This appeal followed.

Discussion

Hearsay Evidence

¶6 Simmons first argues his due process rights were violated because his convictions were “predicated almost entirely upon hearsay.” In support of this argument, however, although he identifies numerous witness statements, he fails to explain which of these statements he claims are hearsay or to analyze whether they otherwise might have been admissible.² He also acknowledges he did not object to any of them below. A statement is hearsay if it is an out-of-court statement “offered in evidence to prove the truth of the matter asserted.” Ariz. R. Evid. 801(c). “Hearsay is not admissible except as provided by applicable constitutional provisions, statutes, or rules.” Ariz. R. Evid. 802.

¶7 “[I]f hearsay is admitted without objection, it becomes competent evidence admissible for all purposes.” *State v. McGann*, 132 Ariz. 296, 299, 645 P.2d 811, 814 (1982). However, “if the admission of hearsay evidence amounts to fundamental error in a criminal case, we will reverse even if the defendant has failed to object to its admission.” *Id.*; see *State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607 (2005). To prevail under a fundamental error review, “a defendant must establish both

²Simmons also asserts there were “numerous other hearsay statements . . . introduced” at trial. He does not, however, detail these statements or rely on them in his argument. Accordingly, we consider only those statements Simmons specifically contests in his brief.

that fundamental error exists and that the error in his case caused him prejudice.” *Henderson*, 210 Ariz. 561, ¶ 20, 115 P.3d at 607. Thus, “[w]hen hearsay evidence is the sole proof of an essential element of the state’s case, reversal of the conviction may be warranted.” *McGann*, 132 Ariz. at 299, 645 P.2d at 814; *see also State v. Allen*, 157 Ariz. 165, 171, 755 P.2d 1153, 1159 (1988).

¶8 In his briefs to this court, Simmons fails to cite either *McGann* or *Allen*, stating only that the admission of hearsay evidence “undoubtedly was a major factor contributing to [his] convictions.” Even assuming the statements Simmons listed in his briefs were inadmissible hearsay, his conclusory assertion is insufficient to demonstrate he was prejudiced. Nor did any of the hearsay statements Simmons identifies constitute “the sole proof of an essential element of the state’s case,” *McGann*, 132 Ariz. at 299, 645 P.2d at 814, and Simmons’s convictions otherwise were supported by substantial evidence. Accordingly, Simmons has not met his burden to demonstrate that the erroneous admission of hearsay statements affected the outcome of his case. *See Henderson*, 210 Ariz. 561, ¶ 20, 115 P.3d at 607.

Prosecutorial Misconduct

¶9 Simmons also argues the prosecutor committed misconduct by “knowingly introduc[ing] unreliable, unsupported hearsay in order to secure a conviction.” Again, Simmons did not raise this argument below and therefore has forfeited appellate relief absent fundamental, prejudicial error. *See Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d at 607. A prosecutor commits misconduct by “call[ing] to the attention of the jurors

matters that they would not be justified in considering in determining their verdict.” *State v. Jones*, 197 Ariz. 290, ¶ 37, 4 P.3d 345, 360 (2000), quoting *State v. Hansen*, 156 Ariz. 291, 296-97, 751 P.2d 951, 956-57 (1988). “Prosecutorial misconduct ‘is not merely the result of legal error, negligence, mistake, or insignificant impropriety, but, taken as a whole, amounts to intentional conduct which the prosecutor knows to be improper and prejudicial” *State v. Aguilar*, 217 Ariz. 235, ¶ 11, 172 P.3d 423, 426-27 (App. 2007), quoting *Pool v. Superior Court*, 139 Ariz. 98, 108-09, 677 P.2d 261, 271-72 (1984). To warrant reversal, the defendant must demonstrate the improper statements “so infected the trial with unfairness as to make the resulting conviction a denial of due process.” *State v. Hughes*, 193 Ariz. 72, ¶ 26, 969 P.2d 1184, 1191 (1998), quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974); see U.S. Const. amend. XIV, § 1; Ariz. Const. art. II, § 4.

