



**ARIZONA SUPREME COURT
ORAL ARGUMENT CASE SUMMARY**



**STATE OF ARIZONA v. ROBERT CHARLES GLISSENDORF
CR-13-0388-PR**

PARTIES:

Petitioner/Cross-Respondent: Robert Charles Glissendorf

Respondent/Cross-Petitioner: State of Arizona

FACTS:

In 2012, Glissendorf was tried for three counts of child molestation involving three separate victims. In Count One, he was alleged to have molested his niece, E.G., one night between 1997 and 1999 when they were both staying at her grandfather's house. E.G. testified that she first woke up on the living room floor, noticed her pajamas and underwear had been pulled down, and saw Glissendorf touching her vagina. She went back to sleep. Later, she awoke in her bedroom and saw Glissendorf touching her vagina again. E.G. did not tell anyone about it until 2001. At that time, her accusation was recorded in an interview with a Tucson police detective, who summarized the interview in a report. According to the report, however, E.G. described only one molestation in the interview. E.G. stated she and her sister were sleeping on the living room floor when Glissendorf put her sister in his bed, came back to the living room and molested her. The report stated that "[t]his is the only time that this happened." E.G.'s interview with Child Protective Services ("C.P.S.") was also video recorded. Shortly after the detective's report was issued, the prosecutor's office decided not to prosecute. Under departmental policy, the police disposed of the interview recordings within 6 to 12 months of the decision not to prosecute. The C.P.S. video was also destroyed.

In 2010, another allegation of similar molestation was raised against Glissendorf. I.K., 5 years old, reported that in January of 2010, she and her sister were asleep at her mother's house. Her mother was Glissendorf's girlfriend. I.K. testified that Glissendorf touched her under her underwear on the body part that "[m]akes you pee." This was the evidence for Count Two. I.K. also testified that on the same night she witnessed Glissendorf molest her sister, A.K., while she was asleep. This was the sole evidence for Count Three. A.K. had no memory of this and did not testify at trial. After I.K. reported the incident to the police, the police learned of E.G.'s 2001 allegation against Glissendorf and pursued those charges.

Over Glissendorf's objection, the trial court allowed another witness, C.L., to testify to events that occurred in Nevada in 1976, pursuant to Ariz. R. Evid. 404(c). In 1976, C.L. was 6 years old. According to C.L., Glissendorf lured her with candy to an apartment, locked her inside, pulled down her pants, and touched her vagina. He also threatened to hit her if she screamed. Glissendorf gave

her \$2 and let her go. Glissendorf was arrested in Nevada but the case was later dismissed.

Glissendorf testified at trial and denied the allegations. Glissendorf requested a jury instruction pursuant to *State v. Willits*, 96 Ariz. 184, 393 P.2d 274 (1964), with respect to the interview recordings that were destroyed by the State. The trial court refused the request for a *Willits* instruction. A jury convicted Glissendorf of Counts One and Two, involving E.G. and I.K. The jury acquitted him of Count Three, involving A.K. Glissendorf appealed.

The court of appeals found that the trial court abused its discretion in refusing Glissendorf's request for a *Willits* instruction. The recording of E.G.'s 2001 interview was obviously material, reasonably accessible, and potentially useful to Glissendorf's defense. Further, the failure to provide the *Willits* instruction was not harmless as to Count One. Glissendorf's guilt on Count One turned entirely on the reliability of E.G.'s testimony. The contents of the lost recording of her interview became central to the case. Because the court could not say that the error had no effect on the jury's verdict on Count One, the court of appeals reversed the conviction and sentence on this count. The court of appeals did not overturn the conviction on Count Two because, in its view, the requested instruction applied only to Count One and Glissendorf did not develop an argument showing he was entitled to relief on Count Two as a result of the error regarding Count One.

Glissendorf also argued that the trial court erred in admitting C.L.'s testimony about the 1976 event pursuant to Ariz. R. Evid. 404(c). The issue in this case surrounds the factors and analysis of the trial court under Rule 404(c)(1)(C): whether the evidentiary value of the other act evidence is substantially outweighed by the danger of unfair prejudice. In balancing the relevant factors, the court of appeals found that the trial court erred in finding the acts were similar because Glissendorf normally used inducement or placating. There was no inducement or placating of the victims in the current offenses. This error was embedded in the balancing of factors and constituted an abuse of discretion. Rather than reversing the convictions, however, the court of appeals found that a remand for a new Rule 404(c) hearing was appropriate to allow the trial court to clarify whether the error had resulted in the admission of inadmissible evidence.

ISSUES:

Petition for Review:

1. The [Court of Appeals] COA correctly held that the trial court abused its discretion by refusing a *Willits* instruction. In failing to reverse both convictions, did the COA erroneously place the burden on the defendant to prove harm, rather than on the State to prove harmlessness?
2. The COA correctly determined that one of the trial court's findings pursuant to Rule 404(c)(1)(C) was clearly erroneous and affected the entire analysis. Then, the trial court: 1) suggested the error might have been clerical; 2) remanded for a new evidentiary hearing, rather than reverse the convictions; and 3) contradicted its own recent opinion in *Herrera* by restricting which evidence may be considered by the new trial judge. Based on the record before it, is the proper remedy a reversal of both

convictions?

Cross-Petition for Review:

When the State loses or destroys obviously material, potentially exculpatory evidence, a *Willits* instruction permits the jury to infer the unpreserved evidence would have exonerated the defendant. Applying settled law, the trial court in this case denied Appellant’s request for a *Willits* instruction on the basis he had failed to demonstrate the unpreserved evidence would have tended to exonerate him.

The court of appeals reversed. It held that, to be entitled to a *Willits* instruction, a defendant need only show the unpreserved evidence might have been “potentially helpful” to his defense and that the evidence need not have had any apparent exculpatory value at the time of loss. The court also held that the State’s explanation for not preserving the evidence is inconsequential to whether a *Willits* instruction must be given. Did the court of appeals err in so holding?

DEFINITIONS:

Willits instruction: 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).

RELEVANT RULE:

Ariz. R. Evid. 404(c) provides in part:

(c) Character evidence in sexual misconduct cases

In a criminal case in which a defendant is charged with having committed a sexual offense, or a civil case in which a claim is predicated on a party's alleged commission of a sexual offense, evidence of other crimes, wrongs, or acts may be admitted by the court if relevant to show that the defendant had a character trait giving rise to an aberrant sexual propensity to commit the offense charged. In such a case, evidence to rebut the proof of other crimes, wrongs, or acts, or an inference therefrom, may also be admitted.

(1) In all such cases, the court shall admit evidence of the other act only if it first finds each of the following:

(A) The evidence is sufficient to permit the trier of fact to find that the defendant committed the other act.

(B) The commission of the other act provides a reasonable basis to infer that the defendant had a character trait giving rise to an aberrant sexual propensity to commit the crime charged.

(C) The evidentiary value of proof of the other act is not substantially outweighed by danger of unfair prejudice, confusion of issues, or other factors mentioned in Rule 403. In making that determination under Rule 403 the court shall also take into consideration the following factors, among others:

- (i) remoteness of the other act;
- (ii) similarity or dissimilarity of the other act;
- (iii) the strength of the evidence that defendant committed the other act;
- (iv) frequency of the other acts;
- (v) surrounding circumstances;
- (vi) relevant intervening events;
- (vii) other similarities or differences;
- (viii) other relevant factors.

(D) The court shall make specific findings with respect to each of (A), (B), and (C) of Rule 404(c)(1).

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