¶10 We agree with the state that the most pejorative testimony Simmons complains of—the investigating detective’s testimony that several people had told him they had heard Simmons had killed A.—arguably was introduced not as proof of Simmons’s guilt but rather to explain why the detective had pursued Simmons as a suspect. Under those circumstances, the statements were not hearsay. See Ariz. R. Evid. 801(c); *State v. Romanosky*, 162 Ariz. 217, 222, 782 P.2d 693, 698 (1989) (“[I]n some circumstances out-of-court declarations will not be excluded as hearsay when they are not offered to prove the truth of the matter asserted but to prove their effect upon a person whose conduct is in question, such as an arresting police officer.”); *State v. Hernandez*,

170 Ariz. 301, 307, 823 P.2d 1309, 1315 (App. 1991) (words offered for effect on listener not hearsay because not offered to prove truth of matter asserted); *cf. State v. Dunlap*, 187 Ariz. 441, 457, 930 P.2d 518, 534 (App. 1996) (statement not hearsay when offered “to show the inadequacy of the investigation,” rather than truth of matter asserted). Because the detective’s testimony about these out-of-court statements did not necessarily violate the rules of evidence, their mere introduction, in the absence of any objection by the defendant, cannot be construed as misconduct. We note, however, the prosecutor did appear to suggest in closing arguments they supported a finding of guilt. But it long has been the rule in Arizona that hearsay admitted without objection is competent evidence for all purposes. *See McGann*, 132 Ariz. at 299, 645 P.2d at 814; *State v. Tafoya*, 104 Ariz. 424, 427, 454 P.2d 569, 572 (1969).³ A prosecutor’s reliance on this well-established rule is not misconduct.

Sufficiency of the Evidence

¶11 After moving unsuccessfully below for a judgment of acquittal pursuant to Rule 20, Ariz. R. Crim. P., Simmons asserts on appeal that insufficient evidence supported each of his five convictions. A trial court may only grant such a motion “if there is no substantial evidence to warrant a conviction.” Ariz. R. Crim. P. 20(a).

³We do not suggest that such testimony necessarily would be admissible, or the prosecutor’s argument proper, had the defendant raised a proper contemporaneous objection. At minimum, the defendant would have been entitled to an instruction limiting the consideration of that evidence to its admissible purpose had he sought such an instruction. Moreover, a trial court could have concluded on proper objection that the probative value of such testimony was outweighed by its prejudicial impact. *See Ariz. R. Evid.* 403.

“Substantial evidence is that which reasonable persons could accept as sufficient to support a guilty verdict beyond a reasonable doubt.” *State v. Davolt*, 207 Ariz. 191, ¶ 87, 84 P.3d 456, 477 (2004). Even if reasonable persons could “fairly differ as to whether certain evidence establishes a fact in issue, then such evidence must be considered as substantial.” *State v. Rodriguez*, 186 Ariz. 240, 245, 921 P.2d 643, 648 (1996). “If reasonable minds could differ as to whether the properly admitted evidence, and the inferences therefrom, prove all elements of the offense, a motion for acquittal should not be granted.” *State v. Bible*, 175 Ariz. 549, 595, 858 P.2d 1152, 1198 (1993). “We conduct a de novo review of the trial court’s decision, viewing the evidence in a light most favorable to sustaining the verdict.” *Id.* And, in reviewing for substantial evidence to support a conviction, we make no distinction between circumstantial and direct evidence. *See State v. Stuard*, 176 Ariz. 589, 603, 863 P.2d 881, 895 (1993).

¶12 To convict Simmons of first-degree murder, the state had to prove he had intentionally or knowingly, and with premeditation, caused A.’s death. A.R.S. § 13-1105(A). Simmons’s DNA was on a baseball cap left at the scene of A.’s murder, and the bullet casings recovered there came from the assault rifle found in the Phoenix apartment Simmons had left before his arrest. The apartment’s other residents testified they had no guns in the apartment before Simmons arrived, and Simmons’s DNA was found on the jacket in which the weapon was wrapped. Thus, the jury readily could conclude the rifle was Simmons’s and that he had been at the scene of A.’s murder.

¶13 Additionally, Simmons made numerous inculpatory statements during his interview with police. He asserted A. had come to his house and shot at him and some of his family members. When asked if he had shot A., Simmons responded: “I love my peoples, . . . I just snapped.” When officers suggested he had used a relative’s truck to chase A., he responded that “the f—ing truck was not involved.” When the detective asked Simmons if he “need[ed] to look for somebody else that was in this shooting,” Simmons responded, “You don’t need to look for nobody else.” Simmons also stated that he “got” A. and replied “Yeah” when asked if he was “upset that [he had] shot him.” The statements Simmons made in his interview, together with the other evidence produced, provided a sufficient basis for the jury to conclude Simmons had killed A.

¶14 Finally, there also was sufficient evidence the murder was premeditated. The jury could infer from Simmons’s interview that he had pursued A. after A. had fired a shot at him and other members of his family. In addition, Simmons had fired at least thirteen shots at A., some at very close range. *See, e.g., State v. Pittman*, 118 Ariz. 71, 75, 574 P.2d 1290, 1294 (1978) (appellant’s “entry into the victim’s house with a gun and his eventual firing of the gun into the victim three times” substantial evidence of premeditation).

¶15 To convict Simmons of the drive-by shooting of A., the state had to prove he had “intentionally discharg[ed] a weapon from a motor vehicle at a person, another occupied motor vehicle, or an occupied structure.” A.R.S. § 13-1209(A). An officer testified that the spacing of the bullet casings found at the scene of A.’s murder

demonstrated that the shooter had been “mobile.” But the officer did not explain this statement further or suggest the distribution of the casings meant the shooter necessarily had been firing from a motor vehicle. The state does not identify, nor do we find, anything else in the record supporting the inference Simmons was in a vehicle when he shot A. Thus, we agree with Simmons that there was insufficient evidence to support his conviction for drive-by shooting.

¶16 To convict Simmons of disorderly conduct as to G., the state had to prove Simmons, “with intent to disturb the peace or quiet of a . . . person, or with knowledge of doing so,” “[r]ecklessly handle[d], display[ed] or discharge[d] a deadly weapon.” A.R.S. § 13-2904(A)(6). G.’s statements to officers that he had seen Simmons shooting in the alley, the shooting had made his house “shake,” and he had gotten down on the floor when the shooting began were sufficient to support Simmons’s conviction for disorderly conduct. As we understand his argument, however, Simmons asserts this evidence was inadmissible hearsay. But he is mistaken. G. testified at trial that he had neither heard nor seen anything and did not recall making any of those statements. His testimony was inconsistent with his earlier statements, and those statements therefore were not hearsay under Rule 801(d)(1)(A), Ariz. R. Evid. That rule provides that a witness’s prior, out-of-court statement is not hearsay if the witness testifies at trial, is subject to cross-examination concerning the statement, and the statement is inconsistent with the witness’s testimony. *Id.*

¶17 Regarding the charge that Simmons had fired a weapon at a structure in violation of A.R.S. § 13-1211, Simmons argues “there is absolutely no evidence to establish that [he] discharged a firearm” near B.’s house. But, again, G. told police officers he had seen Simmons in the alley shooting, and bullet holes were found in B.’s neighboring house. The bullet casings found in the adjacent alley were from the gun Simmons dropped while fleeing from police in Phoenix. This evidence plainly is sufficient to support Simmons’s conviction for discharging a firearm at a residential structure.

¶18 The indictment also alleged Simmons had violated A.R.S. § 13-3102(A)(4) by possessing either a rifle or nine-millimeter handgun while he was a prohibited possessor “[o]n or about” September 14, 2006.” Simmons asserts “the only evidence that [he] possessed a weapon was that police recovered one in Maricopa County from an apartment where [he] had been staying.” He reasons there thus was insufficient evidence to support a conviction because the assault rifle was recovered “approximately two weeks after [the date] alleged in the [i]ndictment and was in a different county.” But, as we have explained, the jury properly could conclude Simmons had possessed a firearm—either the rifle or the pistol recovered when he later fled from police—because he had used those weapons to commit the shooting at B.’s house and the murder of A. And Simmons admitted to the investigating detective he had fired a gun on the date in question. Thus, this conviction was supported by ample evidence.

Conflict of Interest

¶19 Simmons next contends the trial court violated his constitutional rights to counsel and due process under the United States and Arizona constitutions “by virtue of [its] rulings on his attorney’s conflict of interest.” *See* U.S. Const. amend. VI (counsel); U.S. Const. amend. XIV, § 1 (due process); Ariz. Const. art. II, § 24 (counsel); Ariz. Const. art. II, § 4 (due process). But Simmons fails to develop his due process argument, and we do not address it. *See* Ariz. R. Crim. P. 31.13(c)(1)(vi) (argument shall contain appellant’s contentions, reasons therefor, and citation to authority); *State v. Bolton*, 182 Ariz. 290, 298, 896 P.2d 830, 838 (1995) (claims waived for insufficient argument).

¶20 Simmons’s right-to-counsel argument is difficult to decipher, but it plainly arises out of a potential conflict of interest that his trial counsel, David Gregan, discovered during trial. On the ninth day of trial, the state played for the jury a recording of Simmons’s police interview. Immediately thereafter, Gregan informed the trial court that in the recording Simmons had mentioned the name of one of Gregan’s other clients, Joey Alderete. Gregan was defending Alderete against charges arising out of a drive-by shooting allegedly committed in retaliation for A.’s death. Gregan asserted, however, that he “d[id]n’t believe” there was any information he had learned from representing Alderete that would affect his representation of Simmons. The court recessed the trial until the next morning, at which time Gregan informed the court that the state bar association recommended that the court appoint independent counsel for Simmons to advise him of the nature of the conflict, if any.

¶21 The trial court declined to appoint advisory counsel for Simmons, noting the trial was “almost three weeks old” and reasoning that any conflict was insignificant because “nobody in this case will attempt to blame [Alderete] for anything that has to do with any significant issue in this case at all.” Gregan stated that “there does not appear to be any direct . . . conflict at this point,” but informed the court the “possibility” of a conflict existed. The court asked Simmons whether he was willing to waive any possible conflict. But, because Gregan had not yet fully apprised Simmons of the risks and benefits of waiving a potential conflict, the court then gave Gregan time to do so.

¶22 After a five-minute recess, the trial court again asked Simmons whether he was willing to waive any potential conflict. Simmons stated he wanted Gregan to continue to represent him but “still want[ed] another attorney to explain the advantages and disadvantages about this case.” The court reiterated it would not appoint advisory counsel and asked Simmons whether he wanted Gregan’s representation even without advisory counsel. Simmons replied, “Yes.” Gregan then made a motion to withdraw pursuant to his “ethical obligation . . . pursuant to E[thical] R[ule] 1.16.” *See* ER 1.16, Ariz. R. Prof’l Conduct, Ariz. R. Sup. Ct. 42; Ariz. R. Crim. P. 6.3. The court denied the motion.

¶23 Simmons seems to argue on appeal that the trial court violated his rights to counsel under the Sixth Amendment and Arizona Constitution by failing to appoint advisory counsel and denying Gregan’s motion to withdraw. To the extent Simmons argues Gregan’s representation was ineffective, that argument may be raised only in a

petition for post-conviction relief, and therefore we do not address it. *See State v. Spreitz*, 202 Ariz. 1, ¶ 9, 39 P.3d 525, 527 (2000); *see also* Ariz. R. Crim. P. 32.1.

¶24 The Sixth Amendment guarantees a criminal defendant the right to “Assistance of Counsel for his defence.” The Arizona Constitution similarly guarantees the right to “appear and defend in person and by counsel.” Ariz. Const. art. II, § 24. The decision to appoint advisory counsel is within the discretion of the trial court. *Cf.* Ariz. R. Crim. P. 6.1(c) (“When a defendant waives his or her rights to counsel, the court may appoint an attorney to advise him or her during any stage of the proceedings.”). We therefore will not overturn a denial of a request for advisory counsel absent a clear abuse of that discretion. *Cf. State v. Gonzales*, 181 Ariz. 502, 510, 892 P.2d 838, 846 (1995) (reviewing refusal to appoint advisory counsel for pro se defendant for abuse of discretion). A trial court’s decision on a motion by counsel to withdraw similarly is reviewed for an abuse of discretion. *State v. Sustaita*, 183 Ariz. 240, 241, 902 P.2d 1344, 1345 (App. 1995).

¶25 Relying on *Sustaita*, Simmons asserts the right to counsel “includes the right to be represented by an attorney who does not have a conflict of interest.” In *Sustaita*, Division One of this court concluded the trial court had not abused its discretion in denying counsel’s motion to withdraw because counsel was not burdened by an actual conflict of interest under ER 1.9. 183 Ariz. at 242, 902 P.2d at 1346. *Sustaita* does not stand for the greater proposition that a defendant is entitled to absolutely conflict-free representation without regard to the nature or degree of the conflict.

¶26 Here, we are guided by ER 1.7(a), which provides that “a lawyer shall not represent a client if the representation involves a concurrent conflict of interest.” There exists a concurrent conflict of interest if:

- (1) the representation of one client will be directly adverse to another client; or
- (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer’s responsibilities to another client

E.R. 1.7(a).

¶27 Gregan avowed that he was not burdened by a direct, concurrent conflict of interest. *See* ER 1.7(a)(1). The trial court was entitled to place great weight on his averment. *Cf. State v. Davis*, 110 Ariz. 29, 31, 514 P.2d 1025, 1027 (1973) (attorney representing codefendants “is in the best position professionally and ethically to determine when a conflict of interest exists or will probably develop,” and “trial court should give great weight to a representation by counsel that there is a conflict”). And there was no significant risk that a concurrent conflict of interest would arise. *See* ER 1.7(a)(2). The officer who had interviewed Simmons first uttered Alderete’s surname, and Simmons only thereafter mentioned his first name in passing. Alderete’s name did not arise in regard to any issue relevant to Simmons’s trial.

¶28 Gregan informed the court that only the “possibility” of a future conflict existed. He neither suggested the risk of a future conflict was “significant” nor said his representation would be limited materially should a conflict arise. *See* ER 1.7. Although Gregan was defending Alderete for a drive-by shooting allegedly committed in retaliation

for A.'s death, Simmons does not cite anything in the record, and we find nothing, remotely suggesting the cases otherwise were related.

¶29 Gregan did not have an actual, concurrent conflict of interest, and no useful purpose would have been served by the trial court's appointing advisory counsel to assess a nonexistent conflict. Indeed, the court concluded that appointing advisory counsel would delay significantly Simmons's trial. Simmons asserts that, "[a]t most, the trial would have been delayed for one or two hours," but we disagree. Advisory counsel necessarily would have had to become familiar with the complexities of Simmons's and Alderete's cases. And counsel likely would have had to interview Gregan to determine the extent of Gregan's potential conflict, if any. This review clearly would have required more than two hours to conduct. The court did not abuse its discretion in declining to appoint advisory counsel for Simmons.

¶30 Gregan then moved to withdraw from representing Simmons pursuant to ER 1.16. ER 1.16 requires a lawyer to withdraw from representation if, inter alia, "the representation will result in violation of the Rules of Professional Conduct or other law." ER 1.16(a)(1). But, as we have stated, Gregan had no concurrent conflict of interest. And before the trial court recessed, Gregan asserted he did not believe any information he had learned from representing Alderete would affect his representation of Simmons. *See* ER 1.6(a) (lawyer shall not "reveal information relating to the representation of a client"). He did not state otherwise after the trial resumed the following day. Thus, Gregan's representation of Simmons and Alderete neither violated, nor risked violating, the Rules

of Professional Conduct or any other law. The trial court did not abuse its discretion in denying Gregan's motion to withdraw.

Willits Instruction

¶31 Simmons additionally asserts the trial court improperly denied the instruction he requested pursuant to *State v. Willits*, 96 Ariz. 184, 393 P.2d 272 (1964). A defendant is entitled to a *Willits* instruction, which permits the jury to draw a negative inference against the state, when ““(1) the state failed to preserve material and reasonably accessible evidence that had a tendency to exonerate the accused, and (2) there was resulting prejudice.”” *State v. Broughton*, 156 Ariz. 394, 399, 752 P.2d 483, 488 (1988), quoting *State v. Reffitt*, 145 Ariz. 452, 461, 702 P.2d 681, 690 (1985). We review a trial court's refusal to give a requested jury instruction for an abuse of discretion. *State v. Kiles*, 222 Ariz. 25, ¶ 27, 213 P.3d 174, 181 (2009).

¶32 Simmons argues the state failed to preserve a compact disc (CD) of the recorded interview of Sonyay Demeer Jordan, who was a relative of Simmons and an alleged witness to A.'s murder. The CD purportedly captured Jordan's statements about the shooting that later, at trial, he denied having made. Sergeant Galen Flynn, who had conducted and recorded the interview, failed to preserve the CD as evidence, and it was lost.

¶33 Flynn testified at trial that Jordan had admitted being in the area of Fifth Street and Trekell Road, where A.'s body was found, when A. was killed. Jordan testified he did not remember making any such statement. He testified Flynn had said he

knew “[Simmons] did it” and wanted Jordan to say so. He further testified that Flynn, who coached Jordan’s basketball team, had threatened to kick him off the team if Jordan did not cooperate. Flynn denied having made any such threat, explaining that he coached varsity basketball, that Jordan was not on the varsity team, and that Flynn had no authority to kick him off the team in any event.

¶34 Simmons contends Jordan’s recorded interview would have refuted Flynn’s testimony and “called other State[] evidence into question,” although he provides no further analysis or citation to the “other evidence” to which he refers. And Simmons has not suggested that any part of Jordan’s recorded statement would have had any tendency to exonerate Simmons directly. Notably, Jordan testified he did not recall telling Flynn that Simmons had carried an AK-47 assault rifle on the night of A.’s death or that Jordan had seen the gunfire and also had seen Simmons drive away from the scene of the shooting. Assuming Jordan made these statements to Flynn and they were recorded, Jordan’s interview would have tended to incriminate, rather than exonerate, Simmons.⁴

¶35 Simmons fails to demonstrate the lost CD of Jordan’s interview would tend to exonerate him, a necessary showing for a *Willits* instruction. *Broughton*, 156 Ariz. at 399, 752 P.2d at 488. The trial court thus correctly denied Simmons’s request for such an instruction.

⁴Curiously, Flynn never testified that Jordan had made these statements or that such statements had been recorded.

Disposition

¶36 We vacate Simmons’s conviction and sentence for drive-by shooting but affirm his remaining convictions and sentences.

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Judge

CONCURRING:

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Presiding Judge

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Judge